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## System works in Australia

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With the death of 80-year-old Chief Justice William H. Rehnquist, the retirement of 75-year-old Sandra Day O'Connor and the confirmation of John G. Roberts Jr. and Samuel Alito, respectively, to replace them, the U.S. Supreme Court is now being recast. In this environment, some have proposed the introduction of a mandatory retirement age for the Supreme Court. Others have argued that such a rule would be too inflexible, forcing some justices to retire when they are at their peak. In considering the pros and cons of a mandatory retirement age, lawmakers would do well to look to a country that implemented just such a reform in the late 1970s.

In 1977, Australians debated whether to implement a mandatory retirement age of 70 for justices on our highest appellate court, the High Court of Australia. Supporters of the reform argued that it would prevent the embarrassing situation of a judge who was unable to continue with his or her duties, but unwilling to resign.

The push for a mandatory retirement age was partly driven by the experience of Edward McTiernan, who had retired from the High Court of Australia in 1976, after 46 years on the bench. McTiernan still holds the record for the longest tenure of any judge of a final appellate court in the Western world. It was said that he would have stayed on the bench even longer, but for the refusal of the then chief justice, Garfield Barwick, to build a ramp to allow McTiernan to access the bench in a wheelchair.

### Reducing strategic retirements

Two other arguments were also made in the referendum campaign. It was suggested that a mandatory retirement age would help to maintain vigorous and dynamic courts, bringing fresh ideas and contemporary social attitudes to the bench. Further, it was pointed out that a mandatory retiring age reduced the possibility that judges would influence the choice of their successor, as is more likely to occur in a system where judges can time their retirement so as to coincide with a government of their political persuasion.

When put to the Australian electorate, the mandatory retirement age proposal was overwhelmingly carried, winning the support of four in five voters. The mandatory judicial retirement age remains the third most popular of the 44 referendum proposals that have been put to the Australian public since the nation was founded in 1901.

With the introduction of a compulsory retirement age, the average age of Australian High Court justices is 65. (By contrast, prior to Rehnquist's death, the average age of U.S. Supreme Court judges was 71.) The typical tenure of a judge on the High Court of Australia is around 14 years. (By contrast, those justices who left the U.S. Supreme Court in recent decades had served for an average of 24 years.) While the age profile of the High Court of Australia is close to that of the U.S. Senate, the average age of the U.S. Supreme Court has at times been closer to that of

the Chinese Communist Party Politburo.

Those opposing a mandatory retirement age for justices have pointed to its inflexibility. For example, a retirement age of 70 would have deprived the U.S. Supreme Court of much of the enduring wisdom of Oliver Wendell Holmes, who served until the age of 92. But for every Holmes, there is a McTiernan.

Amending the U.S. Constitution is no simple process: For every successful proposal, hundreds more are introduced into Congress. But neither is the Australian Constitution easily changed. Indeed, during the 20th century, the U.S. Constitution was amended more often (12 times) than its Australian counterpart (eight times).

As former Supreme Court clerks Akhil Amar and Steven Calabresi have pointed out, no other major democracy follows the U.S. model of unelected life tenure for the highest court. Enforcing a compulsory retirement age has done no harm to the administration of justice Down Under. If put to the test, such a reform may turn out to be just as popular with the American public in 2006 as it was with Australian voters in 1977.

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