Policy Analysis

Cato Institute Policy Analysis No. 178: Will the Gentlemen Please Yield?--A Defense of the Constitutionality of State-Imposed Term Limitations

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Executive Summary

The recent rash of congressional retirements has led many politicians and pundits to speculate that the term limit movement will prove to be nothing more than a passing fad. They argue that the likely election of over 100 new House members this fall will satisfy even the most disenchanted voter's appetite for change. This claim, however, greatly underestimates a series of developments now taking place at the grass-roots level across the country.

Indeed, recent events suggest that, rather than waning, interest in term limits continues to grow. California and Michigan, home of two large and powerful congressional delegations, will include federal term limit initiatives on their ballots this November, and as many as a dozen other states, including Florida, are contemplating similar moves. Public support for term limits hovers around 75 percent in the polls, and activists across the country have formed and funded bipartisan national organizations dedicated to their propagation.[1] In sum, it appears that term limits will likely remain on the national political agenda for quite some time.

Nervous incumbents, perhaps hoping that the courtroom will prove more hospitable than the ballot box, have already attempted to shift the debate over term limits from their merits to questions about their constitutionality. Rep. Larry Smith (D-Fla.), for example, recently used the services of the House Counsel's office--at taxpayer expense--to prepare a legal brief challenging a term limit initiative in his home state. Last fall, California state legislators brought, and lost, a lawsuit aimed at invalidating a term limit California voters imposed on their state representatives and senators in 1990. And most recently, the Massachusetts legislature has refused to allow a term limit initiative on the ballot until the state's supreme court renders an advisory opinion certifying the measure's constitutionality.

In short, term limit opponents appear increasingly willing--perhaps even anxious--to avoid any debate over the merits of state-imposed term limits, embracing instead the comfortable notion that it is pointless to consider a patently unconstitutional measure. House Speaker Thomas Foley put the proposition most succinctly: "Any constitutional lawyer worth his salt will tell you [term limits are] a sham."[2]

We beg to differ. Although the constitutional case for term limits is not beyond doubt, it can hardly be characterized as frivolous. Hoping to move the ongoing debate over term limits from the legal realm to a discussion of their merits, we argue here that a state-imposed limit on the terms of that state's congressional delegation is constitutionally permissible.

We begin this study with an examination of U.S constitutional history and find that a term limit is entirely consistent with the Framers' intentions. Recognizing that men are not angels, the Framers of the Constitution put in place a

number of institutional checks designed to prevent abuse of the enormous powers they had vested in the legislative branch. Bicameralism, frequent elections, staggered terms, differing qualifications, shared and exclusive powers, and state control over election procedures are all examples of the mechanisms the Framers crafted with the hope of ensuring a responsive yet responsible legislature. A term limit, we suggest, is simply an analogous procedure designed to advance much the same substantive end.

Similarly, the text of the Constitution leaves room for term limits. Article I, section 4, explicitly grants the states wide latitude to determine the times, places, and manner of congressional elections. This provision, in our judgment, fully empowers states to enforce term limits on members of their congressional delegations. Moreover, a term limit is harmonious with our constitutional guarantees of free speech or equal protection.

Before proceeding further, however, it would be well to explain exactly what we will defend. Although various term limit proposals have been suggested, we will defend a measure similar to the initiative the voters of Colorado recently approved as an amendment to their state constitution--the only congressional term limit actually enacted 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.[3] The amendment applies prospectively in that it affects only those congressmen elected after 1990.

We would add one important provision to the Colorado amendment, however: an incumbent would be allowed to conduct a write-in candidacy at any time. Thus, the term limit 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.[4]

We defend this slightly amended version of the Colorado term limit, including the number of years permitted, only because it is the first such measure actually to have been approved by a state's voters. In truth, fewer terms--such as six consecutive years for members of the House, as reflected in most proposals currently before the voters--may be perfectly acceptable. In any case, however, the constitutional issues should not turn on the number of terms a particular measure allows.

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.[5] This argument ignores both the principles of government that influenced the Framers and the concrete analogs to term limits that they included in the Constitution. Although a limit was not written into the Constitution, its absence suggests not that the Framers thought one inimical to their project but only that it was unnecessary in light of the numerous restrictions they had imposed on the national legislature.

James Madison, in The Federalist no. 51, reminds us of the Framers' basic views on human nature's tyrannical possibilities, and their danger for a government composed of men:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[6]

Put simply, institutional constraints on the power of government--in Madison's parlance, "auxiliary precautions"--were, to the Framers, necessary preconditions for liberty. A dependence on popular elections, while surely the first line of defense in securing and maintaining a free society, cannot reasonably be expected to suffice.

Thus, when the Framers outlined the nature and responsibilities of the legislative branch, they established a number of safeguards to control the significant power they had vested in that body. Bicameralism, size of membership, term lengths, staggered terms, differing qualifications, shared and exclusive powers, and state control over election procedures are all examples of the mechanisms they deployed in the hope of "obliging [government] to control itself."

Like those restraints, term limits were also a familiar device. Before drafting and ratifying our present Constitution, several states had constitutional limits on the terms of their legislators.[7] Delegates under the Articles of Confederation were also limited to a maximum of three one-year terms during any six-year period.[8]

Hoping to continue a tradition of limited terms, Edmund Randolph proposed a rotation scheme at the Federal Convention in Philadelphia that would have prevented members of the House from serving consecutive terms.[9] Two days after its introduction, however, Randolph's rotation proposal was set aside, along with several other provisions concerning the legislative branch, because it entered "too much into detail for general propositions."[10] Legislative rotation was never the subject of recorded debate at the Federal Convention, and on June 12, 1787, the delegates quietly voted to drop a rotation requirement.[11]

A rotation scheme, of course, was only one means the Framers considered for curbing the self-aggrandizement and disregard for the electorate that long-term incumbents often display. To address such problems, they adopted relatively short terms for all elected federal officials; indeed, the Framers settled on a six-year Senate term only after debating proposals for a tenure "during good behavior" of nine years, seven years, and four years.[12] Likewise, they fixed terms in the House at two years after considering proposals of three years and one year.[13] The presidential 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.[14] John Adams gave an eloquent explanation of these decisions:

> [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.[15]

Having mandated frequent elections, it was virtually inconceivable to the Framers that many incumbents would be able to win continual reelection.[16] Rather, the common assumption that frequent elections would produce a high degree of turnover was plainly evident in the debate over the length of tenure for representatives. Anti-Federalist "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.[17] James Madison, likewise assuming that "new members . . . would always form a large proportion" of the House, urged longer terms to allow newcomers time to learn their job.[18]

The Framers' decision to stagger the terms of senators further demonstrates the common assumption of significant turnover.[19] Advocates of staggered terms viewed them as a mechanism both for ensuring that not all members would be new at the same time[20] and for creating at least a limited degree of accountability by compelling one-third of all senators to run biennially.[21] Of course, a staggered term cannot accomplish either of those goals if incumbents regularly win reelection.

The Framers added yet another check on the ability of the Congress to insulate itself from its constituents by explicitly assigning the states primary authority to regulate the "Times, Places and Manner" of congressional elections.[22] Recognizing that election procedures could be used to shape and control the Congress, many argued that state regulation was necessary or else representatives and senators might favor a certain group or class most like 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.[23]

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 parochial interests or to subvert the national government altogether by simply refusing to hold elections.[24]

Understanding that power over election procedures was too important to be left to chance, the Framers of the Constitution adopted a compromise that placed primary authority with the states but empowered the Congress to override undesirable regulations. This designation is important because it allows states to shape districts, restrict access

to the ballot, establish a runoff system, or otherwise regulate congressional elections. Nevertheless, the Congress may nullify or replace any regulation it finds unpalatable.

In sum, to prevent a stagnant and unresponsive legislature, the Framers adopted relatively short terms of office on the assumption that frequent elections would produce a high amount of turnover. They staggered Senate terms and also vested the states with primary authority to regulate elections. Given those and other institutional controls, the absence of a term limit in the Constitution should not be read as strong evidence that the Framers intended to preclude its later legislative enactment. Rather, a better explanation for the absence of a limit is that most Framers simply thought a rotation scheme unnecessary.

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

> Nothing 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.[25]

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.[26] The majority of delegates, however, apparently believed that the measures they had already enacted were sufficient.[27]

In fact, the majority's assumptions proved correct for quite some time. In the first House election after George Washington was elected president, 40 percent of the incumbents were defeated.[28] Indeed, there was a tradition, lasting 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 for office again until he sought the presidency.[29] Perhaps because of this tradition, 40 to 50 percent of the Congress typically left office in every election until the Civil War.[30]

Only after the Civil War--in part because the establishment of standing committees in the Congress made seniority more important--did House seniority begin to rise. From 1860 to 1920, the average length of service doubled from four to eight years. By 1991, twenty House members had held office for at least twenty-eight years.[31] When the 57th Congress convened in 1901, for the first time less than 30 percent of its members were freshmen. In 1981, when the 97th Congress convened, only 17 percent of the members were newly elected. By contrast, when the 101st Congress convened, fewer than 8 percent were newcomers.[32]

Clearly, the Framers' underlying assumption about the length of elective service no longer reflects 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 rejecting a rotation scheme--that it was unnecessary to ensure turnover--no longer applies.

Article I Objections

Having decided that the Framers did not intend to preclude a state-imposed term limit, we now will determine whether the Constitution presents any barriers to such a limit. In this section, we will examine the most serious constitutional objection to a term limit: that it violates the strictures of Article I. We conclude that Article I does not proscribe but, in fact, offers ample textual authority for the enactment of a term limit.

Background

Article I, sections 2 and 3, which are referred to here as the "qualifications clauses," establish three qualifications for membership in the Congress: at the time of their election, (1) members of the House of Representatives must have attained the age of twenty five and Senators must be at least thirty; (2) members of the House and Senate must be U.S. citizens for at least seven and nine years, respectively; and (3) members of both houses must be inhabitants of the state from which they were elected. Article I, section 4, deals with the regulation of congressional elections. As mentioned,

it assigns states the task of regulating the "Times, Places and Manner" of congressional elections, albeit subject to congressional override.

Opponents of term limits commonly insist that a term limit would impose a de facto fourth qualification upon the Congress--namely that a candidate not be a long-term incumbent. The reason for their argument is obvious: if labeled a qualification, a term limit would not likely survive constitutional scrutiny because in Powell v. McCormack[33] the Supreme Court held that the Congress may not supplement the three enumerated qualifications.

Adopting the logic of their 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 a quantifiable amount of popular support for his candidacy. Thus, the question whether a term limit ought to be considered a qualification must be answered by analysis, not by conclusory labeling.

In our view, a term limit is better considered a regulation affecting the "manner" of an election than a qualification. As a manner regulation, a term limit is constitutional because states have explicit textual authority to regulate congressional elections under section 4. It is worth noting at this point that since Congress may override a state election regulation at will under section 4, a state could not enact a term limit without congressional acquiescence. In sum, if we are correct in considering a term limit as a manner regulation, Speaker Foley has nothing to complain about save his own inability to muster a congressional majority to defeat it.

Some have argued that even if a term limit is deemed a qualification, a state may still enact one under the power reserved to it by the Tenth Amendment. In making that argument, they point out that at least the Supreme Court's literal holding in Powell does not stand in the way: On its facts, Powell dealt with a qualification enacted by the Congress, not by a state.[34] That argument may have something to recommend it from a philosophical standpoint. However, because the Court has tended to regard the Tenth Amendment's reservation of powers to the states as "but a truism"[35] and because Powell's reasoning appears to forbid all but constitutionally enumerated qualifications, we think an argument for term limits grounded in the express authority of Article I, section 4, will more likely prevail.

Distinguishing Between a Qualification and a Manner Regulation

The question before us, then, is one of classification: Is a term limit an impermissible qualification under Powell or a permissible manner regulation under Article I, section 4? To answer that question, we must ask another: How have courts used the terms "qualification" and "manner restriction"? Here, the analysis is complicated somewhat because the Supreme Court has never attempted to define either of these terms; nor has it had reason to distinguish explicitly 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; the Court, it seems, knows a qualification or a manner regulation when it sees one.

In Powell v. McCormack, the leading qualification clause case, the House of Representatives sought to deny Adam Clayton Powell his seat for alleged unethical behavior even though he had been duly elected and met the age, citizenship, and residency requirements enumerated in Article I. An exhaustive survey of parliamentary precedents, the constitutional convention and ratification debates, and past congressional practice led the Court to conclude 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."[36] Despite the thoroughness of the opinion and its unequivocal holding, however, nowhere did the Court describe the attributes of a qualification.[37]

In Storer v. Brown,[38] the leading manner regulation case, the Supreme 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. The Court dismissed the qualification argument in a footnote as "wholly without merit."[39] Choosing instead to analyze and uphold the statute as a manner regulation, it 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."[40]

Although neither Powell nor Storer discussed explicitly how one might differentiate between a qualification or a manner restriction, at least five possible analytical distinctions might be drawn from these cases. We will attempt to explain those distinctions and explore what impact they might have for a term limit. The first two distinctions, which are based upon the restriction's severity and the directness with which it regulates the congressional office, are sure to be suggested by term limit opponents because they tend to favor labeling a term limit as a qualification. Yet, as we shall see, neither distinction can explain fully the differences between a qualification and a manner regulation that are evidenced in the case law. The third distinction--relating to the timing of a regulation--only partially differentiates between a qualification and a manner regulation; to the extent that it has some explanatory power, however, it favors labeling a term limit a manner regulation. The final distinctions relating to judicial considerations and a measure's invidious potential prove the most useful in marking the boundary between a qualification and manner regulation. Moreover, they convincingly demonstrate that a term limit is best considered a manner regulation.

Severity. Although not stated explicitly in Powell or Storer, a qualification seems intuitively to denote a substantive precondition 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 satisfying certain requirements. Seizing this intuition, commentators have argued that a term limit is a qualification because of the severity with which it precludes individuals from candidacy or officeholding.[41]

Albeit intuitive, a distinction based upon severity cannot withstand scrutiny. Even a quick examination of the three enumerated qualifications belies the argument that they must necessarily be severe or permanent. The residence qualification is easily mutable; at most a congressional hopeful would need only a few days to comply with it. The age and citizenship requirements are less mutable than the residency requirement only by degree; they are not qualitatively different. Accordingly, any attempt to portray a qualification as obviously stringent finds little support in the Constitution.

Moreover, the ballot access cases demonstrate that a manner regulation may severely restrict candidates who attempt to become officeholders. Consider again the severity of the qualification struck down by the court in Powell in comparison with the manner regulations upheld in Storer. 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 William 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.[42] The justice found this "an impossible burden to shoulder" in the context of a two-year congressional term.[43] Yet despite the measure's severity, he would have stricken it as violative of the First Amendment--not as creating a fourth qualification.

Beyond the ballot access cases, there are other strong indications that severity is not a reason to label an election regulation a qualification. The Hatch Act[44] passed by Congress in 1939 explicitly prohibits most federal government employees from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office."[45] This outright ban, which of course includes campaigns for congressional office, was first upheld by the Supreme Court in United Public Workers v. Mitchell.[46] Despite subsequent lower court decisions striking down portions of the Hatch Act (apparently on the assumption that Mitchell was outdated),[47] the Court reaffirmed its constitutionality in United States Civil Service Commission v. National Association of Letter Carriers.[48]

As in Storer, the Court in Letter Carriers considered First and Fourteenth Amendment challenges to the Hatch Act at length and concluded that it promoted legitimate state interests in maintaining an independent civil service. Yet, despite the severe ban on candidacy, neither the parties nor the Court ever suggested that the Hatch Act created an additional qualification that a congressman not be a government employee.

Finally, a look at the Supreme Court's treatment of political gerrymandering also undercuts the severity distinction. Even though a state legislature, through redistricting, may effectively prevent a particular candidate from ever seeking congressional office or even can effectively remove an incumbent, at no point has the Court considered even the most contorted political gerrymander a de facto qualification for office. All gerrymanders have been analyzed as manner regulations.[49]

In sum, the enumerated qualifications are less severe than the manner regulations 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, even if a term limit that relegates an incumbent to run a write-in campaign is deemed a "substantive" or "severe" burden to officeholding, this presents no principled reason to label it a qualifica- tion and, hence, unconstitutional.

Directness. In a second distinction, a few courts have used a "directness" test to separate a qualification from a manner regulation. Simply stated, they have held that if a state election procedure directly affects federal office, then it is a qualification. By contrast, if the procedure affects the federal office only indirectly, then it is per- missible as a manner regulation. In Signorelli v. Evans,[50] for example, a federal court of appeals 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 statute with laws requiring a congressman to reside in the district from which he runs, the court upheld the resign-to-run statute because, with it, New York had sought to "regulate the ... office that [the state official] holds, not the Congressional office he seeks."[51]

With this distinction, one could argue that a state-imposed term limit would be an unconstitutional qualification because it directly regulates a congressional election. But the premise of this argument--and the entire directness rationale--is flatly wrong. To argue that an election regulation is unconstitutional by virtue of its directness completely ignores the express constitutional assignment of primary responsibility for the regulation of congressional elections to the states in Article I, section 4. Moreover, the Court's approval of manner regulations directly regulat- ing the attainment of federal office--such as the direct ballot access restrictions in Storer--only reaffirms that a distinction based upon directness cannot hold. Thus, al though a term limit might directly regulate the attainment of congressional office, this hardly provides cause for deeming it a qualification.

The Timing of the Restriction. A third possible ground upon which to distinguish 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[52]--involved refusals to seat representatives who had been duly elected. By contrast, manner regulations invariably precede the election they purport to police. Thus, one could argue that qualifications (at least in their historical operation) act to exclude candidates after an election, while manner regulations precede it.

That said, the ex-post/ex-ante distinction does not demarcate the categories in all circumstances. One can easily conceive of a prospective restriction that would be deemed a qualification. If the Congress, for example, passed legislation requiring congressional candidates to be at least forty years old before running, the act would probably also establish a qualification because of the obvious parallel with constitutionally enumerated qualifications and the decision in Powell.[53]

To the extent that a distinction based upon the timing of a restriction has explanatory power, however, it suggests that term limits like Colorado's, which are applied only prospectively, are permissible manner regulations.[54] Because a prospective term limit would not operate to prohibit existing long-term incumbents from continuing in office but would only apply to those elected in the future, a court using this distinction would be likely to label a term limit a manner regulation.

Judicial Considerations. To this point, the possible grounds we have explored for distinguishing between a qualification and a manner regulation have been at best only partially descriptive. From the cases discussed, however, one useful observation does emerge: the Supreme Court has chosen to construe the qualifications clauses extremely narrowly. Indeed, it has used these clauses to strike down a legislative act only twice. By contrast, the Court has put Article I, section 4, to ample use, examining the vast majority of election regulations, at least implicitly, 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 upholding similar provisions as manner regulations.[55] Those older decisions--one of which, for example, rejected a New Mexico requirement that a party candidate must have been a member of his party for at least one year before the primary election[56]--simply assumed that such restrictions fell into the qualifications category. By contrast, the Supreme Court itself has viewed virtually all

state election restrictions--including party affiliation requirements much like New Mexico's--as time, place, and manner regulations. In so doing, the Court has effectively overruled some of the earlier decisions and has cast doubt upon the validity of others.[57] In sum, the Court's practice, unlike that of lower courts in the past, strongly suggests that a state election law will be considered a manner regulation unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.

The decision to employ the qualifications clauses only sparingly makes good sense. They are a blunt weapon: Once a court determines that a restriction creates a qualification, it must automatically invalidate the offending provision. It has no discretion to permit a qualification, even one with salutary characteristics. By contrast, analyzing a provision as a manner regulation allows a court more flexibility. Even though a state may regulate the manner of congressional elections pursuant to Article I, Section 4, such a regulation, of course, may not discriminate against political minorities or chill the protected speech of candidates or voters in violation of the First and Fourteenth Amendments. Thus, in accord with contemporary Supreme Court jurisprudence, when evaluating a manner regulation, a court must balance the good created by that measure against any potential or actual harm the measure might cause.

In sum, the Supreme Court has preferred using the man- ner regulation rubric to a qualifications analysis--employing a scalpel rather than a mallet--when reviewing state-enacted election regulations. This observation of the Court's trends and preferences bodes well for term limits and suggests that they will more likely be treated as manner restrictions.

Invidious Potential. Finally, one could classify a restriction as either a qualification or a manner regulation based upon the evils that might follow from its abuse. In the drafting of Article I and the adjudicating of subsequent qualification and manner regulation cases, the Framers of the Constitution and the Supreme Court have shared a common hope of fostering fair and open elections. Abuse of the power to set qualifications, however, presents a very different threat to that hope than the threat posed by abuse of state-imposed manner regulations. If the Congress were allowed to set its own qualifications for membership, it might be tempted to use that power for self-aggrandizement or self-perpetuation. By contrast, if a state were to abuse its power to regulate the manner of congressional elections, the result would be discrimination against a class of voters or potential candidates.

The Framers' debates at the Federal Convention demonstrate that the qualifications clauses were drafted and had been construed out of a fear of congressional self-aggrandizement. After a lengthy discussion, the delegates rejected a proposal to allow the Congress to set additional qualifications.[58] They refused to give the Congress such power largely out of 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, . . . the future elections might be secured to their own body."[59] Similarly, James Madison warned that to give the Congress the authority to set additional qualifications would vest "an improper and dangerous power in the Legislature."[60]

In Powell, the Supreme Court, too, was concerned that a Congress with the power to augment the constitutionally enumerated qualifications might wield it for self-insulation and aggrandizement rather than for promotion of the common good. The Court's review of our constitutional history in that decision clearly impresses upon the reader the likelihood of congressional abuse. In fact, the Court concludes its 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."[61]

By contrast, when a state regulates the manner of a congressional election, the potential for legislative self-insulation and aggrandizement is present only indirectly, if at all. To enact manner regulations that favored current incumbents, a temporary majority in the Congress would have to solicit support from a majority of state legislatures. 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 sentiment continues to vary widely among the states, any faction in the Congress will encounter extreme difficulty when attempting to insulate itself using state election regulations.

This is not to say, however, that a majority in any given state legislature will not try to ensure that its congressional 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 delegation. Self-replication, however, is distinct from self-perpetuation, and the former has historically, at least, proven to be tolerably restrained by our nation's diversity. Accordingly, the Supreme Court has used an equal protection and/or First Amendment analysis to measure the constitutionality of state-imposed manner regulations. Instead of searching for legislative self-aggrandizement, the Court has looked to see if the manner regulations impermissibly classify, discriminate against, or encroach upon rights of expression or association.

To the extent that a term limit can be judged either a qualification or a manner regulation by virtue of its invidious potential, it 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 that a congressional term limit might:

* level the playing field in an election process that otherwise provides incumbents with practically insurmountable advantages;

* ensure that elected representatives truly represent and are representative of the community that elected them;

* prevent corruption in office; and

* broaden opportunities for participation in public service.

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. Nevertheless, as it does with all manner regulations, a court should evaluate carefully whether a term limit unduly discriminates against long-term incumbents or frustrates the expressive and associational rights of incumbents or voters. In sum, with respect to the mischief it could work, a term limit fits squarely within the category of manner regulations.

Summary

We have seen that the question of whether a term limit is labeled a qualification or a manner regulation determines its constitutional viability under Article I. Bearing that in mind, we have examined a variety of grounds on which one might distinguish between a qualification and a manner regulation. We have rejected superficial distinctions based upon severity or directness as unsustainable given current case law. Instead, we have argued that distinctions based upon judicial concerns and a regulation's invidious potential present the soundest way to capture the difference between manner restrictions and qualifications. That said, we have gone on to show that under either of those rubrics a term limit can be properly understood only as a manner restriction.

Beyond Article I: First and Fourteenth Amendment Objections

If a term limit is indeed considered a manner regulation, opponents are left to search for other constitutional objections. The only other textual provisions offering any serious hope for thwarting a term limit, however, are the speech and associational rights embodied in the First Amendment and the equal protection concerns found in the Fourteenth Amendment. Yet a careful application of those provisions, as we shall see, provides long-term incumbents very little quarter.

Standard of Review

Any discussion of a free speech or equal protection challenge to a term limit regulation must begin by ascertaining just how closely a reviewing court is likely to examine the regulation: will it "strictly scrutinize" the limit initiative or merely check to see if it is "reasonable"? Although the Supreme Court's jurisprudence regarding appropriate standards of review has been widely criticized by academics of all stripes, the utility of determining how a court will examine a regulation cannot be minimized. The standard of review employed by a court in the First and Fourteenth Amendment

contexts has, to date, nearly always foreshadowed its disposition on the merits: the stricter the scrutiny applied, the more likely a measure is to fail.

In 1983 in Anderson v. Celebrezze,[62] the most recent pronouncement on the standard of review for election regulations, the Supreme Court set forth guidelines that augur well for a term limit. Making plain that it does not demand a "strict" review of most election regulations, the Court stated that lower courts need only conduct a general balancing of all interests involved. Specifically, it instructed courts to (1) assess the asserted burdens upon the First and Fourteenth Amendment rights of candidates and voters, (2) evaluate the interests put forward by the state as justifi- cations for imposing those burdens, and (3) consider whether the burdens are necessary to achieve the state interests.

Burdens on Incumbents

Following the Anderson test, we begin by examining the burdens placed on incumbents by term limit legislation. It seems likely that incumbents will make three distinct arguments based on the First and Fourteenth amendments: first, that a term limit infringes upon their "fundamental right" to run for office; second, that it creates an indefensible classification, discriminating against long-term officeholders; third, that it encroaches upon their right to speak and associate by limiting their ability to run for office. As we shall see, however, none of those arguments is persuasive.

In 1968, when the Supreme Court first struck down a ballot access regulation, it did so on the ground that the regulation inappropriately discriminated against minority party candidates.[63] In the wake of that decision, some commentators suggested that the Court was prepared to announce --or already had announced--that there is a "fundamental right" to run for office rendering all regulation of that right subject to a searching form of scrutiny.[64] Those suggestions proved misguided, however, as in 1972 the Court made plain that it had not recognized any such right.[65] More recently, in Clements v. Fashing,[66] the Court put to rest any doubt about the potential viability of a "fundamental right" to candidacy when it held that restrictions on candidacy need bear only a rational relationship to a legitimate state end. Thus, it seems evident that any challenge to a term limit on this basis is likely to fall on deaf ears.[67]

Likewise, the argument by incumbents that a term limit impermissibly discriminates against them as a class will almost assuredly fail. The Court has found that when states enact election laws discriminating against poor[68] and minority party[69] candidates, strict protections under the equal protection clause are warranted. To date, however, it has found no other groups that qualify for such treatment; moreover, in other contexts, the Court has generally declined to find new classes or groups deserving of heightened protection.

Incumbents, of course, would have a hard time convincing a court that they fit within the two suspect classifications firmly established by the Supreme Court. Congressional incumbents are largely a group of white (93 percent),[70] males (95 percent),[71] who also happen to be disproportionately rich (11 percent of the House are millionaires, and 26 percent of the Senate also enjoy this status)[72]; it would be ironic at the very least were they to plead successfully for protection under a constitutional clause initially intended to serve newly freed slaves.

Despite the irony of it, incumbents have not been dissuaded from pressing classification-based claims. In Clements v. Fashing,[73] for example, incumbent officeholders specifically argued that a provision preventing some of them from seeking another elective office until the terms of their present posts had expired improperly discriminated against them as a class. This "serve your term" provision, they claimed, unconstitutionally disabled them from running for office over periods as long as two years. The Court quickly dismissed this argument, calling a two-year waiting period a "de minimis burden."[74] The four-year exclusion from the printed ballot required by our term limit proposal seems hardly more substantial--especially given the availability of the write-in campaign (something unavailable to the incumbents in Clements).

Moving to the speech-related burdens upon incumbents, we again examine Clements. There the Court considered whether a "serve your term" provision or another measure requiring certain elected officials to resign their office before seeking another (known as a "resign to run" regulation) violated the First Amendment.[75] Although both measures precluded many elected officials from becoming candidates, a majority of the Court noted that

> [They] in no way restrict appellees' ability to participate in the political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. . . . [A]ppellees may distribute campaign literature and may make speeches on behalf of a candidate.[76]

Thus, the Supreme Court found that whatever First Amendment rights elected officials enjoy, they do not necessarily include an unfettered right to candidacy. 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 [those] this Court has upheld" in Letter Carriers and Broadrick.[77] As with civil servants, the speech and activities of elected officials may be curtailed rather substantially, even so far as to preclude participation in future elections under certain conditions. While it may be interesting to speculate about just how far states may go in burdening the speech activities of their elected officials, a term limit seems safely within the constitutional limits established by Letter Carriers whose severe restrictions were discussed previously.

Burdens on Voters

We now turn to consider the impact a term limit might have on voters. Unlike candidacy, the opportunity to vote has been deemed a "fundamental right" under the equal protection clause.[78] The relevant questions thus become: What are the contours of this fundamental right, and how does this right affect the term limit we propose?

One might initially and intuitively imagine that the right to vote requires states to allow voters to express their preference for any individual they wish. Under this view, a term limit might at first glance appear problematic to the extent that it prevents voters from selecting long-term incumbents who have exceeded their allotted terms. The limit we propose, however, overcomes this objection with its addition of a write-in provision. Simply put, no voter is precluded from expressing a preference for any candidate, including a long-term incumbent; he need only write in the candidate's name.

That said, the Supreme Court has recently indicated that the fundamental right to vote is far more limited than one might first imagine. In Burdick v. Takushi,[79] the Court considered a voter's challenge to a Hawaiian election regulation banning all write-in candidacies. Finding no fundamental right to vote for any individual one wishes and noting that the state provided ample means for interested candidates to obtain a spot on the printed ballot, the Court held Hawaii's ban to be perfectly acceptable.[80]

If the right to vote does not necessarily encompass a write-in ballot and the concomitant opportunity to choose any candidate in the general election, what does it mean? The likeliest view is that it simply prohibits states from discriminating against a particular individual or group in providing access to the franchise and from diluting the effectiveness of the votes of disfavored individuals or classes. All voters and votes must be treated equally. This view of the right was espoused by the court of appeals in Burdick[81] and satisfactorily explains the case law developed to date.[82] Of course, a term limit--even one without a write-in provision--poses no threat to this view of the right: all voters are treated alike in their inability to find the twelve-year incumbent on the ballot.

To summarize, Burdick makes plain that the right to vote does not encompass the right to choose any individual one wishes; consequently, a term limit that removes an incumbent from the ballot poses no immediate problems for voters' rights. Indeed, term limit legislation that includes a write-in provision may afford voters more protection than the First and Fourteenth Amendments themselves require.

The State's Interest

We now consider the state interests advanced by a term limit that, under the Anderson test, must be balanced against the rights of incumbents and voters. As mentioned, proponents have suggested that four objectives might be promoted through a term limit: a level electoral playing field, prevention of corruption in office, truly representative elected representatives, and broadened opportunities for participation in public service.

Courts have found that a state has rational--even compelling--interests in pursuing these goals. In Austin v. Michigan Chamber of Commerce,[83] 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. Upholding the regulation, the Court recognized that it placed a significant burden on corporate speech but emphasized that it was an important 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 may unfairly influence elections."[84] In other words, a state has a valid, even significant, interest in preventing corruption and unfair influence in the electoral process.

Promoting representativeness in government has also been sanctioned by the Supreme Court. Upholding the Clements "resign to run" statute, the Court found that states have a legitimate interest in preventing state officeholders from making decisions that might advance their own political ambitions rather than the public good.[85] Lower courts faced with the application of the resign-to-run statutes against candidates for federal office have come to exactly the same conclusion.[86]

The concern with representativeness was also an impetus behind many of the ballot access regulations. Afraid that latecoming independent candidates are often prompted "by short-range political goals, pique or personal quarrel," courts have reasoned that ballot access regulations excluding such candidates from the ballot help prevent the "bleed[ing] off [of] votes" from candidates that command a more popular support.[87]

The rationality of an attempt to limit the effects of an entrenched incumbency and broaden political opportunity also finds support in federal and state constitutions. The Twenty-second Amendment limiting presidential terms, like state provisions capping the tenure of governors, is powerful testimony that term limitation is indeed sound public policy.

Interestingly, state constitutional limits on gubernatorial terms have been challenged under the equal protection clause of the federal Constitution in much the same fashion as a congressional term limit might be.[88] Such limits have been universally upheld, with courts acknowledging that states have a significant interest in both eliminating "[t]he power of incumbent officeholders to develop networks of patronage" and assuaging "fears of an entrenched political machine which could effectively foreclose access to the political process."[89] Also important, they have been deemed to help "stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election."[90] Because these provisions have been deemed inoffensive to the First and Fourteenth Amendments of the federal Constitution, there is good reason to believe that a congressional term limit would also pass muster.

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.[91] It explicitly re quires the "weighing [of] all the factors"[92] to determine whether a challenged provision is constitutional.

On one end of the balance, the burden of a term limit on First and Fourteenth Amendment rights does not seem great. The right to candidacy has been construed narrowly; essentially, courts try to guard against regulations creating classifications based only upon wealth or 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, after Burdick, a term limit will have little or no impact on the right to vote because all voters will have equal difficulty in voting for a long-term incumbent.

On the other side of the balance, a term limit promotes strong societal interests. The hope of maintaining a representative democracy and limiting the influence of unfair electoral advantages has 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 First and Fourteenth amendment grounds looks very promising for term limit proponents.

Conclusion

Term limits raise substantial questions about our notions of citizenship and representative democracy. They signify a dramatic rejection of the legislative scheme that has emerged over the course of the twentieth century, with its dependence upon seniority, rank, and the professional congressman. However, we do not purport to provide any

answers to the questions term limits raise about democratic theory. Rather, we write only to dispel a myth that has distracted attention from such central concerns: that the enactment of a term limit is futile because a court will quash it as unconstitutional.

As discussed, the absence of a term limitation provision in the Constitution hardly bespeaks an intention on the part of the Framers to foreclose the subsequent legislative imposition of term limits by the states. Article I doctrine, upon which term limit opponents rely so heavily, indicates that a limit is more likely to be deemed a constitutional manner restriction than an inappropriate qualification restriction. Moreover, the First and Fourteenth Amendment guarantees offer incumbents little hope.

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

Notes

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[1] Gloria Borger, "Can Term Limits Do the Job?" U.S. News & World Report, November 11, 1991, p. 34.

[2] "Term Limits: The Talk of the Town," The Hotline, Octo ber 21, 1991.

[3] Article XVIII, section 9[1], of the Colorado Constitu tion provides 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 shall serve more than six consecutive terms in the United States House of Representatives. . . . Terms are considered consecutive unless they are at least four years apart.

[4] 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 man date. As of 1982, four write-in candidates had won congres sional seats. See Facts on File World News Digest (available in Lexis), November 5, 1982.

[5] See, for example, Steven Greenberger, "Democracy and Congressional Tenure," DePaul Law Review 41 (1991): 37, 38.

[6] C. Rossiter, ed., The Federalist Papers no. 51 (New York: 1961), p. 322 (J. Madison).

[7] Pennsylvania Constitution of 1776, Chapter II, section 8; see also Virginia Constitution of 1776, paragraph 4 (cre ating a rotation system for the senate).

[8] Articles of Confederation, Article V, clause 2.

[9] See Jonathan Elliot, ed., The Debates on the Adoption of the Federal Constitution (Philadelphia: J. P. Lippincott Co., 1836), vol. 5, p. 127. [hereinafter Elliot's Debates].

[10] Ibid., at 137.

[11] See Max Farrand, ed., The Records of the Federal Conven tion of 1787 (New Haven, Conn.: Yale University Press, 1966), vol. 1, p. 217.

[12] See Elliot's Debates, vol. 5, at 241-45.

[13] Ibid., at 224-26.

[14] Ibid., at 358-68.

[15] John Adams, The Political Writings of John Adams, G. Peek, Jr., ed. (New York: Macmillan, 1985), p. 134.

[16] Madison 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." The Federalist Papers no. 53 (New York: C. Rossiter, ed., 1961), p. 359 (J. Madison). Madison clearly envisioned, however, that most of the seats would be continually occupied by new members. Contrasting the con tinual reelection of the delegates to the Continental Con gress chosen by their state legislatures with the proposed popularly elected representatives in the House, he argued: "their re-election is considered by the legislative assem blies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle." (Emphasis added) Ibid.

[17] See Philip Kurland and Ralph Lerner, The Founders' Con stitution (Chicago: University of Chicago Press, 1987), vol. 2, p. 51 (hereinafter Founders' Constitution).

[18] Elliot's Debates, vol. 5, at 225.

[19] See Article I, section 3 ("Immediately after [the Sena tors] shall be assembled in Consequence of the first Elec tion, 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").

[20] Elliot's Debates, vol. 5, at 224-25 ("[i]n order to pre vent the inconvenience of an entire change of the whole number [of Senate members] at the same moment, [Mr. Dickin son] suggested rotation, by an annual election of one third").

[21] In the Massachusetts ratification debates, Mr. Ames ar gued that although "the 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." Elliot's Debates, vol. 2, at 46-47.

[22] Article I, Section 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 Regula tions, except as to the Places of chusing Senators").

[23] See Kurland and Lerner, Founders' Constitution, p. 251.

[24] See Elliot's Debates, vol. 5, 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").

[25] Elliot's Debates, vol. 3, at 485. Patrick Henry like wise lamented that "[t]he only semblance of a check is the negative power of not reelecting 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." Elliot's Debates, vol. 3, at 167.

[26] Commenting on the proposed Constitution in a letter to James Madison, Jefferson wrote, "[another] feature I dis like, and strongly dislike, is the abandonment, in every instance, of the principle of rotation in office." H. A. Washington, ed., The Writings of Thomas Jefferson (1853), vol. 2, p. 330.

[27] Of course, there were also some Framers of the Constitu tion who adamantly opposed the principle of rotation. For example, Alexander Hamilton remarked that "in contending for rotation, the gentlemen carry their zeal beyond all reason able bounds. I am convinced that no government, founded on this feeble principle, can operate well." Elliot's Debates, vol. 2, at 320. Speaking against rotation for the presiden cy, Gouverneur Morris argued that "[i]t formed a political school, in which we were always governed by the scholars, and not by the masters." 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." Elliot's Debates, vol. 5, at 366-67.

[28] See John H. Fund, "Term Limitation: An Idea Whose Time Has Come," Cato Institute Policy Analysis no. 141, October 30, 1990, p. 3.

[29] This was apparently the result of an informal agreement with his political rivals. Such agreements were common and evidenced a vigorous party system. See ibid., p. 4.

[30] See ibid.

[31] Trudy Pierce, Term Limitation: The Return to a Citizen Legislature (Washington: Citizens for Congressional Reform Foundation, 1991), p. 14.

[32] See ibid.

[33] 395 U.S. 486 (1968).

[34] See, for example, John C. Scully, "Congressional Term Limitation--It's Constitutional for the States to Act" (Washington Legal Foundation) (on file with authors).

[35] United States v. Darby, 312 U.S. 100, at 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered").

[36] Powell, at 522.

[37] The Supreme Court declined to discuss whether Article I, section 3, clause 7, which authorizes the disqualification of any person convicted in an impeachment proceeding; Arti cle I, section 6, clause 2, which prohibits a person "hold ing any Office under the United States" from being a "Member of either House during his Continuance in Office"; and Sec tion 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 I, section 5. See Powell, at 520.

[38] 415 U.S. 724 (1974).

[39] Ibid., at 746, note 16.

[40] Ibid., at 730.

[41] Rep. Jim Kolbe (R-Ariz.), in a recent editorial piece, argued that manner regulations involve only "election proce dures," while the qualifications clause governs the "sub stance of office-holding." See Jim Kolbe, "Term Limits Are Unconstitutional," Wall Street Journal, February 13, 1992, p. A19. Kolbe claims that term limits affect the substance of officeholding and he therefore believes that they are unconstitutional qualifications. Like many others who dis tinguish between substance and procedure, however, Kolbe ne glects 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 as much as anything, we eschew the "substance" and "procedure" labels and instead discuss the distinction as one based upon severity.

[42] Storer, at 758 (Brennan, J., dissenting).

[43] Ibid.

[44] 5 U.S.C. section 7324(a)(2).

[45] Section 733.121(6). The Hatch Act may technically per mit independent candidacies, but in prohibiting any engage ment in partisan fundraising or party activities, it pre vents individuals from participating in aspects of political life crucial to mounting an effective campaign, even as an independent. Thus, what it gives with one hand, it takes away with the other.

[46] 330 U.S. 75 (1947).

[47] See Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973); Hobbs

v. Thompson, 448 F.2d 456 (5th Cir. 1971); Gray v. Toledo, 323 F.Supp. 1281 (N.D. Oh. 1971); Bagley v. Washington Town ship Hosp. Dist., 65 Cal.2d 499, 421 P.2d 409 (1966); Minielly v. State, 242 Ore 490, 411 P.2d 69 (1966).

[48] 413 U.S. 548 (1973). The Supreme Court also upheld an Oklahoma statute that essentially imposed the Hatch Act's prohibitions upon Oklahoma state employees. See Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[49] In Davis v. Bandemer, 478 U.S. 109 (1986), the Supreme Court declared an enormously high standard for stating a cognizable equal protection cause of action in political gerrymandering cases: plaintiffs have to prove both inten tional discrimination and a pattern of discriminatory im pact. 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 inevita bly has and is intended to have substantial political conse quences." Gaffney v. Cummings, 412 U.S. 735, 753 (1972); see also Badham v. Eu, 109 S.Ct 829 (1989).

[50] 637 F.2d 853, 858-60 (2d Cir. 1980).

[51] Ibid., at 859.

[52] 385 U.S. 116 (1966).

[53] Indeed, district and state courts have summarily stricken state election restrictions as impermissible addi tional qualifications when those regulations created un avoidable similarities to the three constitutionally enumer ated qualifications. See Exon v. Tiemann, 279 F.Supp. 609, 613 (D. Neb. 1968) (overturning district residency require ments for representatives because "[s]tates have no authori ty to add qualifications to those set forth in Article 1, Section 2"); State ex rel Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968) (same); Hellman v. Collier, 217 Md. 93, 98, 141 A.2d 908, 911 (1958) (same); State v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (concluding that state constitution cannot modify the eligibility criteria for the Senate).

[54] See, for example, Colorado Constitution, Article XVIII, section 9(1) ("This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991").

[55] See, for example, Stockton v. McFarland, 56 Ariz. 138, 106 P.2d 328 (1940) (state judge not eligible for federal office); Buckingham v. Killoran, 42 Del. 405, 35 A.2d 903 (1944) (state judges forbidden from running for other posi tions until six months after the expiration of their term); Handley v. Superior Court of Marion County, 238 Ind. 421, 151 N.E.2d 508 (1958) (governor not eligible for U.S. Sen ate); Sundfor v. Thorson, 7 N.D. 246, 6 N.W.2d 89 (1942) (candidate defeated in primary not eligible to run for same office in general election); Riley v. Cordell, 200 Okla. 390, 194 P.2d 857 (1948) (state supreme court justice not eligible to run for nonjudicial position); In re Opinion of the Judges, 79 S.D. 585, 116 N.W.2d 233 (1962) (governor and lieutenant governor not eligible for other office during term); Chandler v. Howell, 104 Wash. 99, 175 P.2d 569 (1918) (state judge not eligible for other office); Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946) (same).

[56] See Dillon v. Fiorina, 340 F.Supp. 729 (D.N.M., 1972).

[57] Storer at least implicitly overruled the cases cited in note 55 that struck down as qualifications provisions re quiring a period of party affiliation. Likewise, Williams v. Tucker casts serious doubt on Dillon v. Fiorina. Final ly, Clements v. Fashing suggests the cases cited in note 55, which strike down as qualifications resign-to-run statutes, are also incorrect.

[58] Elliot's Debates, vol. 5, at 391, 377-78, 402-04.

[59] Ibid., at 404.

[60] Ibid.

[61] Ibid., at 547-48.

[62] 460 U.S. 780 (1983).

[63] Williams v. Rhodes, 393 U.S. 23 (1968).

[64] See, for example, Note, Southern California Law Review 45 (1972): 996, 1009; Note, University of Chicago Law Review 40 (1973): 357, 367.

[65] See Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Clements, at 963 ("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'") (citations omitted).

[66] Clements, at 963.

[67] The Supreme Court has even received some support from the academic community for its refusal to extend "fundamen tal rights" analysis to candidacy. See, for example, "De velopments in the Law: Elections," Harvard Law Review 88 (1975): 1117, 1135, n. 81. Laurence H. Tribe, American Constitutional Law, 2d ed. (Mineola, New York: Foundation Press, Inc., 1988), p. 1098 at note 5 ("[T]here is something more than faintly odd, even in a country boasting that any one 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").

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

[69] See Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724 (1974); American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Tucker, 393 U.S. 23 (1968).

[70] See Susan B. Glasser, "GOP Says Number of Black, His panic Seats Should Double to 68, but 44 More Realistic," Roll Call, April 29, 1991.

[71] See Matthew Cossolotto, "True Democracy Requires Chang ing Hill Election System," Roll Call, December 2, 1991.

[72] See Jeffrey Berman, "Filings Reveal 51 Members of House Qualify for Millionaires Club," Roll Call, July 15, 1991; Craig Winneker and Jeffrey Berman, "More Than a Quarter of the Senate Qualifies for Millionaires' Club," Roll Call, June 20, 1991.

[73] 457 U.S. 957 (1982).

[74] Ibid.

[75] Ibid., at 967.

[76] Ibid., at 972.

[77] Ibid.

[78] See Reynolds v. Sims, 377 U.S. 533 (1964).

[79] 1992 LEXIS 3404 (1992).

[80] Ibid.

[81] Burdick v. Takushi, 927 F.2d 469, 473 (9th Cir. 1991) ("Burdick does not have a fundamental right to vote for a particular candidate; he is simply guaranteed an equal voice in the election of those who govern").

[82] Courts have stepped in to protect the right to vote in two scenarios, both of which evidence their concern that no voter have a greater voice at the polling place than any other. They have struck down state attempts to impose voter qualification regulations discriminating against a particu lar group's access to the franchise. See, for example, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (poll tax violates equal protection clause); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (con ditioning right to vote in school board elections on proper ty ownership is impermissible). Likewise, they have inter ceded when states attempt to dilute the effectiveness of the votes of a particular class. See, for example, Reynolds v. Sims, 377 U.S. 533 (1964) (bicameral legislature must be apportioned on a population basis).

[83] 110 S.Ct. 1391 (1990).

[84] Ibid., at 1397-98.

[85] Clements, at 957.

[86] See, for example, Signorelli v. Evans, 637 F.2d 853 (1980).

[87] See, for example, Storer, at 735-36.

[88] See, for example, State ex rel. Maloney v. McCartney, 223 S.E.2d 607 (W.Va. 1976), app. dism. sub nom. Moore v. McCartney, 425 U.S. 946 (1976); Maddox v. Fortson, 172 S.E.2d 595 (Ga. 1970).

[89] Maloney, at 611.

[90] Ibid.

[91] Anderson, at 789-90.

[92] Ibid.

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