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WILL THE GENTLEMEN PLEASE YIELD?
A DEFENSE OF THE CONSTITUTIONALITY OF STATE-IMPOSED TERM LIMITATIONS

Neil Gorsuch*  
and  
Michael Guzman**

INTRODUCTION

Prior to the 1990 congressional elections, the crescendo of voter dissatisfaction with incumbent legislators seemed likely to culminate in substantial victories for challengers across the country. When the votes were counted, however, only one incumbent senator had been defeated and ninety-six percent of the representatives who ran were re-elected.¹ Such is the story of contemporary American politics: year after year we witness pre-election expressions of voter outrage that are followed by consistent re-election rates of ninety percent or more.² Lee Iacocca has summed up the trend with this observation: “Sitting Congressmen are almost as likely to be sentenced to jail as they are to be sent home by the voters. Since 1988, six Congressmen went home and five were sentenced to the slammer.”³

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² See Mark Tushnet et al., Judicial Review and Congressional Tenure: An Observation, 66 TEX. L. REV. 967, 973 (1988) (observing that, since World War II, voters have re-elected over ninety percent of all incumbent representatives running for office); see also graph at Appendix (from TRUDY PEARCE, TERM LIMITATION: THE RETURN TO A CITIZEN LEGISLATURE (1991)).

³ Lee Iacocca, We Can’t Even Throw The Rascals Out; Congress: What Does it Mean When Incumbents Keep Getting Reelected? That We’re Pleased With Their Work?, L.A. TIMES, May 18, 1990, at B7. Senator Hank Brown (R-CO) has also noted that the turnover in the United States House of Representatives during the 1980s was almost identical to that of Britain’s House of Lords. The members of the House of Lords, of course, are appointed

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In protest over these re-election trends, a populist movement to limit the tenure of elected officials has sprung up in the western states and appears to be spreading rapidly across the country. In 1990, California and Oklahoma voters passed initiatives limiting the terms of their state legislators. Coloradoans went further, limiting the terms of both state and congressional representatives. Despite Washington's 1991 rejection of a term limit initiative, the movement is unlikely to wane; nearly 150 term limit bills are currently pending in 45 states, and proponents claim that term limit initiatives will be on the ballot in seventeen states this November.

A broad coalition stands behind the term limitation movement. Consumer activist Ralph Nader, presidential candidate Jerry Brown, Senators Barbara Mikulski (D-MD) and Dennis Deconcin (D-AZ), Texas Governor Ann Richards, and other grass-roots liberals have forged an unlikely alliance with the likes of President George Bush, for life. See 137 CONG. REC. S6273 (daily ed. May 22, 1991) (statement of Sen. Brown).

4. Of course, western voters also continue to re-elect their own congressmen. Noticing this oddity, Jeff Greenfield quipped, "If it's almost as if the voters are saying, 'stop me before I reelect again.'" Nightline: Congressional Term Limits (ABC television broadcast, Nov. 4, 1991) (transcript on file with the authors) [hereinafter Nightline]. Certainly, it appears as though the voters are more dissatisfied with incumbents from other states or districts than with their own. See, e.g., Timothy Egan, Term Limits; State of Washington Rejects a Plan to Curb Incumbents, N.Y. TIMES, Nov. 7, 1991, at B16.


8. Gloria Borger, Can Term Limits Do the Job?, U.S. NEWS & WORLD REP., Nov. 11, 1991, at 34. Recently, political commentators have begun to suggest that the 1992 elections may result in as many as one hundred new members of the Congress. See, e.g., William J. Eaton, Is Congress Headed For Big Turnover?, L.A. TIMES, Feb. 26, 1992 at A5. Arguably, such a large turnover could snatch the impetus from the term limitation movement. It would be a mistake, however, to attribute all of the predicted change, if it even happens, to anti-incumbent sentiment. At most, only about half of the predicted new faces will have beaten an incumbent. According to one commentator's worst case (for incumbents) projections, sixty-five representatives will retire in 1992 and forty-two will lose their seats to challengers. See Charles F. Cooper, Numbers Game: How Many Will Lose Their Seats?, ROLL CALL, Mar. 30, 1992. House members who retire before 1993 can pocket unused campaign funds. This "severance pay" could be as large as one million dollars for some. Id. Of the forty-two defeated incumbents, a small number can be attributed to redistricting. In 1992, at least five pairs of incumbents will be running against each other. Eaton, supra. The result of this worst case scenario: a re-election rate of 88.7%, about the same as that of 1982 (90.1%). Cooper, supra.

9. A bellicose President Bush lashed out: "Those old guys that control those subcom-
Senator Hank Brown (R-CO), and columnists George Will and Gordon Crovitz. Even Dan Quayle, a Washington establishment member since 1976, claims to have supported term limits before they were fashionable. It seems only long-term legislators, lobbyists, and academicians oppose term limits with any vigor.

With popular support for congressional term limits running at almost seventy-five percent and term limit proposals pending in nearly every state, opponents of such measures have already begun looking to the courts for help. Campaigning against the Washington initiative that would have cost him the job that he has held for twenty-eight years, Speaker of the House Tom Foley (D-WA) threatened, "[i]f the voters of the state of Washington pass this initiative, it should and must be tested constitutionally, and I will take an active part in testing it." Less visibly, Representative Larry Smith (D-FL) actually became the first member of Congress to challenge the constitutionality of term limits; Smith recently filed a brief that he had prepared by House Counsel asking the Florida Supreme Court to issue an advisory opinion on the constitutionality of a Florida term limit initiative.
Opponents contend that a state-imposed limit on congressional terms is unquestionably unconstitutional. They argue, among other things, that a term limit impermissibly augments the three qualifications listed in Article I—age, residence, and citizenship—by requiring that a congressman also not be a long-term incumbent. According to Representative Smith's brief, "[s]ingularly unanimous rulings of the Supreme Court of the United States, the Florida courts, and all other state and federal courts that have confronted such an issue, have uniformly held that neither Congress nor any of the states may add to, subtract from, or otherwise modify the three constitutionally enumerated qualifications." Speaker Foley puts the proposition more bluntly: "Any constitutional lawyer worth his salt will tell you [term limits are] a sham."

We beg to differ. Though building a constitutional case for state-imposed term limits is not simple, neither is it as futile as Speaker Foley and others suggest. The Constitution contains no explicit guarantee of a right to candidacy, ballot-access, or continuity in office. Indeed, it is precisely because of the Constitution's silence on such matters that term limit opponents must scrabble to grasp onto little known handholds like the qualifications clauses to protect their incumbency.

Before taking up the constitutional case for term limits, let us begin by explaining exactly what we aim to defend. Although various term limits have been suggested, we will defend a measure similar to the initiative passed in Colorado—the only congressional term limit actually passed to date. Colorado's amendment limits United States Senators and Representatives to twelve years in office, allowing them to run again only after a four-year "rotation" out of office.


18. From a legal standpoint, the least risky way to enact a congressional term limit is to amend the federal Constitution. In fact, during the 102d Congress at least three such proposals were made. See H.R.J. Res. 363, 102d Cong., 2d Sess. (1991); H.R.J. Res. 112, 102d Cong., 1st Sess. (1991); H.R.J. Res. 28, 102d Cong., 1st Sess. (1991). Not surprisingly, none of these proposals was ever voted upon on the floor. Also, Senator Brown (R-CO) introduced an innovative term limit proposal in the Senate last year that would link receipt of federal campaign funds with a pledge by the recipient candidate that he will step down after twelve years. 137 Cong. Rec. S6273 (daily ed. May 22, 1991).

19. Art. XVIII, section 9(1) of the Colorado Constitution, as amended in 1990, reads in pertinent part:

[N]o United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of
Colorado Amendment applies prospectively only; in other words, it affects only those congressmen whose terms began after January 1, 1991. To the Colorado initiative we would add one important provision: an incumbent would be allowed to conduct write-in candidacies at any time. Thus, the term limit that we defend would remove an incumbent from the printed ballot after twelve consecutive years, but leave him the option to run as a write-in candidate. The legal significance of this modification will become apparent later in our analysis.

Organizationally, we divide our argument into four sections. We begin in Section I by examining the relevant constitutional history. In Section II, we consider constitutional provisions and precedents, seeking to determine whether a term limit on the Congress must inevitably be judged an impermissible qualification. Although by no means an easy argument, this section concludes that a term limit should be considered a legitimate exercise of state authority to regulate the time, place, and manner of congressional elections. On that assumption, we proceed in Section III to analyze whether such a regulation would violate the First and Fourteenth Amendment rights of candidates or voters. After demonstrating that a term limit would almost certainly pass muster on these grounds, this Article concludes in Section IV by arguing that a term limit imposed only upon state elected officials is likewise constitutional.

I. HISTORICAL PERSPECTIVE

Opponents of term limits frequently emphasize the absence of a limit on congressional terms in the Constitution as evidence that the Framers intended to preclude such a measure. This argument overextends the available evidence. Instead, the recorded history demonstrates that the Framers were indisputably fearful of creating an aristo-

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Representatives . . . Terms are considered consecutive unless they are at least four years apart.

20. COLO. CONST. art. XVII, § 9(1). "This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991." Id.

21. See infra notes 139-41 and accompanying text. In practical terms, allowing a write-in candidacy hardly saps a term limit of its efficacy, but it does provide some hope for a twelve-year incumbent who believes he has a mandate. As of 1982, four write-in candidates had won congressional seats. See Facts on File World News Digest (available in Lexis) Nov. 5, 1982.

cratic legislature permanently ensconced in the capital. To prevent this, the Framers wrote relatively short terms of officeholding into the Constitution on the assumption that frequent elections would ensure a high degree of turnover. In addition, the Framers gave the states primary authority to regulate the times, places, and manner of congressional elections, a power that the Framers understood would let the states play an important role in selecting the Congress. With these safeguards in place, the best explanation for the absence of a term limit in the Constitution is that the Framers simply thought it unnecessary to include one.

The notion of limiting the terms of elected representatives dates back at least to the eighteenth century. Prior to the drafting and ratification of our present Constitution, several states limited the terms of their legislators. For example, the Pennsylvania Constitution of 1776 prohibited state legislators from serving more than four one-year terms within a period of seven years, hoping that "the danger of establishing an inconvenient aristocracy [would] be effectually prevented."23

Likewise, in our nation's first federal term limit,24 delegates under the Articles of Confederation were limited to a maximum of three one-year terms during any six-year period.25 In 1784, when this limit was first to take effect, an attempt to exclude delegates who had exceeded their terms created an ugly incident on the floor of the Congress. With respect to the bickering, James Monroe commented, "I never saw more indecent conduct in any assembly before."26

Perhaps hoping to continue a tradition of limited terms, on May 29, 1787, Edmund Randolph proposed, as part of what has come to be known as the Virginia Plan, a rotation scheme that would have prevented members of the House from serving consecutive terms.27

23. PA. CONST. of 1776, Ch. II, § 8; see also VA. CONST. of 1776, para. 4 (creating a rotation system for the senate).
24. The second federal term limit was the enactment of the Twenty-Second Amendment in 1951, which limits presidential tenure to two four-year terms. See U.S. CONST. amend. XXII.
25. ARTICLES OF CONFEDERATION art. V, cl.2.
27. In relevant part, the Plan provided:
3. Resolved, that the national legislature ought to consist of two branches.
4. Resolved, that the members of the first branch of the national legislature ought to be elected by the people of the several states every [for the term of] to be of the age of [years at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public ser-
Randolph's rotation proposal was never the subject of recorded debate and was set aside two days later along with several other provisions concerning the legislative branch because they entered "too much into detail for general propositions." At that early date in the Convention, the delegates had hardly become comfortable with their decision to create a new government and they were still debating the larger issues of its organization. When the delegates did take up the details of constituting the legislative branch in mid-August, they were no longer working from the text of Randolph's proposals. Thus, the final version of Article I did not include a system of rotation.

Each of the early rotation schemes was one of a variety of mechanisms designed to prevent the national legislature from becoming an American House of Lords; the newly independent Americans believed that representatives ought to be representative. With his characteristic forthrightness, John Adams summed up the feeling of many anti-federalists: "[The legislature] should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." Of course, not all of the Framers shared the intensity of Adams' view. But even Federalist Alexander Hamilton, never
keen on too much democracy, recognized that members of the House of Representatives “should have an immediate dependence on, and an intimate sympathy with, the people.”

The notion that a long term in office would diminish representativeness and unduly empower officeholders clearly worried many delegates. Charles Pinckney, for example, proposed a Senate term of four years, urging that “[a] longer time would fix them at the seat of government. They would acquire an interest there, perhaps transfer their property, and lose sight of the states they represent.”

Opposing a proposed nine-year Senate term, Roger Sherman argued: “Government is instituted for those who live under it.... The more permanency it has, the worse, if it be a bad government. Frequent elections are necessary to preserve the good behavior of rulers.”

John Adams was equally eloquent in his advocacy of frequent elections:

[E]lections, especially of representatives and counselors, should be annual, there not being in the whole circle of the sciences a maxim more infallible than this, “where annual elections end, there slavery begins.” These great men ... should be elected once a year—like bubbles on the sea of matter borne, they rise, they break, and to that sea return.

As a result of these concerns, the Framers adopted relatively short terms for all federal elected officials. The delegates finally settled on a six-year Senate term only after debating proposals for a tenure of “during good behavior,” nine years, seven years, and four years. Likewise, terms in the House were fixed at two years after consideration of proposals of three years and one year. The presi-

33. Id. at 241.
34. Id. at 243.
36. See 5 ELLIOT’S DEBATES, supra note 27, at 241-45.
37. Id. at 224-26. The terms of state legislators were mostly fixed at one year. Connecticut and Rhode Island had semi-annual elections and South Carolina held them biennially. See THE FEDERALIST No. 53, supra note 32, at 354 (Alexander Hamilton). It seems that the primary reason for choosing two- instead of one-year terms was inconvenience—not for the electorate, but for the representatives. James Madison, for example, fretted, “[Representatives] would have to travel seven or eight hundred miles from the distant parts of the Union; and would probably not be allowed even a reimbursement of their expenses.” 5 ELLIOT’S DEBATES, supra note 27, at 225. Similarly, William Randolph “would have preferred annual to biennial, but for the extent of the United States, and the inconvenience which would result
dential term was also reduced to four years after proposed terms of life tenure, twenty years, fifteen years, eight years, and seven years were debated and rejected.38

Because of these frequent elections, it was virtually inconceivable that most incumbents would be able to win continual re-election.39 Rather, the common assumption was that frequent elections would produce a high degree of turnover. This assumption is plainly evident in the debate over the length of tenure for representatives. Antifederalist “John DeWitt,” for example, argued in favor of a one-year term for representatives despite his belief that two-thirds of the members would be new each term.40 James Madison, likewise assuming that “new members . . . would always form a large proportion” of the House, urged longer terms in order to allow the newcomers to learn their job.41

The Framers’ decision to “stagger” the terms of Senators also demonstrates the common assumption of significant turnover.42 Staggered terms were advocated as a mechanism both for ensuring that not all members would be new at the same time43 and for creating at least a limited degree of accountability in the Senate by compelling one-third of its members to run biennially.44 The former rationale as-

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38. See THE FEDERALIST NO. 53, supra note 32, at 358-68.

39. Hamilton observed that, “[a] few of the members [of the House], as happens in all such assemblies, will possess superior talents; will, by frequent re-election, become members of longstanding . . . .” Id. at 359. He clearly envisioned, however, that most of the seats would be continually occupied by new members. Contrasting the continual re-election of the delegates to the Continental Congress chosen by their state legislatures with the proposed popularly elected representatives in the House, he argued that “their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.” Id. (emphasis added).


41. 5 ELLIOT’S DEBATES, supra note 27, at 225.

42. See U.S. CONST. art. III, § 1.

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

Id.

43. 5 ELLIOT’S DEBATES, supra note 27, at 224-25. “In order to prevent the inconvenience of an entire change of the whole number [of House members] at the same moment, [Mr. Dickinson] suggested rotation, by an annual election of one third.” Id.

44. In the Massachusetts ratification debates, Mr. Ames argued that, although “the
sumes a relatively high degree of turnover to make it necessary; the latter depends upon the same assumption for its efficacy.

In addition to adopting relatively short terms of office, the Framers created a second check on the ability of the Congress to insulate itself from its constituents by explicitly assigning to the states primary authority to regulate the "Times, Places and Manner" of congressional elections, albeit subject to congressional override. The Framers recognized that election procedures could be used to shape and control the Congress. Indeed, many argued that state regulation was necessary because otherwise the Congress might set election rules so as to favor a certain group or class—likely themselves. For example, Brutus wrote:

The proposed Congress may make the whole state one district, and direct that the capital (the city of New York, for instance) shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class.

On the other hand, ardent Federalists like Madison and Hamilton believed that the power to regulate elections must be vested at least in part with the Congress, lest the states manipulate the rules to advance their own parochial interests or to subvert the national government altogether by simply refusing to hold elections. Defending the scheme of shared power embodied in Article 1, section 4, Hamilton wrote,

Every government ought to contain in itself the means of its own preservation. Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate

senators are seated for six years, they are admonished of their responsibility to the state legislatures. If one third new members are introduced, who feel the sentiments of their states, they will awe that third whose term will be near expiring." 2 ELLIOT'S DEBATES, supra note 27, at 46-47.

45. U.S. CONST. art. 1, § 4. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed by 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 Senators." Id.

46. Brutus, No. 4, 29 Nov. 1787, in KURLAND & LERNER, supra note 40, at 251.

47. See 5 ELLIOT'S DEBATES, supra note 27, at 401-02. "The necessity of a general government supposes that the state legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices." Id.
it, by neglecting to provide for the choice of persons to administer its affairs.\textsuperscript{48}

Understanding that power over election procedures was too important to be left to chance, the Framers adopted a compromise, placing primary authority with the states, but empowering the Congress to override undesirable regulations. This designation was important. It allows states to shape districts, restrict access to the ballot, determine a runoff system, and otherwise regulate congressional elections. Nevertheless, the Congress may nullify or replace any regulation it finds unpalatable.

Thus, when the Framers were ready to finalize Article I, they had already adopted shorter congressional and presidential terms than originally proposed on the assumption that these frequent elections would produce a high amount of turnover. Moreover, they had vested the primary authority to regulate elections in the states. Given these measures to prevent a stagnant and unresponsive legislature, the absence of a term limit cannot plausibly be read as strong evidence that the Framers intended to preclude such a measure. Rather, the best explanation of the omission is that most of the Framers did not think a rotation scheme was necessary to guard against perpetual incumbents.

Of course, there were a few anti-federalists and others who objected to a lack of a rotation for the Congress. For example, during the Virginia ratification debate, George Mason warned that

\textit{[n]othing is so essential to the preservation of a republican government as a periodical rotation. Nothing so strongly impels a man to regard the interest of his constituents as the certainty of returning to the general mass of the people, from whence he was taken . . . . It is a great defect in the Senate that they are not ineligible at the end of six years.}\textsuperscript{49}

\textsuperscript{48} \textsc{The Federalist} No. 59, \textit{supra} note 32, at 392 (Alexander Hamilton).
\textsuperscript{49} 3 ELLIOT’S DEBATES, \textit{supra} note 27, at 485. Patrick Henry likewise lamented that “[t]he only semblance of a check is the negative power of not re-electing them. This sir, is but a feeble barrier, when their personal interest, their ambition and avarice, come to be put in contrast with the happiness of the people.” \textit{Id.} at 167. Samuel Chase of Maryland complained that members of the House “will not be the representatives of the people at large but really of a few rich men in each state. A representative should be the image of those he represents. He should know their sentiments and their wants and desires . . . .” 5 \textsc{The Complete Anti-Federalist} 89 (Herbert J. Storing ed., 1981) (footnote omitted). Gilbert Livingston of New York and antifederalist writers “Centinel,” “Montezuma,” and “John DeWitt” also decried the lack of rotation and predicted that it would lead to a congressional aristocracy. See Kenyon, \textit{supra} note 31, at 62, 89, 390-96.
Similarly, Thomas Jefferson felt that the absence of rotation, along with the omission of a bill of rights, was one of the two largest flaws in the Constitution. The majority of delegates, however, apparently believed that the measures that they had already enacted were sufficient.

The majority’s assumptions proved correct for quite some time. In the first House election after George Washington was elected President, forty percent of incumbents were defeated. Indeed, there was a tradition that lasted through the first half of the nineteenth century for members of the House to serve only four years and for Senators to serve only six. Abraham Lincoln, for example, stepped down after serving one term in the House and did not run again until he sought the Presidency. Perhaps in part due to these traditions, forty to fifty percent of Congress typically left office in every election until the Civil War.

Only after the Civil War, in part because the establishment of standing committees made seniority more important, did House seniority begin to rise. From 1860 to 1920, the average length of service doubled, rising from four to eight years. By 1991, there were twenty House members who had held office at least twenty-eight years.


51. Of course, there were also some Framers who adamantly opposed the principle of rotation. For example, Alexander Hamilton remarked that, “in contending for rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well . . . .” 2 ELLIOT’S DEBATES, supra note 27, at 320. Speaking against rotation for the presidency, Gouverneur Morris argued that, “[i]f formed a political school, in which we were always governed by the scholars, and not by the masters.” 5 ELLIOT’S DEBATES, supra note 27, at 366-67. He believed that the problem of representativeness could best be addressed by a popularly elected president, and moved that each voter should “vote for two persons, one of whom at least should not be of his own state.” Id.


53. This was apparently the result of an informal agreement with his political rivals. Such agreements were common and evidenced a vigorous party system. See id. at 4.

54. See id.

55. See TRUDY PEARCE, TERM LIMITATION: THE RETURN TO A CITIZEN LEGISLATURE 14 (1991). The record for House service is held by Jamie Whitten (D-MS), who has been a member for over fifty years. See id. Seniority has clearly become more important over time. In 1811, Henry Clay was chosen Speaker of the House as he began his first term as a congressman. Of the seven Speakers of the House chosen between 1870 and 1894, one was
When the 57th Congress convened in 1901, for the first time less than thirty percent of its members were freshmen. In 1981, when the 97th Congress convened, only seventeen percent of the members were newly elected. By contrast, when the 101st Congress convened, fewer than eight percent were newcomers.56

Clearly, the Framers' underlying assumptions about the length of elective service no longer reflect reality. Indeed, the statements of some anti-federalists warning against a permanent legislature now appear to have been prophetic. Given the current lack of congressional turnover and the concomitant increase in length of legislative service, the Framers' apparent reason for not adopting a rotation scheme—that it was not necessary to ensure turnover—no longer applies.

Constitutional history, thus, teaches three relevant lessons. First, the mere absence of a term limit in the Constitution itself hardly can be said to indicate an intention to preclude such a limit. Second, the Framers recognized that the power to control the procedures of Congressional elections was significant. For that reason, they divided it between the states and the Congress. Finally, the Framers' likely reason for omitting a term limit has been substantially undermined by subsequent experience.

II. ARTICLE I OBJECTIONS

While the historical evidence demonstrates that the Framers likely did not intend to preclude a state-imposed term limit, we turn now to the question of whether the Constitution itself presents any barriers. In so doing, we first consider Article I, sections 2 through 4, the provisions that directly govern election to the Congress.

A. Background

Article I, sections 2 and 3, the “qualifications clauses,” establish three qualifications for membership in the Congress. At the time of their election, members of the House of Representatives and Senators must have attained the ages of 25 and 30, respectively; members of the House and Senate must have been U.S. citizens for at least seven

56. See Fund, supra note 52, at 4.
and nine years, respectively; and members of both houses must have been inhabitants of the state from which they were elected.\textsuperscript{57} Article I, section 4, deals with the regulation of congressional election. Specifically, it assigns to the several states the task of regulating the times, places and manner of congressional elections, albeit subject to congressional override.\textsuperscript{58} Opponents of term limits commonly insist that a term limit imposes a \textit{de facto} fourth qualification upon the Congress—namely, that a candidate \textit{not} be a long-term incumbent. The reason is obvious: if labeled a qualification, a term limit would not likely survive Constitutional scrutiny because, in \textit{Powell v. McCormack},\textsuperscript{59} the Supreme Court held that at least the Congress may not supplement the three enumerated qualifications.

Adopting the logic of this argument, however, one could conclude that any election regulation creates a qualification; for example, a requirement that a candidate gather a given number of signatures before gaining access to the ballot could be cast as imposing a fourth qualification that he demonstrate popular support for his candidacy. Thus, any attempt to determine whether a term limit ought to be considered a qualification must go beyond mere conclusory labeling and explain why the label assigned is appropriate.

In this section, we confront directly the assumption that a term limit constitutes a qualification.\textsuperscript{60} In our view, a term limit is better considered a regulation affecting the manner of an election. As a manner regulation, a term limit ought to survive Article I scrutiny because states have explicit authority to regulate congressional elections pursuant to section 4. Indeed, since Congress may override a state election regulation at any time, a state could not enact a term

\textsuperscript{57} See U.S. Const. art I, § 2, cl. 2 and § 3, cl. 3.

\textsuperscript{58} See supra note 45 and accompanying text.

\textsuperscript{59} 395 U.S. 486 (1968).

\textsuperscript{60} We note that another alternative would be to concede that a term limit is a qualification, but to argue that a state may impose additional qualifications pursuant to authority derived from the Tenth Amendment. See, e.g., \textit{John C. Scully, Congressional Term Limitation—It's Constitutional for the States to Act} (Washington Legal Foundation) (on file with the authors). Under this view, \textit{Powell} would not apply to the states because its literal holding was no more than that the Congress itself is “without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.” Powell, 395 U.S. at 522. Others, however, have argued that the breadth and exhaustiveness of the Court’s analysis in Powell bespeaks an intention to preclude states from adding qualifications as well. See, e.g., Erik H. Corwin, \textit{Limits on Legislative Terms: Legal and Policy Implications}, 28 Harv. J. on Legis. 569, 581-82 (1991). Because we believe that a term limit should be viewed as a manner regulation, we will not attempt to resolve this dispute.
limit under section 4 without congressional acquiescence. Put simply, if we are correct in considering term limits as manner regulations, Speaker Foley has nothing to complain about save his own ability to muster a congressional majority to defeat them.

B. Distinguishing Between a Qualification and a Manner Regulation

To resolve the question of whether a term limit is better considered a qualification or a manner regulation, we must first understand what is meant by each term. Here, the analysis is complicated somewhat because the Supreme Court has never attempted to define either of the two terms, nor has it had reason explicitly to distinguish between them. Nevertheless, a look at the leading qualification and manner regulation cases leaves no doubt that the two categories are at least intuitively distinct; apparently, the Court knows a qualification or manner regulation when it sees one.

In Powell v. McCormack, the House of Representatives sought to deny Adam Clayton Powell his seat for alleged unethical behavior\(^6\) even though he had been duly elected and met the age, citizenship, and residency requirements enumerated in Article I. In an 8-1 decision, the Court held that the House is “without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.”\(^6\) An exhaustive survey of parliamentary precedents, the constitutional convention and ratification debates, and past congressional practice led Chief Justice Warren to conclude that, although the Congress possesses the power to judge the qualifications of its own members,\(^6\) it does not retain the authority to add qualifications lest it repeat the unfortunate excesses of its past.\(^6\) Despite the thorough-

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61. Powell was accused by a Special Subcommittee on Contracts of the Committee on House Administration of deceiving House authorities about travel expenses, making illegal salary payments to his wife, and asserting an unwarranted immunity from the processes of the New York courts. *Powell*, 395 U.S. at 489-92.

62. *Id.* at 522. Justice Stewart disserted, arguing that the seating of Powell in a subsequent Congress mooted the controversy. *Id.* at 559-63 (Stewart, J., dissenting).

63. See U.S. CONST. art. 1, § 5. “Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.” *Id.*

64. The Court catalogued the occasions on which Congress has excluded a duly elected member, characterizing them as “erratic,” *Powell*, 395 U.S. at 545, and noting that the fact “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.” *Id.* at 546-47. The Court also noted the exclusion of John Wilkes, who was expelled from the Parliament in 1763 for publishing vehement criticism of a peace treaty with France. Wilkes was elected to three subsequent
ness of the opinion and its unequivocal holding, nowhere did the Court describe the attributes of a qualification. 65

In Storer v. Brown, 66 the Court considered a California statute that denied two independent candidates access to the general election ballot because each had been a member of a major political party within the preceding year. These congressional hopefuls challenged the regulation as both an impermissible manner regulation and an attempt to add a fourth qualification. Writing for the majority in a 6-3 decision, Justice White dismissed the qualification argument as "wholly without merit" in a footnote. 67 Choosing instead to analyze and uphold the statute as a manner regulation, he concluded that, "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 process." 68 Like Chief Justice Warren before him, Justice White made this choice of framework without explanation.

Although neither Powell nor Storer explicitly discusses the difference between a qualification and a manner regulation, at least six distinctions may be crafted in an attempt to capture the unspoken line that separates them. These distinctions are significant because they facilitate reasoned analysis on the question of whether a term limit should be considered a qualification or a manner regulation. The first two—based upon the severity of the restriction and the directness with which it regulates the congressional office—are sure to be offered by term limit opponents because they suggest that term limits are qualifications. As we shall see, however, both prove illusory in light of existing case law. The second pair—distinctions based upon the timing of the regulation and its generality—are formal distinctions that only partially delineate the boundary between a qualification and a manner regulation. Nevertheless, to the extent that these two distinctions have explanatory power, they favor labeling a term limit a

65. The Court declined to discuss whether Article 1, section 3, clause 7, which authorizes the disqualification of any person convicted in an impeachment proceeding; Article 1, section 6, clause 2, which prohibits a person "holding any Office under the United States" from being a "Member of either House during his Continuance in Office;" and section 3 of the Fourteenth Amendment, which disqualifies any person who has engaged in insurrection or rebellion against the United States, should be considered "qualifications" within the meaning of Article 1, section 5. See Powell, 395 U.S. at 520.
67. Id. at 746 n.16.
68. Id. at 730.
manner regulation. The final duo—distinctions based upon judicial considerations and a measure’s invidious potential—prove the most useful. Although they are not the distinctions upon which courts have traditionally relied, we argue that they, too, demonstrate that a term limit should be considered a manner regulation.

1. Severity

Although not explicitly suggested by Powell or Storer, a “qualification” seems intuitively to denote a substantive pre-condition or a severe bar to the attainment of office. By contrast, a “manner” regulation evokes images of a mere procedural mechanism designed to ensure that candidates receive a spot on the ballot only after having satisfied certain safeguards. Seizing upon this intuition, commentators have argued that a term limit is a qualification because of the severity with which it precludes individuals from candidacy or office-holding.

Albeit intuitive, a distinction based upon severity cannot withstand scrutiny. Upon closer inspection, the constitutionally enumerated qualifications prove not to be particularly difficult to attain. Moreover, courts have consistently upheld as manner regulations state election procedures that inarguably pose substantial barriers to office-holding. Finally, the Hatch Political Activity Act (hereinafter the “Hatch Act”), which effectively bars federal employees from running for the Congress, and political gerrymandering have been treated as permissible manner regulations. Each of these permissible manner regulations poses an obstacle to the attainment of office at least as severe as the enumerated qualifications and more severe than the term limit that we defend. Thus, the perceived severity of a term limit presents no reason to label it a qualification.

The intuition that a qualification is inarguably severe or perma-

69. Representative Jim Kolbe (R-AZ), in a recent op-ed piece, argues that manner regulations involve only “election procedures,” while the qualifications clauses govern the “substance of office-holding.” See Jim Kolbe, Term Limits Are Unconstitutional, WALL ST. J., Feb. 13, 1992, at A19. Kolbe claims that, because term limits affect the substance of office-holding, they are unconstitutional qualifications. Like many others who distinguish between substance and procedure, however, Kolbe neglects to explain what he means by those terms. In the context of Article I, we think that “substance” must be closely aligned with severity or permanency and “procedure” can only mean less severe or permanent. For simplicity’s sake, then, we eschew the “substance” and “procedure” labels and instead discuss the distinction as one based upon severity.

70. See id.; Corwin, supra note 60.

nent is belied merely by examining the three enumerated in Article I. The residence qualification is easily mutable and the age and citizenship requirements are less mutable only by degree; they are not qualitatively different. Accordingly, any attempt to portray a qualification as self-evidently stringent finds little support in the Constitution itself. 72

Moreover, the ballot access cases demonstrate that a state may severely regulate candidates in their attempts to become office-holders. Consider again the regulations upheld in Storer in comparison with those struck down in Powell. Adam Clayton Powell was forced to sit out for one Congress; the subsequent Congress allowed him to take his seat. Likewise, the two congressional hopefuls in Storer had to wait two years until the next congressional election to renew their candidacies. As Justice Brennan pointed out in dissent, the California regulation had the effect of forcing an affiliated candidate to declare his independent status seventeen months before the general election. 73 The Justice found this “an impossible burden to shoulder” in the context of a two-year congressional term. 74 Despite the measure’s severity, however, even Justice Brennan would have stricken it as violative of First Amendment associational rights, not as creating a fourth qualification.

Two other examples also undercut the severity distinction. In American Party of Texas v. White, 75 the Court considered a Texas statute that denied a party access to the ballot in congressional races unless it had garnered 2% of the vote in the previous general election or had filed petitions signed by more than 1% of the voters who cast votes in that election. In upholding the statute as a manner regulation, the Court found itself “unimpressed with arguments that burdens like those imposed by Texas are too onerous.” 76 Even if it had found the support requirements unduly burdensome, the Court would have stricken them as violative of the First Amendment or of the Equal

72. The three constitutionally enumerated qualifications are best explained as procedural proxies for characteristics that the Framers hoped that successful candidates would possess. Wilson Carey Nicholas, a Virginia Federalist, argued that the age, residence, and citizenship qualifications “create a certainty of [candidates’] judgment being matured, and of being attached to their state.” 3 Elliot’s Debates, supra note 27, at 8. In a rough sense then, age serves as a proxy for maturity and wisdom; residence bespeaks an attempt to ensure representativeness; and the citizenship requirement is a stand-in for patriotism or nationalism.

73. See Storer, 415 U.S. at 758 (Brennan, J., dissenting).
74. Id.
Protection Clause, not as an impermissible qualification.77

Likewise, in Williams v. Tucker,78 a three-judge district court considered a Pennsylvania law precluding candidates who lost in the primary election for Congress from obtaining a position on the general election ballot. Dismissing as "totally without merit"79 the argument that the prohibition constituted a qualification, the court upheld the law on the ground that "a State has a legitimate interest in regulating the number of candidates on the ballot."80

Beyond the ballot-access cases, there are other strong suggestions that severity is not a reason to label an election procedure a qualification. The Hatch Act, passed by the Congress in 1939, explicitly prohibits most federal government employees from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office."81 This outright ban, which of course includes campaigns for congressional office, was first upheld by the Supreme Court in United Public Workers v. Mitchell.82 Despite subsequent lower court decisions striking down portions of the Hatch Act (apparently on the assumption that Mitchell was outdated),83 the Court reaffirmed its constitutionality in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers.84 As in Storer, the Court in Letter Carriers considered First and Fourteenth Amendment challenges to the Hatch Act at length and concluded that the Hatch Act promoted legitimate state interests in maintaining an independent civil service.85 Yet, despite the absolute nature of the ban on candidacy, neither the parties nor the Court ever suggested that it constituted a qualification for office.

79. Id. at 388.
80. Id.
82. 330 U.S. 75 (1947).
85. The Court stated the interest in creating an independent bureaucracy: "Government employees [will] be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their [political] superiors rather than to act out their own beliefs." Letter Carriers, 413 U.S. at 566.
Finally, a look at the Court's treatment of political gerrymandering also undercuts the severity distinction. While a state legislature may effectively prevent a particular candidate from ever seeking congressional office—or even effectively remove an incumbent—through redistricting legislation, at no point has the Court considered even the most contorted political gerrymander a de facto qualification for office; all have been analyzed as manner regulations.86

In sum, the enumerated qualifications are less severe than the manner regulations that the Court has upheld to date. Indeed, permissible manner regulations prohibit minor party candidates, primary losers, federal employees, and those not favored by state redistricting from running even in their first congressional election. Thus, the perceived severity of a term limit that relegates a twelve-year incumbent to run a write-in campaign presents no principled reason to label it a qualification.

2. Directness

In a second distinction, a few courts have relied upon the directness with which a state election restriction affects the congressional office to separate a qualification from a manner regulation. In Signorelli v. Evans,7 for example, the Second Circuit observed that a New York statute requiring a state judge to resign from the bench before running for Congress only indirectly impinged upon the conduct of congressional elections. Contrasting this "resign to run" provision with laws requiring a congressman to reside in the district from which he was elected, the court upheld the resign-to-run statute because New York had sought to "regulate the . . . office that [the state official] holds, not the Congressional office he seeks."88

Seizing this distinction, one could argue that a state-imposed term limit would be unconstitutional because it directly regulates a congressional election. This argument, however, simply proves too much; to argue that an election regulation is unconstitutional by virtue

86. In Davis v. Bandemer, 478 U.S. 109, 127 (1986), the Court declared an enormously high standard for stating a cognizable equal protection cause of action in political gerrymandering cases: plaintiffs have to prove both intentional discrimination and a pattern of discriminatory impact. Indeed, the Court has acknowledged that states are not expected to draw up districts without regard to their political effect: "The reality is that districting inevitably has and is intended to have substantial political consequences." Gaffney v. Cummings, 412 U.S. 735, 753 (1972).

87. 637 F.2d 853 (2d Cir. 1980).

88. Id. at 859.
of its directness is flatly inconsistent with the assignment in Article I, section 4, of primary responsibility for the regulation of congressional elections to the states. Moreover, the Court’s approval of severe and direct ballot-access restrictions in *Storer, American Party*, and other cases also demonstrates that a distinction based upon directness is ill-conceived. Thus, the directness of a measure cannot cause it to be labelled a qualification.

3. The Timing of the Restriction

A third possible distinction between a qualification and a manner regulation is suggested by the fact that the only two Supreme Court cases analyzing the qualifications clauses—*Powell* and *Bond v. Floyd*—involved refusals to seat representatives who had already been duly elected. By contrast, manner regulations invariably precede the election that they purport to police. Thus, one could argue that qualifications operate to exclude candidates after an election, while manner regulations precede it.

This *ex post/ex ante* distinction fully explains why the Court in *Powell* looked to the qualifications clauses to order the seating of Powell; because he had already been duly elected, no argument about impermissible election regulation was possible. Nevertheless, the *ex post/ex ante* distinction does not demarcate the categories in all circumstances. It is easily conceivable that an *ex ante* restriction could be analyzed as a qualification. If the Congress, for example, passed legislation requiring congressional candidates to be at least forty-years old before running, there is little doubt that the measure’s constitutionality would be judged to be a qualification because of its obvious parallel to the constitutionally enumerated qualifications and the holding in *Powell*.

To the extent that a distinction based upon the timing of a restriction has explanatory power, however, it favors term limitations like Colorado’s that are applied only prospectively. Because a pro-

90. Indeed, district and state courts have summarily stricken state election restrictions as impermissible additional qualifications when those regulations created unavoidable similarities to the three constitutionally enumerated qualifications. See *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (overturning district residency requirements for representatives because “[s]tates have no authority to add qualifications to those set forth in Article I, Section 2.”); *State ex rel Chavez v. Evans*, 446 P.2d 445 (N.M. 1968); *Hellman v. Collier*, 141 A.2d 901, 911 (Md. 1958); *State v. Crane*, 197 P.2d 864 (Wyo. 1948) (concluding that the state constitution cannot modify the eligibility criteria for the Senate).
91. *See supra* note 20.
pective term limit would not operate to prohibit existing long-term incumbents from continuing in office, using this distinction, a term limit would be labelled a manner regulation.

4. The Generality of the Restriction

One reason why we fear ex post facto legislation—that the measure will target an individual or small group—combined with the facts of Powell, suggests yet another possible difference between a qualification and a manner regulation. The argument would be that, as happened in Powell, a qualification could be used more easily to preclude a single person whom the legislature disliked. By contrast, a manner regulation, because of its general application, cannot be tailored as narrowly without significantly greater cleverness.

Although this individual/general distinction may have some descriptive force with regard to Powell, it does not present a particularly solid basis for distinguishing between the two categories. Clever politicians have used many tools to preclude individuals or an identifiable type of individual from running or winning. When challenged, these tools have consistently been reviewed as manner regulations.

For proof, we need look no farther than this year's presidential primary headlines to witness the difficulty that Pat Buchanan and David Duke had in gaining a place on many state ballots. Although specifically designed to exclude non-mainstream, relatively late-coming candidates, party rule, ballot-access restrictions have nonetheless been consistently evaluated as manner regulations.92

Note again, however, that because the Colorado term limit is not a mechanism for targeting individuals, to the extent that a distinction based upon generality of application has power, it favors labelling a term limit a manner regulation.

5. Judicial Considerations

To this point, the possible distinctions that we have explored between qualifications and manner regulations have been partially descriptive at best. From the cases discussed, however, one useful

92. For example, David Duke was denied a spot on the ballot for the Georgia Republican primary largely on the ground that a party has the right to choose its own candidates. That denial was upheld by the Eleventh Circuit. See Duke Loses Appeal to Win Spot on Ga. Primary Ticket, UPI, Jan. 23, 1992, available in LEXIS, Nexis Library, UPI File. Under the same theory, Patrick Buchanan was denied a spot on the South Dakota primary ballot. See John Hanchette, ACLU Fights to Get Duke, Buchanan on Primary Ballots, Gannett News Service, Jan. 9, 1992, available in LEXIS, Nexis Library, GNS File.
observation does emerge: the Supreme Court has chosen to construe the qualifications clauses extremely narrowly. The Court has instead examined the vast majority of election restrictions as manner regulations, regardless of their severity or directness.

This conclusion is best illustrated by contrasting several older lower court decisions striking down state election laws as impermissible qualifications with more recent Supreme Court decisions analyzing and upholding similar provisions as manner regulations. These older decisions, which rejected, for example, a New Mexico requirement that a party candidate must have been a member of his party for at least a year prior to the primary election, simply assumed that the proper mode of analysis was as a qualification. By contrast, the Supreme Court itself has seriously considered the possibility of a qualifications clauses violation in only two cases, Powell and Bond, and viewed all other state election restrictions as time, place, and manner regulations. In so doing, the Court has implicitly overruled some of these earlier state decisions and cast doubt on the validity of others. Thus, the Court’s practice strongly suggests that a state election law will be considered as a manner regulation unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.

At least to a legal realist, this choice of framework makes good sense. The qualifications clauses, as construed in Powell, are a blunt weapon; once a court determines that a restriction creates a qualification, it must invalidate the offending provision. A court has no discre-

93. See, e.g., In re Opinion of the Judges, 116 N.W.2d 233 (S.D. 1962) (governor and lieutenant governor not eligible for other office during term); State ex rel. Handley v. Superior Court of Marion County, 151 N.E.2d 508 (Ind. 1958) (governor not eligible for U.S. Senate); Riley v. Cordell, 194 P.2d 857 (Okla. 1948) (state supreme court justice not eligible to run for nonjudicial position); State ex rel. Wettengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946) (state judge not eligible for other office); Buckingham v. State ex rel. Killoran, 35 A.2d 903 (Del. 1944) (state judges forbidden from running for other positions until six months after the expiration of their term); State ex rel. Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942) (candidate defeated in primary not eligible to run for same office in general election); Stockton v. McFarland, 106 P.2d 328 (Ariz. 1940) (state judge not eligible for federal office); Chandler v. Howell, 175 P.2d 569 (Wash. 1918) (state judge not eligible for other office).


95. Storer at least implicitly overruled the cases cited supra note 93, striking down provisions requiring a period of party affiliation as imposing a “qualification.” Likewise, Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974), casts serious doubt on the New Mexico decision. Finally, Clements v. Fashing, 457 U.S. 957 (1982), suggests that the cases cited supra note 93, striking down “resign to run” statutes as qualifications, are also incorrect.
tion to permit a qualification with salutary characteristics. By contrast, the Equal Protection and First Amendment inquiries used to evaluate manner regulations are much better suited for separating unduly discriminatory or chilling legislation from election regulations that advance legitimate state interests.

This distinction suggests that, because a term limit presents a difficult classification dilemma and its effects upon incumbents and voters are complex, a court would likely rely upon its more subtle instrument. Thus, a distinction based upon judicial considerations demonstrates that a term limit is better considered a manner regulation.

6. Invidious Potential

Finally, one might distinguish between a qualification and a manner regulation based upon the evils that might follow from their abuse. In other words, this distinction focuses on the hopes and fears motivating courts as they choose a constitutional framework for analyzing a term limit. In the drafting and interpretation of Article I, the Framers and the Court have shared a common hope of fostering fair and open elections. In the qualifications cases, however, the threat to that hope was very different from the threat posed by state-imposed manner regulations.

With respect to qualifications, the Framers and the Court were preoccupied with preventing the Congress from wielding the power to control the composition of its own membership, a fear we will label congressional self-aggrandizement or self-perpetuation. Indeed, so strong was this fear that the Framers assigned the states primary authority to regulate the manner of elections. By virtue of that assignment, a state-drafted manner regulation cannot present the possibility of congressional self-aggrandizement. Thus, in the manner regulation cases, the Court has been wholly concerned with ferreting out regulations that impermissibly discriminate or otherwise violate the right to free expression or association.

Both the Framers' debates and the Court's opinion in Powell demonstrate that the qualifications clauses were drafted and have been construed out of a fear of congressional self-aggrandizement. The present Article I, sections 2, 3, and 5, were adopted only after significant debate. On August 8, 1787, the Convention delegates unanimous-

96. See supra text accompanying notes 45-47.
ly adopted qualifications of age, citizenship, and residency. On August 10, the Convention debated a proposal to give the Congress "authority to establish such [additional] uniform qualifications of the members of each House . . . as . . . shall seem expedient."98 The delegates rejected this proposal that same day largely out of a fear that a Congress permitted to set the qualifications of its own members might permanently ensconce itself in office by limiting new entry. For example, Hugh Williamson of North Carolina worried that if a majority of the Congress should happen to be "composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body."99 Similarly, James Madison reminded the delegates that "the abuse" Parliament had made of its power to fix qualifications "was a lesson worthy of our attention. They had made the changes . . . subservient to their own views, or to the views of political or Religious parties."100 Madison concluded, and a majority of delegates apparently agreed, that the authority to set additional qualifications would vest "an improper and dangerous power in the Legislature."101 Rejecting the proposal by a 7 to 4 vote, the Convention instead permitted the House to be only "the Judge of the . . . qualifications of its own members."102

Likewise, the Court in Powell was worried that a Congress with the power to augment the trio of constitutionally enumerated qualifications might wield it for self-insulation and aggrandizement rather than for promotion of the common good. The Court’s review of history clearly impresses upon the reader the likelihood of abuse. In fact, the Court concludes its own brief analysis by recognizing that "[t]o allow [the power to create additional qualifications] to be exercised under the guise of judging qualifications, would be to ignore Madison’s warning . . . against ‘vesting an improper & dangerous

97. 5 ELLIOT’S DEBATES, supra note 27, at 391.
98. Id. at 377-78, 402. The initial proposal by the Committee of Detail was that 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." Id. at 377-78. Gouverneur Morris, however, moved to strike "with regard to property" from the Committee’s proposal. His intention was "to leave the Legislature entirely at large" to fix qualifications. Id. at 404. Both the original proposal and Morris’ motion were rejected by votes of 7-3 and 7-4, respectively. Id.
99. Id. at 404.
100. Id.
101. Id.
102. Id. at 378, 406; U.S. Const. art. IV, § 4.
power in the Legislature." 103

By contrast, when a state regulates the manner of a congressional election, the potential for legislative self-insulation and aggrandize-
ment is present only indirectly, if at all. A temporary majority in the Congress would have to solicit support from a majority of state legis-
latures to enact manner regulations that favored the current incumbents. The difference in constituencies and the sheer number of states and people involved makes this sort of invidious collusion improbable. As long as the dominant party, interest group, or popular senti-
ment on important issues continues to vary widely among the states, any faction in the Congress will encounter extreme difficulty in at-
tempts to insulate itself using state election regulations.

This is not to say, however, that a majority in any given state will not try to ensure that its representatives reflect its own partisan biases. Indeed, it would be peculiar if a temporary state majority did not seek to replicate its views in its congressional representatives. Self-replication, however, is distinct from self-perpetuation and the former has, at least historically, proven to be tolerably restrained by our nation’s diversity. Accordingly, the Court has used an equal pro-
tection and/or First Amendment analysis to measure the constitutionality of state-imposed manner regulations. 104 Instead of searching for legislative self-aggrandizement, the Court has looked to see if the manner regulations impermissibly classify, discriminate, or impinge upon rights of expression or association. 105

103. Powell, 395 U.S. at 547-48. In Powell, Chief Justice Warren noted that “[a] fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’” Id. at 547. It would be a mistake, however, to emphasize this statement as the animating rationale of the decision because of its context. As mentioned, the opinion takes an extensive excursion through history, while confining its own analysis to a single concluding paragraph. Indeed, it would be fair to say that Chief Justice Warren let history speak for itself. If letting the people choose whom they please were the animating principle of Powell, the ballot access cases show that it would prove too much; restricting independent candidates or requiring candidates to demonstrate significant support before allowing them a place on the ballot surely, though permissibly, confines the people’s ability to choose. See, e.g., Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

104. In offering this distinction, we do not presume to suggest that state legislation may never create a qualification. Certainly, were a state to pass a statute purporting to modify the age, residency, or citizenship requirements for the Congress, a court almost certainly would strike it down because of its obvious parallel with one of the constitutionally enumerated qualifications. In such a case, however, the question of whether to label the restriction a qualification or a manner regulation answers itself. Where the choice of labels is not self-
evident, a distinction based upon invidious potential provides a meaningful rationale upon which to base the choice.

105. The intricacies of this analysis, as well as how a term limit such as the one we
Storer provides a specific example of the inquiry that courts pursue when evaluating a manner regulation. As mentioned, the California statute at issue in Storer imposed a “flat disqualification” from the various primaries upon any candidate who had been affiliated with a major party at any time within twelve months of the primary that he wished to enter. The Court first noted that a decision in the election law context is “very much a matter of ‘consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.’” Then it went on to list a variety of legitimate state interests that it found were promoted by the statute, including interests in “maintaining the integrity of the electoral process,” “ensuring significant support for each candidate on the ballot,” and “preventing splintered parties and unrestrained factionalism.”

Concluding that these state goals easily outweighed any interests that a particular candidate might have in immediate access to the ballot, the Court did not hesitate to uphold the regulation.

To the extent that a term limit will be judged a qualification or manner regulation by its invidious potential, a term limit clearly falls within the broad category of manner regulations. Even a cursory glance at the attributes and objectives of a term limit makes clear that it does not present the possibility of congressional self-perpetuation or aggrandizement. Indeed, it is intended to counteract such evils.

Proponents have suggested four sorts of interests that they seek to promote through such congressional term limits:

- levelling the playing field in an election process that provides incumbents with practically insurmountable advantages;

- ensuring that elected representatives truly represent and are representative of the community that elected them;

- preventing corruption in office; and

- broadening opportunities for participation in public

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106. Storer, 415 U.S. at 733.
107. Id. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).
108. Id. at 731, 735-36.
A court reviewing a term limit would find no reason to determine that such a measure vests an "improper and dangerous" power in the Congress. To the contrary, a term limit would strip long-term members of that body of their privileges. A court would, however, need to evaluate carefully whether a term limit unduly discriminates against long-term incumbents or frustrates the expressive and associational rights of incumbents or voters. Thus, a term limit fits squarely within the category of manner regulations as defined by invidious potential.

C. Conclusion

In this section, then, we have seen that whether a term limit should be considered a qualification or a manner regulation presents a complex question of labelling and categorization. Rejecting facile distinctions based upon severity or directness as not sustainable in light of existing case law, we have instead argued that distinctions based upon judicial considerations and a regulation's invidious potential present a reasoned basis upon which to affix the manner regulation label to a term limitation.

III. BEYOND ARTICLE I: FIRST AND FOURTEENTH AMENDMENT OBJECTIONS

If courts do indeed classify term limits as manner restrictions, opponents are left facing the following question: what other constitutional objections can be leveled against state-imposed limits on congressional service? The answer is not immediately apparent from the text of the Constitution because the Framers failed to include any explicit protection of political rights in their document. In fact,
the only remaining provisions that offer opponents any serious hope of thwarting a term limit are the First and Fourteenth Amendments.

In this section, we turn to consider the strength of potential free speech and equal protection arguments. In so doing, the proper conclusion comes quickly into focus: to the extent that the free speech and equal protection doctrines have been used to fashion political rights, they do term limit opponents little or no good. Once over the qualifications hurdle, term limits are, in a real sense, in the home stretch.

In coming to this conclusion, we take two steps. Because the level of scrutiny applied in First and Fourteenth Amendment adjudication frequently foreshadows the result on the merits, we first examine the standard of review that a court will likely employ to assess a term limit. We then apply it to the rights and interests term limit opponents might assert.

A. Standard of Review

It is familiar learning that the standard of review applied by the Supreme Court in the First Amendment and equal protection contexts has been in a state of flux.\(^{111}\) Cases involving candidate and voter rights are no exceptions. They have varied from employing a rather narrow rationality review to invoking a somewhat stricter form of scrutiny.\(^{112}\) In \textit{Anderson v. Celebrezze},\(^ {113}\) however, the Court has recently provided a new and comprehensive framework for analyzing all election regulation cases.

\textit{Anderson} involved a challenge to an Ohio election law by both John Anderson, the 1980 Independent candidate for president, and voters inclined to vote for him. The law in question required the candidate to file 5,000 signatures by March 20 in order to appear on the November ballot. The Court found these regulations too onerous and, in striking them down, announced a three-step standard of review in election law cases, abandoning the "strict" and "rational"

\[^{111}\text{g}overnement\] is guaranteed, is an explicit protection of political rights. However, the courts have consistently refused to utilize the Guarantee Clause, claiming that judicial enforcement is precluded by the political question doctrine. See, e.g., \textit{Baker v. Carr}, 369 U.S. 186 (1962); \textit{Luther v. Borden}, 48 U.S. (7 How.) 1 (1849).

\(^{112}\) See \textit{John E. Nowak & Ronald D. Rotunda, Constitutional Law § 14.3 (4th ed. 1991)}.


\(^{114}\) \textit{460 U.S. 780} (1983).
labels altogether. Lower courts are now expected to

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. [They] must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by this rule. In passing judgment, [courts] must not only determine the legitimacy and strength of each of those interests, [they] 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 [a] reviewing court in a position to decide whether the challenged provision is unconstitutional.114

Under Anderson, then, courts are to balance the interests of candidates and voters against those motivating the state's actions. Accordingly, in addressing First and Fourteenth Amendment objections to term limits, we will follow the Court's guidance and (1) assess the character and magnitude of the asserted burdens imposed; (2) evaluate the interests advanced by the state as justification for the burdens imposed; and (3) consider whether the burdens are necessary to achieve the state's interests.

B. Burdens on Incumbents

Any analysis of the burdens imposed by a term limit must begin with the following basic question: who is harmed? There are only two conceivable "classes" of individuals affected by a term limit: incumbents whose jobs are at stake and voters whose choices might be narrowed. We turn to consider the magnitude of the burdens that each class might assert, beginning with office-holders.

Before doing so, one point must be recalled. No matter how severely a term limit might infringe upon an incumbents' First and Fourteenth amendment rights, Article I, section 4, inarguably authorizes the Congress to overrule any manner regulation. With such an obvious means of self-protection available to members of Congress, a court need not be particularly sympathetic to equal protection or free speech harms claimed by incumbents themselves.

If courts nonetheless choose to entertain objections by incumbents, three separate arguments derived from the First Amendment and Equal Protection Clause will likely be made. First, term limits arguably infringe upon a fundamental right to run for office. Second,
they perhaps create an indefensible classification by distinguishing between incumbents and challengers. Third, they may impinge upon the right to speak and associate by limiting one's ability to run for office. As we shall see, however, each of these arguments will almost assuredly fail.

In 1968, when the Supreme Court first struck down a ballot access restriction, it did so because the regulation inappropriately discriminated against minority party candidates. In the wake of that decision, some commentators rushed to conclude that the Court was prepared to announce—or already had announced—a fundamental right to candidacy derived from the Equal Protection Clause. These conclusions were not merely wishful thinking; the Warren Court was, at the time, in the process of deriving several fundamental rights from the Equal Protection Clause.

With the transition from the Warren Court to the Burger Court, however, came a new reticence about using equal protection analysis to craft fundamental rights. In 1972, the Court made plain that it had not recognized a fundamental right to candidacy. Reaffirming this conclusion recently in Clements v. Fashing, the Court has made entirely clear that it will not strike down any legislative limitation on candidacy under the fundamental rights rubric.

118. See Dandridge v. Williams, 397 U.S. 471, 487 (1970) (stating that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."); Lindsey v. Normet, 405 U.S. 56 (1972) (holding that there is no fundamental right to "decent shelter"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental right).
120. 457 U.S. 957 (1982). "Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’” Id. at 963.
121. The Court has even received some support from the academic community for its refusal to extend fundamental rights analysis to candidacy. See, e.g., Developments in the
Likewise, a suspect classification argument provides incumbents little hope for success. In *Clements*, the Court acknowledged that regulations discriminating against poor and minority party candidates are nearly always impermissible under the Equal Protection Clause. However, it quickly added that no other groups or classes identified to date merit such exacting scrutiny by the Court. This stinginess with suspect classification analysis in the election context is emblematic of the Court's general movement away from close concern with regulatory groupings under equal protection analysis. It also suggests that, because a term limit does not discriminate against poor or minority party candidates, it is free from classification-based objections. Indeed, a term limit affects a group far removed from the suspect class paradigm; Congress is, after all, rather heavily dominated by white (93%), male (95%), millionaire (11% of the House, 26% of the Senate). It would, at the least, be ironic were incumbents to win protection under a constitutional doctrine initially intended to serve newly freed slaves.

Even so, incumbents have not been dissuaded from pressing classification-based claims. In *Clements*, incumbents specifically argued that a provision requiring incumbents to serve their full terms

Law: Elections, 88 HARV. L. REV. 1111, 1135 n.81 (1975); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1098 n.5 (2d ed. 1988) (remarking that "there is something more than faintly odd, even in a country boasting that anyone can become President, about a society's describing as a 'fundamental right' an activity bound to be unthinkable for a vast majority of its members.").


124. See *Clements*, 457 U.S at 965.

125. Suspect and quasi-suspect classification analysis applies to restrictions based on race, ethnic origin, gender, and illegitimacy. The Burger and Rehnquist Courts have rejected numerous attempts to add additional classes to this list. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that the mentally retarded are not a suspect class); Harris v. McRae, 448 U.S. 297 (1980) (holding that wealth classifications do not trigger strict scrutiny); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that an age qualification does not demand strict review).

126. See Susan B. Glasser, GOP Says Number of Black, Hispanic Seats Should Double to 68, But 44 More Realistic, ROLL CALL, Apr. 29, 1991.


128. See Jeffrey Berman, Filings Reveal 51 Members of House Qualify for Millionaires Club, ROLL CALL, July 15, 1991; Craig Winneker & Jeffrey Berman, More Than a Quarter of the Senate Qualifies for Millionaires' Club, ROLL CALL, June 20, 1991.
before seeking another elective office improperly discriminated against them as a class—forcing them to sit out an election cycle while others could run. The Court quickly dismissed this argument, labeling the waiting period created by this “serve your term” provision a “\textit{de minimis} burden.”\textsuperscript{129} The four-year exclusion from the printed ballot required by our term limit proposal seems hardly more substantial, given the twelve years that incumbents will be allowed to hold office and the constant availability of the write-in campaign—something that incumbents in \textit{Clements} could not use.

Moreover, states impose regulations at least as severe as the rotational term limit on classes far less privileged than congressional incumbents without violating the Fourteenth Amendment. Some impose durational residency requirements requiring the newly-arrived to wait up to seven years before becoming eligible to run for state office.\textsuperscript{130} Others specify minimum ages for candidacy.\textsuperscript{131} Both types of requirements have been analyzed without reference to the suspect classification standard and upheld with relative ease. If states can force one class of citizens to endure these burdens before making an initial run for public office, it seems highly improbable that a four-year exclusion from the printed ballot, applicable only to those who have already served twelve years, will trigger equal protection concerns.

Moving to the speech-related burdens placed upon incumbents, we return to \textit{Clements}. There the Court considered whether either the “serve your term” provision or one requiring certain elected officials to resign their offices before seeking another violated the First Amendment.\textsuperscript{132} Although the regulations precluded many elected officials from becoming candidates when they wished, a majority of the Court noted that the rules

\begin{quote}
 in no way restrict appellees’ ability to participate in the political campaigns of third parties. They limit neither political contributions
\end{quote}

\textsuperscript{129} \textit{Clements}, 457 U.S. at 967.


\textsuperscript{131} \textit{See}, \textit{e.g.}, Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973) (upholding a requirement that city council candidates be twenty-five years of age); Blassman v. Markworth, 359 F. Supp. 1 (N.D. Ill. 1973) (upholding a requirement that school board members be eighteen years of age).

\textsuperscript{132} \textit{Clements}, 457 U.S. at 972.
nor expenditures. They do not preclude appellees from holding an office in a political party . . . . [A]ppellees may distribute campaign literature and may make speeches on behalf of a candidate.\textsuperscript{133}

Thus, the Court found that whatever First Amendment rights elected officials enjoy, an unfettered right to candidacy simply is not included among them. The Court emphasized just how severely elected officials' free speech rights might be limited by noting that the provisions before it were "far more limited . . . than this Court has upheld" in \textit{Letter Carriers} and \textit{Broadrick}.\textsuperscript{134} Like civil servants, then, elected officials may indeed have their speech activities curtailed rather substantially, even so far as to preclude participation in upcoming elections under certain conditions.

The question of how far states may go in burdening the speech activities of their elected officials may prove to be an interesting question. But, whatever the outer bounds, rotational term limits seem safely within those limits. They are, like the \textit{Clements} regulations, less burdensome on speech and associational rights than the Hatch Act;\textsuperscript{135} moreover, they permit congressional incumbents to participate fully in the campaigns of third parties, a factor the Court considered significant in \textit{Clements}. In sum, there is little term limit advocates need fear in any assertion of "candidate rights." Incumbents possess no fundamental right to candidacy, they are not members of an impermissible class, and they do not enjoy an unlimited First Amendment right to run.

\textbf{C. Burdens on Voters}

We now turn to consider the nature and extent of the impact term limits will have on voters. Significantly, unlike candidacy, the opportunity to vote \textit{has} been deemed fundamental under the Equal Protection Clause.\textsuperscript{136} What remains unclear, however, is what exactly this fundamental right entails and, thus, whether term limits infringe upon the exercise of that right.

One possible theory of the right simply holds that all votes must be counted equally. This theory has found expression in a recent Ninth Circuit decision, \textit{Burdick} v. \textit{Takushi},\textsuperscript{137} and fits well with the

\begin{flushleft}
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} See "severity" discussion, supra Section II.B.1.
\textsuperscript{137} 927 F.2d 469 (9th Cir.), cert. granted, 112 S. Ct. 635 (1991).
\end{flushleft}
Court's analysis in other important right to vote cases.\textsuperscript{138}

Under this theory, term limits as we imagine them are completely unobjectionable: all voters are treated alike in their inability to find the twelve-year incumbent on the ballot. Since there is no fundamental right to vote for a particular individual, nothing is lost by the imposition of a term limit. In fact, by allowing the write-in candidacy as we suggest, a state might actually provide voters more than is required by First and Fourteenth Amendment analysis.

Another theory of the right to vote, however, requires not only equal treatment, but also the opportunity to express one's preference for a particular candidate. Under this view, \textit{Burdick} is wrongly decided. But, that said, the breadth of a right to vote for a particular individual under this view is not altogether clear. It could simply be that every voter must have the opportunity to write-in his chosen candidate's name at the ballot box. Or, more boldly, a right to vote for a specific individual could require access to the printed ballot for all interested candidates.

Proponents of the write-in interpretation have some reason for optimism. Despite \textit{Burdick}, two courts have decided that the write-in option is encompassed within the fundamental right to vote.\textsuperscript{139} Moreover, the Supreme Court has recently granted certiorari to consider \textit{Burdick} this term.\textsuperscript{140} In the end, whether this vision of the right to vote or that adopted in \textit{Burdick} ultimately prevails matters little to our analysis as, under the provision we propose, long-term incumbents are free to conduct a write-in campaign.\textsuperscript{141}

A broader construction of the right to vote, one perhaps requiring

\textsuperscript{138} Courts have stepped in to protect the right to vote in two situations. The first is when states impose voter qualification regulations that unduly discriminate against a particular group's access to the franchise. \textit{See, e.g.}, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that conditioning the right to vote in school board elections on the ownership of property is impermissible); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (holding that a poll tax violates the Equal Protection Clause). The second is when the state attempts to dilute the effectiveness of the votes of a particular class. \textit{See, e.g.}, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that a bicameral legislature must be apportioned on a population basis). In both situations, the Court's concern has focused on the fact that the regulation in question allows some voters a greater voice at the polls than others.


\textsuperscript{140} \textit{See supra} note 137 and accompanying text.

\textsuperscript{141} Our reasons for suggesting the write-in as an important addition to the Colorado provision have now become clear: not only does it help a term limit look more like a manner regulation for Article I purposes, but it also allows states to hedge their bets on the eventual outcome of \textit{Burdick}. 
open ballot access, might well imperil a term limit. However, there is almost no chance that such a view of the right will ever be adopted. Unlike the other theories that we have discussed, no court has pursued this notion and it, like the directness distinction in Article I analysis, proves too much. If an absolutely open ballot were constitutionally required, then not only would term limits be prohibited, but the ballot access, Hatch Act, and "serve your term" cases would all have to be overruled because they permit substantial restrictions on the names that may be printed on the ballot. Were a right to vote construed so broadly, one might even argue that the constitutionally-granted power of the states to govern the manner of congressional elections under Article I, section 4, would become a nullity.

In sum, a term limit does not trammel the right to vote in either of its tenable interpretations. The right to vote, however, does suggest that a write-in provision may be an important addition to any term limit proposal.

D. The State's Interest

Now we consider the state interests advanced by a term limit, which, under Anderson, must be balanced against the rights of incumbents and voters. As mentioned above, proponents have suggested four interests they seek to promote through term limits: levelling the electoral playing field, preventing corruption in office, ensuring that elected representatives truly represent, and broadening opportunities for participation in public service.

An examination of the case law reveals that these interests are rational—even compelling—goals for government to pursue. In Austin v. Michigan Chamber of Commerce, the Supreme Court considered a Michigan statute prohibiting corporations from using general treasury funds to support candidates for state office, but permitting them to make such expenditures from segregated funds used solely for political purposes. In upholding the regulation, the Court emphasized that, while it placed a significant burden on corporate speech, the statute was an important and legitimate attempt to control "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . . . Corporate wealth can unfairly influence elections." It was, thus,

142. See supra note 109 and accompanying text.
144. Id. at 660.
deemed a legitimate state purpose to prevent corruption and the unfair influence of monied interests in the democratic system—something term limits are specifically designed to do.

These same anti-corruption and level playing field arguments were employed by the Court in *Buckley v. Valeo*\(^\text{145}\) to uphold a $1,000 limit on individual contributions to candidates for federal office. Not only was the regulation deemed a reasonable attempt to prevent actual corruption in office, but it was also accepted as a legitimate weapon to combat even the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In [*Letter Carriers*] the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."\(^\text{146}\)

Thus, the Court will allow absolute bans on direct corporate contribution, severe caps on campaign contributions, and a near-total elimination of political activity by civil servants, all to the end of eliminating corruption—and perhaps even its appearance—in government.

The legitimacy of promoting representativeness in government has also been recognized by the Court. In upholding the *Clements* measure requiring certain elected officials to resign before running for another office, the Court found that states have a legitimate interest in preventing state office-holders from neglecting their duties or from making decisions that might advance their own political ambitions rather than the public good.\(^\text{147}\) Lower courts faced with the application of such "resign to run" statutes against candidates for federal—not just state—office have come to exactly the same conclusion.\(^\text{148}\) Further, we note that a concern for representativeness played an enormous role in *Letter Carriers* as well. The only possible way to ensure representative and responsive civil servants, the Court con-

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146. *Id.* at 27 (citation omitted).

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cluded, was to limit drastically their associational rights.\footnote{149} This same concern with representativeness was also an impetus behind many of the ballot-access regulations. Afraid that late-coming independent candidates are often prompted “by short-range political goals, pique, or personal quarrel,”\footnote{150} courts have reasoned that ballot access regulations excluding such candidates from the ballot help prevent the “bleed[ing] off [of] votes” from candidates properly on the ballot.\footnote{151}

The rationality of an attempt to limit the effects of entrenched incumbency finds support in the federal and in state constitutions. The Twenty-Second Amendment\footnote{152} limiting presidential terms, along with similar state provisions covering governors, are powerful testimony that the limitation of incumbent terms is indeed sound public policy.\footnote{153} Interestingly, state constitutional limits on gubernatorial terms have been challenged under the Equal Protection Clause of the federal Constitution in much the same fashion a congressional term limit might be.\footnote{154} They have, of course, been universally upheld, with courts acknowledging that states have a significant interest in eliminating “[t]he power of incumbent officeholders to develop networks of patronage,” and “fears of an entrenched political machine which could effectively foreclose access to the political process.”\footnote{155} Also important, these limits have been acknowledged by courts to help “stimulate criticism within political parties” and “insure a meaningful, adversary, and competitive election.”\footnote{156} If such state provisions are inoffensive to the federal Constitution, and their rationales accepted, there is indeed a strong base of precedent to suggest that the congressional term limits now proposed would also pass mus-

\footnote{149. See Letter Carriers, 413 U.S. at 565. “[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.” \textit{Id.}}

\footnote{150. \textit{Storer}, 415 U.S. at 735.}

\footnote{151. \textit{Id.}}

\footnote{152. U.S. \textsc{Const}. amend. XXII, § 1.}

\footnote{153. Much emphasis has been placed on the fact that these limitations are expressed in constitutional amendments rather than legislative enactments. However, for our purposes here—discerning the significance of the governmental interest in term limits under an Ander-son balancing test—this distinction has little relevance.}


\footnote{155. Maloney, 223 S.E.2d at 611.}

\footnote{156. \textit{Id.}}
E. The Necessity of Imposing Restrictions

The final step in the Anderson test requires an inquiry into the “necessity” of burdening incumbents’ and voters’ First and Fourteenth Amendment rights. It explicitly requires the “weighing [of] all these factors” to determine whether a challenged provision is constitutional. 159

On one end of the balance, the character and magnitude of the First and Fourteenth Amendment rights affected by term limits seem not at all profound. To the extent that a right to candidacy has been judicially developed, it seems almost exclusively concerned with guarding against regulations that create invidious classifications, especially those based on wealth and minority party status. A term limit regulation does not discriminate on either basis or, for that matter, on any other basis traditionally the subject of heightened scrutiny.

Likewise, term limits have little impact on the right to vote. If Burdick proves to have been rightly decided, term limits will actually have no impact, as all voters will be equally unable to vote for a long-term incumbent. If Burdick proves to have been wrongly decided, and the right to vote does include a right to vote for a particular person, the analysis changes slightly, but the result does not. Voters will not encounter an incumbent’s name on the printed ballot, and will instead be required to write in the incumbent’s name, taking extra care with their exercise of the franchise. But there is no indication from existing law that the right to vote includes the right to have one’s favored incumbent printed on the ballot. Thus, even if Burdick is wrong, the right to vote likely constitutes nothing more than the right to write and no damage is done by the limit we suggest.

On the other side of the balance, strong governmental interests are promoted by term limits, in our view—in fact, some of the most basic and important it may pursue. Maintaining a representative de-

157. At this point, opponents might attempt to argue that the governmental interests explored in this section might justify federal legislation to limit terms, but cannot be used to justify state action on what is “purely” a federal matter. As we have discussed above, however, Article I, section 4, does not permit such a wooden view of federalism in the election context. Instead, it explicitly recognizes the interest that states have in the election of members from their own soil by allowing them broad regulatory powers over those elections. See supra notes 45-47, 58, 96 and accompanying text.
159. Id.
mocracy and limiting the influence of unfair electoral advantages have moved legislatures and courts to enact and approve bold measures in the past that restrict certain individuals at least as severely as a term limit. In sum, once over the qualifications hurdle, the fight on the First and Fourteenth Amendment grounds does indeed look promising for term limit proponents.

IV. STATE LEGISLATIVE TERM LIMITS

Although the debate over the constitutional status of congressional term limits promises to continue without a definitive judicial resolution for several years, recent developments in the California courts and basic notions of federalism virtually assure state legislative limits a positive reception in court. Three states have already passed limitations on state office-holders; two of these even impose lifetime bans, not mere rotation schemes. Further, all three deny state legislators even the opportunity to conduct write-in campaigns. On the state level, however, such variations are not likely to prevent their judicial affirmance.

The case for term limitations on state office-holders is simpler to build than the case for their federal counterparts in large part because the qualifications clauses, by their own terms, apply solely to congressional elections. Consequently, state term limits do not require that we engage in the vexing task of drawing analytical lines between various sections of Article I, or to explore the boundaries of Powell and Storer.

In fact, the only serious constitutional objections opponents can level against state limits stem from the First and Fourteenth Amendments. We have, however, already considered these arguments in Section III with reference to federal limits and found that they provide opponents with little ammunition. To the extent that a term limit impairs recognized free speech and equal protection interests at all, it does so only minimally. Moreover, the governmental interest motivating the imposition of a limit finds strong precedential support. Any

160. A definitive ruling may be some time in coming, in part because Colorado chose, and presumably other states adopting federal term limits will choose, to apply their provisions only prospectively. See COLO. CONST. art. XVIII, § 9(1).
161. These states are California, Colorado, and Oklahoma. See CAL. CONST. art. IV, § 2(a); COLO. CONST. art. V, § 3(2); OKLA. CONST. art. 5, § 17A.
162. These are California and Oklahoma. See supra note 161. Colorado has chosen to apply a rotational scheme to its state legislature similar to the one it imposes on its federal representatives.
Further discussion of why and how state limits ought to survive First and Fourteenth Amendment challenges, thus, might seem cumulative. Still, there are two additional factors uniquely relevant to limitations on state office-holders that we have not yet discussed and that are of such importance that they deserve mention.

First is a recent decision of the California Supreme Court involving what may prove to be the nation’s strictest limitation. The California provision holds state senators to eight years in office and assembly members to six, contains no write-in provision, and is a lifetime ban. Despite the severity of these restrictions, the court found the First and Fourteenth Amendment objections raised to be completely unavailing under an *Anderson* analysis:

> On balance . . . the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them . . . . It is true, as petitioners observe, that respondents have not offered evidence to support all of the various premises on which [the initiative] is based. But as the United States Supreme Court pointed out . . . . a state need not demonstrate empirically all of the various evils that its regulations seek to combat . . . . In sum, it would be anomalous to hold that a statewide initiative measure aimed at “restor[ing] a free and democratic system of fair elections” and “encourag[ing] qualified candidates to seek public office” is invalid as an unwarranted infringement of the rights to vote and to seek public office.

The California experience, thus, bolsters our conclusion that the assertion of the First and Fourteenth Amendment rights pose few problems for a limitation initiative. It also suggests that, at least on the state level, limitation provisions need not necessarily include rotational and write-in devices in order to ensure their constitutionality. Thus, the Colorado rotational concept for state officers may be copied, but may not be needed.

The truly ambitious might also argue that the California decision paves the way to include lifetime bans in, and delete the write-in provision from, the federal limit we propose. But, we fear this may fail to appreciate fully the Article I analysis. While the lifetime ban and the write-in prohibition may pass scrutiny under the First and

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164. *Cal. Const. art. IV, § 2(a).*

165. *Eu, 816 P.2d at 1328-29 (citations omitted) (emphasis added).*
Fourteenth Amendments, a federal limit must also be classified as a manner regulation. As discussed above, the difference between impermissible qualifications and permissible Article I, section 4, regulations, is more one of degree than one of kind; thus, any procedures that can be added to a term limit to move it closer to the paradigmatical section 4 manner regulation and further from the traditional qualifications of sections 2 and 3 should be included in order to pose courts with the most favorable case first. Still, the California decision does suggest that states have enormous latitude in crafting their own internal limitation provisions.

Our confidence in the conclusion that states enjoy substantial discretion in establishing their own election procedures is reinforced by the second factor specially relevant to state term limits: the federalism concerns raised when one uses the United States Constitution to regulate how states organize their own legislatures. The Supreme Court has itself stated that, "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." From this general concern with the power of the states to structure their own governments has grown a body of law evidencing a serious disinclination to alter internal state election requirements. Despite substantial constitutional objections, courts have, among other things, permitted states to develop highly restrictive mechanisms for filling state legislative vacancies, to impose severe durational residency requirements on newcomers, and to mandate minimum ages for running for elective office. Likewise, courts have intervened to protect state interests when the federal government has attempted to impose its own ideas of how state government should be organized.

Though federalism concerns do not trump equal protection or First Amendment concerns or obviate the need to conduct an Anderson balancing test, they surely must be counted in the balance. Just

166. Again, the necessity of a write-in provision may hinge on the outcome of Burdick. See supra Section III.C.
169. See supra note 130 and accompanying text.
170. See supra note 131 and accompanying text.
171. See, e.g., Mitchell, 400 U.S. 112 (holding that the federal government may not dictate a minimum age to vote in state elections).
how heavily they weigh becomes evident in the Court's decision in Oregon v. Mitchell:

[The Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the State's power to govern themselves . . . . In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.]

No finer examples of the cautious approach courts have exhibited towards internal state election regulations can be found than the state durational residency cases. Courts have upheld election regulations preventing newcomers from seeking their first elective office for up to seven years after arrival in state. It would be rather incongruous if such severe limitations were upheld, but a term limit affecting only the political opportunities of those who have already had a chance to serve several years was not.

In sum, the constitutional analysis for state term limits follows the Anderson analysis laid out in Section III, but does so with two added factors in the balance, both of which press heavily in the state's favor. The California experience and the federalism concerns involved in the state context powerfully suggest that, whatever the eventual outcome of cases challenging federal term limits, term limits will have a profound impact on the way in which state governments are organized and operate.

CONCLUSION

Term limits raise enormous questions about our basic notions of citizenship and representative democracy. They represent a dramatic rejection of the nation's present legislative scheme and its dependence upon seniority, rank, and the professional Congressman. They suggest, too, a move back toward an ideal long-discarded—that of the citizen-legislator.

172. Id. at 126; see also Clements v. Fashing, 457 U.S. 957, 975 n.4 (Stevens, J., concurring). "In defining the interests in equality protected by the Equal Protection Clause, one cannot ignore the State's legitimate interest in structuring its own form of government. The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard." Id.

Our contribution to the ongoing debate about the wisdom of imposing term limits is relatively minor. We do not purport to provide any answers to the questions of democratic theory raised. We do not suggest that one representative ideal is superior to another. We write only to dispel a myth that has detracted attention from such central concerns: that the enactment of term limits is futile as courts will quash them. In our view, a strong argument can indeed be made that state-imposed term limits are constitutional—that they do not constitute a blatant "end run around the Constitution."174

As we have discussed, the absence of a term limitation provision in the Constitution itself hardly bespeaks an intention on the part of the Framers to foreclose their subsequent legislative imposition. Article I doctrine, upon which term limits opponents so heavily rely, indicates that limits are more likely to be deemed legitimate manner restrictions than inappropriate qualifications. First Amendment and equal protection guarantees offer incumbents extremely little hope. And state legislative limits seem bound for success in our courts.

In the end, we believe that the fate of term limits may not be decided by the courts as nervous incumbents so hope, but in a fashion far more familiar to those they would displace: through the ballot box.

174. Kolbe, supra note 69.
## APPENDIX

### Turnover Rates In The House

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<th>Year</th>
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<td>1834</td>
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<td>1835</td>
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<tr>
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*Source: Calculated from information contained in Congressional Research Service Report*