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Scott S. Boddery  
*Gettysburg College*

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# Kennedy Retirement Plunges Supreme Court into Politics. Here's How to Turn Down the Heat.

## **Abstract**

Justice Anthony Kennedy's decision to retire from the Supreme Court could create a sea change in the court's jurisprudence for years to come. The debate about his successor will once again underscore the fierce partisan politics that surround the court.

It's worth recalling that the constitutional framers originally envisioned a Supreme Court that was insulated from such politics. In fact, Alexander Hamilton argued quite famously, in Federalist No. 78, that the court must be protected from the electorate in order to serve as a check against the political branches of government without fear of reprisals at the ballot box. [*excerpt*]

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# Kennedy retirement plunges Supreme Court into politics. Here's how to turn down the heat.

Scott S. Boddery, Opinion contributor

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*Why not limit Supreme Court tenure? Senators could make lists of potential justices for presidents to weigh, and voters would know when seats were at stake.*

Justice Anthony Kennedy's decision to [retire](#) from the Supreme Court could create a sea change in the court's jurisprudence for years to come. The debate about his successor will once again underscore the fierce partisan politics that surround the court.

It's worth recalling that the constitutional framers originally envisioned a Supreme Court that was insulated from such politics. In fact, Alexander Hamilton argued quite famously, in [Federalist No. 78](#), that the court must be protected from the electorate in order to serve as a check against the political branches of government without fear of reprisals at the ballot box.

Hamilton's argument was a direct response to [Robert Yates](#), a New York lawyer, who feared that the proposed court structure was flawed. Yates pointed out that justices' [lifetime tenure](#), coupled with no democratic accountability, was dangerous, and he advocated that a better removal mechanism was necessary should "want of capacity" arise.

Of course, Hamilton's quixotic notion of an apolitical Supreme Court won the day. But after more than 220 years, it's apparent that the Supreme Court is far from insulated from the political influence Hamilton so feared. In fact, as we've seen throughout this past election cycle, "politics" has seeped into every aspect of the Supreme Court.

## Politicizing the bench

Supreme Court nomination proceedings have become [grand political theater](#), where an incumbent president seeks to place a like-minded jurist on the seat to help shape legal precedent beyond the term of years that restrict the commander in chief's policy impact. And senators [attempt to decipher](#) how a given nominee will rule on a certain subset of issue areas that may come before the court.

Scholars have stocked aisles of shelf space in libraries pointing out the [political nature](#) of the Supreme Court's decision-making. With virtually no oversight save for amending the Constitution, justices are free to interpret the Constitution without any credible avenue for censure. What has become apparent is that

the [political leanings](#) of the justices are more dispositive of their votes than legal precedent or legal philosophies.

Justice Antonin Scalia's untimely death in 2016 was [politicized](#), and the retirement announcement from the court's [most centrist jurist](#) will be hotly debated. But politicized departures are far from new. The justices themselves have admitted to timing their departures with an eye toward the White House since the Franklin D. Roosevelt administration, when Justice James Clark McReynolds bitterly proclaimed that he would "never resign as long as that [crippled son-of-a-bitch](#) is in the White House."

We must find a way to deal with the reality that the Supreme Court is far from politically isolated. I question whether Hamilton's defense of the court's structure still holds water. In fact, I challenge anyone to read the debate between Yates and Hamilton — or their pen names, [Brutus](#) and [Publius](#) — and not see the merit to Yates's argument.

We can avoid the shock attendant to Supreme Court retirement announcements by reconsidering the underlying justification for giving Supreme Court justices life tenure. Why not make the justices' time on the bench subject to a staggered term of years? Departures would become knowable events that can be taken into consideration by the electorate as it considers potential Senate and White House candidates.

## Ending life tenure benefits both parties

This does not mean the justices would be subject to elections. There are many alternatives to judicial elections, but one appealing option is to have a bipartisan committee of senators create a shortlist of qualified jurists. That list would then be submitted to the president, and he or she would have to select an individual from that list.

Once selected, the nominee would be given a vote in the Senate. If a sudden, unexpected departure occurs before the end of a justice's term, then the same procedure would take place, except that the nominee, once confirmed, would fill the vacant seat for only the remainder of the original term.

Of course, any such change to [Article III](#) would require a constitutional amendment, which is a tall order in today's polarized political climate. But it's feasible. After all, we've already corrected the Constitution's original selection criteria for vice presidents and senators by way of the [Twelfth](#) and [Seventeenth](#) Amendments. Republicans won't hold the House, Senate, and White House forever, and any future Democratic monopoly also will be limited in time.

Changing the way we structure the Supreme Court is more prudent than partisan.

*Scott S. Bodderly, J.D., Ph.D., is currently an assistant professor of political science and public law at Gettysburg College and is an expert in judicial behavior and decision making and court legitimacy.*

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