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CONGRESSIONAL TERM LIMITS: UNCONSTITUTIONAL BY INITIATIVE

Abstract: Numerous states are considering voters' initiatives limiting the terms of their congressional delegations. This Comment analyzes the constitutionality of these measures and concludes that congressional term limits are unconstitutional when enacted through voters' initiatives, but may be properly enacted through a federal constitutional amendment. Moreover, imposing term limits at all, regardless of their implementation, appears inconsistent with original intent of the Constitution's framers. Finally, previous amendments used to implement changes to the electoral process, and judicial decisions on such proposed changes, suggest that changes such as term limits must be enacted by constitutional amendment.

In November 1991, Washington voters turned down Initiative 553, which would have imposed term limits on both state and federal officials elected from Washington.¹ In 1990, Colorado voters passed a similar measure imposing term limits on its state and federal elected officials.² Washington and Colorado are the only states that have attempted to limit congressional terms.³ Many states, however, may soon join them. Congressional term limits are currently under consideration in forty-five states.⁴ Seventeen of those states could vote on congressional term limits as early as this November.⁵ Although support is growing for term limit initiatives, it is not clear that congressional term limits can constitutionally be enacted through voters' initiatives.⁶

If term limits are enacted at all, they should be enacted through a formal amendment to the United States Constitution, rather than by a

1. INITIATIVE MEASURE 553 (Wash., Nov. 5, 1991). Initiative 553 would have forced all eight of Washington's U.S. Representatives to retire in 1994. David Schaefer, *Federal Term Limits Would Hurt—State Would Be Zero in Congress, Says McDermott*, SEATTLE TIMES, Oct. 20, 1991, at B1.

2. AMENDMENT 5 (Colo., Nov. 1990); see Timothy Egan, *Building on Mistrust of Officials, Voters in West Try to Limit Terms*, N.Y. TIMES, Sept. 23, 1991, at A1. The Colorado courts have not yet considered the constitutionality of their state's new term limits measure. *Id.*

3. Egan, *supra* note 2.

4. Gloria Borger, *Can Term Limits Do the Job?*, U.S. NEWS & WORLD REP., Nov. 11, 1991, at 34.

5. *Id.*

6. This Comment will not discuss term limits that affect only state elected officials. For a discussion of the issues involved in limits on state officials, see *Legislature of California v. March Fong Eu*, 816 P.2d 1309 (Cal. Sup. Ct. 1991), where the California Supreme Court upheld a voters' initiative imposing term limits on state officials.

voters' initiative, for three reasons. First, congressional term limits are inconsistent with the original intent of the delegates at the Constitutional Convention (the Framers), thus raising serious questions about whether term limits should be enacted by any device other than a constitutional amendment. Second, in the past, when Americans have imposed major changes on the electoral process, they have used amendments to implement these changes. Third, courts have prohibited Congress and the states from enacting provisions that bar otherwise eligible individuals from serving in Congress, unless the provisions are enacted through a constitutional amendment. This Comment analyzes the issue of whether congressional term limits must be enacted by amendment, and concludes that an amendment is both an appropriate and necessary means for enacting congressional term limits.

I. THE HISTORY OF TERM LIMITS IN THE UNITED STATES: FROM THE REVOLUTION TO THE CONSTITUTIONAL CONVENTION

Although congressional term limits are currently receiving much public attention, they are not a new idea in American politics. Term limits were also a popular idea in America just before the Constitutional Convention.⁷ As this section will demonstrate, however, colonial Americans ultimately concluded that term limits undermined political leadership, increased instability and corruption within the states, and restricted voting rights. For these reasons, historian Gordon Wood concludes that the Framers ultimately rejected congressional term limits at the Constitutional Convention.⁸

A. *The Rise and Fall of Term Limits: 1776-1787*

In 1776, prior to the signing of the Declaration of Independence, the American colonies had begun drafting their own constitutions. Many of these early constitutions included Radical Whig reforms.⁹ These constitutions increased the size of the legislatures, imposed annual

7. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 140-41 (1969). According to Wood, term limits "stood as a cardinal tenet of their [American Radical] Whig faith." *Id.* at 141.

8. See *infra* notes 35-37 and accompanying text.

9. The Radical Whigs had been a minor opposition party in England that found great support in America. Their message was uniquely suited for Americans. WOOD, *supra* note 7, at 17. The Radical Whigs had proposed the following reforms for Parliament: shorter sessions, more representatives, representation by population, and voting instructions from constituents. *Id.* at 15; James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 *DEPAUL L. REV.* 1, 8 (1991).

elections, and attempted to tie representatives closely to their constituents.¹⁰

Term limits were also included in the early constitutions. Although not every state enacted term limits, they were a very popular reform in the 1770s.¹¹ Seven new states imposed term limits on state executives.¹² Four placed limits on their delegates to the Continental Congress.¹³ Virginia imposed term limits on its state senators.¹⁴ Pennsylvania, a hotbed of Radical Whiggism in the 1770s, set term limits for all of its elected state officials.¹⁵

Despite the numerous Radical Whig reforms, however, America's new state and federal governments were mired in instability and corruption.¹⁶ Many observers, including the individuals who would ultimately meet at the Constitutional Convention, believed that the political rise of the "non-elite" was causing the problems in the state and federal governments.¹⁷ The legislatures, which were increasingly comprised of the non-elite, were constantly changing the laws to benefit themselves.¹⁸ They permitted the confiscation of property, they devised new paper money schemes, and they suspended the ordinary means for recovering debts.¹⁹ The elite believed that the new laws benefited the lower classes at the expense of the elite, and at the expense of a sound commercial economy.²⁰ With so many statutory changes, it became impossible for the wealthy commercial interests,

10. WOOD, *supra* note 7, at 165–67, 189.

11. *See id.* at 140–41.

12. *Id.* at 140. These seven states were: Delaware, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia.

13. FRANCIS N. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1695–97, 2467, 3084–85, 3742–43* (1909). These four states were: Maryland, New Hampshire, Pennsylvania, and Vermont.

14. Otteson, *supra* note 9, at 8 n.38.

15. *Id.*; THORPE, *supra* note 13, at 3084.

16. Otteson, *supra* note 9, at 9. Instability and corruption refer to the constant statutory changes made in state legislatures in the 1770s and 1780s. WOOD, *supra* note 7, at 405. Corruption also refers to the increase in extortion and profiteering that resulted from the conspicuous consumption and luxurious lifestyles of the times. *Id.* at 109. Attorney General James Iredell provided one colorful reaction to the growing corruption. He called the North Carolina laws of 1780 "the vilest collection of trash ever formed by a legislative body." *Id.* at 406 (citing letter from James Iredell to Mrs. Iredell).

17. WOOD, *supra* note 7, at 397–98, 413–15, 432 (citing letter from Benjamin Franklin to Charles Carroll, May 25, 1789); Otteson, *supra* note 9, at 24 n.120 (citing Charles A. Beard).

18. WOOD, *supra* note 7, at 404–05.

19. *Id.* at 404.

20. *Id.* at 404–05 (citing letter from James Madison to Caleb Wallace, Aug. 23, 1785).

the merchants, the planters, and the professional classes, to plan their economic futures.²¹

Eighteenth century commentators²² and twentieth century historians agree that inadequate leadership was one reason for the instability and corruption in the states.²³ Term limits were a major cause of the leadership problem.²⁴ Term limits prevented re-election. Eighteenth century commentators believed, consequently, that term limits prevented qualified officials from continuing their service in the federal government.²⁵ As a result, term limits made it relatively easy for ambitious individuals to find a temporary political office.²⁶ Eventually, less qualified, non-elite individuals had an opportunity to obtain public office.²⁷

Consequently, Americans began to question the utility of term limits, and such limits were dropped from a number of state constitutions.²⁸ In 1780, the Massachusetts Constitutional Convention rejected term limits for the Governor.²⁹ In 1784, Pennsylvania, a state that had fervently supported term limits, removed all term limit measures from its constitution.³⁰ These states' actions marked the beginning of an intense reaction against term limits.³¹

B. The Demise of Term Limits: The Constitutional Convention

The growing opposition to term limits eventually found its way to the Constitutional Convention. The Constitutional Convention's first proposal, the Virginia Plan, originally included congressional term limits.³² The Virginia Plan limited members of the National Legislature, which eventually became the United States Congress, to one

21. *Id.*

22. *Id.* at 397-98 (citing MD. J. (Baltimore), Aug. 3, 1787).

23. *Id.* at 397-99.

24. *Id.* at 436.

25. *See id.* at 399, 436-37, 477.

26. *Id.*

27. *Id.* at 397, 399.

28. *See infra* notes 29-31.

29. WOOD, *supra* note 7, at 436. *See generally* ELISHA P. DOUGLASS, REBELS AND DEMOCRATS 187-214 (1955) (recounting the Massachusetts Constitutional Convention).

30. WOOD, *supra* note 7, at 439-40. The Pennsylvania term limits provisions were eliminated at the first session of the Council of Censors in the winter of 1783-1784. *Id.* at 439.

31. After completion of the U.S. Constitution in 1787, states removed some or all term limit measures that remained in their constitutions. *See* THORPE, *supra* note 13, at 781, 788, 1694-97, 1710-11, 1712, 2466-68, 2486-87, 3084-85, 3093-95, 3742-43, 3758-59. (comparison of original states' constitutions prior to 1787 and after 1787). However, in more recent times, many states have imposed term limits on their governors. State courts have upheld these actions. *See State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va. 1976).

32. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (1937).

term.³³ Although there are no recorded debates on the congressional term limits measure, the Framers voted unanimously on June 12, 1787 to reject congressional term limits.³⁴

Gordon Wood cites three primary explanations for the Framers' rejection of term limits. First, the Framers believed that term limits reduced the quality of the candidates by forcing qualified individuals out of office and making room for less qualified, non-elite officials.³⁵ Second, the Framers believed that since term limits were helping the non-elite to control the state legislatures, term limits were increasing instability and corruption in the country.³⁶ Third, the public felt that term limits violated their right to vote because term limits prevented them from voting for the candidate of their choice.³⁷

The Framers hoped to remedy the problems in the state and federal governments with an elitist representational federal government.³⁸ The Framers believed that a successful government needed elected officials with confidence, authority, experience, intelligence, and "natural social influence."³⁹ They wanted to create a government that would filter out the non-elite who did not possess these qualities.⁴⁰ Term limits made it easier for the non-elite to find positions in the federal government. Term limits were, therefore, incompatible with the Framers' political philosophy, and the Framers consciously

33. *Id.*

34. *Id.* at 217; SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 71 (James H. Hutson ed., 1987).

35. See WOOD, *supra* note 7, at 398–99, 436–38, 477. Wood describes the Framers' frustration with term limits because of term limits' affect on the quality of elected officials. Term limits required annual elections where new people came into the state government. These constant elections made it impossible for officials to gain experience and made it more likely that the non-elite could overwhelm the elite in the legislature.

36. See *id.* at 436–37, 467, 477, 510–11.

37. *Id.* at 439.

38. *Id.* at 517.

39. *Id.* at 508.

40. See generally *id.* at 506–18. See also THE FEDERALIST NO. 10 (James Madison). In the words of Michael Parenti:

[T]he delegates repeatedly stated their intention to erect a government strong enough to protect the haves from the have-nots. They gave voice to the crassest class prejudices and never found it necessary to disguise the fact—as have latter-day apologists—that their uppermost concern was to diminish popular control and resist all tendencies toward class equalization . . .

Michael Parenti, *The Constitution as an Elitist Document*, in HOW DEMOCRATIC IS THE CONSTITUTION? 52 (Robert A. Goldwin & William A. Schambra eds., 1980).

decided not to place term limits on any elected positions in the government.⁴¹

C. *The Constitutional Provisions Relating to Term Limits*

The text that the Framers finally adopted, the Constitution, contains three provisions pertinent to a discussion of congressional term limits: the Qualifications Clause for United States Representatives; the Qualifications Clause for United States Senators; and the local elections power. The Qualifications Clause for United States Representatives requires that all Representatives be at least twenty-five years of age, a citizen of the United States for at least seven years, and a resident of the state represented in Congress.⁴² The Qualifications Clause for Senators uses similar language to establish the qualifications for United States Senators.⁴³ The local elections power gives the states the power to regulate the time, place and manner of their local congressional elections.⁴⁴

D. *Using Original Intent in Constitutional Interpretation*

One way of interpreting the Constitution is to examine the original intent of the Framers. This method has won limited acceptance in the legal community, particularly among conservative scholars who prefer original intent analysis to an analysis that interprets the Constitution in accord with contemporary values.⁴⁵ Advocates of original intent claim that because original intent relies on well-established legal principles rather than contemporary values, it minimizes judges' personal biases and produces more neutral results than analysis that relies on contemporary values.⁴⁶ Consequently, these scholars argue that any clear departure from original intent demands close judicial scrutiny

41. See generally WOOD, *supra* note 7, at 520-21. Unlike congressional term limits, there were extensive debates about presidential term limits, which were also rejected at the Constitutional Convention. 1 FERRAND, *supra* note 32, at 68-69; 2 *id.* at 108-15, 493, 500-03.

42. U.S. CONST. art. I, § 2, cl. 2.

43. *Id.* at § 3, cl. 3. For a United States Senator, the minimum age is thirty and the minimum period of citizenship is nine years.

44. *Id.* at § 4, cl. 1. Article V also will be indirectly referred to in this Comment. Article V establishes the means of amending the Constitution. It requires a two-thirds vote from both houses of Congress or a Convention of two-thirds of the state legislatures in order to propose an amendment. After the amendment is proposed, three-fourths of the state legislatures, or a Convention of three-fourths of the states, must ratify the amendment. *Id.* at art. V.

45. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989).

46. See Bork, *supra* note 45, at 1-20. But see Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787-94 (1983).

and may require a constitutional amendment to enact the proposed change.⁴⁷

When using original intent to interpret the Constitution, scholars suggest that the analyst first look to the text of the Constitution, the history, and the political practice of the colonial period.⁴⁸ Ideally, the text, history, and political practice will clarify the Framers' intent, and thereby provide the answer to a contemporary constitutional question. Unfortunately, many contemporary issues were inconceivable in 1787. In these cases, the analyst must attempt to derive constitutional rights or limits from the governmental processes established by the Constitution.⁴⁹ Advocates and critics of original intent analysis agree that deriving general constitutional rights or limits from the Constitution's governmental processes is more problematic than deriving those same rights or limits from the text of the Constitution, the history, and the political practice.⁵⁰ When evaluating term limits, however, Constitutional text, history, and political practice are available to the analyst.

II. TWENTIETH CENTURY CONSIDERATIONS OF TERM LIMITS AND RELATED RESTRICTIONS ON ELIGIBILITY FOR OFFICE

Since 1787, there has been little discussion of congressional term limits; congressional term limits have only captured public attention within the last twenty years.⁵¹ Congress, the state legislatures, and the courts have, however, discussed other measures that are pertinent to a discussion of congressional term limits. Congress and the state legislatures have approved the Twenty-Second, Twelfth, and Seventeenth Amendments. These amendments affect terms of office and qualifications for elected federal officials, and more generally, the American electoral process.⁵² The courts, although they have not yet analyzed the constitutionality of the congressional term limit initiatives,⁵³ have considered the constitutionality of other restrictions on eligibility that can be compared with term limits. In particular, they have decided a

47. Scalia, *supra* note 45, at 862.

48. Bork, *supra* note 45, at 17-18.

49. *Id.* at 17.

50. *Id.* at 18-19.

51. Otteson, *supra* note 9, at 24-25 n.122-24.

52. See *infra* notes 58-60, 64-67 and accompanying text.

53. In Washington, opponents of Initiative 553 asked the Washington Supreme Court to prohibit the initiative from appearing on the November 1991 ballot. The court refused because the issue would not be ripe for consideration unless it prevailed in the election. *League of Women Voters v. Ralph Munro*, No. 58438-9 (Wash., Sept. 3, 1991) (denying petitioners' request).

number of cases regarding the constitutionality of so-called 'resign and run' amendments.⁵⁴

A. Constitutional Amendments Affecting Terms or Qualifications of Federal Officials

The Twenty-Second, Twelfth, and Seventeenth Amendments made fundamental changes in the Constitution and the American electoral process.⁵⁵ The Twenty-Second Amendment limits presidents to two terms,⁵⁶ and demonstrates one way that federal term limits have been enacted. The Twelfth Amendment separates the Vice-President's election from the President's election. The Seventeenth Amendment provides for the popular election of United States Senators.

Congress proposed the Twenty-Second Amendment to the states on March 24, 1947.⁵⁷ Many members of Congress agreed that presidential term limits made a fundamental change in the Constitution.⁵⁸ Term limits prevented Americans from voting for the candidate of their choice.⁵⁹ Consequently, it changed the nature of presidential electoral politics in America.⁶⁰ Nevertheless, Congress determined that presidential term limits could be enacted if presidential term limits received public support.⁶¹ Congress also determined that the ratification process was an adequate way to achieve public consent.⁶² Consequently, Congress concluded that presidential term limits could be accomplished by an amendment to the Constitution.⁶³

54. These amendments require individuals on the bench and/or in elected positions to resign from that position before running for Congress. See *infra* notes 93-95, 101-05.

55. See *infra* notes 58-60, 68-70.

56. U.S. CONST. amend. XXII; *id.* at art. II, § 1, cl. 5 (provides the original requirements for the President of the United States).

57. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 39 n.14 (Johnny H. Killian ed., 1987).

58. 93 CONG. REC. 844-46, 848 (1947) (statements of Reps. Halleck, Rayburn & Springer). The Twenty-Second Amendment opponents argued that term limits were too fundamental a change to consider in an amendment. *Id.*

59. *Id.* at 844 (statements of Reps. McCormack & Halleck). Although Mr. McCormack and Mr. Halleck had opposite views of presidential term limits both agreed that they change citizens' voting rights.

60. *Id.* at 845 (statement of Rep. Rayburn). Mr. Rayburn contended that presidential term limits would change electoral politics and undermine representative democracy in the United States.

61. *Id.* (statement of Rep. Springer). Mr. Springer did not explain why term limits required public consent; Springer's conclusion may rest on the constitutional ideal of consent of the governed.

62. *Id.*

63. *Id.* at 844, 846.

Two other constitutional amendments—the Twelfth and Seventeenth Amendments—also changed the American electoral process. Prior to the Twelfth Amendment, the Constitution stipulated that the presidential candidate who received the second largest number of votes in the electoral college would become the Vice-President.⁶⁴ The Twelfth Amendment makes the Vice-President's election technically independent of the President's election.⁶⁵ In reality, the Amendment links the Vice-President to the President, because the Vice-President is chosen by the President or the President's political party.

Similarly, the Seventeenth Amendment changed the electoral process by instituting the direct election of United States Senators.⁶⁶ Prior to the Seventeenth Amendment, the Constitution required that each state legislature elect the two United States Senators from its state.⁶⁷

Congress proposed the Twelfth Amendment in 1803 and the Seventeenth Amendment more than one-hundred years later in 1912.⁶⁸ Despite the intervening period between proposed amendments, similar arguments were made during the respective congressional debates.⁶⁹ In both debates, members expressed their belief that the amendments were changing more than just the plain text of the Constitution; these amendments were changing the structure and balance of power in the Constitution.⁷⁰ For example, during debate over the Twelfth Amendment, members argued that the Amendment changed the delicate balance between the large states and the small states.⁷¹ They claimed that the amendment made vice-presidential elections more like a straight popular election, which benefited the large states, and less like a federative election, which benefited the small states.⁷² During the debate on the Seventeenth Amendment, members contended that it changed

64. U.S. CONST. art. II, § 1, cl. 3.

65. *Id.* at amend. XII.

66. *Id.* at amend. XVII.

67. *Id.* at art. I, § 3, cl. 1.

68. 48 CONG. REC. 6367 (1912) (noting the House vote on the Seventeenth Amendment); see 3 ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856 37 (New York, D. Appleton & Company 1857) (noting the Senate vote on the Twelfth Amendment).

69. See *infra* notes 71–74.

70. See *infra* notes 71–74.

71. See ABRIDGEMENT, *supra* note 68, at 30–33. In the words of Senator Uriah Tracy: “[T]he resolution before us contains principles which have a manifest tendency to deprive the small States of an important right, secured to them by a solemn and constitutional compact, and to vest an overwhelming power in the great States.” *Id.* at 30.

72. *Id.*

the balance between the federal and state governments.⁷³ Effectively, this meant that regardless of size, it reduced all states' power because the state legislatures no longer controlled Senate elections.⁷⁴

B. Congressionally Imposed and State Imposed Eligibility Restrictions on Federal Officials: Judicial Scrutiny

Although the courts have not decided the constitutionality of congressional term limits, they have decided the constitutionality of other restrictions on congressional eligibility.⁷⁵ Both Congress and the states have enacted eligibility restrictions.⁷⁶ The cases discussed below analyze the constitutionality of these types of eligibility restrictions. In each of these cases, the courts first addressed whether the restriction, in fact, constituted an addition to the Congressional Qualifications Clauses. If the court concluded that the restriction was an addition to the Qualifications Clauses, then the court found the restriction unacceptable unless it had been formally amended to the Constitution.

1. Congressionally Imposed Eligibility Restrictions Rejected by the Supreme Court: Powell v. McCormack

In 1967, the House of Representatives attempted to prevent Representative Adam Clayton Powell from taking his seat in Congress.⁷⁷ A Special Subcommittee on Contracts found that he had abused his authority while serving as Chairman of the House Committee on Education and Labor.⁷⁸ Powell had allegedly misused his travel expense privileges and had arranged an illegal salary for his wife.⁷⁹ Based on these findings, House Speaker John McCormack introduced House Resolution Number 278 (H.R. 278) to prevent Powell from taking his seat. The measure passed by a majority, and Powell was excluded from Congress.⁸⁰

73. 48 CONG. REC. 6362-63 (1912). In describing the resolution, Representative Saunders said: "This is a matter of fundamental power, of fundamental relation between the States and the Nation, and the language by which this power is conveyed, and this relation is established, is vague, and indefinite." *Id.* at 6363.

74. *Id.*

75. See *infra* notes 93-95, 101-05.

76. ARIZ. CONST. art. 22, § 18; Powell v. McCormack, 395 U.S. 486, 492-93 (1969); see H.R. Res. 278, 90th Cong., 2d Sess. (1967); see also *infra* notes 94, 102-05.

77. Powell, 395 U.S. at 492-93.

78. *Id.* at 489-90.

79. *Id.*

80. *Id.* at 492-93.

Powell challenged the validity of H.R. 278. The Supreme Court, in *Powell v. McCormack*,⁸¹ held that Congress had exceeded its right to exclude its members when it enacted H.R. 278. The Court found that the resolution made congressional approval of one's ethical behavior a criteria for serving in Congress.⁸² A congressional ethics test does not appear in the Congressional Qualifications Clause. Yet, the ethics test prevented Powell from serving in Congress. The Court concluded, therefore, that the ethics test constituted an addition to the House Qualifications Clause.⁸³ The Court held that Congress did not have the authority to exclude duly-elected United States Representatives, unless the Representative-elect did not satisfy the requirements enumerated in the Qualifications Clause.⁸⁴ The Court, therefore, struck down H.R. 278 as unconstitutional.⁸⁵

In reaching its decision, the Supreme Court looked at eighteenth century history and political practices, and at the Framers' philosophy.⁸⁶ The Court concluded that the Framers intended to limit the voters' choice of candidates as little as possible.⁸⁷ Therefore, the Framers limited Congress' power to exclude its members,⁸⁸ and they set minimal eligibility requirements in the Congressional Qualifications Clauses.⁸⁹ The Court found that allowing Congress to exclude members for reasons other than those specified in the Qualifications Clause was inconsistent with the Framers' original intent.⁹⁰ Based on this inconsistency, the Court struck down H.R. 278.

2. *State Imposed Eligibility Restrictions: The Courts Are Split Over Resign and Run Provisions*

"Resign and run" provisions require public officials to resign from one post before running for another elected position.⁹¹ Conversely, they prevent officials who refuse to leave their current post from running for other offices. The cases below demonstrate two different views of the constitutionality of these provisions. The first group of

81. *Id.* at 550.

82. *Id.* at 520-22.

83. *Id.* at 522.

84. *Id.* at 522, 550.

85. *Id.* at 550.

86. *See id.* at 520-47 (describes the way in which the Court determined the Framers' original intent).

87. *Id.* at 532-34.

88. *Id.* at 547.

89. *Id.* at 543, 547-48.

90. *Id.*

91. *See infra* notes 93-95, 101-05.

cases prohibits resign and run provisions, and the second group of cases permits resign and run provisions.

a. *Cases Prohibiting Resign and Run Provisions: State ex rel. Wettengel v. Zimmerman*

Just as *Powell* invalidated a congressional attempt to modify the Qualifications Clause,⁹² so the courts in Wisconsin,⁹³ Washington,⁹⁴ and Hawaii⁹⁵ have struck down state resign and run provisions because they modify the Congressional Qualifications Clauses. Representative of these cases is the 1946 case, *State ex rel. Wettengel v. Zimmerman*.⁹⁶ In *Wettengel*, the Wisconsin Supreme Court struck down an amendment to the Wisconsin Constitution that prohibited judges from holding any public office except a judicial office. A Wisconsin circuit judge, Joseph R. McCarthy, challenged the constitutionality of the amendment because it prevented him from running for the United States Senate.⁹⁷ The court found that the Wisconsin amendment constituted a qualification because it disqualified certain individuals, in this case judges, from attempting to serve in Congress.⁹⁸ The court held that because membership in Congress is established by the United States Constitution, only the United States Constitution, and not the Wisconsin Constitution, can set the qualifications for these positions.⁹⁹ The court, therefore, rejected the amendment. According to *Wettengel*, if a candidate fulfills the criteria enumerated in the United States Constitution, then a state cannot impede that person's candidacy either by a statute or by an amendment to its constitution.¹⁰⁰

92. See *supra* notes 83–85.

93. *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946).

94. In *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569, 570 (1918), the Washington Supreme Court struck down an amendment to the Washington Constitution that prohibited judges from running for Congress. The court found that by forcing the judge to resign, the state constitution added criteria to the Qualifications Clause.

95. In *Cobb v. State*, 722 P.2d 1032, 1033–34 (Haw. 1986), the Hawaii Supreme Court avoided addressing the federal constitutional issue. The court held that an amendment to the Hawaii Constitution that prohibited incumbent officials from maintaining their positions while running for another position did not apply to candidates for federal positions.

96. 24 N.W.2d 504 (Wis. 1946).

97. *Id.*

98. *Id.* at 508.

99. *Id.*

100. *Id.* at 508–09.

b. Cases Permitting Resign and Run Provisions: Joyner v. Mofford

Courts in Arizona,¹⁰¹ California,¹⁰² Pennsylvania,¹⁰³ New York,¹⁰⁴ and Oklahoma,¹⁰⁵ on the other hand, have upheld state resign and run provisions. These courts have found that these provisions are an acceptable exercise of the states' constitutional power to regulate their local congressional elections. The decision of the Ninth Circuit Court of Appeals in *Joyner v. Mofford*¹⁰⁶ best illustrates the reasoning behind these decisions.

In *Joyner*, the Ninth Circuit upheld the constitutionality of an amendment to the Arizona Constitution that prohibited an incumbent in a salaried elective office from running for another salaried local, state or federal office, except in the final year of the incumbent's term.¹⁰⁷ The amendment required that a candidate resign from any elected post before running for Congress. The court found that the amendment fell within the state's constitutional power to regulate the time, place, and manner of its congressional elections.¹⁰⁸ The court recognized that although the resignation requirement placed an indirect burden on potential candidates for Congress, the burden did not constitute a qualification because it did not bar a candidate from running for Congress.¹⁰⁹ The court noted that if the amendment totally barred a candidate from serving in Congress, then it would have violated the Qualifications Clause.¹¹⁰ In such a case, the court implied that it would have struck down the amendment.¹¹¹

101. *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

102. *Alex v. County of Los Angeles*, 35 Cal. App. 3d 994, 111 Cal. Rptr. 285 (1973) (upholding a California law that required judges to take a leave of absence if they run for public offices).

103. *Adams v. Supreme Ct. of Pa.*, 502 F. Supp. 1282 (M.D. Pa. 1980) (upholding a Pennsylvania law that required state judges to resign before running for Congress).

104. *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980) (upholding a New York law that required state judges to resign from the judiciary before running for political office).

105. *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776 (Okla. 1980) (upholding an Oklahoma law that forbids district attorneys from running for an office that overlapped their term of service).

106. 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

107. *Id.* at 1528.

108. *Id.*; see U.S. CONST. art. 1, § 4, cl. 1.

109. *Joyner*, 706 F.2d at 1528, 1531.

110. *Id.* at 1528. Similarly, the courts have upheld state provisions prohibiting convicted felons from running for Congress. However, these cases have not considered whether these provisions implicate the Congressional Qualifications Clauses. See *Wilson v. Goodwyn*, 522 F. Supp. 1214 (E.D.N.C. 1981).

111. *Joyner*, 706 F.2d at 1528, 1531.

III. MODERN TERM LIMIT PROPOSALS: UNCONSTITUTIONAL BY VOTERS' INITIATIVE, CONSTITUTIONAL BY AMENDMENT

Courts should reject voters' initiatives that impose term limits on members of Congress. Term limits should only be enacted by amending the United States Constitution. Three grounds of analysis support this conclusion. First, term limits do not reflect the Framers' original intent. Therefore, they raise the possibility that a constitutional amendment is required for their enactment. Second, prior constitutional amendments affecting federal elections support the conclusion that an amendment is an appropriate way to implement congressional term limits. Third, judicial decisions have held that term limits modify the Constitution's Qualifications Clause and, as such, can only be enacted through a federal constitutional amendment.

A. Term Limits are Inconsistent with the Framers' Original Intent: Raising the Prospect of Constitutional Amendment

Original intent analysis enjoys some support among conservative scholars, but original intent can be difficult to ascertain.¹¹² Where original intent is ascertainable, any departure from original intent poses a serious question about whether that departure should be enacted by constitutional amendment. A departure from original intent can imply a change in one of the Constitution's fundamental values. Consequently, advocates of original intent claim that any clear departure from original intent must be enacted by amendment.¹¹³ It is easiest to ascertain original intent when the text of the Constitution, the history surrounding the particular provision, the eighteenth century political practices and Framers' philosophy point to one clear conclusion.¹¹⁴ This section proposes that all four of the factors above demonstrate that congressional term limits are inconsistent with the Framers' original intent.

The text of the Constitution is the least helpful of the four factors. The text does not include term limits, but it also does not specifically prohibit them. This textual shortcoming, however, is not fatal to this analysis. In *Powell*, the text alone also did not reveal the Framers' intent. The text of the Constitution does not specifically prohibit Con-

112. See generally Tushnet, *supra* note 46.

113. See *supra* note 47.

114. See *supra* note 48 and accompanying text. Even where the intent is clear, however, it does not always control the decision as to constitutionality. For example, the Framers rejected a national bank, but a national bank was, nevertheless, implemented early in the nineteenth century. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

gress from expelling its members for ethical misconduct. As a result, the Court used eighteenth century history and political practice, and the Framers' philosophy to determine the constitutionality of Congress' actions.¹¹⁵ Likewise, because the Framers' intent on term limits is unclear from the text of the Constitution, analysts should look at eighteenth century history and political practice and the Framers' philosophy to determine the constitutionality of congressional term limit initiatives.

Eighteenth century history reveals that Americans considered term limits a failed experiment.¹¹⁶ Initially, term limits appealed to the early Americans; they were consistent with the other Radical Whig reforms that the Americans were implementing in their new country.¹¹⁷ Ultimately, however, Americans thought that term limits were only increasing their nation's problems.¹¹⁸

By the time of the Constitutional Convention, term limits had fallen into disfavor, and were no longer the common political practice in the states.¹¹⁹ Prior to the Constitutional Convention, Massachusetts and Pennsylvania had already removed the term limits provisions that had appeared in their constitutions.¹²⁰ The Framers followed these states' examples. Not only did the Framers unanimously reject congressional term limits, they also rejected all the other term limits on elected federal officials that were proposed at the Convention.¹²¹

Congressional term limits are also inconsistent with the Framers' philosophy. The Framers were attempting to create an elitist federal government that would filter out the non-elite candidates.¹²² Term limits were inconsistent with this goal because such limits made it easier for the non-elite to obtain positions in the federal government through greater turnover among officeholders.¹²³ The Framers also thought that government was a sophisticated science that required offi-

115. *See supra* note 84.

116. *See supra* notes 22–24, 28.

117. *See supra* note 9.

118. *See supra* notes 22–24, 28 and accompanying text.

119. *See supra* notes 28–31 and accompanying text.

120. *See supra* notes 29–30.

121. *See supra* note 41.

122. *See supra* notes 38–40 and accompanying text.

123. *See supra* notes 25–26, 35 and accompanying text. If enacted today, term limits may have the same result. Congressional expert Norman Ornstein contends that term limits might increase the “corrupting” ambition in Congress. He claims that members will try to parlay their positions in Congress into post-Congress positions as lobbyists. The members will be more concerned with securing their personal future than with producing sound national policy. Borger, *supra* note 4, at 35 (quoting Ornstein).

cialists who possessed superior knowledge and experience.¹²⁴ Term limits encouraged part-time politicians, making it impossible for individuals to gain the experience that the Framers thought was necessary to govern well.¹²⁵

Using the criteria set out by original intent advocates and the *Powell* Court, it appears that the Framers intended to prevent the adoption of term limits as part of the Constitution. The Framers did not simply leave term limits out of the Constitution to be determined at some future date. Rather, they expressly rejected the adoption of term limits. History, prevailing political philosophy and the Framers' philosophy all point to a rejection of term limits. In *Powell*, the Court struck down the congressional ethics test because it was inconsistent with the eighteenth century history and political practice, and the Framers' philosophy. Therefore, under *Powell*, congressional term limit initiatives should also be struck down because they are inconsistent with eighteenth century history and political practice, and the Framers' philosophy.

Under *Powell*, it was inappropriate for Congress to impose an ethics test on its members. This problem could have been remedied, however, if the Congressional Qualifications Clauses had been amended to include ethical criteria. Likewise, congressional term limits would be acceptable if adopted by amendment. Although original intent advocates might claim that congressional term limits make such fundamental changes in the Constitution that they require an amendment,¹²⁶ it is not clear that all observers would conclude that original intent mandates an amendment in this case. Nevertheless, congressional term limits bring original intent into question and thereby warrant an amendment.

B. Past Practice for Term Limits: Constitutional Amendment

Although original intent only suggests that an amendment might be necessary to enact congressional term limits, past amendments strengthen the argument favoring a constitutional amendment. The Twenty-Second, Twelfth, and Seventeenth Amendments suggest that an amendment is the appropriate way to enact congressional term limits. These amendments all made major changes in the American electoral process. Congressional term limits will make comparable

124. See *supra* note 39.

125. See *supra* notes 25–26, 35 and accompanying text.

126. See *supra* note 47.

changes.¹²⁷ Therefore, these past amendments suggest that an amendment is the appropriate way to enact congressional term limits.

According to former Chief Justice Warren Burger, presidential term limits and congressional term limits are sufficiently similar that their enactments should both be treated the same way.¹²⁸ Presidential and congressional term limits are similar in two ways. First, the Constitution's Qualifications Clauses for both the President and Congress set very minimal criteria for candidates in both positions.¹²⁹ As a result, in both cases, term limits add a major new eligibility requirement to these positions. Under term limits, candidates would not only have to meet the age, citizenship, and residency requirements, they would also have to meet the term limit requirement.¹³⁰

Second, in 1947, Congress concluded that because presidential term limits were making such a fundamental change in the Constitution and the electoral process, the amendment required public consent.¹³¹ Congress believed that the ratification process provided a suitable way for determining public consent.¹³² Congressional term limits present as serious a change in the Constitution and the electoral process as presidential term limits. Congressional term limits deny voters the right to vote for candidates who satisfy the Congressional Qualifications Clauses, just as presidential term limits deny voters the right to vote for candidates who satisfy the Presidential Qualifications Clause.¹³³ Therefore, because an amendment was used to enact presidential term limits, an amendment is also the appropriate way to enact congressional term limits.

The Twenty-Second Amendment, by itself, does not prove that a constitutional amendment is the only way to enact term limits. When

127. There are many ways that term limits could change the federal government. For example, term limits could substantially change the seniority system, the committee system, and the leadership in Congress. In addition, term limits could change the balance of power between Congress and the President. Term limits could reduce members' experience with and knowledge of many complex issues facing Congress, making Congress a less effective check on the executive branch than it is currently. Borger, *supra* note 4, at 35–36. See generally Otteson, *supra* note 9, at 31–32; Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL L. REV. 37, 53–55 (1991).

128. Warren Burger, Address at the National Press Club (Nov. 12, 1991), available in LEXIS, Nexis Library, Current File.

129. See *supra* notes 42–43 and accompanying text. A presidential candidate must be a natural-born citizen, must be at least thirty-five years old, and must be at least a fourteen-year resident of the United States. U.S. CONST. art. II, § 1, cl. 5.

130. But see *infra* notes 141–42, 145–46, 149–50 and accompanying text, discussing whether term limits are properly characterized as qualifications.

131. See *supra* notes 58–62 and accompanying text.

132. 93 CONG. REC. 845–46 (1947) (statement of Rep. Springer).

133. See *supra* notes 37, 129 and accompanying text.

other constitutional amendments are considered, however, it appears more likely that an amendment is the only appropriate way of imposing term limits on members of Congress. The Twelfth and Seventeenth Amendments changed provisions of the original Constitution affecting elections of Vice-Presidents and Senators, respectively. The only way to change explicit constitutional text is through an amendment. These amendments, however, changed more than just the text of the Constitution, they changed the balance of power within the constitutionally established federal government, and they changed the American electoral process.¹³⁴

Although term limits initiatives would not change the actual text of the Constitution, congressional term limits would effectively change the Congressional Qualifications Clauses. Term limits would add a fourth qualification for candidacy, and thereby prohibit many individuals from serving in Congress who would otherwise be eligible.¹³⁵

Term limits will also change the fundamental balance of power between the President and Congress. With term limits, Congress may no longer be able to effectively check the President's power.¹³⁶ The Twelfth and Seventeenth Amendments also each changed a fundamental balance of power in the Constitution. The Twelfth Amendment changed the balance between large and small states, and the Seventeenth Amendment changed the balance between the federal and state governments.¹³⁷

Congressional term limits also will change the American electoral process.¹³⁸ If nothing more, term limits will prohibit many powerful congressional leaders from running for re-election.¹³⁹ Because an amendment was appropriate to change the balance of power and the electoral process in the Twelfth and Seventeenth Amendments, an amendment probably is the only appropriate way to impose the changes in power and the electoral process that may result from congressional term limits.¹⁴⁰

134. See *supra* notes 64–66, 69.

135. See *supra* note 1 and accompanying text.

136. See *supra* note 127.

137. See *supra* notes 70–73 and accompanying text.

138. See *supra* notes 123, 127 and accompanying text. These notes show how term limits will influence the federal government directly, and thereby indirectly influence the electoral process. Changes in congressional ambition, *supra* note 123, and congressional structure and leadership, *supra* note 127, will influence who runs for Congress and who we elect to Congress when term limits are enacted.

139. Borger, *supra* note 4, at 35.

140. Former Chief Justice Warren Burger has said that the changes caused by congressional term limits seem similar enough to the changes wrought by popular election of Senators that term limits should be enacted by amendment. See *supra* note 128.

The Twenty-Second, Twelfth, and Seventeenth Amendments did more than just change the text of the Constitution. Like congressional term limits, these amendments changed the fundamental balances of power and the electoral process that were originally established by the Constitution. Given these past amendments, an amendment appears to be the appropriate way, if not the only way, to enact congressional term limits.

C. The Necessary Way to Enact Term Limits: Constitutional Amendment

A constitutional amendment, however, is more than just the appropriate means of enacting congressional term limits, it may also be the only way to enact term limits. The cases discussed earlier suggest that congressional term limits will be characterized by the courts as an amendment to the Congressional Qualifications Clauses because they place a fourth qualification on candidates for Congress. Consequently, unless congressional term limits are added to Congressional Qualifications Clauses by constitutional amendment, they likely will be struck down as unconstitutional.

1. The Supreme Court: Congress Cannot Make Additions to the Congressional Qualifications Clauses

The Supreme Court, in *Powell v. McCormack*,¹⁴¹ held that it is unconstitutional for Congress to exclude its members for any reason other than the member's failure to meet the three criteria of the Qualifications Clause.¹⁴² Like the congressional ethics test in *Powell*, term limits impose an additional qualification on members of Congress. Under term limits, when an official reaches the term limit, the official is prohibited from running for re-election. Term limits will thereby disqualify individuals from serving in Congress who meet all of the Qualifications Clause criteria. Therefore, under *Powell*, term limits will constitute a qualification.

According to *Powell*, this additional qualification is only acceptable if it is added to the Constitution by amendment.¹⁴³ Term limit initiatives, like the congressional action in *Powell*, do not comply with the constitutional amendment process set out in Article V.¹⁴⁴ Therefore,

141. 395 U.S. at 486 (1968).

142. *Id.* at 547-48.

143. *Id.* at 522. *Powell* only considers the powers of Congress and not those of the states. The Courts' characterization of what qualifications are, however, is instructive for analysis of states' power.

144. *See supra* note 44.

under *Powell*, the courts likely will strike down congressional term limit initiatives as an unconstitutional modification of the Qualifications Clause.

2. *State Actions Restricting Candidates: Complete Bars on Candidacy are Unconstitutional*

No court has yet decided on the constitutionality of state-imposed congressional term limits. Therefore, to determine their constitutionality, the analyst must look to other state actions that raise similar issues. Resign and run provisions raise many of these same issues about the Congressional Qualifications Clauses and the states' power to regulate the time, place and manner of elections. These provisions prevent officials who refuse to leave their current post from running for office. Although courts have reached differing conclusions as to the constitutionality of resign and run amendments, they have agreed that any provision completely barring certain candidates from serving in Congress is unconstitutional.

Cases in Wisconsin, Washington, and Hawaii, have rejected resign and run amendments altogether.¹⁴⁵ These courts have found that resignation requirements constitute an additional qualification to the Congressional Qualifications Clauses.¹⁴⁶ Similarly, congressional term limits impose a qualification outside of the Congressional Qualifications Clause, and the above courts would strike them down as unconstitutional.¹⁴⁷

Cases in Pennsylvania, New York, Oklahoma, California and Arizona have upheld state actions that require elected officials to resign their current posts before running for a federal position.¹⁴⁸ The courts justify these measures as an exercise of the states' power to regulate congressional elections.¹⁴⁹

Some observers might suggest that the cases permitting resign and run requirements also make term limits permissible. They might argue that term limit initiatives are state actions, like resign and run amendments, in which the state is simply regulating the time, place, and manner of elections. These cases, however, do not support term limits. For example, in *Joyner*, the court specifically noted that if the Arizona amendment had totally barred certain candidates from running for Congress, then the amendment would have constituted an

145. See *supra* notes 93-95.

146. See *supra* notes 94, 95, 98-100 and accompanying text.

147. See *supra* note 94, 95, 98-100 and accompanying text.

148. See *supra* notes 101-05.

149. See, e.g., *supra* notes 101-05.

additional qualification for serving in Congress.¹⁵⁰ In such a case, the court implied it would have struck down the amendment.¹⁵¹

Congressional term limits would completely bar some candidates from serving in Congress. Unlike resign and run provisions where candidates can, through their own acts, attain eligibility for Congress, term limits create an impediment to eligibility that candidates are powerless to overcome. *Powell* and *Joyner* both hold that any provision that disqualifies individuals from Congress constitutes an additional qualification of the Qualification Clauses.¹⁵² Under these cases, therefore, term limits constitute an additional qualification.

Powell and *Joyner* also hold that additional qualifications for federal office are unconstitutional.¹⁵³ Therefore, because term limit initiatives effectively amend the Qualifications Clause, they are unconstitutional. A constitutional amendment is the only way that these provisions can be enacted.

These two groups of cases reach different results on the constitutionality of resign and run provisions. Nevertheless, both groups of cases find impermissible any state provisions that completely bar or disqualify individuals from running for Congress. Amendments that completely bar candidates unconstitutionally modify the Qualifications Clause. Term limits initiatives would completely bar candidates from running for Congress. They are, therefore, unconstitutional, and the courts should strike them down.

IV. CONCLUSION

Congressional term limits are inconsistent with original intent, and therefore, they raise the likelihood that an amendment is necessary to enact them. Furthermore, past amendments reveal that the amendment process has been deemed an appropriate way to enact substantive changes to the electoral process. Term limits will produce substantial changes in the electoral process. Therefore, an amendment is an appropriate way to enact congressional term limits. Finally, case law indicates that congressional term limits constitute an additional qualification for service in Congress. The courts have struck down other attempts at imposing additional qualifications for congressional service. They should likewise strike down this latest attempt to rewrite the Constitution by means of the initiative process. The courts

150. See *supra* note 110 and accompanying text.

151. See *supra* note 111.

152. See *supra* notes 84, 110 and accompanying text.

153. See *supra* notes 84–85, 109–10 and accompanying text.

have indicated that additional qualifications can only be added if the Constitution is amended. An amendment, therefore, is the only constitutionally permissible way to enact congressional term limits.

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