July 2015

The Constitutionality of State-Passed Congressional Term Limits

Martin E. Latz

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by

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Few issues in American politics have the potential to change the political landscape as dramatically as term limits. Term limits restrict the *number* of terms elected officials may remain in office. The forced retirement of leaders in Congress and state legislatures across the country may bring a new generation of officials to our political arena. Rarely have topics with such enormous potential impact been favored by 70 percent of the American electorate.[1] It should be no surprise that in 1990 term limit measures passed for the first time in this nation's history in California, Colorado, Missouri, Oklahoma, South Dakota and Utah.[2] Term limit supporters are currently organizing all over the country to get this issue placed on statewide ballots. Supporters point to grass-roots organizations active in 35 states.[3] Likely battlegrounds in 1992 include Arizona, Florida, Georgia, Michigan, Ohio and Oregon and Washington.[4]

Colorado is the only state currently imposing *congressional* term limits. Colorado's voters passed a state constitutional amendment in November, 1990, limiting the terms of their U.S. members of Congress. Senators were restricted to serving two consecutive terms, while Colorado's members of the U.S. House of Representatives may now only serve six consecutive terms.[5]

A multitude of problems arise when states pass constitutional amendments or laws limiting the terms of their federal representatives. This article focuses only on the U.S. constitutional issue. Does a state law limiting the number of terms its federal representatives may serve violate the U.S. Constitution?[6]

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[1] Gallup Poll, December 1989

[2] California, Colorado, and Oklahoma passed initiatives limiting the terms of their state representatives. South Dakota and Utah passed resolutions calling for a Constitutional Amendment to limit Congressional terms. Kansas City, Missouri and San Jose, California passed laws limiting the terms of their city councilmembers.

[3] Glasser, *Advocates of Congressional Term Limits Push for Votes in Ariz., Wash., Ohio, Fla.*, ROLL CALL, Feb. 14, 1991.

[4] *Id.*

[5] The Colorado amendment defines terms as consecutive "unless they are at least four years apart." COLO. CONST. amend. V.

[6] Current efforts to pass a constitutional amendment limiting congressional terms will not be addressed in this paper. However, eight different constitutional amendments limiting members' terms had been introduced in the 102nd Congress as of February 14, 1991. Few observers, however, expect any of these measures to move out of the judiciary committees.

In Part I, this article explores the underlying policy debate surrounding this issue.[7] Our Founding Fathers debated variations of these arguments in the Constitutional Convention. Academics and political columnists are currently tackling this issue in the popular press. Part II examines the debate over whether to allocate the power to limit congressional terms to each individual state instead of to the federal government (through a constitutional amendment or federal law). Part III investigates potential constitutional challenges based on the qualification and election clauses in the Constitution. Finally, Part IV addresses possible first amendment free speech and fourteenth amendment equal protection challenges to state-passed congressional term limits.

PART I: POLICY ARGUMENTS UNDERLYING THE DEBATE ABOUT TERM LIMITATIONS

Term limit activists defy ideological pigeonholes. While Republicans largely support term limits, 37 years of continuous Democratic control of the U.S. House of Representative provides ample incentive for supporting measures which may break up this stranglehold on Congress. Democrats also control most state legislatures.[8] Term limit supporters are markedly anti-incumbent, not strictly partisan.[9] As Thomas E. Cronin, a political scientist at Colorado College states, the term limit movement is generally "anti-politician, anti-establishment, anti-taxes, and anti-Washington, D.C."[10] A quick survey of term limit supporters and opponents bears this out. "Conservative" President George Bush and Vice-President Dan Quayle support term limits. "Liberal" Democrats like newly elected U.S. Senator Paul Wellstone of Minnesota, Governor Ann Richards of Texas, and U.S. Senator Tom Daschle of South Dakota, however, join the President and Vice-President on this side of the term limit fence. "Conservative" Bruce Fein, however, opposes term limits. Noted "Conservative" columnist George F. Will initially opposed term limits, but now supports them. There are powerful arguments and prominent Republicans and Democrats on both sides.

Term limit proponents lament the state of a representative democracy that reelects congressional incumbents at excessive rates. Ninety-six percent of incum-

[7] Term limitations imposed on state or city elected officials may also be subject to constitutional challenge. This will not be analyzed here. Potential *state* constitutional challenges to term limit laws are also outside the scope of this paper. Some of this analysis may, however, apply equally to any term limit measure.

[8] Americans to Limit Congressional Terms (ALCT) was founded and is run out of republican consultant Eddie Mahe's office. Term limits were also part of the 1988 Republican party platform. All but three co-sponsors in the U.S. Senate of the measure limiting terms to 12 years are Republicans. As Michael Kinsley writes, it is "basically an expression of Republican frustration at the Democratic dominance of Congress over the past few decades" Kinsley, *IRB: Voters in Chains*, The New Republic, Apr. 2, 1990, at 4.

[9] One cautionary note for Republicans - the 22nd Amendment drive limiting the number of Presidential terms to two was spearheaded by Republican support in response to Democratic President Franklin Delano Roosevelt's four terms in office. It's effect, however, has been to preclude two popular republican Presidents - Dwight Eisenhower and Ronald Reagan - from potentially being elected to third terms.

[10] Cronin, *Term Limits—a Symptom, Not A Cure*, The N.Y. Times, Dec. 23, 1990, at E 11, col. 1.

bent members of the U.S. House of Representatives who ran in 1990 were reelected.[11] In 1988, 98.3 percent were reelected; (Out of 409 incumbents who ran for re-election, only six were defeated). Eighty-five percent of incumbents received more than 60 percent of the vote in their districts in 1988, and the average incumbent received 73.5 percent of the vote. Sixty-three members were returned with majorities exceeding 94 percent.[12] Term limit supporters contend that voters do not have viable choices. They state that our democratic system needs drastic reform. Term limits will return real choices and competition between candidates and ideas to the voters, where they belong. Voters need real choices in order for our representative democracy to function effectively.

Term limit supporters also stress that term limits will dramatically increase turnover in Congress. Congressional newcomers will inject fresh blood and new ideas into our democratic system. Our democratic system, they argue, is currently stagnant with leaders who have spent more than half their lives in the halls of Congress and who are rarely challenged in elections. The country will be better served by foreclosing Congress as a permanent professional career and opening up Washington, D.C., to a regular influx of new citizen-legislators. Increased turnover will lead to a more responsive, varied, and democratic Congress. Thomas Jefferson agreed, stating "The second feature I dislike [about the Constitution], and strongly dislike, is the abandonment, in every instance, of the principle of rotation in office."[13] Many Founding Fathers feared the "professional" legislator. Term limit supporters see professional legislators as constituting the current majority in Congress.[14]

Term limit opponents respond by analyzing the *actual* percentage turnover in Congress. While the congressional reelection rate of 90-plus percent is indeed high, there has been a nearly two-thirds turnover in Congress in the last twelve years.[15] During Ronald Reagan's presidency, 55 percent of the House of Representatives turned over, and since 1974, 81 percent of the House was replaced by "new blood". Average seniority in the House in 1971 was six terms (only twelve years); in 1990 it was 5.8.[16] These percentages reveal significant turnover in Congress.

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[11] A recent study by David C. Huckabee of the Congressional Research Service of the Library of Congress concluded that this number has remained in the 90s ever since 1974. The study also noted that this percentage is currently the highest it has ever been since the middle of President Washington's first term. This number in the 19th Century hovered between 40 and 70 percent (even hitting as low as 24 percent in 1842). It hit the 70s after World War I and has been steadily rising ever since.

[12] Hertzberg, *Twelve is Enough: A Simple Cure For Chronic Incumbency: Limiting Congressional Terms*, THE NEW REPUBLIC, Volume 202, Number 20, May 14, 1990, at 22. In 1990, 74 house members and 4 senators ran unopposed. (Fifty-six house members were unopposed in 1988.)

[13] Thomas Jefferson, as quoted by Edward H. Crane, *Should Terms of Political Officeholders be Limited?*, GANNETT NEWS SERVICE, American Forum, September 30, 1990. Mandatory rotation of Members of Congress was required in the Continental Congress. A limit of three years service in any six years was imposed.

[14] Kessler, *Bad Housekeeping: The Case Against Congressional Term Limitations*, THE HERITAGE FOUNDATION Policy Review, Summer 1990.

[15] Cronin, *supra* note 10.

[16] Will, *Is 18 Years On The Hill Enough?*, The Washington Post, Jan. 7, 1990, B 7, col. 6.

Further, the U.S. Senate experienced only about a 70 percent reelection rate over the last 50 years.[17] This guarantees significant turnover.[18] If proponents' stated goal is increased turnover in Congress, and the danger to be avoided is stagnation, no such problem exists. Opponents also point out that re-election rate percentages overstate the likelihood incumbents will remain in Congress. Incumbents expecting to lose tend to retire. In 1986, six senators out of thirty-three with terms ending and more than fifty representatives decided not seek office.[19] The likelihood of loss might have been a factor in these incumbents' decision not to seek re-election.

Term limit opponents foresee dangerous consequences should congressional term limits pass. They foresee the forced loss of valuable experienced legislators just when they are becoming most effective. The business of state and federal government has grown increasingly complex. Expertise and experience in government has become proportionately more valuable.[20] Both supporters and opponents recognize this cost. They differ, however, in assessing the value of the loss of particular members.

Opponents also contend term limits will transfer power to non-legislative and non-elective actors. Nelson W. Polsby, the director of the Institute of Governmental Studies at the University of California - Berkeley, notes:

> Term limitations throw away the benefits of learning from experience. Inexperienced legislators are less powerful in relation to legislative staff, executive branch bureaucrats and interest group lobbyists from who they must learn the customs and routines of legislative operations and the stories behind policy proposals. New people in any complex institution are highly dependent on the people around them. *Term limitations just shift power from elected officials to the relatively inaccessible officials, bureaucrats and influence peddlers who surround them.*[21]

Opponents note this transfer of power undercuts the essence of democracy. No longer will policymakers be responsive to the public.

Supporters do not believe members of Congress are currently very responsive to the public. They further argue that limiting the tenure of legislative staff and increased turnover in Congress will decrease the value of lobbyists' contacts. Opponents respond that these measures have costs. Dedicated and experienced career public servants would be lost. Nationally syndicated political analyst Mark Shields writes that by further limiting legislative and staff terms, you put power

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[17] Becker, *Reforming Congress: Why Limiting Terms Won't Work*, BUSINESS WEEK, Aug. 6, 1990, at 18.
[18] *Id.*
[19] *Id.*
[20] Wicker, *The Best Revenge*, The N.Y. Times, June 11, 1990, at A19, cd. 5 states "[t]he increasing complexity of legislation requires expertise and experience, which would be limited as well as terms." *Id*
[21] Polsby, *Perspectives on Term Limitations*, The Los Angeles Times, Sept. 27, 1990, (emphasis added).

"[r]ight in the grubby, grabby hands of Washington lobbies and lawyers. . . . They would be the prime repositories of information and knowledge."[22]

Supporters dispute this, contending that the current impact of money and special interest group politics on our elective process largely removes citizens from effectively exercising their votes. Terms limits will minimize the influence of money and special interest groups on politics by decreasing the relevance of money to incumbents. Incumbents will have less incentive to amass huge war chests if they can only serve a limited number of terms. Special interest groups and lobbyists' influence will decrease as incumbents will not be forced to rely to such a great extent on big fundraisers and special interest money.

Opponents challenge the accuracy of this conclusion. Money, in their view, will matter as long as members of Congress may serve more than one term. Opponents contend that interest groups' play critical roles in our democratic system. Despite the rhetoric of the 1984 Presidential campaign which castigated Former Vice President Mondale for his alleged dependence on interest groups, such groups still represent millions of citizens' views before Congress, and lobby for such views in an organized and effective manner. This is one way our system assures that the voice of many different people and organizations will be heard.

Term limit opponents most powerful argument, however, is that term limits deny voters one of the most basic and fundamental rights in our country: *the right to vote for a representative of one's choice.* Voters who believe extended incumbency undermines our democratic system are free to vote against their particular incumbents. Denying other voters the right to choose a particular candidate whom they have chosen many times before, forcing incumbents to prematurely retire, is inherently undemocratic. Our system of representative democracy rests on citizens choosing their representatives. Term limit opponents trust in voters to make the best choice. Former President Gerald Ford noted that he would rather put his trust in voters than in an "abstract, indiscriminate rule like a 12 year limitation."[23] Former President Jimmy Carter also responded, noting in a talk at New York University in December 1990 that "[t]he ultimate authority in this country is the collective will of the American people."[24] Polsby agrees.[25]

Supporters respond by underscoring their assertion that there is no real choice

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[22] Shields, *Limiting Terms in Congress Will Only Make Things Worse*, NEWSDAY, Mar. 21, 1989.

[23] Wicker, *supra* note 20.

[24] Wicker, *On the Bandwagon*, N.Y. Times, Dec. 16, 1990, at E 15, col. 5.

[25] He argues that "term limitations won't enhance representative democracy. Just the opposite, since they create an artificial barrier preventing voters from returning to office legislators they might otherwise favor. Why are we so certain that voters have such terrible judgment that they need a constitutional restriction keeping them from voting for incumbents they know and like? It is hard to *see* how restricting voters' alternatives in this arbitrary way can be proposed in the name of representative government or democracy." Polsby, *supra* note 21.

in a system that re-elects House incumbents at a 98.5 percent rate. They focus on the meaning of "choice." As Mark B. Liedl of The Heritage Foundation states,

> Is [choice] the ability to vote for a particular person or the ability to vote for a set of ideas and values? The heart of voting is really the latter—to vote for someone who shares your beliefs. Limiting terms does not restrict that fundamental choice. It limits voters' ability to pick a particular person, but not their ability to elect congressmen who share their policy views.[26]

Supporters also point out that *Presidential* terms were limited by the 22nd amendment, which restricts voters' right to vote for Presidents who have already served two terms. Congressional term limits impose the same restriction on a state's members of Congress. The country saw fit to restrict the terms of its sole national representative, the President.[27] States should have the power to restrict the terms of *its* representatives, its members of Congress. Members of Congress serve the need of their state's citizens, not the citizens of other states. If a state's citizens want to restrict their member's terms, they should have the ability to do so. Many arguments made against congressional term limits could also have been made against passage of the 22nd amendment.

Opponents reply that it is significant that the measure limiting presidential terms is a constitutional amendment. The process by which the Constitution is amended is more onerous than each state passing separate laws restricting the number of terms for its members of Congress. The Presidency is also a federal office, as are members of Congress. No state action should be able to restrict the number of terms for federal elected officials.

Supporters assert that term limits will create incentives for Congressmen to focus on national policy issues instead of constituent casework. Constituent operations compose a time-consuming and unproductive aspect of congressional service. By efficiently serving constituent needs, members of Congress help ensure their return to Washington, D.C., but accomplish little else. Term limits would significantly diminish the value of this part of congressional service, freeing members to focus on policy.

Opponents respond by questioning the assumption that constituent service harms our democratic system. Opponents view constituent operations as the essence of responsiveness to the electorate. Further, members of Congress will still desire to be reelected even if term limits are enacted. They will continue to act in ways that assure them a better chance of reelection, and if constituent service accomplishes

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[26] Liedl, Heritage Foundation Reports, Nov. 10, 1990.

[27] The Vice-President is also a *national* representative, but he/she is elected on the same ticket as the President. The 22nd amendment in effect limits particular tickets' terms, although presumably a vice-president may serve consecutively under different Presidents.

this, there is no compelling reason to limit it. Opponents also stress that members of Congress *currently* focus a great deal on national policy issues. This is especially true in the U.S. Senate, where Senators are up for reelection only once every six years. If members of the House of Representatives put greater focus on "national" issues and less on "parochial" needs of their constituents, the basic rationale for creating a separate House and Senate would be lost - that is, stricter accountability to the electorate.

Supporters emphasize that term limits will reinvigorate political parties by limiting the strength of individual members of Congress. As Hendrik Hertzberg in *The New Republic* notes,

> [b]y routinely undermining the totally independent, totally personal power bases that long serving [S]enators and [R]epresentatives are able to build and maintain under the current system, and by dramatically increasing the number of elections fought on the basis of national issues, the term limit would enhance the strength and coherence of both national parties.[28]

Term limit supporters believe stronger national political parties will result in a more effective democratic system.

Proponents further believe that the pervasive and undemocratic rule of seniority which infects Congress will be a major victim of term limits. As Hertzberg argues,

> The House Speaker, the chairmen of important committees, and the other potentates of Congress have long been elevated by a decades-long, quasi-feudal process of favor-trading, personal alliance-building, ladder-climbing, and "getting along by going along." The term limits would leave Congress little choice but to elect its chiefs democratically, on the basis of the policies and the leadership qualities of the candidates.[29]

Term limit opponents respond by reiterating the point that term limits remove *experienced* legislators. There is a great deal of evidence that the strict seniority structure has been in a state of deterioration over the past twenty years. The system has undergone substantial reform since the early 1970s, much of which has already undermined the seniority system.[30]

Supporters respond by stating that good, *experienced* legislators will not be removed from the system by term limits. Instead, term limits will increase

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[28] Hertzberg, *supra* note 12, at 26.

[29] *Id.* at 24.

[30] The Class of 1974 and the subsequent reform of the committee structure with the advent of numerous and powerful subcommittees and subcommittee chairs is one example of this phenomenon. Committee chairmen are also now elected by secret ballot.

competition for elective office as members "forced" out of office would seek other elective offices. The more competition, the better our democracy will function. Voters will be faced with more and varied choices, and experienced legislators will continue to provide their expertise for the public good.

Proponents also emphasize the fact that many government bureaucrats currently are more responsive to Congress than the executive branch because of the extended tenure of most members of Congress. Bureaucrats are less responsive to the President because the 22nd amendment limits Presidential terms and increases turnover in the executive branch. Term limits will restore the Presidency to its proper place and restore the intended balance of power between the two branches of government.

Opponents, however, respond that the Presidency is already too powerful. Our Founding Fathers never intended the executive branch to wield the power with which it is currently endowed. Passage of the New Deal and other reforms essentially created the administrative state and shattered the balance between the two branches of government. Opponents believe term limits will exacerbate this problem.

Irrespective of whether one supports or oppose term limits for members of Congress, the constitutional issue looms. In the next part, I examine the potential danger of giving states, as opposed to the federal government, the power to limit congressional terms. Colorado exercised this power in November, 1990, by amending their state constitution to limit congressional terms.[31] Proponents in other states hope to follow in their footsteps.

PART II: METHODS TO LIMIT TERMS

Congressional term limit supporters are organizing about 35 states across the country to place this issue on ballots on election day. Efforts may proceed on three fronts to pass Congressional term limits. Two types of efforts are subject to constitutional challenge. Advocates may press for a constitutional amendment limiting congressional terms.[32] Currently, there has been no action in Congress outside the judiciary committees. South Dakota and Utah, however, have passed resolutions calling for a constitutional amendment limiting congressional terms.

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[31] Colorado amended its constitution to limit the term of its federal representatives COLO. CONST. amend V. Most of the analysis and decisions in this paper address state *statutes*. This distinction does not significantly impact the analysis in this paper, for any state action that violates the U.S. Constitution will be held invalid, regardless if it was a state statute or state constitutional amendment.

[32] The U.S. Constitution may be amended one of two ways. First, two-thirds of each house of Congress may vote to send to the states a proposed constitutional amendment. In order for it to be enacted, three-quarters of the states' legislatures must then pass the proposed constitutional amendment. Second, two-thirds of the states may force Congress call a convention for the purpose of proposing amendments. The convention's proposed amendments, however, still need to be ratified by three-quarters of the states.

Amending the constitution is burdensome. In our country's 215 years of existence, only 26 Amendments have been ratified (and only 16 since 1791 - when the Bill of Rights was ratified). Term limit activists view amending the constitution as the most difficult route.

Activists may also pressure Congress to pass a law limiting congressional terms. Term limit activists also believe relying on Congress to voluntarily limit their own terms is highly unlikely. This avenue raises some of the same constitutional issues as state-passed initiatives.

State-passed initiatives are the most popular activist route. Congressional term limit supporters organize states to place term limit proposals directly on ballots. An initiative was placed on the Colorado ballot in November, 1990. Activists in 35 states hope to place term limits on state ballots using this route in November, 1992.

The next section examines the proposition that qualifications may only be added by amending the U.S. Constitution.

PART III: CONSTITUTIONAL ISSUES

The constitutional debate surrounding state-passed congressional term limits revolves around three constitutional provisions. Term limit activists urge different interpretations of the various clauses to support their respective viewpoints. The first critical provision, Article I, Sections 2 and 3, sets forth qualifications without which an individual may not serve in the United States Congress:

> 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[33] and,
>
> [n]o 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[34] ("qualifications clauses").

Term limit opponents primarily rely on this provision for the major constitutional challenge to term limit laws. They assert that the qualifications clauses enumerate exclusive qualifications for members of Congress. Attempts to add to or take away from these enumerated qualifications by Congress or the states are unconstitutional. Term limits are an added qualification. Therefore, term limits may only be enacted by amending the Constitution.

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[33] U.S. CONST. art. I, § 2.
[34] U.S. CONST. art. I, § 3.

The second critical constitutional provision in this debate, Article I, Section 4, ("state regulation clause") states:

> [t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.[35]

Supporters of state-passed congressional term limits depend on this clause for the proposition that term limits do not add qualifications for membership in Congress. Term limits are simply another measure whereby states regulate congressional elections. The state regulation clause grants states this power.

Finally, Article I, Section 5 of the U.S. Constitution states that "[e]ach house shall be the Judge of the Elections, Returns and Qualifications of its own Members[36]. . ." ("judging clause"). Congress relies on this clause to "judge the qualifications" of particular members in determining whether to seat them in Congress ("Exclusion Cases"). Most commentary and court decisions addressing the issue of what constitutes a "qualification" for congressional office do so in the context of exclusion cases. The question whether term limits are additional "qualifications" distinguishes the two sides in this debate. One's conclusion rests on whether one primarily focuses on the qualifications clauses or the state regulation clause.

Three questions must be examined to ascertain the effect of these constitutional provisions on state-passed congressional term limits. May Congress or any of the individual states constitutionally impose additional "qualifications" for office upon individuals wishing to become (or remain) members of Congress absent amending the Constitution? What constitutes an additional "qualification"? Finally, are term limits additional "qualifications"?

Neither Congress nor states may add qualifications for membership in Congress to those currently enumerated in the Constitution.

Whether Congress or states may add qualifications to those enumerated in the Constitution without amending it has been extensively debated in Congress, the courts, and in the academic community. The United States Supreme Court faced this issue in *Powell v. McCormack*.[37] While the *Powell* Court never defines "qualifications", its analysis and conclusions pertaining to the qualifications clauses provide the basis for understanding term limit opponents' argument that such measures may only be enacted by amending the Constitution. The *Powell* holding serves as the foundation for subsequent Supreme Court decisions affecting the definition of "qualifications."

[35] U.S. CONST. art. I, § 4.
[36] U.S. CONST. art. I, § 5.
[37] Powell v. McCormack, 395 U.S. 486 (1969).

Petitioner Adam Clayton Powell was reelected to the United States House of Representatives from the 18th Congressional District in New York in 1966. Pursuant to a House resolution based on the judging clause of the Constitution, Congress refused to seat Powell. This refusal was predicated on a House special subcommittee report that concluded Powell had deceived the House of Representatives concerning certain travel expenses and had directed illegal salary payments to his wife while serving as Chair of the House Education and Labor Committee. Powell filed suit against House Speaker John McCormack and others alleging the House unconstitutionally refused to seat him. Powell argued that the House could refuse to seat him only if he failed to satisfy the three standing qualifications enumerated in the qualification clause of the Constitution. He satisfied the age, citizenship, and residency requirements specified in this clause. Powell asserted the House action as a result was unconstitutional.

The House's refusal in *Powell* to seat a duly elected member of Congress forced the Supreme Court to interpret the judging clause of the Constitution.[38] The *Powell* Court found it necessary to exhaustively review the historical materials surrounding the passage of both the judging clause and the qualifications clauses in its analysis. This decision provides the most clear and unambiguous U.S. Supreme Court holding regarding *both* clauses in the Constitution.

The Supreme Court faced a variety of constitutional issues in *Powell.* The critical question regarding term limits rested on the Court's extensive historical analysis underlying the inclusion in the U.S. Constitution of the qualifications clauses. Respondent McCormack raised the "qualifications" issue by arguing that the case presented a political question and was nonjusticiable. He contended that there was a "'textually demonstrable constitutional commitment' to the House of the 'adjudicatory power' to determine Powell's qualifications. Thus [McCormack]. . . 'argued that the House, and the House alone, has power to determine who is qualified to be a member.'"[39] The *Powell* Court embarked on a comprehensive effort to "determine what power the Constitution confers upon the House through Art. I, § 5 [judging clause]. . ." and whether it includes the power to add qualifications to those explicitly enumerated in the qualifications clauses. [40]

The Supreme Court concluded, after analyzing cases starting with a 16th Century British Parliament case, that their "examination of the relevant historical materials leads us [the Court] to the conclusion that petitioners [Powell. . .] are correct and that the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for

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[38] Justice Stewart's dissent contends that this constitutional issue need not have been addressed by the Court. He relies on a different interpretation of findings earlier addressed by the Court. *Id* at 56D (Stewart, J. dissenting)

[39] Powell v. McCormack, 395 U.S. at 519.

[40] *Id.*

membership expressly prescribed in the Constitution."[41] These requirements include those explicitly stated in the qualifications clauses (age, citizenry, and residency requirements). The *Powell* Court found that Congress could not consider outside criteria and qualifications in addition to those "expressly prescribed" in the Constitution in determining whether or not to seat a member under the judging clause.[42]

This conclusion underlies the argument that because term limits are additional "qualifications", one may *only* add them by amending the Constitution. It is important to examine the relevant historical materials in light of whether term limits constitute an additional qualification to those enumerated in the qualifications clauses. Also, the *Powell* Court's holding as it applies to the Colorado measure, may be limited because it did not directly resolve the issue of whether Congress or a state may explicitly add a qualification for office. However, while the *Powell* Court did not directly address the qualifications clauses in that context, its historical examination of the debates leading up to their inclusion in the Constitution makes this distinction less relevant.

1. *Powell v. McCormack's* Historical Analysis of the Qualifications Clauses

The *Powell* Court analyzed English and colonial exclusion cases dating back to a House of Commons declaration in 1553, which excluded a clergyman from his seat in the House. The Court concluded that "[b]y 1782, after a long struggle, the arbitrary exercise of the power to exclude was unequivocally repudiated by a House of Commons resolution which ended the most notorious English election dispute of the 18th century, the John Wilkes case."[43] Wilkes, while serving in Parliament, had published an attack on a peace treaty with France in unusually harsh language. The House of Commons consequently expelled him. Wilkes, however, regained his seat by popular vote years later. He also convinced the House to expunge the previous House action expelling him. The action previously expelling him was finally denounced as "subversive of the rights of the whole body of electors of this kingdom."[44] The case stood for the proposition that the voters (electors) rights were paramount and the House of Commons did not have the power to exclude those duly elected by the public.

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[41] *Id.*, *Powell* Footnote 44 states "Since Art. I, § 5, cl. 1, applies to both Houses of Congress, the scope of the Senate's power to judge the qualifications of its members necessarily is identical to the scope of the House's power, with the exception, of course, that Art. I, § 3, cl. 3, establishes different age and citizenship requirements for membership in the Senate." *Id.*

[42] 395 U.S. at 548.

[43] *Id.* at 527.

[44] *Id.* at 528, (quoting 22 Parl. Hist. Eng. 1411 (1782)).

The *Powell* Court used the case involving Wilkes to note:

> [w]ith the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and the qualifications were 'not occasional but fixed'.[45]

Great Britain concluded that the House of Commons was without the power to exclude members based on any criteria other than standing qualifications. This view protected voters' fundamental rights to choose whom they wished to represent them, for the House was without the arbitrary power to deny seats from voters' duly elected representatives.

Voters' fundamental right to choose is the strongest policy argument against term limits. This right also provides the crucial rationale in arguing why qualifications enumerated in the Constitution should be fixed and subject only to change by amending the Constitution. The Wilkes case stood for this right in the American colonies prior to the Constitutional convention. The *Powell* Court stressed:

> Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause celebre* for the colonists. . . . It is within this historical context that we must examine the Convention debates in 1787, just five years after Wilkes' final victory.[46]

Before examining the Convention debates, however, the Supreme Court noted that petitioners (Powell. . .) relied heavily on constitutional scholar Charles Warren's analysis in arguing that the Constitutional Convention "proceedings manifest 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."[47] While the *Powell* Court stated that "[w]e do not completely agree [with this proposition], for the debates are subject to other interpretations. . .", it concludes:

> the records of the debates, viewed in the context of the bitter struggle for the right to freely choose representatives which had recently concluded in England and in light of the distinction the Framers made between the power to expel and the power to exclude, indicate that petitioners' ultimate conclusion in correct.[48]

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[45] *Id.*

[46] Powell v. McCormack, 395 U.S. at 530-31.

[47] *Id.* at 532; *see* C. WARREN, THE MAKING OF THE CONSTITUTION (1937).

[48] Powell v. McCormack, 395 U.S. at 53. The power to expel was separately provided for in U.S. CONST. art. I, § 5, cl. 2. It states that a member can only be expelled by a vote of two-thirds of the house in which the member sits.

The Supreme Court indicated that the constitutional debates were subject to other interpretations. These alternate interpretations underlie some of term limit supporters' arguments. However, the Supreme Court adopted and relied upon substantial portions of Charles Warren's analysis in their opinion. This necessitates a brief recitation of Warren's conclusion.

Charles Warren in his seminal work on the Constitution concluded that neither the Houses of Congress nor the states had been granted "the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence."[49] He emphasized that "[t]he elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications."[50] Warren's conclusions primarily rest on his examination of the debate in the Constitutional Convention over whether to add property qualifications to those already enumerated in the qualifications clauses.[51]

James Madison played the crucial role in this debate, which took place on August 10, 1787.[52] Madison led the fight against giving Congress the power to regulate its own qualifications. He argued that granting Congress this power would place "an improper and *dangerous* power in the Legislature," and noted that the qualifications of the elected were "*fundamental* articles in a Republican Government and ought to be *fixed* by the Constitution."[53] As M. Farrand notes in his *Records of the Federal Convention of 1787*, Madison argued:

[i]f the Legislature [of the United States] could regulate those [qualifications]

[49] *See* C. Warren, supra note 47. Warren also notes that by 1937 at least four amendments to the Constitution had been proposed to add qualifications for Members of Congress to those specifically prescribed by the Constitution. This reinforces his conclusion that the amendment process is the sole method to add qualifications to those found in the Constitution. These proposals included "to make officers and stockholders of the Bank of the United States ineligible, *2d Cong., 2d Sess.*, March 2, 1793; to make Government contractors ineligible, *9th Cong., 1st Sess.*, March 29, 1806; *10th Cong., 1st Sess.*, March 1, 1808; *24th Cong., 1st Sess.*, Feb. 13, 1836...; [t]he New York ratifying Convention in 1788, and the Massachusetts and Connecticut Legislatures in 1798, recommended an amendment [notably did not try to pass amendments to their state Constitutions] making naturalized foreigners ineligible, as did the Legislatures of Massachusetts and Connecticut, in 1815, following the recommendation of the Hartford Convention." *Proposed Amendments to the Constitution, 1789-1889* (1897), by Herman v. Ames. Warren, *supra* note 47, at 421 n.1.

[50] C. Warren, *supra* note 47, at 422.

[51] The proposal voted on read as follows. "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Art. VI, Sec. 2 as reported by the Committee of Detail. Powell v. McCormack, 395 U.S. at 533. *See* FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1966), Vol 2, p.248.

[52] The *Powell* Court focused extensively on this debate. It noted "[t]he debate on this proposal discloses much about the views of the Framers on the issue of qualifications." Powell v. McCormack, 395 U.S. at 533. This expansive language implies broad precedential value. This may apply to more than exclusion cases.

[53] *Id.*, (emphasis added). By arguing that qualifications "ought to be fixed by the Constitution", Madison, by implication, opposes giving the power to alter qualifications to the state's legislatures. It is true, however, that this debate centered on whether or not to give this power to the "Legislature of the United

> of either [the electors or the elected], *it can by degrees subvert 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. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to all 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 [against] another. Qualifications founded on artificial distinctions may be devised . . . by the the stronger to keep out partizans of [a weaker] . . . faction.[54]

Madison also stated 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 our attention."[55] Madison continues "[t]hey [Members of Parliament] had made the changes in both cases subservient to their own views, or to the views of political or [R]eligious parties."[56] The *Powell* Court notes that "Madison's argument here was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications. The parallel between Madison's arguments and those made in Wilkes behalf is striking."[57] This is further proof that the framers intended the qualifications enumerated in the Constitution to be fixed and unalterable by Congress.

The Convention agreed with Madison at the close of this debate, for "it defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven States to four; and it also defeated the proposal for a property qualification, by a vote of seven States to three."[58] Warren concludes:

> [c]ertainly it [the Convention] did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply.[59]

States." The *Powell* Court quoted Madison for the proposition that qualifications ought to be fixed.

[54] M. FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 250 (1966) (emphasis added). The *Powell* Court quoted substantial parts of Farrand's report on Madison. *See* Powell v. McCormack, 395 U.S. at 533-34.

[55] Madison here seems to refer to the Wilkes case. *See infra* at 16-17. *See also* C.WARREN, *supra* note 47, at 420 n.1.

[56] M. FARRAND, *supra* note 4704, at 250.

[57] Powell v. McCormack, 395 U.S. at 534.

[58] C. WARREN, *supra* note 47, at 421.

[59] *Id.*

Warren determined that the Convention felt neither Congress nor the states should have the power to establish qualifications in general for membership in Congress. He felt that additional qualifications may only be added or changed by amending the Constitution. Warren also stated that Congress, in judging the qualifications for membership, may not judge individuals on any basis other than those enumerated in the qualifications clauses (age, citizenship, residency). These two issues need to be distinguished. Term limit proponents focus exclusively on Warren's conclusion interpreting the judging clause. Opponents, on the other hand, highlight Warren's focus on the qualifications clauses.

The *Powell* Court explicitly accepted Warren's first conclusion pertaining to congressional power.[60] The Court further supported this conclusion by emphasizing that the convention *separately* passed expulsion rules. For Congress to expel a member, they needed to obtain a *two-thirds* vote to expel, not the bare majority needed to exclude a member based on qualifications. As the Court stated:

> the Convention's decision to increase the vote required to expel, because that power 'was too important to be exercised by a bare majority', while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.[61]

The Court also examined post-convention state ratification debates in supporting Warren's conclusion. These debates "also demonstrate the framers' understanding that the qualifications for members of Congress had been fixed in the Constitution."[62] The Court here extensively quoted Madison and Hamilton from The Federalist. Madison wrote in The Federalist #52 "[t]he qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the time more susceptible of uniformity, have been very properly considered and regulated by the convention."[63] Alexander Hamilton agreed, stating that the power of the national government is "expressly restricted to the regulation of the

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[60] While the *Powell* Court does not explicitly hold that *states* may not add to the qualifications enumerated in the Constitution, the Court's analysis applies equally to this proposition. *See infra* text at 19.

[61] Powell v. McCormack, 395 U.S. at 536.

[62] *Id.* at 540.

[63] Madison's statement here that the qualifications of the elected are "more susceptible to uniformity" may be interpreted as an argument against state-passed congressional term limits (assuming term limits are qualifications). This statement reinforces the argument that there is great danger should separate states pass different length term limits. See *infra* text at 53 for an explanation of this argument. The representative power of the various states' congressional delegations would be either diluted or strengthened, contrary to the framers' intentions. The Committee of Detail also reported out ART. VI, SEC. 2 (Property requirements) without a specified amount of property because they could not agree on the amount of property to require. Committee member Mr. Rutlidge noted in the debate on August 10, 1787 that "the Committee had reported no qualifications because they could not agree on any among themselves." FARRAND, *supra* note 54, at 249. The attempt to report a single property amount requirement implies that the committee felt qualifications for members of Congress should be uniform across the country. Oliver Ellsworth (another Convention delegate), however, disagreed with the effort to only report a single property requirement conclusion.

times, the *places*, and the *manner* of elections [Italics in original]. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, *are defined and fixed in the Constitution, and are unalterable by the legislature.* ."[64] The *Powell* Court also noted that Hamilton, prior to the New York convention, stressed that "[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[65]

The *Powell* Court went on to state:

> [i]n Virginia, where the Federalists faced powerful opposition by advocates of popular democracy, Wilson Carey Nicholas, a future member of both the House and Senate and later Governor of the State, met the arguments that the new Constitution violated democratic principles with the following interpretation of Art. I, § 2, cl. 2 [qualification clause] as it respects the qualifications of the elected: 'It has ever been considered a *great security to liberty, that very few should be excluded from the right of being chosen to the legislature.* This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state'.[66]

The fundamental right of the electorate to choose whom they wish to represent them underlies the argument against term limits. Term limits not only deny the opportunity for reelection to certain Members of Congress, but the excluded incumbents have by definition served for extended periods of time. They were selected time and again by their constituents to represent their district in Washington, D.C. Madison and Hamilton recognized this as a fundamental tenet of our democracy. Madison alluded to the danger of restricting it in the Wilkes case, for the Parliament previously had been able to exclude members arbitrarily by majority vote. Madison pointed out at the Constitutional Convention that "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."[67] The *Powell* Court quoted Madison for this proposition in affirming their agreement with him.[68] Congressional acts excluding members are equivalent to terms limits denying long-serving incumbents the right to run. Hamilton stressed that each measure limited the right of people to "choose whom they please to govern them."[69]

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[64] The Federalist No. 60, at 402 (A. Hamilton) (H. Jones ed. 1961) (emphasis added).
[65] Powell v. McCormack, 395 U.S. at 540-541; 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876).
[66] Powell v. McCormack, 395 U.S. at 541; 2 DEBATES ON THE FEDERAL CONSTITUTION 257, 292-93 (J. Elliot ed. 1876) (emphasis added).
[67] *Id.* at 547.
[68] *Id.*
[69] The Federalist No. 60, (A. Hamilton). *See also*, 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed. 1876); Powell v. McCormack, 395 U.S. at 547.

The *Powell* Court finally reinforces its view that Congress may not constitutionally add qualifications by examining post-ratification cases and commentary by Congress in exercising their judging power in particular exclusion cases.[70] House Speaker McCormack argues that Congress' own understanding of its power to judge qualifications is crucial to its constitutionality.[71] Congress, he argued, has excluded members in the recent past on grounds other than those enumerated in the Constitution.[72] The *Powell* Court disagreed with McCormack's conclusion. They first noted that "[f]or almost the first 100 years of its existence. . .Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution."[73] Regarding the exclusion cases cited by respondents, the Court further recognized that "[because] an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date. Particularly in view of Congress' own doubts in those few cases where it did exclude members-elect, we are not included to give its precedents controlling weight."[74]

Congress' first confrontation with the judging clause occurred in 1807, when "the eligibility of William McCreery was challenged because he did not meet additional residency requirements imposed by the State of Maryland."[75] This confrontation was also analyzed by the *Powell* Court. They examined the House Committee on Elections' reasoning in that case, and recognized the Committee Chairman's conclusion:

> [t]he Committee of Elections considered the qualifications of members have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . .[76]

The Chairman emphasized that the committee's narrow construction of this clause "was compelled by the 'fundamental principle in a free government,'[77] that *restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society'*."[78] The Chairman of the House Committee shared Madison's and Hamilton's view that voters should freely choose their elected representatives without significant restrictions.

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[70] 395 U.S. at 541, 542.
[71] *Id.*
[72] *Id.*
[73] Powell v. McCormack, 395 U.S. at 542.
[74] *Id.* at 546-47.
[75] *Id.* at 542.
[76] Powell v. McCormack, 395 U.S. at 542-43 (quoting 17 Annals of Cong. 872 (1807).)
[77] *Id.*
[78] Powell v. McCormack, 395 U.S. at 543 (emphasis added).

The *Powell* Court finally found:

> [i]n short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. . . . [T]herefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.[79]

2. *Powell v. McCormack* applied to State Action

Powell does not explicitly conclude that *states* may not constitutionally add qualifications to the qualifications clause. However, its analysis and rationale for holding that Congress may not add "qualifications" applies equally to states. *Powell* implicitly denies the power to add qualifications to the states. The *Powell* Court's analysis leads to the conclusion that "qualifications" may only be added by amending the Constitution.[80] The *Powell* Court based much of their holding on Charles Warren's analysis of the Constitutional Convention. Warren explicitly concluded that neither Congress *nor that states* may constitutionally add "qualifications".[81] *Powell* also quotes the chairman of the House Committee of Elections in the McCreery exclusion case for the proposition that "neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . ".[82] James Madison and Alexander Hamilton's arguments also apply equally to a *state's* ability to change "qualifications" set in the Constitution. If the qualifications are "fixed in the Constitution," as Madison states, and as quoted in *Powell*, this prohibits a single state alone from changing it.[83]

Many eminent jurists and authorities on constitutional law have also uniformly held that states may not add such qualifications. Justice Joseph Story concluded that states "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by, the states."[84] Chancellor Kent, a learned judge and well-known legal author, concluded that "[t]he question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the Constitution of the United States, is examined in Mr. Justice Story's Commentaries on the Constitution, ii. 99-103. But the objections to

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[79] *Id.* at 548-49.
[80] *Id.* at 542.
[81] *Id.* at 548.
[82] 395 U.S. at 542-43.
[83] *Id.* at 540.
[84] J. STORY, STORY ON THE CONSTITUTION 626-27 (3d ed. 1925).

the existence of any such power appear to me to be too palpable and weighty to admit of any discussion.[Citation Omitted]"[85] Judge Cooley, in his *General Principles of Constitutional Law*,[86] agrees. "The Constitution and laws of the United States determine what shall be the qualifications for federal offices, and *state* constitutions and laws can neither add to nor take away from them. This has been repeatedly decided in Congress in the case of persons elected to seats therein, when provisions in the state constitution, if valid, would render them ineligible."[87] Finally, Mr. Burdick in his treatise *The Law of the American Constitution*,[88] stated that "[i]t is clearly the intention of the Constitution that all persons not disqualified by the terms of that instrument should be eligible to the federal office of Representative."[89] State courts have uniformly held that states may not add to the qualifications for federal office enumerated in the U.S. Constitution.[90]

3. Alternative Interpretation of *Powell v. McCormack*

Despite the *Powell* Court's conclusions, it is important to explore alternative interpretations of the origin of these clauses.[91] P. Allan Dionisopoulos offers such an interpretation.[92] Dionisopoulos concludes that the Framers intended Congress to be able to add qualifications to those enumerated in the qualifications clauses.[93] He underscores the fact that the First Congress in 1790 enacted a statute imposing a permanent disqualification from Congress on those individuals convicted of offering bribes to federal judges and on those federal judges convicted of accepting bribes.[94] Congress imposed a disqualification by statute, not by constitutional amendment. Dionisopoulos contends that "[s]ince that First Congress was comprised of James Madison and many others who served at the Constitutional Convention, this enactment of 1790 raises a doubt with respect to Warren's assertion that qualifications may not be prescribed by statute." [95]

Dionisopoulos also examines Article VI, Clause 3, of the Constitution, which states "no religious Test shall ever be required as a Qualification to any Office or

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[85] J. KENT, COMMENTARIES ON AMERICAN LAW 229 n. (f) (12th ed. 1873).
[86] T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 285, 290 (3d ed. 1925).
[87] *Id* (emphasis added).
[88] C. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 160, 165 (1922).
[89] *Id.*
[90] For further discussion, see State ex rel. Johnson *v. Crane*,65 Wyo. 189; 197 P.2d. 864 (1948).
[91] The *Powell* Court earlier noted that, while "petitioners' [Powell ...] ultimate conclusion is correct", the [Constitutional] debates are subject to other interpretations." Powell v. McCormack 395 U.S. at 532.
[92] Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J.PUB.L. 103 (1968).
[93] *Id* at 15..
[94] *Id.* at 108. The statute was An Act for the Punishment of Certain Crimes against the United States, Ch. 9, Stat. 112 (1790). It read that any person offering a bribe "to obtain or procure the opinion, judgment, or decree of any judge of the United States, in any suit, controversy, matter, or cause...and shall be thereof convicted...[and the judge accepting such bribe] shall forever be disqualified to hold any office of honor, trust, or profit, under the United States." *Id.*
[95] Dionisopolous, *supra* note 92, at 109.

public Trust under the United States."[96] He argues that the clause's simple existence in the Constitution raises doubts concerning whether the framers felt Congress could alter qualifications for congressional office.[97] If the Framers felt additional qualifications could *only* be added by amending the Constitution, the Convention had no need to enact this clause.[98]

I believe the only method by which additional qualifications may be added is by amending the Constitution. Both Charles Warren and the *Powell* Court thoroughly analyze the origins of the relevant constitutional provisions and conclusively justify their determination that Congress may not add qualifications to those enumerated in the Constitution. Dionisopoulos' first point regarding the action of the first Congress, however, is troublesome. It is not, however, a constitutional provision. His contention that James Madison and others were in the first Congress seems contradictory. Madison and Hamilton's language from the Federalist and during the Constitutional Convention seem so clear as to minimize the relevance of their simple presence in the first Congress. Dionisopoulos' second point is also unpersuasive. The "religious test" provision was probably enacted to serve as insurance against the possibility that Congress might attempt to exclude a member due to his/her religious affiliation. Many states had religious tests in their state constitutions at this time. The Convention may have wanted to explicitly go on record as opposing religious tests for office. Also, Britain's history of religious controversy and political strife based on separate religious groups vying for power made a deep impression on American colonists' minds. Religious freedom was a basis for this country's existence. Our Founding Fathers probably wanted to go on record and explicitly state their views on religious freedom in the Constitution through the "religious test" provision.

Despite this thorough analysis of the historical background underlying the judging clause and the qualifications issue, the *Powell* Court explicitly refused to address one issue potentially relevant to term limits. The Court stated that it was not deciding whether Congress may judge members-elect on the basis of qualifications found in the Constitution yet not enumerated in the qualifications clauses.[99] These included,

> [i]n addition to the three qualifications set forth in Art. I, § 3, cl. 7, [which] authorizes the disqualification of any person convicted in an impeachment proceeding from 'any Office of honor, Trust or Profit under the United States'; Art. I, § 6, cl. 2, provides that 'no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'; and § 3 of the 14th Amendment disqualifies any person 'who, having

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[96] U.S. CONST. art. VI, cl. 3.
[97] *Id* at 109.
[98] *Id.*
[99] Powell v. McCormack, 395 U.S. at 520 n.41.

previously taken an oath*** to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.' [Others also argue that] . . .the [g]uarantee [c]lause of Article VI and the oath requirement of Art. VI, cl. 3, is no less a "qualification" within the meaning of Art. I § 5 [judging clause] than those set forth in Art. I § 2 [qualification clause]. [100]

The *Powell* Court concluded that, "[w]e need not reach this question, however, since both sides agree that Powell was not ineligible under any of these provisions."[101]

Term limit supporters believe this omission indicates that the *Powell* Court's holding that Congress may not add qualifications to those enumerated in the entire Constitution is not absolute. I believe this depends upon the context in which *Powell* is analyzed. Term limits are the context to which we now turn in examining the effects of *Powell v. McCormack.*

4. *Powell v. McCormack's* Relevance to Term Limits

Powell lends a great deal of force to term limit opponents' initial contention that neither Congress nor the states may add to or change qualifications found in the Constitution. The sole method to limit congressional terms is to amend the Constitution. The sweeping language in *Powell* regarding the right of voters to choose their elected representatives, and the Framers' clear intention as interpreted by *Powell* to only minimally limit the pool of candidates, reflects a distinctly hostile attitude to actions which limit voters' franchise and choice. Term limits by definition restrict the eligible pool of candidates for election and significantly limit the right of voters to choose their own representatives. They might consequently be labeled an additional "qualification," and, as such, unconstitutional as attempts to add qualifications to those enumerated in the Constitution. However, courts in other contexts have held that measures limiting voters' choices *are* constitutional. These decisions need to be examined to explore how *Powell's* conclusions have withstood more recent Supreme Court analysis.

Term limit supporters also note that *Powell* was an exclusion case. Even if term limits are additional "qualifications", which is not conceded, such a conclusion should only be reached after the Supreme Court examines the qualifications clauses in the context of either Congress' or a state's attempts to add qualifications, not in addressing the judging clause. As a result, the question of whether term limits are an unconstitutional addition to the qualifications clauses, or are simply further attempts by states to regulate congressional elections, remains unanswered. While the Supreme Court has not extensively addressed the qualifications issues since *Powell*, lower courts have applied *Powell's* holdings to various contexts. Many courts found particular state statutes unconstitutional as impermissibly adding

[100] *Id.*
[101] *Id.*

"qualifications" to the Constitution. These decisions provide the context for examining what constitutes additional "qualifications."

What constitutes an additional "qualification?"

The United States Supreme Court has never questioned whether term limits constitute a "qualification" for office. No court has explicitly defined the term "qualification" in an election context. Webster's defines a qualification as "a condition that must be compiled with (as for the attainment of a privilege) [a. . .for membership]".[102] By this definition, term limits might impose a "qualification" for office. They eliminate from consideration for office incumbents who do not satisfy the "condition." If an incumbent has served a specified number of terms in Congress, he/she does not "qualify" to run for office. Courts, however, have developed a more sophisticated analysis in addressing this issue.

Courts have approached the question of what constitutes "qualifications" for office in two different ways. First, some courts take what may be called the "direct qualifications approach". These courts directly confront the action (usually a state statute) limiting candidates' and voters' rights. They determine if the action rises to such a level as to constitute a qualification for office. If it does, they strike it down as unconstitutionally adding a "qualification" for office per *Powell*. If the statute's provisions do not rise to the requisite level, it is deemed constitutional under the state regulation clause. Four federal district court decisions utilized this direct qualifications approach.[103] Each held the state statutes unconstitutional as adding "qualifications."[104] State courts addressing state election statutes have also uniformly addressed the issue of qualifications directly.[105] Although many of the state election statutes decisions were rendered prior to *Powell*, each held that states could not add to, nor take away from, qualifications enumerated in the U.S. Constitution.[106]

Courts have also examined the issue of qualifications by analyzing whether particular state election statutes violate the equal protection clause of the fourteenth amendment or the first amendment free speech clause. Term limit opponents contend term limits unconstitutionally impinge on the fundamental right of voters to elect a candidate of their choice. Term limit supporters respond that states were constitutionally granted the power to regulate congressional elections through the

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[102] WEBSTER'S NEW COLLEGIATE DICTIONARY, (1979).

[103] United States v. Richmond, 550 F. Supp. 605 (E.D. N.Y. 1982); Dillon v. Fiorina, 340 F. Supp. 729 (Con. M. 1972), Stack v. Adams, 315 F. Supp. 1293 (N.D. Fla. 1970); Exon v. Tieman, 279 f. Supp. 609 (D. Neb. 1968).

[104] Exon v. Tieman, 279 F. Supp. at 612-14; Stack v. Adams, 315 F. Supp. at 1298. Dillon v. Fiorina, 340 F. Supp. at 731; U.S. v. Richmond, 550 F. Supp. at 608.

[105] State courts may provide a better opportunity for favorable decisions for term limit opponents as a result. However, the U.S. Supreme Court exercises ultimate authority in interpreting the U.S. Constitution, and may overturn state supreme courts on this issue.

[106] Exon v. Tieman, 279 F. Supp. at 613; Stack v. Adams, 315 F. Supp. at 1297-98; Dillon v. Fiorina, 340 F. Supp. at 731; U.S. v. Richmond, 550 F. Supp. at 607.

state regulation clause.[107] U.S. Supreme Court Justice Stevens recognizes, however, that this debate is complicated because any regulation of elections "inevitably effects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."[108] Court decisions explicitly rely on *Powell* for this proposition in holding particular state statutes unconstitutional. Courts addressing these challenges must "inevitably" balance states' interests in regulating Congressional elections against voters' interests in having the broadest opportunity to choose their representatives and associate for political reasons. If state statutes impact too severely on voters' interests, courts hold the statutes unconstitutional as violating either the Equal Protection Clause, the Free Speech Clause, or both. If states' interests trump voters' interests, courts uphold the statute, citing the state regulation clause. The Supreme Court utilizes this basic approach in ballot access restriction cases ("Balancing Approach"). Unfortunately, each subsequent Supreme Court ballot access case seems to redefine the standard and type of review required when such statutes are analyzed.

One Supreme Court decision and two circuit court decisions have also analyzed ballot access statutes by separately addressing the "direct qualifications" challenge and the "balancing" Equal Protection and Free Speech challenge.[109] These decisions will be examined as fitting within the Supreme Court's overall balancing approach for ballot access decisions.

The ballot access decisions will be closely scrutinized to ascertain possible considerations that would tilt the balance for or against term limits.

1. Direct Qualifications Approach

a. Federal Court Decisions

Four Federal District Court decisions directly applied *Powell's* holding regarding the addition of qualifications to those enumerated in the Constitution. Each used the direct qualifications approach. It should be noted that no decision has impugned *Powell's* conclusion that Congress may not constitutionally add qualifications to those enumerated in the Constitution.[110] These District Court decisions explicitly rely on *Powell* for this proposition in holding particular state statutes unconstitutional.

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[107] *See supra* text at 11. This provision states "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4.

[108] Anderson v. Celebreeze, 460 U.S. 780, 788 (1983).

[109] *See infra* text at 35, Storer v. Brown, 415 U.S. 724 (1974). *See also infra* text at 37-38, Signorelli v. Evans, 637 F. 2d 853 (2d Cir. 1980). *See also infra* text at 38, Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983).

[110] Term limit supporters contend Storer v. Brown, 415 U.S. 724 reh'g denied, 417 U.S. 926 (1974), however, explicitly limits *Powell*. *See infra* text at 35 for a full discussion of this contention.

> In *United States v. Richmond*,[111] a Member of Congress agreed to plead guilty to income tax evasion (26 U.S.C. § 7201), supplementing the salary of a federal employee (18 U.S.C. § 209) and possession of marijuana (21 U.S.C. § 844) [as part of a plea bargain agreement.] He also undertook to immediately resign from Congress and withdraw as a candidate for re-election. The government, in return, consented not to prosecute him for a variety of other crimes.[112]

The *Richmond* Court invalidated the portions of the plea agreement pertaining to his resignation from Congress and his withdrawal as a candidate for reelection. Portions of the plea agreement were held impermissible as an "unconstitutional interference by the executive with the legislative branch of government and with the *rights of the defendant's constituents*."[113]

The *Richmond* Court recognized that a fundamental tenet of our democratic system is that voters should "retain the broadest freedom to select legislative representatives."[114] The *Richmond* Court also noted that adding or detracting from the enumerated qualifications found in the Constitution limited this choice. "Our government's founders deliberately withheld from Congress the authority to add or detract from the enumerated qualifications" for this reason.[115] The Court further emphasized that "[t]he courts have not permitted attenuation of this fundamental principle. . . .[in fact,] [i]t is significant that even the *states* are barred from imposing additional qualifications on congressional candidates."[116] The Court concluded that "[j]ust as Congress and the states are prohibited from interfering with the choice of the people for congressional office, federal prosecutors may not, directly or indirectly, subvert the people's choice or deny them the opportunity to vote for any candidate."[117] Federal prosecutors attempted to restrict the rights of both Congressman Richmond and his constituents. The agreement was held unconstitutional.

Dillon v. Fiorina,[118] directly applied *Powell* in striking down a New Mexico statute which required candidates in a congressional primary election to have resided in that state for one year and to have been a party member for an additional year prior to the election.[119] This statute was declared unconstitutional for it added "an impermissible requirement of at least two years residency to the qualifications for United States Senator. . . ."[120] The court stated that the proposition "[t]hat a state cannot add to or take away from these qualifications is well settled."[121]

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[111] 550 F. Supp. 605 (E.D.N.Y. 1982).
[112] *Id.*
[113] *Id (emphasis added).*
[114] *Id.* at 607.
[115] *Id.*
[116] *Id* (emphasis added).
[117] *Id.*
[118] Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972).
[119] *Id.* at 730.
[120] Dillon v. Fiorina, 340 F. Supp. at 729, 731.
[121] *Id.*

In *Stack v. Adams*,[122] the court for the Northern District of Florida employed a similar analysis in invalidating a Florida statute preventing state officials from simultaneously running for federal office.[123] The statute required state officials to resign their positions if they wished to run for Congress. The *Stack* court first noted that "the qualifications prescribed in the United States Constitution are exclusive and that state constitutions and laws can neither add to nor take away from them is universally accepted and recognized."[124] The court also stressed that the "fundamental principle involved is the right of the people to elect whom they choose to elect for office."[125] The court concluded that the "Florida statute. . .does provide an additional qualification not provided by the Constitution for election to Congress. . . it is a flat disqualification."[126] The court goes on to explain what it means by "flat disqualification". One crucial element of the court's analysis rested on the fact that a Florida state official may not even be elected by a write-in campaign unless he/she resigned from his/her state office. This write-in possibility had been earlier categorized in a separate case as being a part of a regulation, not a flat disqualification.[127]

Finally, in *Exon v. Tiemann*, the District Court for the District of Nebraska held that because there was no requirement in the U.S. Constitution that a U.S. representative must live in the district from which he/she was nominated, a state cannot add such a requirement.[128] While this was a pre-*Powell* decision, its examinations directly tracks the *Powell* line by analyzing the statute utilizing the direct qualifications approach.

b. State Court Decisions

State court's approach this issue in a similarly direct fashion. They uniformly hold that no state may add, subtract, or change qualifications for the office of federal representatives. These decisions examine a variety of circumstances to ascertain if the various statutes constitute additional "qualifications" to those enumerated in the U.S. Constitution. The following is an overview of the circumstances where state courts have addressed this issue. The approach in these cases is of paramount concern. Some of the statutes found to constitute additional "qualifications" have been questioned by subsequent federal decisions. Many of these cases are pre-*Powell*.

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[122] Stack v. Adams, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970).
[123] *See generally id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Storer v. Brown, 415 U.S. 724 (1974) may undermine the holdings in *Dillon* and *Stack*. *See* infra text at 32-33. However, these district court decisions are important in laying out the approach and analysis used by the courts, not the ultimate holdings. The challenged statutes do not generally bear much resemblance to term limits. The only resemblance is all these statutes infringe the same voters rights - although to differing degrees - and in one sense may be said to constitute "qualifications." This will also be explored later in more depth as part of Supreme Court holdings utilizing the "balancing" approach.
[128] Exon v. Tiemann, 279 F. Supp at 614.

State statutes held unconstitutional:[129]

	State	Citation
1.	Judges are ineligible to become candidates for any other office during judicial terms.	
	Washington:	*State v. Howell*, 104 Wash. 99, 175 P.569 (1918).
	Oregon:	*Ekwall v. Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934).
	Arizona:	*Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328 (1940).
	Delaware:	*Buckingham v. Killoran*, 42 Del. 405, 35 A.2d907 (1944).
	Wisconsin:	*State v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946).
	Oklahoma:	*Riley v. Cordell*, 200 Okl.390, 194 P.2d 857 (1948).
	Indiana:	*State v. Sup.Ct - MarCy*, 238 Ind.421, 151 N.E.2d 508 (1958).
2.	No elected state legislator may accept a civil appointment to any office - including U.S. Senate - during term to which elected.	
	Michigan:	*Richardson v. Hare*, 381 Mich. 304, 160 N.W.2d 883 (1968).
3.	No candidate for nomination at the primary election who was defeated may be a candidate for the same office at the ensuing general election.	
	North Dakota:	*State v. Thorson*, 72 N.D. 246, 6 N.W.2d 89 (1942).
	Alaska:	*Benesch v. Miller*, 446 P.2d 400 (1968).
4.	Person must be resident of congressional district where seeking election.	
	Maryland:	*Hellmann v. Collier*, 217 Md. 93, 141 A.2d 908 (1958).
	New Mexico:	*State v. Evans*, 79 N.M. 578, 446 P.2d 445 (1968).
5.	Governor must resign office to run for Congress.	
	Wyoming:	*State v. Crane*, 65 Wyo. 189, 197 P.2d. 864 (1948).
	South Dakota:	*In Opinion of the Judges*, 79 S.D. 585, 116 N.W.2d 233 (1962).

[129] For extensive discussion of many of these cases and the underlying proposition that a state cannot add to or change qualifications for federal office, *see also* State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948); Ekwall v. Stadelman, 146 Ore. 439, 30 P.2d 1037 (1934); and Shub v. Simpson, 196 Md. 177, 76 A.2d 332, *appeal dismissed*, 340 U.S. 881 (1950).

6. No person convicted of a felony may run for Congress.

   Minnesota: *Eaton v. Schmahl*, 140 Minn. 219, 167 N.W.481 (1918).

7. Convicted felons are ineligible to run for office.

   Minnesota: *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950).

8. Person who advocates international communism and avowed leader of Communist Party in America is ineligible to run.

   New York: *In re. O'Connor*, 173 Misc. 419, 17 N.Y.S.2d 758 (1940).

9. Person must swear oath he/she is not subversive, defined as those advocating or teaching overthrow of constitutional form of U.S. or state government by revolution, force or violence.

   Maryland: *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332, appeal dismissed 340 U.S. 881 (1950).

10. City Charter provided that President of City Council must not hold or qualify for any other elective office.

    Georgia: *Lowe v. Fowler*, 240 Ga. 213, 240 S.E.2d 70 (1977).

State statutes held constitutional:

These statutes were not deemed additional "qualifications". They were constitutional per the State Regulation Clause.

State	Citation

1. No person who was a candidate for an office in the primary election, and who was defeated, may by petition be placed on the general election ballot for any other office.
   Held: no additional qualificlation because person could be elected by write-in votes. No *absolute* disqualification.

   Nebraska: *State v. Swanson*, 127 Neb. 806, 257 N.W. 255 (1934).

2. Sheriff must resign from office to become a candidate for Congress.

   Florida: *Davis v. Adams*, 238 So.2d 415, (Fla. 1970).

3. District attorneys may not run for any office which has a term concurrent at any time to the district attorney's elected term.
Held: constitutional because district attorney may resign district attorney position to run for Congress.

Oklahoma: *Okla. State Election Board v. Coats*, 610 P.2d 776, (Okla. 1980).

4. Candidates for office required to appoint campaign treasurer.

Maryland: *Sec of State v. McGucken*, 244 Md. 70, 222 A.29 693 (1966).

2. Balancing Approach

a. Constitutional Rights Affected by Term Limits

Term limits affect five constitutional rights or interests.[130] These include the right to candidacy, the right to vote for the candidate of your choice, the right to vote effectively, the right to associate, and the state right to regulate. Each rests on different constitutional bases, and will be separately examined.

1. Right to Candidacy

Term limits completely deny the U.S. Senator or Representative who has served the requisite number of consecutive terms the right to be a candidate for that office in that election ("right to candidacy"). The Supreme Court does not recognize a *fundamental* right to candidacy. As Justice Rehnquist (now Chief Justice) wrote for a plurality of the Court in *Clements v. Fashing*,[131] "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a

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[130] Courts note that ballot access restrictions infringe on these rights. Term limits are a form of ballot access restriction. Term limits differ, however, for they restrict particular incumbents from office, not just from the ballot.

[131] Clements v. Fashing, 457 U.S. 957 (1982), *reh'g denied*, 458 U.S. 1133(1982), ...Justice Rehnquist (now Chief Justice) wrote for himself, Justices O'Connor, Powell and Chief Justice Burger. Justice Stevens filed an opinion in which he joins in Parts I, II and V of Rehnquists plurality opinion and in the judgment. Justice Brennan filed a dissenting opinion which was joined by Justices Marshall and Blackmun, and which was joined by Justice White in Part I. The above quoted section is from Part III of the Rehnquist opinion. This part was supported by the plurality.

In *Clements* plaintiffs challenged the constitutionality of two state statutes restricting their ability to get on the ballot. The first statute rendered an officeholder (such as a judge) ineligible for the state legislature if his current term of office did not expire until after the legislative term to which he aspires begins. Second, plaintiffs challenged a "resign to run" statute. It required that a wide range of state of county officeholders resign if they became candidates for other offices at a time when their unexpired term of office exceeded one year. The Supreme Court held that these provisions did not violate the first amendment. Four members of the Court found that the resign to run statute did not violate the equal protection clause.

This decision implicates many state cases earlier cited which took the "direct qualifications approach". However, the critical factor noted above was not the ultimate holding of the various state statutes, but the approach followed by the courts.

candidate's access to the ballot 'does not of itself compel close scrutiny'."[132] Justices Brennan, Blackmun, Marshall and White in their dissent agree with the plurality here, yet note that "[a]lthough we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on first amendment rights of candidates and voters."[133] These additional first amendment rights include voters right to vote for the candidate of their choice and their right to associate.

2. Right to Vote for the Candidate of Your Choice

These dissenting justices would recognize that term limits, which restrict the candidacy of long-serving incumbents, deny voters of that state or congressional district the right to vote for that senator or representative in that election ("right to vote for the candidate of your choice"). The right to candidacy and the right to vote for the candidate of your choice interrelate. The U.S. Supreme Court noted in *Bullock v. Carter*,[134] that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[135] Justice Stevens also stressed this point in *Anderson v. Celebrezze*,[136] noting that any election regulation "inevitably effects - at least to some degree - the individual's right to vote *and* his right to associate with others for political ends."[137]

The right to vote for the candidate of your choice is almost universally granted fundamental status. This right is clearly infringed by term limits, which restrict a voter's right to vote for particular incumbents. James Madison and Alexander Hamilton in the constitutional debates underscored the fundamental nature of this right, seeing it as a crucial tenet of our system of representative democracy. Term limit opponents base their rejection of term limits on the infringement of this right. It also composed a critical element in *Powell v. McCormack*.[138]

More recently, the U.S. Supreme Court in *Reynolds v. Sims*,[139] stated that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and *any restrictions on that right strike at the heart of representative government.*"[140] This right is recognized as fundamental in most ballot access cases. In *Williams v. Rhodes*,[141] the Court faced an Ohio statute which "made it virtually impossible for a new political party, even though it has hundreds of

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[132] *Id.* at 963. *See also* Bullock v. Carter, 405 U.S. 134, 143 (1972).
[133] *Id.* at 978 n.2.
[134] Bullock v. Carter, 405 U.S. 134 (1972).
[135] *Id.* at 143.
[136] Anderson v. CeleBrezze, 460 U.S. 780 (1983).
[137] *Id.* at 788 (emphasis added).
[138] 395 U.S. at 519.
[139] Reynolds v. Sims, 377 U.S. 533 (1964).
[140] *Id.* at 555 (emphasis added). This was a reapportionment case, not a ballot access case. That this particular right to vote was also implicated here is further proof of its fundamental nature.
[141] Williams v. Rhodes, 393 U.S. 23 (1968).

thousands of members, or an old party, which has a very small number of members, [third parties were implicated, not the two major parties] to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States."[142] The American Independent Party challenged the Ohio statutes that would have denied its candidate, George Wallace, access to the 1968 presidential ballot. The *Williams* Court stated that ballot access restrictions impinge on "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. [This right]. . ."of course, rank[s] among our most precious freedoms."[143] The Court also quoted *Wesberry v. Sanders*,[144] a reappointment case, for noting that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[145] The *Williams* Court emphasized that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[146]

3. Right to Vote Effectively

Term limits also affect the right of every citizen to cast a vote as weighty as every other ("right to vote effectively"). This right to vote was undermined in many reapportionment and franchise cases. Term limits of different lengths placed on congressional terms in separate states give significantly different power to particular members of Congress.[147] Seniority in the U.S. House and Senate affects the power of its representatives. Members with less seniority tend to exercise less power. While I believe term limits impinge the "right to vote effectively", this proposition may not be constitutionally supportable because the seniority structure of the House and Senate is *not* required.[148] Not only is it constantly subject to challenge within Congress by amending the House and Senate Rules or voting senior members from committee chairs, it also has been substantially limited in the past.[149] As a result, the infringement of this right in the constitutional context will not be examined.

The Supreme Court does not, unfortunately, often explicitly distinguish between the right to vote for the candidate of your choice and the right to vote effectively. Noted constitutional scholar Lawrence Tribe, however, recognizes the distinction between the two different types of the right to vote as well as the Supreme

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[142] *Id.* at 30.

[143] *Id.* While this may sound as if the Court here implicates the "right to vote effectively", Tribe, *infra* note 148, disagrees.

[144] Wesberry v. Sanders, 376 U.S. 1 (1964).

[145] *Id.* at 17.

[146] Williams v. Rhodes, 393 U.S. at 31.

[147] *See infra* text Section III.

[148] This may prove to be a further subject for research.

[149] *See supra* note 30.

Court's continuing ambiguity on this matter.[150] Tribe notes "[t]he right to vote invoked here [in *Williams*, the Supreme Court's first modern ballot access restriction decision] differs radically from the right to vote that underlay the reapportionment and franchise cases (footnote 11), which involved the right of every citizen to cast a vote as weighty as that of every other."[151] The Supreme Court recognizes the right to vote effectively most often in reapportionment and franchise decisions, and has not addressed it in the context on ballot access restriction decisions.

4. Right to Associate

The right of individuals to associate for the advancement of their political beliefs is also burdened by term limits ("right to associate"). Term limits deny political parties the right to choose whom they wish to choose as a representative in Congress by restricting their choice of potential candidates. If a political parties' chosen representative is the incumbent who has previously served the specified number of terms, term limits deny him/her a place on the ballot or the possibility of being elected to Congress.[152]

The Supreme Court in *Williams v. Rhodes* and subsequent ballot access cases recognizes the *fundamental* nature of this right. The *Williams* Court stated that:

> the state laws place burdens on. . .the right of individuals to associate for the advancement of political beliefs. . . . [This right is also] among our most precious freedoms. We have repeatedly held that freedom of association is protected by the first amendment. And of course this freedom, which is protected from federal encroachment by the first amendment is entitled under the fourteenth amendment to the same protection from infringement by the States.[153]

The *Williams* Court also explains that "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[154] Term limits may operate to keep the party's chosen candidates off the election ballot. This is especially egregious as term limits will most likely infringe the *majority* party's right to associate in that congressional district. One of the two major parties' candidates

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[150] L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 1320 (2d Ed. 1988).

[151] *Id.* at 1103.

[152] This assumes that the legislator's political party selects its incumbent to represent them in the general election. The vast majority of incumbents wishing to run again are selected as their party's nominee.

This also depends on how the term limit statute reads. For instance, a partial term limit statute might deny a certain incumbent a place on the printed ballot, allowing the incumbent to be elected if enough write-in votes are cast.

[153] Williams v. Rhodes, 393 U.S. at 30, 31. The rubric for challenging states' infringement of this right is by violation of the first amendment as applied to the States by the fourteenth amendment.

[154] *Id.* at 31.

will be denied access to the ballot and to election.[155]

5. State Right to Regulate

Each of the first four rights, examined to differing degrees, command the protection of the first amendment and the equal protection clause of the fourteenth amendment. Term limits, however, also affect the right of states to regulate federal elections as provided in the state regulation clause of the U.S. Constitution ("state right to regulate"). Term limits affect the constitutional right of a state to regulate federal elections. The state interests to which this right serves as an umbrella are varied and depend a great deal on the particular circumstances and context of the state statutes. Courts recognize that some regulation of access to the ballot is necessary in order to conduct orderly and effective elections and to maintain comprehensible ballots. These state interests must be weighed against the right to vote for the candidate of your choice and voters' right to associate. (The right to candidacy and the right to vote effectively are not relevant in this context.)

The parameters of the state's rights under this clause are set out by the Supreme Court in *Oregon v. Mitchell*,[156] quoting from *Smiley v. Holm.* In *Smiley*, Chief Justice Hughes, writing for a unanimous court stated:

> The subject matter is the 'times, places and manner of holding elections for senators and representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of inspection returns; *in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.* . . .
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> This view is confirmed by the second clause of Article, I, § 4, [state regulation clause] which provides that 'the Congress may at any time by law make or alter such regulations,' with the single exception stated. The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. . . . It 'has a general supervisory power over the whole subject.'[157]

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[155] At this time, Congressman Bernard Sander from Connecticut is the only Member of Congress not a member of either the Democratic Party or the Republican Party. He belongs to the Socialist Party. The likelihood that term limits will restrict third parties' candidates from election is highly speculative.

[156] Oregon v. Mitchell, 400 U.S. 112 (1970) (emphasis added).

[157] *Id.* at 123, (quoting Smiley v. Holm, 285 U.S. 355, 366-67 (1932)).

The "congressional override" provision is critical. If courts hold term limits constitutional, Congress may pass laws superseding state-passed term limits by exercising its "general supervisory power". It might, however, prove politically dangerous, for term limits are extremely popular with the American electorate.[158]

The Supreme Court has valued these five rights differently depending on the circumstances of each case. The extent to which the particular rights are infringed greatly affects the Court's analysis. It is critical to separate out the rights involved. However, the Supreme Court notes, in many of these ballot access restriction decisions, that two constitutional provisions are often affected. There is a first amendment claim which has been held applicable to the states through the fourteenth amendment. There is also a fourteenth amendment equal protection claim. The Supreme Court in the ballot access and election area has not, however, engaged in traditional fourteenth amendment equal protection analysis. While distinguishing rights which are "fundamental" remains critical, the distinction in ballot access decisions has not dictated the level of scrutiny which the Court has applied. In traditional equal protection analysis, the nature of the right dictates the level of scrutiny applied by the courts.

Courts may never address the tension between state interests in regulating federal elections and voters' fundamental rights to vote for the candidate of their choice and their right to associate. If this is the case, no court needs to engage in first amendment or equal protection analysis. Courts might simply conclude term limits are an added "qualification" unconstitutionally imposed by the states. Term limits here would not be analyzed as a form of ballot access restriction. Ballot access restriction have never been addressed in the context of denying the candidate of a *major* party a place on the ballot. Most ballot access decisions involve classification schemes imposing burdens on new or small political parties or independent candidates. These schemes effectively keep small parties off the ballot. Other ballot access decisions use classifications based on wealth which have a disproportionately harsh impact on less wealthy candidates.[159] A court may not use the balancing rubric at all for term limits. It may approach term limits in the direct qualifications manner.

Courts may otherwise view term limits as a more absolute form of ballot access restriction. They would then utilize the ballot access "balancing" approach. The Supreme Court has addressed the interests implicated in ballot access cases in a sophisticated manner. We now turn to the Supreme Court's confusing and somewhat contradictory decisions concerning the level of scrutiny to which ballot access restrictions have been subjected.

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[158] *See supra* note 1.

[159] *See* Clements v. Fashing, 457 U.S. at 965, which categorizes the ballot access decisions.

b. Level of Scrutiny for Ballot Access Restrictions

"The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal clarity."[160] This understatement by Circuit Court Judge Goldberg in *Hatten v. Rains*, illustrates the uncertainty of Supreme Court rulings in this area. Goldberg states:

> [t]he [ballot access] cases got off to a rocky start. In *Williams v. Rhodes*, . . .[the Supreme Court] applied strict scrutiny, holding that the election laws violated both the fundamental right of association and the fundamental right to vote. The Court, however, did little to explain the scope of the rights violated and why some restrictions on ballot access might be subject to strict scrutiny while others might not. The Supreme Court's next ballot access case did little to clear up this confusion. In *Jenness v. Fortson*, 403 U.S. 431, (1971), the Court refused to apply strict scrutiny to Georgia's less restrictive petition requirements and filing fees, but failed to explain what distinguished the Georgia restrictions from those invalidated in *Williams*.[161]

Unfortunately, subsequent Supreme Court ballot access cases did not clear up the confusion. The Supreme Court seems to have used four separate levels of scrutiny in addressing ballot access restriction cases. They began by applying traditional strict scrutiny.

1. Traditional Strict Scrutiny

a. *William v. Rhodes* (1968).[162]

The Supreme Court in *Williams*, invalidated highly restrictive petition requirements which disadvantaged small parties in Ohio. The Court followed a strict scrutiny-like approach.[163] The *Williams* Court found two fundamental rights infringed: the right to vote for the candidate of your choice, and the right to associate.[164] The Court then held that the "[s]tate has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate."[165] The *Williams* Court also found a less restrictive alternative available.[166] This inquiry into whether a less restrictive alternative is available is a crucial component of traditional strict scrutiny analysis. The Court finally stated that "the number of voters in favor of a party, along with other circumstances, is relevant in considering whether state laws violate the equal protection clause."[167]

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[160] Hatten v. Rains, 854, F.2d 687, 693 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).
[161] *Id.* at 693-94n.9.
[162] William v. Rhodes, 393 U.S. 23 (1968).
[163] *Id.* at 34.
[164] *Id.*
[165] *Id.* at 34.
[166] 393 U.S. at 35.
[167] *Id.* at 34.

Term limits would be unconstitutional according to this criteria because they infringe the right of all the voters in one of the two major parties to choose their candidate. As a practical matter, the two major parties receive the vast majority of votes cast in congressional elections.

b. *Bullock v. Carter*[168] (1972).

The *Bullock* Court analyzed a Texas statute that required candidates to pay a large filing fee to get their names placed on the ballot.[169] The *Bullock* Court held that, because the statute "has a real and appreciable impact on the *exercise* of the franchise [the right to vote]",[170] and because the impact "is related to the resources of the voters supporting a particular candidate, . . .the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."[171] The provision was found unconstitutional because the state interests cited (an interest in regulating the ballot, thus preventing overcrowding, and an interest in candidates helping pay the administrative costs of the election), while legitimate, did not meet the standard imposed. The Court also recognized that no less restrictive alternative existed.[172]

c. *Lubin v. Panish*[173] (1974).

The *Lubin* Court invalidated a California statute that required candidates for county supervisor to pay a filing fee in order to secure a place on the primary ballot.[174] The case was distinguished from *Bullock* because the required filing fee was smaller and the challenge in *Lubin* was brought by an indigent candidate.[175] The *Lubin* Court, however, also acknowledged the burden imposed on the right to vote and to associate.[176] It further recognized that the state's interest in maintaining a manageable ballot and barring frivolous candidacies were legitimate.[177] It refused to afford

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[168] Bullock v. Carter, 405 U.S. 134 (1972).

[169] *Id.* at 134. Some note that *Bullock* and *Lubin* are filing fee cases, and are treated differently from other ballot access decisions. The plurality in Clements v. Fashing, 457 U.S. at 965 makes this argument, stating that "[o]ne line of ballot access cases involves classifications based on wealth." It then cites *Bullock* and *Lubin* as this line. However, in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), the Court cites Bullock and Lubin for precedential value in setting up its level of scrutiny for ballot access restrictions. The distinction between the two lines of ballot access decisions may be relevant in some contexts, however, their distinction here does not appear necessary.

[170] *Id.* at 144. The standard is "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id* at 143.

[171] *Id.*

[172] *Id.* at 144. While appellants in *Bullock* argued that a candidate may be placed on the general election ballot absent payment of fees by satisfying the petition requirement, the Court found this alternative unreasonable. The alternative required candidates and voters to abandon their party affiliation (in bypassing the primary, candidates and voters may only get on the general election ballot as an independent) to avoid paying filing fees.

[173] Lubin v. Panish, 415 U.S. 709 (1974).

[174] *Id.*

[175] *Id.* at 716.

[176] *Id.*

[177] *Id.* at 715.

them compelling status, however, for to do so would have been to find the challenged statutes constitutional.[178] The Court insisted that the state demonstrate that no less restrictive alternative could satisfy its interests.[179] The state could not satisfy this standard.[180] The Court also found that petition requirements were available as a less restrictive alternative.[181]

The court found that petition requirements were available as a less restrictive alternative.[182]

The *Lubin* Court applied traditional strict scrutiny analysis because the California filing fee requirement served as "an absolute, not an alternative, condition [to candidacy], and failure to meet it is a disqualification from running for office. . .[Thus California chose a means] which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters."[183] Term limits also impose an absolute condition on candidacy. Justices Blackmun and Rehnquist, in a concurring opinion, noted that they would regard a write-in procedure (in addition to a petition requirement) as an acceptable alternative.[184]

d. *Illinois State Board of Elections v. Socialist Workers Party* [185] (1979).

Finally, the *Illinois State Board of Elections* Court also applied traditional strict scrutiny analysis in a case that struck down a particularly onerous petition requirement.[186] New political parties and independent candidates for offices of a political subdivision were required to file petitions with 5 percent as many signatures as the number of votes cast in the previous election in that subdivision.[187] New parties in Chicago under this statute were forced to submit petitions with 35,947 signatures to get on the city ballot, while to be placed on the statewide ballot they only needed to obtain 25,000 signatures.[188] The Court found this untenable.[189]

The *Illinois State Board of Elections* Court recognized that restrictions on access to the ballot burden "two distinct and fundamental rights, . . ."[190] the right to vote for the candidate of your choice and the right to associate. The Court then noted that "[w]hen such vital individual rights are at stake, a State must establish that its

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[178] *Id.* at 719.
[179] *Id.* at 718.
[180] *Id.*
[181] *Id.* at 719.
[182] *Id.* at 718.
[183] *Id.*
[184] *Id.* at 723.
[185] 440 U.S. 173 (1979).
[186] *Id.*
[187] *Id.*
[188] *Id.* at 177.
[189] *Id.* at 184.
[190] *Id.*

classification is necessary to serve a *compelling* interest."[191] The Court found some state's interests legitimate (interest to keep ballots manageable, and interest in keeping frivolous candidates off ballot), but stated:

> [o]ur previous opinions have also emphasized that "even when pursuing a legitimate state interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51, 58-59, . . . (1973), and we have required that States adopt the least drastic means to achieve their ends *Lubin v. Panish, supra*, 415 U.S. at 716, . . . ; *Williams v. Rhodes, supra*, 393 U.S. at 31-33, 89 . . . . This requirement is particularly important where restrictions on access to the ballot are involved.[192]

The Court found no reason why the petition requirement in Chicago was higher than the statewide measure, holding the Chicago petition requirement unconstitutional.[193]

Justice Marshall wrote this opinion. Three concurring opinions, however, were separately filed in this case. Justice Blackmun, Stevens, and Rehnquist each filed separate concurrences.[194] Rehnquist concurred in the judgment and Stevens concurred in part of the Marshall opinion and concurred in the judgment. Chief Justice Burger concurred in the judgment, but did not write a separate opinion. This diversity of views illustrates the uncertain nature of the ballot access area.

2. Intermediate Scrutiny

a. *Storer v. Brown*[195] (1974).

Storer v. Brown addressed two California statutes.[196] One statute required independent candidates to be politically disaffiliated (independent) for at least one year prior to the primary election to which they sought access to the ballot ("disaffiliation statute"). The other statute required that for independent candidates to get on the ballot, they must file petitions signed by over 5 percent of the voters who voted in the last state-wide general election ("petition requirement statute").[197] The Court held that the disaffiliation statute was constitutional because it 1) involved no discrimination against independent candidates with a history of being independent,and 2) the state interest in protecting the electoral process from

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[191] *Id.* (emphasis added).
[192] *Id.* at 185.
[193] *Id.* at 187.
[194] *See Id.* at 188-90.
[195] Storer v. Brown, 415 U.S. 724, *reh'g denied*, 417 U.S. 926 (1974).
[196] *Id.* at 726-27.
[197] *Id.*

"splintered parties and unrestrained factionalism. . .[198]" was compelling.

While the *Storer* Court recognized that the right to vote for a candidate of your choice and the right to associate were infringed, it also held that statutes which serve compelling state interests survive constitutional review under the first and fourteenth amendments and under the equal protection clause.[199] The Court took an expansive view of a state's interests in regulating federal elections, deciding:

> as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and *qualification of candidates*.[200]

The Court also emphasized that the decision that must be made in this area is a "hard judgment" and that the "rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the "Equal Protection Clause."[201]

The states' interests in regulating elections were then found to be compelling.[202] Such interests outweighed the additional "qualification" the statute imposed on candidates by requiring them to be politically independent for at least a year prior to attempting to get on the primary ballot as an independent.[203] The *Storer* Court did, however, remand the question of the constitutionality of the petition requirement statute back to the district court.[204] It directed the district court to determine the extent to which the petition requirement restricted potential candidates.

The *Storer* Court explicitly dismissed the claim that these statutes violated the qualifications clause by imposing additional qualifications upon congressional candidates.[205] This is the only Supreme Court ballot access case which directly addresses the "qualifications" issue since *Powell*. Term limit supporters highlight this decision. They contend *Storer* favors their position on term limits because it rejects the direct qualifications approach challenge in this context. They also believe

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[198] *Id* at 736.
[199] *Id*. at 728-29.
[200] *Id*. at 730 (emphasis added).
[201] *Id*.
[202] *Id*. at 736.
[203] *Id*.
[204] *Id*. at 738.
[205] *Id* at 746.

Storer stands for the proposition that the balancing approach is the most appropriate manner to address measures such as term limits. Term limits in their view will more likely be upheld under this rubric than under the direct qualifications approach.

The *Storer* Court departed from the traditional strict scrutiny analysis the Supreme Court earlier established for ballot access statutes. *Storer* applies a level of scrutiny under which the constitutionality of term limits *may* be upheld.[206] The *Storer* Court did not inquire whether the compelling state objectives could be equally achieved in a less restrictive manner. Justice Brennan pointed to this in his vigorous dissent, which was joined by Justices Douglas and Marshall.[207] Brennan also recognized that the majority opinion seemed to withdraw this burden from the state.[208] As he stated, "[w]hen state legislation burdens fundamental constitutional rights, as conceded here, we are not at liberty to speculate that the State might be able to demonstrate the absence of less burdensome means; the burden of affirmatively demonstrating this is upon the State."[209]

Term limit proponents underscore this seeming burden change. It significantly strengthens their constitutional argument. State interests behind term limits may be achieved by less restrictive means - such as decreasing the benefits of incumbency, lesser ballot access restrictions, etc. If states have the burden of showing that no less restrictive alternatives are available, term limits may be found unconstitutional.

Supporters ignore the fact that ballot access cases deny candidates or parties access to the printed ballot. Ballot access restrictions do not prohibit the election of particular candidates. No ballot access restriction bars write-in campaigns that potentially might elect candidates. Write-in votes, while almost completely ineffective against major party candidates, may prove effective if organized by an incumbent of 12 years standing who was denied a place on the printed ballot. However, this might be a band-aid option even for incumbents. Term limit laws, though, block the election of certain incumbents regardless of whether he/she receives write-in votes or is on the printed ballot.

b. *American Party of Texas v. White* (1974).[210]

The *American Party* Court upheld a number of Texas election statutes using similar analysis to *Storer*.[211] Both decisions were written by Justice White. The *American Party* Court analyzed a statute that denied ballot access to any political party that neither secured 2 percent of the vote in the previous general election nor

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[206] *Id.* at 745-46.
[207] *Id.* at 761, (Brennan, J. dissenting).
[208] *Id.*
[209] *Id.* at 762.
[210] American Party of Texas v. White, 415 U.S. 767 (1974), *reh'g denied*, 416 U.S. 1000 (1974).
[211] *See generally id.*

filed petitions signed by registered voters numbering at least one percent of the votes cast in that prior election.[212] While the Court recognized that voters' right to associate was burdened, it found the state interests in preserving the integrity of the electoral process and in avoiding voter confusion on the ballot compelling.[213] These state interests justified the burden on voters' right to associate. Like *Storer*, *American Party* does not address whether a less restrictive alternative would have satisfied these interests. A more modest petition requirement, for example, might have satisfied these interests.[214]

3. Ad Hoc Level of Scrutiny

a. *Jenness v. Fortson* (1971).[215]

The *Jenness* Court did not explicate the standard of review it used in finding Georgia's filing fee and petition requirements constitutional. Georgia required that all independent candidates for office pay a filing fee and file a petition signed by at least 5 percent of the number of voters registered in the previous election. As Lawrence Tribe noted, "[t]he Court made only a cursory mention of voting and associational rights, and held simply that 'Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.'"[216] Although it did not indicate what standard of review it employed, it appeared that the Court subjected the Georgia laws to only minimal scrutiny."[217] This decision directly followed *Williams v. Rhodes*. The *Jenness* Court could have utilized the strict scrutiny analysis adopted in *Williams*. It simply noted that Georgia's regulations were substantially less oppressive than the Ohio laws overturned in *Williams*.[218]

b. *Clements v. Fashing*[219] (1982).

The *Clements* Court addressed two Texas election statutes.[220] One statute made certain Texas officeholders ineligible to run for state legislative seats should their current term of office overlap the start of the state legislative term to which they wished to run.[221] This statute barred the candidacy of incumbents. The other statute

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[212] *Id.* at 780.
[213] *Id.*
[214] Recognize that the Supreme Court does not consistently analyze what constitutes a "less restrictive alternative." They may either be less onerous requirements, like a lower petition requirement, or different alternatives which are easier to satisfy.
[215] Jenness v. Fortson, 403 U.S. 431 (1971).
[216] *Id.* at 439.
[217] TRIBE, *supra* note 148, at 1105. Tribe also notes here that the court in *Jenness* "did not inquire whether a petition requirement lower than 5 percent would have satisfied the state's interests; such inquiry into the existence of less restricitve alternative has always been deemed an essential aspect of strict scrutiny." 403 U.S. at 431.
[218] *Id.* at 438-42
[219] Clements v. Fashing, 457 U.S. 957 (1982).
[220] *Id.* at 960.
[221] *Id.*

was a "resign to run" statute. It required particular officeholders wishing to run for another office to resign if their unexpired term at that time exceeded one year.[222] The *Clements* Court found both statutes constitutional and upheld them against first amendment free speech and fourteenth amendment equal protection challenges.[223] A *plurality* of the Court joined the opinion.

The plurality stated that these statutes infringed upon the right of individuals to become candidates for elective office.[224] It explicitly rejected the proposition that these statutes restricted one's right to vote for the candidate of one's choice or one's right to associate originally recognized in ballot access cases in *Williams*.[225] The *Clements* plurality framed its analysis around this "right to candidacy." The plurality distinguishes *Clements v. Fashing* in this manner from the other ballot access decisions. It establishes a rational relationship test for classifications that restrict an individuals' right to candidacy. If a legislature's classification is not rationally related to its purpose, it violates the equal protection clause. As a practical matter, once courts define the test as rational, states satisfy this standard. The classification of certain officeholders was found in *Clements* to be rationally related to the state interests.[226] These statutes passed constitutional muster.[227]

The *Clements* Court implicitly rejected the argument that infringement on one's right to candidacy also infringes upon a voter's right to vote for the candidate of their choice as well as a voter's right to associate freely to get their parties' nominee on the ballot.[228] I believe *Clements* singular focus on the individual's right to candidacy is incorrect. These rights are interrelated. The *Clements* plurality refused to address voters' interests here by noting that courts may only address the statute's effects on the litigants, not its potential effect on voters in the officeholder's district. The Court refused to recognize that litigants are also voters. These statutes affect the litigants both as candidates and as voters.

By ignoring the interrelationship between voters' rights and the right to candidacy, the *Clements* Court establishes a new level of scrutiny for statutes that restrict a candidate's right to run for office. The Court held that it must examine "the nature of the interests that are affected and the extent of the burden these provisions place on candidacy."[229] The Court then analyzed each statute in question regarding its alleged violation of the fourteenth amendment's equal protection clause and the first amendment's free speech clause.

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[222] *Id.*
[223] *Id.* at 971.
[224] *Id.*
[225] *Id.*
[226] *Id.* at 965.
[227] *Id.*
[228] *Id.* at 972.
[229] *Id.* at 966.

The *Clements* Court initially noted that the Texas statute mandating a waiting period for *certain* officeholders before they may run for another office imposes a "*de minimus* burden on the political aspirations of a *current* officeholder. . .A 'waiting period' is hardly a significant barrier to candidacy."[230] The Court justified this "de minimus" burden on candidates with the state's interest in "maintaining the integrity of the State's Justices of the Peace."[231] The Court then dismissed the equal protection clause challenge on the grounds that the classification imposed a "de minimus" burden on candidates and the state's interests outweighed it.

The first amendment claim was also dismissed by the *Clements* Court.[232] It again focused on the restriction imposed upon the candidate's political activity. The Court refused to acknowledge the alleged violation of the first amendment rights of voters who were denied the opportunity to vote for this particular candidate.[233] The Court's exclusive focus on the candidate resulted in the holding that these statutes:

> represent a far more limited restriction on political activity than this Court has upheld with regard to *civil servants*. See *CSC v. Letter Carriers*, 413 U.S. 548, . . . (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, . . . (1973); *United Public Workers v. Mitchell*, 330 . . . (1947). These provisions in no way restrict appellees' [judges, etc.] ability to participate in the political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. Consistent with [these statutes], appellees may distribute campaign literature and may make speeches on behalf of a candidate.[234]

Justices of the Peace must wait. The state interests justified the wait to exercise his/her right to be a candidate.

The *Clements* Court finally dismissed the claim that the "resign to run" statute was unconstitutional.[235] It found that the burdens imposed by this statute were "even less substantial" than those imposed by the earlier statute.[236] This holding applied to both the first amendment claim and the equal protection claim.

c. Term Limit Supporters' Constitutional Argument

Term limit supporters rely on *Storer* and *Clements* for the constitutional basis of state-passed congressional term limits. *Storer* took the direct qualifications approach and dismissed it. Supporters rely on *Storer* for the proposition that

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[230] *Id.* at 967.
[231] *Id.* at 968.
[232] *Id.* at 971-72.
[233] *Id.*
[234] *Id.* at 972.
[235] *Id.* at 971.
[236] *Id.*

minimal qualifications for office will be upheld if the state's interest justify the additional "qualification." *Powell* and its progeny in the direct qualifications approach are rejected by supporters' in this manner.

Supporters believe term limits will be upheld if the level of scrutiny applied in *Storer* or *Clements* is applied to term limits. If these decisions alone provide the basis for the present Supreme Court's analysis, supporters make a persuasive argument. Both the *Storer* Court and the *Clements'* plurality dismissed voters' fundamental rights to vote for the candidate of their choice and voters' right to associate for political means.[237] *Storer* found states' interests in regulating the ballot compelling, thus overriding the infringement of these rights.[238] *Clements'* plurality explicitly dismissed these rights as not being the issue in that case.[239] They focused on one's right to candidacy, which was "de minimusly" burdened by the challenged statutes. Supporters stress that neither of the Texas statutes imposed significant burdens on potential candidates. Each was constitutional because it rested on a rational predicate to the classification scheme. Each survived challenge under the fourteenth amendment's equal protection clause and the first amendment's free speech clause. Supporters, while recognizing the factual difference between this situation and term limits, contend that this "case establishes the constitutional analysis for anti-incumbent laws."[240]

Term limits affect congressional incumbents in the same manner as the Texas statute that banned certain candidacies until officeholders finished their elective terms. This is especially true as applied to the Colorado amendment.[241] Both measures ban candidates (or incumbents) from running for a specified period until certain conditions are met. The precondition in Texas was that the potential officeholder not hold an office with a concurrent term.[242] The precondition in Colorado is that the ex-incumbent, who had previously served six consecutive terms in the House of Representatives or two consecutive terms in the Senate, wait four years after being barred from office.[243] The "waiting period" is four years after being kicked out by the term limit law.

Proponents contend this "waiting period" affects the same rights to candidacy and constitutional issues as those addressed by *Clements*. The equal protection clause and free speech clause claims should be dismissed in a similar manner. Supporters emphasize that term limits (assuming the term limit statute has the provision that "barred incumbents" may run again after four years) should be subject to the same constitutional analysis as the statutes upheld in *Clements*.

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[237] Storer v. Brown, 415 U.S. 724 (1974); Clements v. Fashing, 457 U.S. 957 (1982).
[238] *Storer*, 415 U.S. at 746.
[239] 457 U.S. at 972.
[240] Glazier, Each State (Can limit Re-election to Congress, The Wall Street J., June 19, 1990, at A20, col. 3.
[241] COLO. CONST. amend V.
[242] 457 U.S. at 966-67.
[243] COLO. CONST. AMEND. V.

Two federal circuit court rulings may also lend force to supporters' contention that state laws prohibiting long-term incumbents from running do not offend the equal protection clause, the free speech clause, or the qualifications clauses. These two cases are analyzed below.

1. *Signorelli v. Evans*[244] (2nd Cir. 1980).

The *Signorelli* court addressed a New York statute that required state judges to resign their judgeships should they desire to run for a different office, including Congress.[245] The federal district court found the statute invalid as unconstitutionally adding a qualification to the qualifications clauses.[246] The Second Circuit overturned, holding per *Storer* that the statute did not impose a large enough additional qualification to justify overturning the statute.[247] The court emphasized that judges are free to resign their judicial posts if they want run for Congress.[248] It stated that "New York places no obstacle between Signorelli [the state judge] and the ballot or his nomination or his election. He is free to run and the people are free to choose him."[249] The court recognized the fundamental nature of the right of the voters to choose their own representatives, but concluded that this statute did not greatly infringe this right.[250]

The court acknowledged that the statute added the qualification to the qualifications clauses that a candidate not be a sitting state judge.[251] It balanced this, however, by noting that the state is regulating "a local government subject on which New York's regulatory authority is plenary."[252] The state interest and jurisdiction justified the "minimal" qualification it upheld. Finally, the Second Circuit also noted that the United States Constitution restricts particular candidacies for federal office under the incompatibility clause.[253] "By requiring state judges to resign from their positions if they seek election to Congress, New York adopts its own incompatibility principle, protecting the integrity and independence of the judicial branch from the conflicting activities of seeking and holding Congressional office."[254] These interests outweighed the burden placed on candidates and voters by forced resignations.

2. *Joyner v. Mofford*[255] (9th Cir. 1983).

Joyner is also cited in support of the constitutionality of term limits. The

[244] Signorelli v. Evans, 637 F.2d 853 (2nd Cir. 1980).
[245] *Id.* at 855.
[246] *Id.*
[247] *Id.* at 862.
[248] *Id.*
[249] *Id.* at 858
[250] *Id.* at 862-63.
[251] *Id.* at 863.
[252] *Id.* at 859.
[253] *Id. See* U.S. CONST. Art. I, Sec. 6, et. 2.
[254] Signorelli, 637 F2d at 861.
[255] Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983).

Arizona statute challenged in *Joyner* prohibited salaried elective state officeholders from running for other offices, including Congress, while retaining their seats.[256] The incumbent was forced to resign to run for another office.[257] The *Joyner* Court relied substantially on *Clements* in holding that the statute did not violate the qualifications clause, the first amendment's free speech clause, or the equal protection clause of the fourteenth amendment.[258] The court, in passing on the statute's constitutionality vis-a-vis the qualifications clause, distinguished between two types of state provisions. The court initially noted that "state provisions which bar a potential candidate from running from federal office. . . [impose] additional qualifications on candidates and therefore violate the qualifications clause. . . ."[259] However, state provisions which "merely regulate the conduct of state officeholders" are "constitutionally acceptable since [they]. . . merely bar state officeholders from remaining in their positions should they choose to run for federal office."[260] The resign to run statute in question was held constitutional for it merely required current officeholders to resign. It did not bar them from office.[261]

The Ninth Circuit dismissed the first amendment and equal protection claims by relying on *Clements* and *Signorelli*. The Ninth Circuit did note, however, that its statute was more inclusive of officeholders than either of the statutes in *Signorelli* or *Clements*.[262] However, the Ninth Circuit found the Arizona statute constitutional because it fell within the parameters set out under the state regulation clause.[263]

Supporters may also view ballot access cases as prime examples of courts guarding the flexibility and fluidity of American governmental institutions. By broadening access to the ballot and keeping states from effectively barring third parties and independent candidates from elective office, courts attempt to retain real choice for the electorate on the ballot. By giving these candidates the opportunity to get on the ballot, and then to be elected, courts struggle to increase the choices available to the public. However, if courts are convinced that the principle they have been upholding (real and broad choice among candidates for voters) with the ballot access decisions is a farce, courts may invent a new structure under which to analyze cases where the choice is not "real". Term limit supporters contend no real choice exists in a political system that reelects incumbents at such high rates. Courts may adopt this rationale and justify term limits as returning to the voters "real choice".

d. Responses to term limit supporters constitutionality arguments

The cases and principles on which term limit supporters base their arguments

[256] *Id.* at 1525.
[257] Officeholders were also allowed to run under this Arizona statute if they were serving in the last year of their term.
[258] *Id.* at 1531-33.
[259] *Id.* at 1528.
[260] *Id.*
[261] *Id.* at 1530-31.
[262] *Id.*
[263] *Id.* at 1532, 1533.

do not provide compelling factors for the constitutionality of state-passed congressional term limits. *Storer*, *Signorelli*, and *Joyner's* holdings have limited value when applied to the term limit context. *Clements* has been significantly undermined by more recent Supreme Court decisions in the ballot access area. However, if the current Supreme Court singularly focuses on the analysis found in these decisions, especially *Clements*, term limits might be deemed constitutional.[264]

The *Clements* plurality focused on the infringed right to candidacy. Their analysis and level of scrutiny for ballot access cases, however, was replaced in *Anderson v. Celebrezze*.[265] *Anderson* employed the more traditional focus on the infringement upon voters' right to vote for the candidate of their choice and their freedom to associate. *Anderson's* rejection of the right of candidacy analysis is consistent with the debates in the Constitutional Convention. Both recognize the interrelationship between the rights as well as the fundamental nature of the rights involved.

Term limits also impose greater burdens on the rights of candidates than did the Texas statutes upheld in *Clements*. Even if *Clements'* analysis holds, the minimum burden on incumbent members of Congress barred from office after 12 years under the Colorado term limit law is a mandatory four year wait. In Texas, no wait was required under the "resign to run" statute. Any time an incumbent state officeholder wished to run for Congress or any other office, he/she was simply required to resign.

Under the "ineligible to run until the legislative term ends" statute, the maximum period that a Justice of the Peace could be forced to wait is two years, one-half the period required by the Colorado term limit law. The Texas "waiting period" was justified by Texas' interests in "maintaining the integrity of its Justices of the Peace by ensuring that they will neither abuse their position nor neglect their duties because of aspirations for higher office."[266] Term limits do not impact this state interest. The *Clements* plurality's emphasis on the specific applicability of their analysis to Justices of the Peace and the unique role such justices play in our system of government limits its holding.

Finally, one Texas statute in *Clements* as well as the challenged statute in *Signorelli* were ballot access statutes. Ballot access statutes do not bar candidates

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[264] An analysis of the current Supreme Court's views in the ballot access area is beyond the scope of this paper. However, note that then Justice Rehnquist (now Chief Justice) wrote the plurality opinion in *Clements*, which was joined by Justices Powell, O'Connor, and Chief Justice Burger. Justices Brennan, Marshall, and Blackmun dissented, with Justice White joining Part I of the dissent. Justice Steven concurred in part and in the judgment. The strict scrutiny ballot access approach was taken by Justices Brennan and Marshall in *Illinois State Board of Elections*. Justice Stevens delivered the opinion of the Court in Anderson v. Celebrezze. *See infra* text at 41, which undermines *Clements'* focus on the right to candidacy. Chief Justice Rehnquist dissented in *Anderson*, in which he was joined by Justices White, Powell, and O'Connor. Finally, Justice White delivered the opinion in *Storer* and *American Party of Texas*.

[265] 460 U.S. 780 (1983). *See infra* text at 41 for extensive analysis of *Anderson*.

[266] *Clements v. Fashing*, 457 U.S. at 959.

from election. They simply bar candidates' names from placement on printed ballots. Enough write-in votes may elect an officeholder denied a place on the ballot. Term limit laws completely bar incumbents from election, not access to the printed ballot.

The *Signorelli* and *Joyner* circuit court decisions made abundantly clear that their holdings were premised on resign to run statutes that did *not* bar anyone's candidacy or election. Potential candidates were forced to resign in order to run for Congress. The Second Circuit in *Signorelli* recognized that

> New York's scheme. . .confronts the prospective candidate with a choice: he may run for Congress if he is willing to resign his judgeship. . . . New York places no obstacle between Signorelli and the ballot or his nomination or his election. He is free to run and the people are free to choose him.[267]

The Second Circuit distinguished the New York statute it upheld from previous New York laws that barred judges from running during the term for which he/she was elected. Those laws were deemed unconstitutional "for imposing additional qualifications for nomination or election to Congress in violation of the "[qualifications] Clause."[268] They were invalid because a prohibition on a "[c]ongressional candidacy during the term of a person's judicial or other office limits directly and, for a period of time, absolutely the choice of the electorate."[269] Term limits absolutely bar incumbents from office. They do not give incumbents the choice provided by resign to run statutes. Similarly, the Ninth Circuit in *Joyner* noted that "[s]tate laws which bar a potential candidate from running for federal office. . .imposes additional qualifications on candidates and therefore violates the "Qualifications Clause. . . ."[270]

The Second Circuit in *Signorelli* also premised its holding on the fact that the state traditionally exercised "plenary power" over the judicial office, a "local government subject."[271] Term limits affect federal offices for which the U.S. Constitution explicitly enumerates qualifications. True, states may regulate many aspects of congressional elections (subject, of course, to congressional override), but it is not an area over which states have "plenary power."

4. Heightened Rational Basis Review

a. *Anderson v. Celebrezze*[272] (1983).

The *Anderson* Court devised a new rubric to analyze ballot access cases. In

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[267] Signorelli v. Evans, 637 F.2d at 858.
[268] *Id.*
[269] *Id.*
[270] Joyner v. Mofford, 706 F.2d at 1528.
[271] Signorelli v. Evans, 637 § 637 F2d at 859.
[272] Anderson v. Celebrezze, 460 U.S. 780 (1983).

determining whether an Ohio statute that required candidates for President to file a statement of candidacy by a particular date (allegedly placing an unconstitutional burden on the voting and associational rights of the independent candidate's supporters), the Court stated that it must resolve constitutional challenges to specific provisions of a State's election laws with a two-part balancing text.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[273]

The Ohio statute was deemed unconstitutional under this approach.[274]

The *Anderson* Court abandoned *Clements'* focus on the infringed right to candidacy. It recognized that restricting a candidate's right to run for office directly affects voters' rights to choose whom they wish to represent them and voters' right to associate for political reasons.[275] The Court noted that while Ohio's early filing deadline fell upon aspirants for office, the rights infringed are the same as those recognized in *Bullock*:

> Nevertheless, as we have recognized, 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' (citation omitted)
>
> Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on *voters*.'[276]

The Court further recognized that '[t]he exclusion of candidates *also* burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens.'[277] *Clements'* plurality refused to recognize the interrelationship between these rights.

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[273] *Id.* at 790.
[274] *Id.* at 806.
[275] *Id.* at 793-94.
[276] *Id.* at 786 (emphasis added).
[277] *Id.* at 788-89 (emphasis added).

While *Anderson* does not explicitly overrule *Clements*,[278] it shifts the analysis in election cases from the rights of candidates to the rights of voters. The resulting burden *Anderson* places on term limit supporters is substantial. The candidate is no longer the focus. Voters' rights must be balanced against the state interests. Voters in states with term limits are explicitly denied the right to choose longserving incumbents.

b. *Munro v. Socialist Workers Party*[279] (1986).

The most recent Supreme Court ballot access decision, *Munro*, upheld a Washington election statute requiring that minor political party candidates receive over 1 percent of the vote in the primary in order to be placed on the general election ballot.[280]

The *Munro* Court recognized that the right to vote for the candidate of your choice and the right to associate were implicated by this statute.[281] It failed, however, to afford these rights fundamental status, thus avoiding strictly scrutinizing the statute. Instead, the *Munro* Court engaged in a lengthy summation of previous ballot access cases, focusing on the types of statutes which did or did not pass constitutional muster.[282] The Court concluded that the magnitude of the ballot access restrictions on constitutional rights in *Munro* were "slight when compared to the restrictions we upheld in *Jenness* and *American Party*."[283] The *Munro* Court further noted that the general election ballot access restriction was relatively slight because minor parties had "easy access" to the primary ballot.[284] The general/primary election distinction was significant. The Court dismissed the infringed right to associate and right to vote for the candidate of your choice by noting that minor parties' candidates could exercise these rights during the *primary* election.[285]

5. Conclusion on Ballot Access Level of Scrutiny

Despite the tortured and often contradictory approaches the Supreme Court

[278] The *Anderson* Court, in Footnote 9, however, notes that "We have also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values. See Clements v. Fashing, [1025 Ct. 2836]" This seems to contradict the Court's holding. In addition, restrictions on candidate eligibility can never be completely unrelated to First Amendment values. True, they may implicate such values to lesser degrees, however, the Court did not state this.

The Anderson Court also changed the focus of the inquiry. Finally, three of the five justices in the Anderson majority dissented in Clements. This further lends doubt to the relevance of Footnote 9.

[279] 479 U.S. 189 (1986).

[280] *Id.* at 191.

[281] Justices Marshall and Brennan, in dissent, gave these interests fundamental status. They stated that the interests violated were fundamental and triggered strict scrutiny. Since the statute did not survive strict scrutiny, they would have found it unconstitutional.

[282] *Id.* at 193-98.

[283] *Id.* at 199.

[284] *Id.* at 194.

[285] *Id.* at 199.

has taken in the ballot access area, it is clear that, regardless of the level of scrutiny imposed, severe restrictions on ballot access (like those found in *Williams v. Rhodes, Bullock v. Carter, Lubin v. Panish, Illinois Board of Elections v. Socialist Workers Party, Anderson v. Celebrezze*) will be overturned, while minimal restrictions (like those found in *Jenness v. Fortson, Storer v. Brown, American Party of Texas v. White, Clements v. Fashing, Munro v. Socialist Workers Party*) will be constitutional. As Professor Tribe notes,

> the principle to be distilled from the Court's approach [is that] in order to keep ballots manageable and protect the integrity of the electoral process, states may condition access to the ballot upon the demonstration of a significant, measurable quantum of community support,"[286] but cannot require so large or so early a demonstration of support that minority parties or independent candidates have no real chance of obtaining ballot positions.[287]

The ballot access area is fraught with confusing and contradictory Supreme Court decisions spanning the last 20 years. No single standard or level of scrutiny has been provided by the Supreme Court to guide lower courts faced with ballot access issues raised by state regulation. Each circuit seems to have developed its own precedents and viewed the Supreme Court's ballot access decisions with frustration. The extent to which the Supreme Court's ballot access analysis serves as a guide to addressing term limits may not be significant. However, this line of cases provides the best framework for examining the interests and rights infringed by term limits. Term limits will likely be challenged as unconstitutionally adding "qualifications" as well as violating both the first amendment' free speech clause and the fourteenth amendment's equal protection clause. These specific challenges and my conclusions on these issues will be examined.

C. Are term limits an additional "qualification"?

Whether courts approach term limits using the direct qualifications approach or one of the court's "balancing" approaches, courts should determine whether term limits constitute additional "qualifications." The crux of the issue is the extent to which term limits restrict the opportunity and rights of candidates and voters. These must be balanced against the state or nation's interests in justifying term limits.

Ultimately, the policy arguments for and against term limits provide the crucial playground for the courts. Such policy arguments include: the reelection rate *versus* percentage turnover in Congress; The right of voters to choose to restrict their choices *versus* the right of voters to freely choose their representatives; The 22nd amendment *versus* voters' right to associate; Fresh blood, new ideas and the demise of the seniority system *versus* forced loss of expertise and experience in an age of

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[286] L. Tribe, *Supra* note 148 at 1110-11, citing *American Party*, 415 U.S. at 782.

[287] L. Tribe, *supra* note 148 at 1111.

complex government; Interest group money in elections and disproportionate influence in the system *versus* interest groups representing disenfranchised societal interests; Reinvigorated political parties *versus* more powerful unelected lobbyists and legislative staff; Parochial constituent focus *versus* responsiveness to the electorate; Increased national policy focus *versus* original intent for the U.S. House of Representatives to be locally responsive; Increased national policy focus *versus* original intent for the U.S. House of Representatives to be locally responsive; Increased bureaucratic responsiveness to the President *versus* the Presidency as already holding too much power; and, state-passed term limits *versus* nationally-imposed term limits.

I began this paper by examining these arguments. In Part IV, I place these arguments in the context of the court holdings impacting upon this issue. Much depends on the makeup of the court. However, the policy arguments and analysis of the court's precedents remain despite the everchanging nature of the courts.

PART IV: CONCLUSION

A. Unconstitutional under the Direct Qualifications Approach

State-passed congressional term limitations should be deemed unconstitutional under the qualifications clauses in the Constitution as constituting an additional "qualification" per *Powell*. The language in the Constitutional Convention reviewed in *Powell* is definitive regarding the fundamental nature of the right of voters to choose their own representatives. James Madison and other Framers time and again emphasized the fundamental nature of this right and the dangers that follow significant restrictions on it. Term limits substantially restrict voters' right to choose whom they want to represent them. True, the Supreme Court has chipped away at the fundamental nature of the right to vote in ballot access cases. However, the Court has never been faced with a case that substantially restricts this right. The ballot access cases were brought by small parties or independent candidates who were denied a spot on the ballot. Write-in candidacies were possible. No ballot access case absolutely barred candidates from office for four years. The Colorado term limit does just this. It is an additional qualification, and it should be deemed unconstitutional as a result.

B. Unconstitutional under Various Balancing Approaches

State-passed congressional term limits should be deemed unconstitutional regardless of which "balancing test" the courts adopt. They violate the first amendment's free speech clause and the fourteenth amendment's equal protection clause. This is true in large part because term limit supporters are forced to rely on decisions *(Storer, Clements, Signorelli, and Joyner)* that are either inconsistent as applied to term limits or substantially restricted by recent Supreme Court decisions.

The United States Supreme Court has never faced an issue that so significantly restricts voters' freedom to choose their own representatives. The Colorado term limit measure absolutely bars the election (not only the candidacy) of incumbents who have served either six consecutive terms in the U.S. House of Representatives or two consecutive terms in the U.S. Senate. While candidates previously barred may run again after four years, voters' choice in the interim have been seriously limited. This restriction is far greater than any imposed in ballot access cases where the Supreme Court held the restrictions constitutional.

Supporters admit term limits are drastic. They contend the states' interests in fair elections and providing voters with "real" choices, however, make this necessary. They point to reelection rates as evidence that there is no real choice present in today's electoral system. This lack of choice presents far greater dangers to the system than a temporary limitation of the voters' right to choose. I believe that the clear restriction on voters' right to choose overrides supporters' assertion that there is no real choice in congressional elections. Voters fundamental choices should not be arbitrarily restricted by any type of term limits. This holds true especially for states individually attempting to restrict the number of terms their congressional representatives may serve.

Granting individual states the power to enact separate Congressional term limitation laws presents dangers to our federal democratic system. If each state sets different length term limits for their respective congressional representatives, Congress would become an institution where members' tenure depends on the state from which they are elected. This drastically alters the amount of influence each state's delegation will exercise in Congress. States mandating fewer terms in Congress will have less power than states imposing no limits. States fixing a two term limit effectively deny their members the opportunity for leadership positions in the House of Representatives. A similar phenomena would occur in the Senate if a state were allowed to mandate single terms for its senators. This state's Senators would never be chosen as committee chairpersons. The seniority system has been checked, not eliminated. If states pass different length term limits, experienced legislators from states with lower term limits will have even greater influence than they currently wield.

True, particular states' representatives currently exercise different degrees of power. States' populations and resulting size of their delegations mandate this. However, our Founding Fathers established our system of government to give populous states like New York a greater voice in the House of Representatives. Power differentials created by different length term limits in various states, however, would be arbitrary. This poses a danger to our present system of government. Our Founding Fathers intended to vest the Constitution alone with the exclusive power to set qualifications for members of Congress. This is one reason for resting this power at the federal level.

The Supreme Court should end the confusion in this area and clearly hold that restrictions on voters' rights to choose the candidate of their choice and voters' right to associate are fundamental and trigger *traditional* strict scrutiny as originally established in *Williams v. Rhodes, Bullock v. Carter, Lubin v. Parish*, and, most recently, in *Illinois State Board of Elections v. Socialist Workers Party*. If these fundamental rights are to be restricted, one should only be able to accomplish this by amending the Constitution.

1. Traditional Strict Scrutiny

Term limits infringe the rights of voters to choose whom they wish to elect as a representative and also infringes upon their right to freely associate and choose candidates to represent their political party. They restrict these rights by classifying and barring from office incumbent members of Congress who have served a specified number of consecutive terms. These rights are fundamental, and have been recognized as such ever since the Constitutional Convention. While in some contexts the Supreme Court has upheld minimal infringements upon these rights, the absolute bar that term limits impose upon incumbents elected by their constituents for six consecutive terms (in Colorado) warrants fundamental classification of these rights. These incumbents are not denied access to the printed ballot. They are disqualified from assuming office even if they win a majority of votes with a write-in campaign.

States provide no compelling rationale for term limits. If a compelling reason were recognized, as in *Storer* or *American Party*, the Court would next have to examine the possibility of less restrictive alternatives. However, while congressional reelection rates are extremely high, this does not signal a fatal flaw in our system of representative democracy nor does it provide a compelling reason for term limits. True, it is evidence of a major problem in our campaign election law, but the fact remains that constituents time and again are given choices on the ballot, and they should have the opportunity to freely exercise that choice to elect their representatives in Congress. Some argue that voters want to restrict their choice with term limits. People have the right to choose to restrict their own choices. A majority does support term limits, but the majority in passing term limit laws restrict the choices available to the minority who oppose such laws. All voters should have the most unrestricted opportunity to choose their representatives. The majority in favor of term limits may exercise their voting rights and vote against their incumbents. We should not, however, give them the right to restrict other voters' choices. None of the supporters' policy arguments for term limits provide a compelling rationale.

Even if courts find the state interest in a "real" choice compelling, less restrictive alternatives are available to accomplish this end. If the state's compelling interest is evidenced by high reelection rates, the solution being more real choice for

the electorate, there are a number of congressional campaign election reform efforts under congressional consideration that may make the choice more "real." Political scientists enumerate many options whose purpose is to make congressional elections more "fair" to the challengers, thereby reducing the likelihood that incumbents will be reelected. These include limiting the franking privilege, instituting public financing of congressional elections, placing an optional cap on spending should candidates accept public funding (like in the presidential system), mandating free TV time for debates or ads by candidates, and many others. Each of these campaign reform measures is less restrictive to candidates than the absolute bar that term limits impose. Each is aimed at giving the electorate a more "real" choice. Notwithstanding any further arguments, this argument alone is strong enough to constitutionally overcome any form of term limits.

States may also restrict longserving incumbents *access* to the printed ballot. Limiting ballot access is less restrictive than barring such incumbents from office. This would make it far more difficult for incumbents to be elected as they would need to organize massive write-in campaigns to win. Practically speaking, this is extremely difficult. So difficult, in fact, that a court may find such restrictions on ballot access to effectively bar longserving incumbents from office. However, this would be less restrictive than the total bar instituted in Colorado. A state may also bar incumbent members of Congress from one election, not two, as the Colorado term limit measure mandates.

If the Supreme Court adopts the traditional strict scrutiny approach to term limits, as I believe it should, it will find an infringement of fundamental rights, state interests that are not compelling, and the availability of less restrictive alternatives. Voters will thus retain the freedom to vote out their incumbents if they dislike how they are being represented in Washington, D.C. They should have this right.

2. *Anderson/Munro* Approach: Balance the Interests

It is likely, however, that the Supreme Court will continue to confuse lower courts in the ballot access area and draw parallels between decisions that most view as contradictory. If the Supreme Court does not recognize the infringed rights as fundamental and analyzes term limits in a less rigorous fashion than traditional strict scrutiny it will most likely adopt a variation of the *Anderson/Munro* analysis. The Court will weigh the interests on both sides and compare them to previous ballot access restrictions addressed by the courts. I believe Term limits even under this approach will still be held to violate the equal protection clause of the fourteenth amendment and the first amendment's free speech clause.

Clements presents few problems with its focus on the right to candidacy. It's relevance to term limits is minimal. *Anderson* and *Munro* refused to adopt

Clements' approach. It was a plurality decision. The majority of the Court did not endorse its novel analysis of focusing exclusively on the rights of candidates.[288] Voters' rights to choose those candidates and the right of political parties to caucus and freely decide to nominate those candidates were ignored.[289] *Anderson* and *Munro* recognized that ballot access cases impact these rights.[290] Finally, barring an incumbent lawmaker who has been chosen by his constituents to be their U.S. Representative in six straight elections over a span of 12 years (two elections for 12 years if a U.S. Senator) from running for reelection for four years is quite different from restricting a Justice of the Peace from running for the Texas legislature until his term runs out.

Term limits by definition affect incumbents who have a history of being chosen by the voters. Longserving incumbents demonstrated enough previous support to be reelected over the span of many years. It is precisely because they are so "popular" that term limits restrict their right to run and subsequently voters' right to choose them to represent their districts. The vagaries of the American electorate leads to this seemingly contradictory situation. While Americans overall support term limits, most American would only like to apply them to other voters' members of Congress. This is one reason the reelection rate to Congress is so high. Whatever the problem in Washington, D.C., and the public believes Washington is fraught with "crooked" politicians and problems, it is always the other guys' representatives, not their own. "Ours" are "the best." As Mark Liedl of The Heritage Foundation reports, "[a] national survey two days before the election [in 1990] showed that while 69 percent of the public disapproved of Congress, 51 percent approved of their own congressman."[291] Hence the popularity of incumbents and term limits.

Proponents contend that term limits are necessary due to the dire state of our representative democracy. They believe the courts must weigh the nation's interest in a functioning representative democracy against the voters' right to associate and their right to choose their own representatives. Our country needs to broaden the opportunity to serve among the public. The nation's and the states' interests should prevail. The voters' interests are the same as in ballot access cases, but the states' and the nation's interests are far greater than keeping ballots manageable and protecting the integrity of the electoral process. At stake is the nature of our system of representative government. As the Colorado constitution now reads, term limits are needed 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."[292] This measure is constitutional as an additional state regulation of federal elections. It is necessary to preserve our system of representative government.

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[288] L. TRIBE, *supra* note 148, at 1111.

[289] *Id.* at 1109.

[290] Anderson v. Celebrezze, 460 U.S. 780 (1982), Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[291] Liedl, *supra* note 26.

[292] COLO. CONST. amend V.

The Colorado measure cites broadening opportunities for public service and assuring that Colorado's members of Congress are representative of and responsive to its citizens as its states' interests.[293] Colorado's voters passed the measure, feeling that these interests were not being met by longserving incumbents. However, opponents argue it is precisely *because* Congressmen are so responsive to their constituent's concerns that they get reelected at astonishing rates. Members of the U.S. House of Representatives must run for reelection every two years. This ensures responsiveness to the electorate.

Term limit supporters respond that current elections do not reflect responsiveness. The reelection rate reflects the enormous institutional advantages incumbents exercise over challengers. Fundraising advantages, pork barrel projects bringing jobs to constituents, and the franking privilege all operate to take "real" choice out of our elections. Much of this is true. However, these are double-edged swords. Keeping in touch with constituents and bringing them jobs is viewed by some as the essence of responsiveness. Too many "good things", however, make incumbents so popular that challengers challenge in name only. Campaign election reform provides the solution. Many campaign reform efforts do not infringe on voters' or candidates' "fundamental" rights.

True, incumbents may not voluntarily vote away built-in advantages. However, if there is enough popular support for campaign reform measures, Congress will pass them. Ironically, the term limit movement may provide the impetus for Congress to act. I hope so.

[293] *Id.*