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Mr. Smith Went to Washington and Never Came Home: A Defense of Colorado's Term Limitation Amendment

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MR. SMITH WENT TO WASHINGTON AND NEVER CAME HOME: A DEFENSE OF COLORADO'S TERM LIMITATION AMENDMENT*

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I. INTRODUCTION

Public support for long-term Congressional incumbency eroded rapidly during the Bush Presidency. By November, 1992, popular referenda in fifteen states imposed some form of term limitation on national representatives.[1] Alternatively characterized as inherently undemocratic or a as means to ensure representative democracy, the validity of term limitations has not yet been reviewed by the courts.[2] In light of an incumbency return rate to Congress of more than ninety percent, term limitations have been compared to "a primal scream of sorts by citizens attempting to retake control of their government."[3] Opponents of term

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[1] Don J. DeBenedictis, *Voters Limit Politicians' Terms*, A.B.A. J., Jan. 1993 at 26. ("DeBenedictis") In addition to the Colorado Amendment, in 1992, 20 million people in 14 states voted to impose limitations on the number of consecutive terms their federal congressional representatives and senators may serve. *Id.* The fourteen states are Arizona, Arkansas, California, Florida, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington and Wyoming. Susan B. Glasser, *After Their Impressive Victories in 14 States, Term-Limit Backers Plan Next Steps on Hill*, ROLL CALL, Jan. 18, 1993.

[2] The main reason courts have not considered term limits is that "most term-limit initiatives will not prevent incumbents from running until the 1998 elections." Don J. DeBenedictis, *supra* note 1, at 26.

[3] Rob Mosbacher & Jim Calaway, *Basic Change in System Begins with Term Limits*, HOUS. CHRON., Feb. 2, 1993, at 13. Furthermore, "it is an effort to take

limitations argue that election reforms, (e.g., public campaign financing, restrictions on lobbyists, etc.) rather than term limitations, provide a better means to transform Congressional careers into seats of public service. Public sentiment, however, clearly appears to favor term limits. The 1992 term limitation initiatives garnered "more votes than [presidential candidate] Ross Perot, and a greater percentage of the vote in all 14 battleground states than President Clinton." [4] These results attest to the underlying desire for change in the nation's current political structure. Politicians and constituents agree that "what is required is a fundamental change in the attitude of those serving elective office." [5] Political commentator George F. Will, a proponent of term limitations, believes that such action is the way to:

> change the motives that impel people to come to public life. You will rule out one ruinous motive, the motive of having a long-term career. You will not get people who come into politics from no career and have no career to go back to, for whom, therefore, defeat is oblivion.[6]

This article explores the constitutionality of Colorado's 1991 Amendment to its State Constitution which imposes term

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their government back from special interest political action committees and lobbyists, and the career politicians with whom they have developed an unholy alliance to perpetuate the status quo. Simply put, it represents an attempt to re-create elective office as a public service rather than a lifetime career." *Id.*

[4] Jeff Langan, *Term Limits Group Says President Clinton Embraces 'Dramatic Change,'* U.S. NEWSWIRE, INC., Jan. 20, 1993.

[5] Rob Mosbacher, *supra* note 3. By "limiting the length of time an individual can serve in any one office is the most effective way of breaking the cycle of political self-perpetuation. It would refocus most lawmakers on getting things done rather than simply getting re-elected." *Id.*

[6] *Larry King Live: George F. Will on Restoring Deliberative Democracy* (CNN television broadcast, Oct. 9, 1992) *available in* LEXIS, NEXIS Library, SCRIPT file.

limitations on its federal congressional delegation.[7] It focuses on the vexing constitutional issues of the original intent of the Framers and its relation to the textual provisions of the Qualifications Clauses[8] and the Times, Places and Manner Clause.[9] This article

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[7] COLO. CONST. art. XVIII, § 9a.

> 1) In order to broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative and responsive to Colorado citizens, no United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. Any person appointed or elected to fill a vacancy in the United States Congress and who serves at least one half of a term of office shall be considered to have served a term in that office for purposes of this subsection (1). Terms are considered consecutive unless they are at least four years apart.
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> 2) The people of Colorado hereby state their support for a nationwide limit of twelve consecutive years of service in the United States Senate or House of Representatives and instruct their public officials to work for such a limit.
>
> 3) The people of Colorado declare that the provisions of this section shall be deemed severable from the remainder of this measure and that their intention is that federal officials elected from Colorado will continue voluntarily to observe the wishes of the people as stated in this section in the event any provision thereof is held invalid.

[8] U.S. CONST. art. I, § 3, cl. 3. "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

U.S. CONST. art. I, § 2, cl. 2. "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[9] U.S. CONST. art. I, § 4, cl. 1. "The Times, Places and Manner clause gives each state legislature the power to regulate the manner of holding elections while

does not address other constitutional issues, such as separation of powers and aspects of federalism.[10] Nonetheless, focusing on original intent and its relation to textual provisions sufficiently justifies the validity of the Colorado Amendment. The Colorado Amendment restricts United States Senators from serving more than two consecutive terms and Representatives in the House from serving more than six consecutive terms. However, members of Congress who have served the maximum number of consecutive terms may run again, once they have waited a four-year period. The essence of the Colorado Amendment is to "broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative of and responsive to Colorado citizens." [11]

An examination of the goals of the Framers of the Constitution reveals that term limitations are consistent with their intent to create a representative government. In light of this consistency, the Colorado Amendment does not violate the Qualifications Clauses of the Constitution. Furthermore, since the Colorado Amendment does not amount to a qualification, an analysis under the Times, Places and Manner Clause suggests that it is a valid state election regulation.

II. THE FRAMERS' INTENT

Colorado's state-imposed term limitations strongly promote

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reserving in Congress the power to alter such regulations except in the case of Senators."

[10] These issues pose less serious threats to the validity of the Colorado Amendment than original intent and textual analysis. While some modern scholars may view original intent as anachronistic, it remains an important approach to Constitution adjudication. Charles Black notes that modern focus solely on textual categories "forces us to blur the focus and talk evasively, while the structural method frees us to talk sense." CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13 (Ox Bow Press, 1985). *See generally* Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321 (1993), for a recent discussion of the separation of powers issue.

[11] COLO. CONST. art. XVIII, § 9a, cl. 1.

the Framers'[12] intent to create a stable representative government.[13] In order to determine whether term limitations are constitutional, it is necessary to understand the concerns of the Framers during the post-independence era. Their primary concern was to prevent an entrenched aristocratic legislature from usurping power not duly delegated to that branch. Accordingly, the Framers attempted to create structural safeguards sufficient to promote effective representation and to avoid aristocratic tendencies. However, they could not have foreseen the extent to which Congress has become entrenched in Washington.[14] The Framers also believed in republican government and feared a self-interested legislature which could have the power to ensure its own perpetual re-election. Because the Colorado Amendment promotes a responsive and representative legislature, it is consistent with the Framers' belief in republican government and directly addresses their fear of long-term incumbency. While the Framers did consider rotational schemes, a form of term limitations, they instead chose to adopt other structural safeguards that they believed would sufficiently achieve their goals.

A. Political Underpinnings of a Republican Government

One fundamental principle inherent in the Constitution is the strong belief in a republican form of government. James Madison defined such a system in Federalist No. 39:

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[12] For the purposes of this article, the term "Framers" denotes those persons whose views were expressed during the debates over the form of American Government during the colonial period and post-independence era and their views, and not just the views of the delegates at the Constitutional Convention.

[13] "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form." THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

[14] *See generally* TRUDY PEARCE, TERM LIMITATION: THE RETURN TO A CITIZEN LEGISLATURE (1991), *reprinted in* GEORGE F. WILL, RESTORATION 73 (The Free Press, 1992).

> We may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppression by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. [emphasis in original][15]

Nevertheless, such a government was not intended to be a purely popular government.[16] Instead, the Framers envisioned that the people would elect representatives holding similar beliefs to their own, who would act on those beliefs, and promote the interests of the nation.[17] The Framers, discontent with instability, factional-

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[15] THE FEDERALIST No. 39, at 241 (James Madison).

[16] Prior to the Constitutional Convention, many people believed in a pure representative government, where the legislature "should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.", *reprinted in* James C. Otteson, *A Constitutional Analysis of Congressional Term Limits -- Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1, 6 (1991). Also, numerous state constitutions attempted to make legislators reflect the people. James C. Otteson at 8, nn. 34-39. However, subsequent experience demonstrated the unworkable nature of such a system. "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions"; viz., some sort of check on tyranny of the majority. THE FEDERALIST NO. 51, at 322 (James Madison).

[17] The Framers were strongly influenced by the parochialism and factionalism found under the Articles of Confederation. For example, Connecticut refused to comply with requisitions of Congress. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF [hereinafter "NOTES OF DEBATES"] 1787 224 (Norton, 1966); RICHARD BERNSTEIN, ARE WE TO BE A NATION? 73-80 (Harvard University Press, 1987). The drafters at the Convention sought to avoid these problems and many others. In opening the Constitutional Convention,

ism, and lack of accountability under the Articles of Confederation, attempted to create a legislature that was more responsive to its constituents,[18] yet institutionally independent of the "transient impulse[s]" of the people.[19] Furthermore, this notion of representation was based on the premise that the numerous views brought before the legislature would be fully deliberated.[20]

Term limitations provide the electorate with an effective way to encourage new representatives with fresh views to run for office.[21] Term limitations also promote rational deliberation of the constituents' demands.[22] The goals sought to be achieved by

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Edmund Randolph alluded to what government ought to accomplish and specifically delineated the defects of the Articles: "It does not provide against foreign invasion ... it does not secure harmony to the states ... [it is] incapable to produce certain blessings ... [the federal government] cannot defend itself against encroachment ... [and it is] inferior to the states constitutions." 1787 DRAFTING THE U.S. CONSTITUTION 87 (Wilbourne E. Benton ed., Texas A & M University Press, 1986).

[18] THE FEDERALIST, *supra* note 13 at 226-27.

[19] "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests." THE FEDERALIST NO. 71, at 432 (Alexander Hamilton); *see generally* GEORGE F. WILL, *supra* note 14.

[20] Madison stated that the desire for representation of multiple views and rational debate over those issues enables the majority to defeat the sinister views of a controlling minority and conversely, allows the minority to be protected from the majority because of the vast extent of views. THE FEDERALIST NO. 10, at 80-83.

[21] While this distinction may seem imaginary, it is not. The Framers, as noted, intended for people to be represented, not for the people to be represented by a specific person. This point can be seen with greater clarity in later sections of this article, particularly in reference to each state's ability to limit access to the ballot.

[22] *See* James C. Otteson *supra* note 16, at 10 ("one of the most fundamental concepts associated with representation during this period was deliberation, by which representatives arrived at legislative decisions through rational dialogue").

term limitations are not contrary to the underlying goals of the republican form of government. However, achieving representative government was not the only force which motivated the Framers. The fear of an aristocratic legislature also influenced the Framers' goal of achieving a republican government.

B. Fear of an Aristocratic Legislature

One of the prominent reasons for creating a representative government was the deep-seated fear of a self-perpetuating aristocratic legislature. James Madison stated at the Constitutional Convention:

> If the legislature could regulate [the qualifications of electors and elected], it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy.[23]

This fear permeated the thoughts of both Federalists and anti-Federalists during the ratification debates.[24] The anti-Federalist writer, Federal Farmer, observed that "the overriding concern of the founder,...and the alert citizen, should be the danger of insidious usurpation by the few,...and ever active aristocracy."[25] The possibility of legislative self-aggrandizement was not an imaginary fear. History[26] and experience[27] positively demonstrated the

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[23] 2 THE DEBATES ON THE ADOPTION OF THE CONSTITUTION 257 (J. Elliot ed., 1836)[hereinafter "Elliot"].

[24] The Federalists supported the new Constitution and were generally advocates of a strong federal government while the anti-Federalists strongly favored States' rights. However, these labels are not exclusive because most of the Framers shared the same desires, they merely differed on how they were to be implemented.

[25] HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 52 (1981). Storing delineates the anti-Federalist belief that even the new Constitution still promoted aristocratic tendencies. *Id.* at Chapter 6.

[26] On August 7, during the Constitutional Convention, Mr. Butler, a Convention delegate, noted how the legislature in Holland abridged the right of

ability of the legislature to usurp power that had not been delegated to it.

The Framers' antipathy toward aristocratic tendencies is articulated in the Constitution's prohibition against the granting of any title of nobility by the United States.[28] Alexander Hamilton asserted that the prohibition against titles of nobility is "the cornerstone of republican government," [29] because without titles of nobility, the tendency towards aristocracy diminishes. Long-term incumbency, particularly that experienced during the late twentieth century, is analogous to the granting of titles of nobility because long-term incumbency bestows special advantages based on status.[30] However, the Framers anticipated this and not only prohibited the issuance of titles of nobility, but they also created a structural system that safeguarded representation and promoted stability.[31] Therefore, term limitations are a means to address the

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suffrage and stated that the Senate "fills up vacancies themselves, and form[s] a rank aristocracy." NOTES OF DEBATES, *supra* note 17, at 402. On August 10, Madison noted that "the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of ... attention." *Id.* at 428.

[27] Many states believed that aristocratic tendencies were to be avoided and therefore implemented term limitations for the state legislators. *See* PA. CONST. OF 1776, art. II, § 8; *see* James C. Otteson, *supra* note 16 (prohibiting legislators from serving more than four [one-year] terms in seven years in order to avoid the danger of establishing an inconvenient aristocracy).

[28] U.S. CONST. art. I, § 9, cl. 8.

[29] THE FEDERALIST NO. 84, at 512 (Alexander Hamilton).

[30] *See* TRUDY PEARCE, *supra* note 14. The longest term in office for the House of Representatives is Jamie Whitten's (D-MS) term of fifty plus years. In fact, the analogy between long-term incumbency and the granting of titles of nobility is demonstrated by the over 90% return rate of incumbents to Congress, the effects of seniority and other 'perks.' The term limitations movement, then, is evidence of a desire to diminish the aristocratic tendencies of long-term incumbency which have developed in the United States.

[31] Madison illustrates this concern: "it cannot be feared that people of the States will alter [their ability to elect representatives] in such a manner as to abridge the rights secured to them by the federal constitution." THE FEDERALIST NO. 52, at 326 (James Madison). However, Madison then discussed the

modern-day version of titles of nobility.

The Framers also considered, but did not adopt, two different types of rotational schemes. The first rotational scheme, actually in place under the Articles of Confederation, was designed to prevent excessive State power within Congress.[32] This scheme limited members of Congress to serving a total of three one-year terms in office within any six-year period.[33] However, the system of rotation under the Articles of Confederation was based on a wholly different premise than that of the Colorado Amendment. The Colorado initiative is not designed to limit the possible abuse of state power, but rather to promote representation and deliberation. Therefore, the rejection of this rotational scheme based on limiting the influence of states carries little weight because the scheme rejected by the Framers is based on a different principle than the Colorado Amendment.[34]

The second type of rotational scheme paralleled modern term limitations in its desire to promote representation and responsiveness to the people. Because the Framers were aware of this type of rotational scheme, opponents of term limitations argue that the failure to include them in the Constitution is equivalent to

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safeguards provided in the Constitution to ensure representation.

[32] State legislatures elected, controlled, instructed and recalled their representatives. Had any single state been able to keep one delegate in Congress for any length of time, that state was likely to have greater influence or sway. For a thorough discussion of the instruction problem, *see* James C. Otteson *supra* note 16.

[33] ARTICLES OF CONFEDERATION, art. V, cl. 2.

[34] In fact, a rotational scheme to lessen the influence of the States is embodied in Article I, Section 3, Clause 2 of the United States Constitution, which provides:

> Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year.

a rejection of term limitations.[35] While this argument has merit, exclusion of term limitations cannot be equated with outright rejection of them by the Framers. The Framers believed that the inclusion of term limitations was unnecessary because they had provided a minimum framework in order to protect our republican form of government. This framework consisted of a strong faith in the virtue of the people, frequent elections and short terms in office. The Framers believed that reliance on these factors was sufficient. Therefore, the absence of term limitations in the Constitution does not mandate a rejection of the Colorado Amendment.

Furthermore, during the ratification debates of the Constitution, many critics of the new Constitution expressed concern over the absence of a rotational scheme. Thomas Jefferson noted that a feature he strongly disliked was "the abandonment, in every instant, of the principles of rotations."[36] Without such a scheme it was feared that representatives would not be responsive to the people. For example, one Framer feared that:

> [legislators] will reside with their families, distant from the observation of the people. In such situations, men are apt to forget their dependence, lose their sympathy, and contract selfish habits .... The senators will associate only with men of their own class, and thus become strangers to the condition of the common people. They should not only return, and be obliged to live with the people, but return to their former rank of citizenship, both to revive their sense of dependence, and to gain a knowledge of the country.[37]

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[35] *See* L. PAIGE WHITAKER, THE CONSTITUTIONALITY OF STATES LIMITING CONGRESSIONAL TERMS 92-19 A, AT 4 (Congressional Research, The Library of Congress), (Jan. 2, 1992).

[36] THOMAS JEFFERSON, 2 THE WRITINGS OF THOMAS JEFFERSON 330 (H.A. Washington ed., 1853).

[37] Elliot *supra* note 23, at 288 (speech of G. Livingston).

Furthermore, many feared that corruption would flourish,[38] and that less people would run for office and take part in their civic duties.[39] However, proponents of the Constitution argued that the safeguards built into the structure of the Constitution and their faith in the people would allay these fears.[40]

Proponents of the Constitution pointed to frequent elections and short terms of office and argued that the corresponding provisions were included to prevent long-term incumbency, nobility and corruption. Furthermore, the goal was to involve more people with government and to rekindle the relationship between the representatives and their constituents. In fact, Madison expressed the same concerns as the anti-Federalists:

> "It is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate *dependence* and *sympathy* with, the people" [emphasis added].[41]

Under the Constitution "dependence" and "sympathy" flow from

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[38] Livingston, in proposing a term limitation amendment during the New York ratification debates, alluded to the possibility of corruption resulting from long-term incumbency and a failure to be familiar with the people. Referring to a previous speaker, Livingston noted that "there should be no fear of corruption of the members in the House of Representatives; especially as they are, in two years, to return to the body of the people." *Id.* at 288. This statement implies that the Framers believed that the electors would hold representatives accountable, but longer terms would be detrimental to the people and be the seedling of corruption. In fact, many modern commentators have discussed the possibility for corruption; discussing why term limits ensure against corruption, George F. Will noted that those new to the office -- "amateurs," do it for the love of it - not some "contemptible motive." *See Larry King Live, supra* note 6.

[39] Elliot *supra* note 23, at 310 (M. Smith noted that "if the office is to be perpetually confined to a few, other men, of equal talents and virtue, but not possessed of so extensive an influence, may be discourage from aspiring to it").

[40] THE FEDERALIST NO. 57, at 350-53 (James Madison).

[41] THE FEDERALIST No. 52, at 327 (James Madison).

the structural design of the Constitution, not rotational schemes. Proponents of the Constitution believed that responsiveness to constituents would result from the frequency of elections. They also argued that accountability and representation were strongly reinforced by the provisions for two-year terms of office and frequent elections.[42] For example, the biennial election was a compromise reached during the Convention that provided enough travel time for representatives, while it kept them responsive to the demands of the people.[43] The Framers had decreased the possibility of corruption, encouraged citizen-participation in politics and tightened the connection between the people and representatives through other adequate means. Therefore, the absence of a rotational scheme in the Constitution indicates that the Framers' believed that it was unnecessary to include one.

C. Stability and Experience

The Framers also recognized that stability and experience were essential to the proper functioning of government. As Madison noted, "complaints are everywhere heard from our most considerate and virtuous citizens...that our governments are too unstable." [44] The Framers intended that a stable government, free from usurpation by any one branch, would be achieved through devices such as federalism, separation of powers and the bicameral Legislature. In particular, the Legislature was divided into a lower house (House of Representatives) and upper house (Senate) in order to cushion the entire legislative branch from potential instability within any one house. In fact, the Framers created a rotational system where the lower house and one-third of the upper house

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[42] THE FEDERALIST No. 52 (James Madison).

[43] NOTES OF DEBATES, *supra* note 17, at 168-70. In the debate of the one-year or three-year terms, the main question was keeping legislators dependent on the people while not letting them become too far removed. *Id.* at 106. However, Hamilton felt that a three year term was a necessity because "there ought to be neither too much nor too little dependence, on the popular sentiments." *Id.* at 170.

[44] THE FEDERALIST No. 10, at 77 (James Madison).

could be removed from office every two years through the election process. The remaining two-thirds of the upper house provided stability as the base of the legislature. Thus, even by imposing term limitations upon legislators which would foster the more frequent removal of legislators, the legislature remains stable because two-thirds of the upper house remains unaffected by changes resulting from elections.

Furthermore, the Framers valued representativeness and responsiveness to the people over experience. The Framers comprehended the importance of an experienced legislator,[45] but did not intend for experience to be the sole criterion for office. While term limits will exclude some experienced legislators from office, they prevent the entrenchment of legislators whose only qualification is experience. The Colorado initiative also promotes representation and responsiveness which are consistent with the overriding policies of the Framers. If experience was the only qualifying factor, once a Congressman was elected, his experience alone would enable him to hold office, thereby creating a "nobility of experience" detached from the citizenry. Madison concluded that the two year term in office was a useful length of time because it provided the legislator adequate time to acquire knowledge and to be effective.[46]

Colorado's Amendment does not preclude a legislator from gaining experience, but rather provides the opportunity for more citizens to enter government. In fact, after re-establishing their ties to the community, legislators who are required to step aside for four years will be able to return to Congress with experience and a fresh understanding of their constituents' concerns. Therefore, the focus should not be on whether term limits affect the level of experience that a legislator has accumulated, but rather the legislators' responsiveness to the people.

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[45] Madison noted that "No man can be a competent legislator who does not add to an upright intention and sound judgment a certain degree of knowledge of the subjects on which he is to legislate." THE FEDERALIST NO. 53, at 322.

[46] THE FEDERALIST NO. 53, at 332 (James Madison). Today, two years is certainly not enough time in which a Representative can effectively address the number of issues a Congressperson faces. Nonetheless, this rationale should not be justification for allowing self-perpetuation of the legislature.

III. TERM LIMITATIONS: MANNER REGULATIONS OR QUALIFICATIONS?

Colorado's state-imposed term limitation is a valid state election regulation under the Times, Places and Manner Clause. While term limitations are consistent with the Framers' intent, Supreme Court case law requires further analysis of term limits using a categorical approach towards election regulations. Case law has drawn the distinction between "qualifications" and "manner" regulations. A regulation which alters the qualifications required to serve in office enumerated in the Constitution raises serious constitutional questions and will likely be struck down. In contrast, a regulation classified as a "manner" regulation will be subject to a less stringent three-prong balancing test. The Constitution grants the states the authority to regulate the times, places and manner of Congressional elections.[47] Therefore, it is necessary to determine whether the Colorado initiative should be classified as a manner regulation or an additional qualification. Once this distinction is made, if the Colorado Amendment is found to be a manner regulation, it is necessary to subject the amendment to constitutional scrutiny as such a regulation.

A. The Qualifications Clauses

The Supreme Court has never defined the term "qualification." [48] The Constitution requires that candidates for Congress meet three criteria in order to be elected to Congress. First, they must be a resident of the state from which they are elected. Second, they must be at least 25 years old for the House of Representatives, and 30 years old for the Senate. Third, they must be a U.S. citizen for seven years and nine years respectively.[49]

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[47] U.S. CONST. art. I, § 4, cl. 1.

[48] Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 355 (1991).

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

Yet, nowhere in the Constitution are these requirements referred to as qualifications.[50] James Madison, during the course of the Constitutional Convention Debates, came close to defining the qualifications of both voters and candidates as "'fundamental articles in a Republican Govt. [sic] and ought to be fixed by the Constitution.'" [51] But Madison, in his broad characterization of qualifications, failed to provide parameters which might illuminate what the unifying principle is behind the qualifications enumerated in the Constitution.

Qualifications have been defined by a Florida federal district court as qualities which "must be possessed by the candidate; that is they are qualifications personal to him." [52] It appears

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[50] As the previous section of this article sets out, it seems that when the Framers set out the qualifications, they intended that they should be fixed in order to foster the ideals of a republican democratic government, such as preventing the government from becoming entrenched in aristocracy.

> The qualifications of electors and elected were fundamental articles in a Republican Gov[ernment] and ought to be fixed by the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect .... It was as improper to allow them to fix their own wages, or their own privileges. It was a power also which might be made subservient to the views of one faction ag[ainst] another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of a weaker faction. [NOTES OF DEBATES, *supra* note 17, at 427]

Moreover, in Powell v. McCormack, 395 U.S. 486, 522 (1969), the most authoritative interpretation to date of the Qualifications Clauses, the Supreme Court discusses the fixed quality of the Qualifications Clauses. It focuses on whether members of Congress have the power to exclude its own members for reasons beyond not meeting a qualification.

[51] 1 LETTERS OF JUNIUS, LETTER XVIII 249-50, quoted in *Powell*, 395 U.S. at 533-34.

[52] Fowler v. Adams, 315 F. Supp. 592, 594 (M.D. Fla. 1970) (requirement of a filing fee to run in a U.S. Congressional election "is not an additional qualification to hold office but is simply a regulatory measure designed to insure fair and orderly elections").

from this definition that a term limitation is not a trait personal to the individual, nor is it a characteristic that a prospective candidate might possess. On the other hand, someone's age or status as an American citizen are traits that are "personal" to that individual because they are not severable from that person.[53] While the term "qualification" has never been clearly defined by a court, an analysis of the cases which have interpreted the Qualifications Clauses provides insight into its meaning.

B. The Courts' Interpretations of the Qualifications Clauses

The types of regulations that courts have considered to be additional qualifications indicate that Colorado's state-imposed term limitation should not be construed as an enumerated qualification. The leading case interpreting the Qualifications Clauses, *Powell v. McCormack*,[54] emerged from the refusal by Congress to seat Adam Clayton Powell as a member of Congress in 1967. When Powell was elected to the United States House of Representatives for the 90th Congress,[55] he met the standing requirements of age, citizenship and residency. However, the House denied Powell his seat based on a special subcommittee's report which found that Powell, while acting as chair of the Committee on Education and Labor, had deceived House authorities about certain travel expenses. The report also indicated that Powell arranged illegal salary payments for his wife. When the 90th Congress met, the House passed a resolution calling for Powell's exclusion and declaring his

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[53] BLACK'S LAW DICTIONARY 1241 (6th ed. 1990), defines a qualification as:

> [t]he possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function.

[54] *Powell*, 395 U.S. at 486.

[55] *Id.*

seat vacant.[56] Powell challenged the validity of this resolution, and the Supreme Court, in an 8 to 1 decision, held that the House of Representatives did not have the power to exclude an individual who meets all the requirements set forth in the Qualifications Clauses from serving in Congress.[57]

In *Powell*, the Court engaged in an extensive analysis of the historical background of the Qualifications Clauses. The Court concluded that the Convention debates "manifest[ed] the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution." [58] The Court further noted that "the debates at the state conventions . . . demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." [59] Ultimately, the Court held that "the House is without power to exclude any member-elect who meets the Constitution's requirements for membership." [60] Therefore, the House exceeded its authority by attempting to add a qualification for Congress. The principle which emerged from *Powell* is that the Qualifications Clauses are absolute. Accordingly, the legislature does not have the authority to add to or take away from the already existing qualifications for candidacy for either the House or the Senate.

A number of lower federal and state courts have struck down regulations which have attempted to add qualifications under the Qualifications Clauses. In *United States v. Richmond*,[61] the court held that the terms of a U.S. Attorney's plea agreement which required a Congressman to relinquish his seat, was unconstitutional. The plea bargain was interpreted as an attempt by the

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[56] *Id.* at 493.

[57] *Id.*

[58] *Id.* at 532. (However, the Court indicated that it did not *completely* agree with this conclusion, which was put forth by the petitioners, because the debates are subject to other interpretations in other contexts).

[59] *Id.* at 540.

[60] *Id.* at 547.

[61] 550 F. Supp. 605, 607 (E.D.N.Y. 1982).

government to add the qualification that a Congressman convicted of a federal crime would be excluded from Congress. In addition, other district courts[62] have held restrictions unconstitutional which require congressional candidates to live in the same district in which they seek to be elected. Courts have determined that these restrictions constitute additional qualifications since the applicable Qualifications Clause[63] merely requires that candidates for the House of Representatives live in the state in which they seek to run. Colorado's term limitations are distinguishable from the types of regulations which have been struck down as added qualifications. State regulations that have been struck down for attempting to narrow the state residency requirement for prospective members of Congress, in effect, add a qualification. Likewise, a regulation which would attempt to raise or lower the minimum age of a prospective candidate would also be struck, as would a variation on the required number of years of citizenship. In contrast, Colorado's provision limiting the number of consecutive terms in which a member of Congress may serve, does not fall within the three qualifications enumerated in the Constitution. Therefore, term limitations cannot be characterized as additional qualifications.

C. Times, Places and Manner Clause

The Colorado initiative is a valid exercise of a state's authority to regulate the Times, Places, and Manner of congressio-

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[62] Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968)(statute struck down which required a member of Congress to live in the district from which he was nominated); Hellman v. Collier, 217 Md. 93, 141 A.2d 908 (1958)(statute struck down which required candidates to the U.S. House of Representatives to be residents in the congressional district in which they seek election); *see* State ex. rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968)(regulation was struck down which required a state official to certify candidates' names to the county clerks for offices to which they were nominated); Dillon v. Fiorina, 340 F. Supp. 729 (D. N.M. 1972)(election regulation which required a candidate to pay a filing fee to be eligible to run for U.S. Senate was struck down); *see also* State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948).

[63] U.S. CONST. art. I, § 2, cl. 2.

nal elections. As with qualifications, the Supreme Court has never explicitly defined which criteria determine whether a regulation should be classified as a manner regulation. However, the Supreme Court has determined that attempts to label a state manner regulation as a qualification are "wholly without merit" [64] and the federal courts have consistently endorsed this view.[65] Once it is established that the Colorado initiative is a manner regulation, it should satisfy the three-part balancing test set forth by the Supreme Court for assessing whether a manner regulation is constitutional.[66]

In determining whether the Colorado Amendment is a proper manner regulation, it is necessary to compare it with other state election regulations that have been upheld. In particular, a California law which prohibited an independent-party candidate from running in the general election was held to be a manner regulation. Under that statute, candidates who had been registered with an established political party within one year preceding the election were ineligible to run for office on the independent ticket.[67] Further, in Texas, a statute prohibiting local officeholders from running for the federal legislature until their current office terms were completed, was also found to be a valid manner regulation.[68] These ballot access provisions in California and Texas are analogous to the Colorado Amendment in their impact on the election process. Similar to ballot access regulations which temporarily restrain a candidate from seeking office, the Colorado Amendment requires a waiting period whereby legislators who have

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[64] Storer v. Brown, 415 U.S. 724, 746, n.16 (1974).

[65] Williams v. Tucker, 382 F. Supp. 381, 387 (M.D. Pa. 1974)(upholding a statute requiring an independent candidate to obtain signatures within a certain time frame, even if the statute has the effect of excluding those candidates defeated in the primary from obtaining a position on a general election ballot); Adams v. Supreme Court of Pennsylvania, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980) (upholding a statute requiring a state judge to resign from his office upon becoming a candidate for U.S. Congress).

[66] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[67] *Storer*, 415 U.S. at 728 (1974).

[68] Clements v. Fashing, 457 U.S. 957, 971 (1982).

held office for twelve consecutive years must wait four years before seeking re-election. Accordingly, the Colorado initiative should be classified as a manner regulation, and as thus, is subject to constitutional scrutiny.

The Supreme Court has developed a three-part test for determining whether a manner regulation is constitutional.[69] The three factors considered by the Court are: (1) the character and magnitude of the harm resulting from the state regulation, (2) the state's interests promoted by the regulation and (3) the necessity of the regulation in achieving those interests and whether they may be arrived at by a less burdensome means.[70] If the Colorado initiative satisfies this test, it should be upheld as constitutional.

The character and magnitude of the harm caused by the regulation should be reviewed by examining its impact upon First and Fourteenth Amendment rights. Challengers to the Colorado Amendment may argue that candidates' First Amendment rights to associate and right to expression are thwarted by preventing them from running for office for a four-year period. Likewise, under the Equal Protection Clause of the Fourteenth Amendment, challengers may contend that an unfair classification will be established by a regulation that discriminates against twelve-year office holders, who are precluded under the Colorado initiative, and not against newcomers to the political process. Finally, voters themselves may claim that their right to vote, as guaranteed under the Equal Protection Clause, may be abridged by a state regulation that could eliminate their candidate of choice.

The second factor requires identification of the state's interests promoted by the Colorado Amendment.[71] The goals of the Colorado provision, consistent with the Framers' intent, include the promotion of representative democracy, strengthening the ties between representatives and constituents and increasing interest and participation in public service.[72]

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[69] *Anderson*, 460 U.S. at 789.

[70] *Id.*

[71] *Id.*

[72] COLO. CONST. art. XVIII, § 9(1).

The third factor requires the court to measure the extent to which the state interests make it necessary to burden First and Fourteenth Amendment rights.[73] The Supreme Court has held that a waiting period analogous to the waiting period required by Colorado's Amendment "is hardly a significant barrier to candidacy....This sort of insignificant interference with access to the ballot need only rest on a rational predicate." [74] The Colorado Amendment merely requires a four-year waiting period after a candidate serves 12 years in office. This burden is minimal when compared to the strong interest the state has in encouraging legislators to be responsive to their constituents. Therefore, the Colorado initiative should be viewed as a reasonable and nondiscriminatory regulation because it is rationally related to the state interest. The Court applied a similar analysis in upholding a Texas provision that prohibited individuals who held certain public offices from running for the legislature until their current office terms were completed.[75] In addition, the Court has upheld a statute which prohibited certain federal employees from running for political office.[76] The Colorado Amendment does not prevent an incumbent from participating in the political process in general or in the campaign of another candidate. Therefore, the amendment satisfies First Amendment challenges because it is based on a rational predicate and is less restrictive than previously upheld regulations.

In addition, the state's interest must be balanced against the claim that term limitations unfairly discriminate against incumbents, in violation of the Equal Protection Clause. The Supreme Court has held that an equal protection violation only exists when there is an "invidious, arbitrary, or irrational" classification.[77] In fact, the Supreme Court has held that a regulation imposing a waiting period does not result in such classification because there

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[73] *Anderson*, 460 U.S. at 789.

[74] *Clements*, 457 U.S. at 967-68.

[75] *Id.*

[76] United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

[77] *Clements*, 457 U.S. at 967.

is no discrimination based on the incumbent's political affiliation, nor on his qualifications to hold public office.[78] Since the Colorado initiative is based on a strong state interest, it does not result in an invidious, arbitrary, or irrational classification, and thus is not a violation of an incumbent's right under the Equal Protection Clause.

Furthermore, the Supreme Court has held that certain burdens on a citizen's right to vote are reasonable and do not violate the Equal Protection Clause.[79] For example, the Court held that Hawaii did not need to demonstrate a compelling interest in order to justify its ban on write-in voting.[80] Likewise, a rational relation test should also be applied to the Colorado initiative's effect on the rights of voters, since it promotes the goal of representation and imposes "only a limited burden on voters' rights to make free choices and to associate politically through the vote." [81] While term limitations may diminish a voter's choice of candidates, this burden will "be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." [82] Accordingly, a claim brought by citizens arguing that their right to vote is burdened under the Colorado Amendment does not outweigh the state's interests. Therefore, the Colorado initiative satisfies the Court's three-part balancing test and is a valid manner regulation.

IV. CONCLUSION

Regardless of whether term limitations are viewed as a qualification or a manner regulation, the Colorado initiative is precisely what the Supreme Court has determined to be a valid exercise of the state's power. Whether or not term limitations are

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[78] *Id.*

[79] Burdick v. Takushi, __ U.S. __, 112 S. Ct. 2059, 1992 U.S. LEXIS 3404, at *23 (1992).

[80] *Id.* at *19.

[81] *Id.*

[82] *Id.* at 22.

the best means to address long-term incumbency, they are endorsed by the fundamental principles embodied in the Constitution. The Colorado initiative does not infringe on the fixed qualities set forth in the Qualifications Clauses. In fact, a desire to eliminate long-term incumbency and promote representation weighs heavily in favor of interpreting the Colorado Amendment to be a constitutionally valid manner regulation. Coupling the strong desire for representative government with the broad powers of the states to regulate elections under the Times, Places and Manner Clause, Colorado's Amendment is valid.