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NOTE

A CHOICE APPROACH TO THE CONSTITUTIONALITY OF TERM LIMITATION LAWS

INTRODUCTION

Whatever else they signify, elections are about choice. Ross Perot's electronic town halls notwithstanding, there is little doubt that the Constitution institutes voting as the primary means by which citizens choose their government. Additionally, the electoral process is the overriding concern of most of the post-Bill of Rights constitutional amendments¹ and of a large body of constitutional case law.

As states continue to pass laws limiting the terms of their congressional representatives,² the issue of voter choice is at the fore again.³ Many commentators have attempted to show that term limitations promote values essential to constitutional democracy.⁴ This Note suggests that as interesting as such arguments are as a matter of policy,⁵ they miss the constitutional point. Though variants of

¹ Eleven of the sixteen post-Bill of Rights amendments deal expressly with voting or elections.

² In the November 1992 general elections, term limitation initiatives passed in Arizona, Arkansas, California, Florida, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming. Robert Reinhold, *Move to Limit Terms Gathers Steam After Winning in 14 States*, N.Y. TIMES, November 5, 1992, at B8.

³ For a summary of the recent history of the term limitation movement, see Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L. REV. 1913, 1915-20 (1992).

⁴ See, e.g., F. Paul Calamita, *Solving the Voters' Dilemma: The Case for Legislative Term-Limitation*, 8 J.L. & POL. 559, 561 (1992) (arguing that term limitations "will further the goals of our representative democracy as envisioned by the Framers of the Constitution"); Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991) (defending the constitutionality of a modified term limitation proposal); Cleta D. Mitchell, *Limiting Congressional Terms: A Return to Fundamental Democracy*, 7 J.L. & POL. 733 (1991); James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1, 3 (1991) (arguing that "elimination of the reelection incentive will improve representative legislation"). But see Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL L. REV. 37 (1991) (responding to James C. Otteson, *supra*, that term limitations will upset the balance of power); cf. Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 496-510 (1992) (using game theory to show that term limits encourage legislators to consider their own and special interests at the expense of constituent interests).

⁵ For a summary of the policy arguments for and against term limitations, see Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155, 156-62 (1991).

the concept of representation abounded at the time of the Constitutional Convention of 1789, the Constitution itself does not require a choice between these particular views. Instead, the Constitution mandates only that citizens be allowed to choose their representatives with as few infringements as possible.

Consequently, courts examining the constitutionality of congressional⁶ term limitations should frame the issue in terms of voter choice. This Note argues that when examined in the light of the Framers' social contract theory, the Constitution requires the maximum amount of substantive voter choice. Because term limitations diminish the substantive range of voter choice by excluding the class of incumbents, courts should hold such laws unconstitutional.⁷ Today's voters may not constitutionally choose to limit the substance of their future choices.⁸

Part I of this Note demonstrates that *substantive* voter choice is rooted in the democratic political theory of the Framers and shows how the Constitution institutes choice through legislative elections. Part II argues that the Constitution harmonizes with this theory by explicitly articulating the limited qualifications for representatives. This reading finds support in the case law interpreting the Qualifications Clauses.⁹ These cases hold that while state legislatures and Congress may regulate the *procedure* of congressional elections, they may not impose additional *substantive* qualifications on legislative candidates. Part II reasons that because term limitations are substantive qualifications on electoral candidates, they are presumptively unconstitutional. This Note concludes that if voters want to proscribe future electoral choices, they must use the mechanism that

⁶ This Note considers only laws and amendments that limit the terms of U.S. Representatives and Senators. Courts have consistently held that the U.S. Constitution does not bar a state from limiting the terms of its state and local elected officials. *See, e.g.,* *Maloney v. McCartney*, 223 S.E.2d 607 (W. Va. 1976) (holding that West Virginia state constitutional amendment limiting governor to two terms does not violate U.S. Constitution); *Legislature of State of Cal. v. March Fong Eu*, 816 P.2d 1309 (Cal. 1991) (holding that California state constitutional amendment limiting the terms of state legislators does not violate U.S. Constitution). Whether these local term limitations violate a particular state constitution is, of course, within the sole authority of the state. For a discussion of term limitations of state officeholders, see Tiffanie Kovacevich, Note, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 PAC. L.J. 1677, 1684-97 (1992).

⁷ *See* Erik H. Corwin, Note, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 578 (1991) (concluding that the Qualifications Clauses of the Constitution prohibit states from imposing term limitations).

⁸ Of course, voters can choose to amend the Constitution to proscribe their future choice. But this involves a different species of choice. *See infra* part II.D.

⁹ The Qualifications Clauses are found at Article I, § 2, cl. 2 (qualifications for the House of Representatives) and Article I, § 3, cl. 3 (qualifications for the Senate) of the U.S. Constitution.

the Constitution provides for structural changes: the amendment process of Article V.¹⁰

I

SUBSTANTIVE ELECTORAL CHOICE AND THE LOCKEAN POLITICAL THEORY OF THE CONSTITUTION

Section A of this Part explicates John Locke's social contract theory that consent (*i.e.*, choice) legitimates democratic government. This Section posits that the constitutional value of choice derives from or at least is congruent with Lockean theory. Section B argues that the Lockean conception of consent is expressed in the electoral system of American constitutional democracy. Section C concludes that, in order for elections to fulfill their Lockean role of legitimating government, courts should read the Constitution to ensure the maximum amount of substantive voter choice.

A. The Theoretical Roots Of Choice: John Locke and the Role of Consent in Ensuring Governmental Legitimacy

1. *The Elements of Locke's Social Contract Theory*

"[T]he legitimacy of the United States government—that is, its rule by right rather than by force—rests on the consent of the governed."¹¹ John Locke is often associated with this linking of legitimacy and consent. He articulates this social contract theory in his *Second Treatise of Government*.¹²

Locke begins by positing humans in a pre-political "state of nature."¹³ Persons in the state of nature have "*perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit."¹⁴ Because the state of nature is "a *State also of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another. . . , Creatures of the same species . . . should

¹⁰ See Brendan Barnicle, Comment, *Constitutional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415, 435-36 (1992) (arguing that because term limitations are unsupported by the original intent of the Framers, they may only be enacted by a constitutional amendment).

¹¹ James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192 (1990).

¹² JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 198.

¹³ *Id.* §§ 4-15. "The Law of Nature," *i.e.*, natural law, establishes the conditions of persons in Locke's state of nature. *Id.* § 6. The Law of Nature is synonymous with the Law of Reason, and reason is the key to discovering the particulars of natural law. *Id.* Reason is available to all "who will but consult it." *Id.* § 4. In other words, reason is a natural attribute of individuals. Persons in the state of nature have "*perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit." *Id.* This represents the individual's natural liberty. Persons have equivalent natural rights: no one has a right to more liberty than is consistent with another's. *Id.*

¹⁴ *Id.* § 4.

also be equal one amongst another without Subordination or Subjection. . . ."¹⁵ It follows that in this pre-political condition no person has the moral right to subordinate another.

A government, which subordinates an entire group of free individuals, must therefore justify its exercise of power over these persons in order to claim moral legitimacy.¹⁶ According to Locke, the sole principle that justifies a government's power is consent: "[t]he only way whereby any one devests himself of his Natural Liberty, and *puts on the bonds of Civil Society* is by agreeing with other Men to joyn and unite into a Community."¹⁷ Political theorists often describe this agreement using the metaphor of a social contract. Like a contract for the sale of goods, both parties must manifest consent to the social contract, and each party can exercise only the rights specified in its terms.¹⁸ Just as a defect in consent vitiates a sales contract, a defect in the people's consent to the social contract undermines the legitimacy of the government.

¹⁵ *Id.*

¹⁶ *Id.* § 199.

¹⁷ *Id.* § 95. Consent can be hypothetical or actual. If Locke means merely that persons need only hypothetically consent to government, consent will have little bearing on real-world elections and term limitation laws. John Rawls' liberal theory of justice, which he calls "justice as fairness," provides an example of hypothetical consent. See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971). Rawls' version of the state of nature, the original position, "is not . . . thought of as an actual historical state of affairs . . . It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice." *Id.* at 12 (footnote omitted).

When considering what the particulars of a system of government would be under Rawls' theory, an analyst can step into the original position at any time, and use it to determine principles of justice. Therefore, "the consent conjured up in the original position can be purely hypothetical." Jerry Weinberger, *Liberalism, Constitutionalism, and the Rediscovery of the State of Nature*, in *THE REVIVAL OF CONSTITUTIONALISM* 24 (James W. Muller ed., 1988). For Rawls, a government is legitimate if a hypothetical individual in the original position *would* rationally consent to it. Governmental legitimacy does not depend upon a real individual's actual consent. RAWLS, *supra*, at 136-42.

For Locke, though, a real individual must actually (or tacitly) consent to government for the government to have legitimate power over that individual: ". . . all Men are naturally in [the state of nature], and remain so, till by their own Consents they make themselves Members of some Politick Society." LOCKE, *supra* note 12, § 15. This follows from Locke's conception of the natural rights of persons. A person has no natural right to dominate another, but she does have the right to make compacts. *Id.* §§ 4, 95. The only way a government (*i.e.*, a group of persons) can exercise power consistent with respecting an individual's rights is with the individual's consent. No person has the right to consent for another, and therefore the consent must be actual. See Weinberger, *supra*, at 1. Only a consented-to government can legitimately subordinate free individuals.

¹⁸ For an interesting discussion of the relationship between the social contract and the sales contract in the work of Lon L. Fuller, see generally James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371 (1993).

2. *The Lockean Constitution*¹⁹

This Note adopts James A. Gardner's conclusion that "whatever else it may encompass, the Constitution reflects a theory of popular sovereignty in which governmental legitimacy is based on the consent of the governed . . . [and] this theory is essentially Lockean."²⁰ Professor Gardner observes that recently some historians have reexamined the intellectual influences upon the Framers.²¹ There is little debate, however, about the proposition that Locke's ideas were in the *Zeitgeist* during the American Revolution and at the time of the drafting of the United States Constitution.²² The writings of the Framers—including Thomas Jefferson, John Jay,²³ James Madison, Alexander Hamilton, and James Wilson—all evince the elements of a Lockean theory of consent.²⁴

Regardless, the argument of this Note does not turn upon the details of the debate among intellectual historians about which philosophical strains were preeminent influences upon the Framers. Courts, not historians, decide cases and this Note demonstrates that the case law interpreting the Qualifications Clauses displays a predominantly Lockean value of choice.²⁵

¹⁹ This phrase comes from Gardner, *supra* note 11.

²⁰ *Id.* at 200. Gardner argues that we should read the Constitution as embodying a Lockean theory of election laws. For Gardner, elections are important because they "play a significant role both in implementing popular sovereignty and in mediating governmental legitimacy by enhancing electoral accuracy." *Id.* at 192.

²¹ *Id.* at 193-95. Gardner explains that

[t]here has been an explosion of scholarly rethinking of the ideological origins of the Revolution and its two main documents, the Declaration of Independence and the Constitution. Historians and philosophers have identified a wide variety of significant influences on the revolutionary generation that are said to stand independently alongside, or contradict entirely, the ideas of Locke.

Id. at 193. The historical question of what ideas influenced a particular event is unsolvable. This is especially true when the event involves many diverse individuals, as did the framing of the Constitution. Whether Lockean ideas directly influenced the Framers is not essential for the argument of this Note, however. With Gardner, this Note argues only that the Constitution reflects the outlines of Locke's consent theory.

²² See, e.g., CARL BECKER, *THE DECLARATION OF INDEPENDENCE 27-28* (1922). Gardner observes that "[t]he historical record brims with evidence that the framers embraced an essentially Lockean theory of popular sovereignty." Gardner, *supra* note 11, at 209.

²³ Jefferson and Jay were not among the delegates to the Constitutional Convention of 1789, see 1787: *DRAFTING THE CONSTITUTION* 21-25 (Wilbour E. Benton ed., 1986) [hereinafter *DRAFTING THE U.S. CONSTITUTION*] (Jay was appointed a delegate but declined to serve, while Jefferson was in Europe at the time), but the writings of both men were important influences upon the delegates.

²⁴ See Gardner, *supra* note 11, at 209.

Id. at 193.

²⁵ See *infra* part II.A.

B. Elections Are the Means By Which Citizens Consent to Government

1. *Elections as a Present-Day Manifestation of Choice*

The real-world equivalent of the Lockean idea of consent is the value of choice expressed in the Constitution's provisions dealing with elections and representation. Most people intuitively connect consent and the election of representatives,²⁶ but this linkage also has an important theoretical role in the Lockean social contract. According to Locke, the people's choice of a form of government is itself a sovereign act.²⁷ The ratification of the Constitution is a perspicuous example of such an act: the citizens of the confederated states formed the United States by electing state convention delegates to approve or disapprove of the proposed Constitution.²⁸ The link between consent and adoption of a government is particularly clear because the choice to form the United States was a discrete event—the product not of evolution but of revolution. Citizens²⁹ could choose whether or not to adopt the proposed new form of government embodied in the Constitution; ratification was not a foregone conclusion.³⁰ Thus, the adoption of the United States Constitution was an act of electoral choice rather than a mere acquiescence to or grudging acceptance of an already existing government.

While the ratification of the Constitution represents a choice by an historical group of citizens, obviously no one alive today participated in that choice. Yet a citizen's sovereignty and her associated right to consent to government is not vitiated merely because she was not present at the founding of the government.³¹ Contemporary citizens can still consent to an existing government, albeit in a different sense than if they were choosing an entirely new system.

²⁶ See Gardner, *supra* note 11, at 213.

²⁷ See LOCKE, *supra* note 12, § 132.

²⁸ See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 606-30 (1928).

²⁹ The question of who was allowed citizenship at the time of the framing, and thus who could choose a form of government, is problematic for this discussion of consent. Tribe suggests that the Constitution may only represent the consent of white property owners. See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 n.2 (2d. ed. 1988); see also Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985) (arguing that because the Framers represented only a limited socio-economic group, their intent is not an authoritative source for interpreting the modern meaning of the Constitution). This Note considers whether elections in general actually represent voter choice *infra* notes 37-54 and accompanying text.

³⁰ Many noted Anti-Federalists, including Eldbridge Gerry and Richard Henry Lee, opposed the new government. See generally WARREN, *supra* note 28, at 733-80 (discussing opposition to and ratification of the Constitution).

³¹ See LOCKE, *supra* note 12, § 4.

In a republic,³² an individual usually exercises her consent to an existing government by choosing representatives to serve in that government.³³ These legislators act as the agents of citizens when making substantive governmental policies.³⁴ Though citizens retain their power to dissolve their government,³⁵ they ordinarily choose not to do so.³⁶

2. *Term Limitations and the Reality of Electoral Choice*

Critics have challenged whether elections in the political world truly represent voter choice.³⁷ These challenges take two basic forms. First, some argue that the menu of candidates in the United States is too limited to allow citizens a meaningful substantive choice. Because the candidates for a legislative seat often represent essentially the same political perspective, the argument goes, a voter cannot really choose the government.³⁸ Rather, she is just choosing between different spokespersons for the same ideas.³⁹ In the second challenge, critics argue that voters themselves are incapable or unwilling to exercise a *meaningful* choice because they are apathetic, ignorant, or alienated.⁴⁰ Instead, special interest groups herd the electorate like so many sheep to the polls, where voters blindly mark ballots without making a genuine political choice.⁴¹ On either argu-

³² A Lockean government need not be a republic. See LOCKE, *supra* note 12, § 132. But Gardner notes that "the United States is a republic, not a democracy, in which the people exercise only sovereign power and government power is exercised solely by their representatives." See Gardner, *supra* note 11, at 217 n.114 (citing THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961)).

³³ See RUTH W. GRANT, JOHN LOCKE'S LIBERALISM 201 (1987).

³⁴ See LOCKE, *supra* note 12, § 141.

³⁵ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁶ Electing legislators is a more attenuated exercise of sovereignty than choosing a new form of government. See Gardner, *supra* note 11, at 218. Even if the electorate chooses a legislative candidate who represents a radical departure from the status quo, the election of a single representative may not produce the wholesale changes that approval of a new form of government would. Nevertheless, electing legislators is still an act of sovereign consent because the voter authorizes the representative to exercise her right of choice as her agent. *Id.* at 219. In a republic, then, an individual retains her sovereign power to change the form of government if necessary. See GRANT, *supra* note 33, at 201. Usually, however, the individual only exercises a more limited form of her sovereign right of choice by choosing a representative to be her agent in the existing government. See Gardner, *supra* note 11, at 216.

³⁷ See, e.g., JOHN C. LIVINGSTON & ROBERT G. THOMPSON, THE CONSENT OF THE GOVERNED 208-40 (1963); Otteson, *supra* note 4, at 32 n.159.

³⁸ Cf. Richard Rose, *Is Choice Enough? Elections and Political Authority*, in ELECTIONS WITHOUT CHOICE 196 (Guy Herment et al., eds., 1978) (discussing elections in which all candidates are selected by the government).

³⁹ Cf. Marshall Frady, *Outsider: I-The Gift*, THE NEW YORKER, Feb. 3., 1992, at 36 (describing Jesse Jackson's characterization of the American bipartisan system as "one party with 'two names'").

⁴⁰ See LIVINGSTON & THOMPSON, *supra* note 37, at 210.

⁴¹ *Id.* at 220-22.

ment, elections do not promote real choice but instead serve some other, presumably less valid, function.

Opponents of these critics rejoin that “the responsive voter evidences considerable awareness of ideology and issues.”⁴² Far from having no desire or ability to make a meaningful choice, a voter can be “moved by concern about central and relevant questions of public policy, of governmental performance, and of executive personality.”⁴³ Finally, these commentators observe that even conceding the limits of choice, United States voters come closer to exercising actual consent than any other voters world-wide.⁴⁴

These criticisms of the reality of elections as choice are important and powerful. If voters do not truly exercise meaningful choice in elections, governmental legitimacy may be lessened.⁴⁵ There are at least three reasons, however, why the arguments that elections do not truly promote choice are inapposite to this Note’s concern with the constitutionality of term limitations. First, it is fairly uncontroversial that voters exercise at least *some* meaningful choice when electing representatives.⁴⁶ As noted above, the dispute concerns how much choice voters have and how meaningful that choice is.

⁴² GERALD M. POMPER, *VOTER’S CHOICE* 10 (1975).

⁴³ V. O. KEY, JR., *THE RESPONSIBLE ELECTORATE* 7-8 (1966).

⁴⁴ Cf. Alex Pravda, *Elections in Communist Party States*, in *ELECTIONS WITHOUT CHOICE* 169-95 *passim* (Guy Herment et al., eds., 1978) (describing the limited choices in (then) authoritarian communist states).

⁴⁵ Factors other than choice affect government legitimacy. For instance, Richard Rose argues that:

[e]lectorate choice is not the only political institution of value . . . it is important to emphasize the conditions and limit of electoral choice. These are usually taken for granted in Western countries, where classical elections and fully legitimate governments are found together. . . . Free elections *follow*, rather than precede, the establishment of legitimate authority.

Rose, *supra* note 38, at 196, 211.

⁴⁶ Cf. GERALD C. WRIGHT, JR., *ELECTORAL CHOICE IN ELECTIONS: IMAGE, PARTY, AND INCUMBENCY IN STATE AND NATIONAL ELECTIONS* 72-75 (1974) (analyzing the 1968 California senatorial election in which voters chose between an arch-conservative Republican and a liberal Democrat based both on personal image differences and substantive policy differences).

Though observers of the presidential elections of 1992 will differ, one can plausibly argue that the three major candidates presented voters with some meaningful range of choice. The Democratic and Republican candidates were separated at the very least by different stated positions on social issues such as abortion, gays in the military, and fetal tissue research. Robin Toner, *At Dawn of New Politics, Challenges for Both Parties*, N.Y. TIMES, November 5, 1992, at B1. The independent Ross Perot ran as a Washington outsider, and emphasized the budget deficit as the most pressing problem facing the United States. See Stephen A. Holmes, *An Eccentric but No Joke*, N.Y. TIMES, November 5, 1992, at A1, B4.

Concededly, the major candidates for most elections in this country do not represent the range of political viewpoints voiced by candidates in countries such as Germany or Great Britain. This may be due to the possibility that Americans are perhaps more politically homogeneous than citizens of these countries.

Though reasonable minds differ on this issue,⁴⁷ only the most cynical observers claim that the election process is an utter sham. The existence of some quantum of electoral choice suggests that the constitutional value of choice is at least relevant to real-world politics.

Second, it is unclear that term limitations would increase the aggregate amount of choice available to voters. Though term limitations supporters argue that these laws would increase substantive choice,⁴⁸ this claim is highly speculative. Term limitations alone will not prevent the party and special interests that helped elect an incumbent in the first place from doing the same with a replacement candidate.⁴⁹ For example, the term limitation that kept George Wallace from running for additional terms as Governor of Alabama did not prevent voters from electing Lurleen Wallace in his stead.⁵⁰

Third, term limitations do not guarantee that voters would choose candidates who would be any substantial improvement over term-limited incumbents because "the same public that votes to throw out the old Congress would elect the new one."⁵¹ Even if a term limitation gives voters more choice (and it is not clear that it does), such a law cannot ensure that the electorate will actually exercise its vote more effectively.

Moreover, even if term limitations do increase choice in one sense, this must be netted against the corresponding and certain decrease in choice in another sense. This is the "baby and the bath water" problem.⁵² In a system without term limitations, voters may choose either to retain effective incumbents or to vote them out. In a system with term limitations, voters are prohibited from choosing an effective candidate simply because she is an incumbent. Initially, it is at least highly questionable that term limitations will result in an aggregate increase in voter choice.

Finally, even if electoral choice is as unrealistic as some claim, this argument does not squarely refute the central claim of this Note, which is that term limitations are impermissible substantive limitations on voter choice. This Section has developed the background of the constitutional value of voter choice as an analytic tool

47 Compare text accompanying notes 37-41 with text accompanying notes 42-44.

48 See Tom Wicker, *A Necessary Change?*, N.Y. TIMES, Nov. 3, 1991, at § 4, p. 15.

49 *Id.*

50 See WILLIAM MANCHESTER, 2 *THE GLORY AND THE DREAM* 1270 (1973). Lurleen Wallace was married to George Wallace. She ran and was elected governor with the understanding that George would be the de facto governor. *Id.* The author thanks Joe Kennedy for research assistance on this point.

51 Wicker, *supra* note 48, § 4, p. 15.

52 *Id.*

for examining the constitutionality of term limitations.⁵³ This value runs through the Constitution and provides a rationale for why the Constitution prohibits term limitations.⁵⁴

C. The Value of Choice Dictates Ensuring Maximum Substantive Voter Choice

Because it is a tenet both of American political orthodoxy⁵⁵ and of Lockean theory⁵⁶ that the citizenry is the ultimate sovereign, the value of choice implies that they should have the maximum *substantive* choice possible. Elections, which authorize representatives to exercise power, are the principal way by which the people exercise their sovereignty.⁵⁷ Because sovereignty means complete and supreme authority,⁵⁸ when a voter's choice of a representative is diminished, her sovereignty is reduced as well. In the political realm, this means that a voter should be able not just to select a representative from among a slate of government-approved candidates, but to vote for the particular person she wants.

Studies of elections in authoritarian states support this proposition. These studies suggest that elections in which voters select a candidate from a government-approved list produce "representatives" who are not responsive to their constituents.⁵⁹ Elections that limit substantive choice thus serve their legitimizing function more poorly than do elections offering greater substantive choice. If a voter's preferred candidate cannot run because of a substantive prohibition on her candidacy, the connection between choice and consent is diminished.⁶⁰

Completely unrestrained choice, however, poses enormous practical difficulties. For example, a presidential general election with a thousand candidates could provide too much choice. Voters might split into the factions that Madison warned against,⁶¹ and no

⁵³ See *infra* part II.

⁵⁴ See *infra* part II.B.

⁵⁵ One need look no farther than the Preamble to the Constitution: "*We the People* of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmb. (emphasis added).

⁵⁶ See LOCKE, *supra* note 12, § 132.

⁵⁷ Gardner, *supra* note 11, at 213-14.

⁵⁸ See BLACK'S LAW DICTIONARY 1395 (6th ed. 1990).

⁵⁹ See Pravda, *supra* note 44, at 193.

⁶⁰ Guy Hermet, Richard Rose, and Alain Rouquié note that "[e]lections are held in nearly every country in the world . . . But most of these contests are elections without choice; only about one-third of United Nations members can claim to hold competitive free elections conforming to the classical liberal model of democracy." GUY HERMET ET AL., *Preface*, in ELECTIONS WITHOUT CHOICE, *supra* note 44, at vii.

⁶¹ See THE FEDERALIST No. 10 (James Madison).

candidate could obtain enough support to govern effectively.⁶² Additionally, the practical difficulties of running such an election fairly might prove intractable. Mechanisms such as nominating systems and primaries are practical necessities for effective representation to exist. This is so even though these devices may marginally restrict the substantive choice of voters.⁶³

Distinguishing between procedural and substantive restrictions on voter choice is often difficult.⁶⁴ The common requirement that candidates win a primary election in order to be able to run in the general election may affect voter choice in the same way and to the same degree as do purely substantive restrictions.⁶⁵ Nevertheless, Part II shows that the distinction between procedure and substance exists both in the text of the Constitution and in the case law.⁶⁶

II

SUBSTANTIVE VOTER CHOICE IN THE CONSTITUTION: ARGUMENTS FROM STRUCTURE AND CASE LAW

The Constitution does not explicitly set out what type of choice voters should have. Section A of this Part demonstrates that the thread of substantive voter choice runs through the Qualifications Clauses and the case law interpreting them. Section B shows that this case law preserves a distinction between substance and procedure, permitting Congress and the states to regulate only the procedure of elections. Because term limitations are substantive regulations, courts should hold them unconstitutional. Section C discusses some alternatives to term limitation laws which do not im-

⁶² Richard Rose makes an analogous point regarding parliamentary democracy, noting that

[j]ust as subjects of a one-party state can complain of too little choice, so citizens of [a parliamentary democracy] may complain of too much choice, when they learn that their collective ballots have returned ten to fourteen parties to their national parliaments. Multi-party competition carried to this extreme is alleged to produce weak government through a coalition of parties so numerous that they can have few positive policies or goals in common.

Rose, *supra* note 38, at 196.

⁶³ Article I, § 4 of the Constitution provides for procedural regulation of elections: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1.

⁶⁴ See *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949) (observing the difficulty in "laying down a precise rule to distinguish 'substance' from 'procedure'").

⁶⁵ See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (noting that an election regulation which governs "the selection and eligibility of candidates, or the voting process itself," affects the individual's right to vote).

⁶⁶ See *infra* notes 67-102 and accompanying text.

permissibly limit substantive voter choice. This Section notes that these alternatives, while permissible, may not adequately address the problem of an entrenched Congress. Section D concludes that if voters truly want to override the value of substantive voter choice, they can do so only by constitutional amendment.

A. The Constitution Exhibits the Value of Substantive Voter Choice

This Section examines the Qualifications Clauses and argues that they represent only minimal procedural regulations on voter choice. The Supreme Court has drawn upon political theory and the history of these clauses to suggest that Congress and the states may not circumscribe voter choice by superadding qualifications for candidates for Congress.

1. *Constitutional Qualifications For Congress*

a. *The Text of the Qualifications Clauses*

The Qualifications Clauses of Article I of the U.S. Constitution establish the standards of eligibility for members of the U.S. House of Representatives and the Senate:

[Qualifications for members of the House] No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.⁶⁷

[Qualifications for members of the Senate] No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.⁶⁸

⁶⁷ U.S. CONST. art. I, § 2, cl. 2.

⁶⁸ U.S. CONST. art. I, § 3, cl. 3.

The age, citizenship, and residency qualifications are the "standing qualifications."⁶⁹ Commentators⁷⁰ and courts⁷¹ have suggested that other provisions of the Constitution represent additional qualifications, but the Supreme Court has never so held.

Many early commentators on the Constitution maintained that the Article I standing qualifications are the exclusive qualifications for membership in Congress.⁷² No less an authority than Hamilton said that "[t]he qualifications of the persons who may . . . be chosen [for Congress] . . . are defined and fixed in the Constitution, and are unalterable by the legislature."⁷³ Early congressional practice confirmed Hamilton's reading.⁷⁴

⁶⁹ See Miles C. Cortez, Jr., & Christopher T. Macaulay, *The Constitutionality of Term Limitation*, 19 *COLO. LAW.* 2192, 2194 (1990).

⁷⁰ P. Allan Dionisopoulos lists five "disqualifications," in addition to the three standing qualifications:

[A]rticle I, section 6, prohibits Congressmen from holding a second office under the United States; article IV, section 4, which guarantees a republican form of government to the States, also serves to disqualify any Member-elect whose State government is not republican in form; article VI, clause 3, requires that Senators, Representatives, and other national and State officers execute an oath to support the Constitution of he [sic] United States, and section 3 of the fourteenth amendment disqualifies any person, who, having previously taken the foregoing oath, violates it by engaging in insurrection or by giving aid or comfort to the enemies of the United States.

P. Allan Dionisopoulos, *A Commentary on the Constitutional Issues in Powell and Related Cases*, 17 *J. PUB. L.* 103, 108 n.16 (1968); see also *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 108 nn.5, 9 (J.H. Killian ed., 1987) (noting similar disqualifications); Corwin, *supra* note 7, at 579 n.65 (same).

⁷¹ The United States Supreme Court is among the courts that have suggested this. See *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969).

⁷² *E.g.*, 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 623-628 (Da Capo Press 1970) (1833). Story argues that "when the constitution established certain qualifications, as necessary for office, it meant to exclude all others. . . ." *Id.* § 624. Thomas Jefferson claimed that the states could adopt additional qualifications for legislators, since the Ninth Amendment reserved this undelegated power to the states. *Id.* §§ 624-625. Story correctly notes, however, that the states could not reserve a power that they did not have prior to the adoption of the Constitution. The states could not reserve a power to make additional congressional qualifications because the Constitution itself was the original delegation to the states of the power to elect representatives. *Id.* §§ 625-626. Jefferson's "reservation of undelegated power" theory thus fails.

⁷³ *THE FEDERALIST* No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁴ In 1807, the House refused to disqualify William McCreery, even though he did not meet additional state residency requirements. *Powell*, 395 U.S. at 542. The House Committee of Elections said that it "considered the qualifications of members to have been unalterably determined by the Federal Convention [of 1789] . . . that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . ." 17 *ANNALS OF CONG.* 872 (1807). The *Powell* Court noted that "[t]here was no significant challenge to these principles for the next several decades." *Powell*, 395 U.S. at 543.

During and after the Civil War, however, Congress occasionally prevented elected congressional candidates from taking their seats on the basis of extra-constitutional qualifications, though the rejected legislators never challenged these actions in court.⁷⁵ The Supreme Court has said that these congressional exclusions are of limited precedential value: “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”⁷⁶ Current case law forecloses Congress and the states from limiting voter choice by imposing substantive qualifications for Congress.⁷⁷

b. *The Standing Qualifications Are Not Themselves Substantive Restrictions on Voter Choice*

The Constitution appears to place some substantive restrictions on voter choice because Congress can refuse to seat members-elect who do not meet Article I's standing qualifications.⁷⁸ These qualifications, however, place limits on candidacy and voter choice that are more procedural than substantive. A nation must have some means of defining certain aspects of its sovereignty, such as its territorial boundaries and its citizens.⁷⁹ To define a citizen, a nation must establish who counts as a “person” in various contexts. This definition is not the same in every situation, of course. For instance, only duly registered voters count as persons in the electoral context, but all human beings are persons under the criminal law.⁸⁰

The standing qualifications are such a means of political definition. The state residency requirement for legislators defines “persons” eligible to represent a state. Someone who does not reside in a state when elected is arguably a less effective representative of that state than someone who does.⁸¹ Similarly, the U.S. citizenship requirement defines the very broad group of persons from which the

⁷⁵ In the aftermath of the Civil War, Congress passed a statute requiring that members swear they had not been disloyal to the Union government. Act of July 2, 1862, 12 Stat. 502. Under this law, “[s]everal persons were refused seats by both Houses because of charges of disloyalty and thereafter House practice, and Senate practice as well, was erratic [footnotes omitted].” THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, *supra* note 70, at 108 (footnote omitted).

⁷⁶ *Powell*, 395 U.S. at 546-47.

⁷⁷ This Note discusses the leading case of *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court's most extensive reading of the Qualifications Clauses, *infra* at part II.A.2.

⁷⁸ See *Powell*, 395 U.S. at 548.

⁷⁹ See GERHARD VON GLAHN, LAW AMONG NATIONS 57-58 (5th ed. 1986).

⁸⁰ Even the reach of the criminal law extends only to those with the capacity to understand their acts. See, e.g., MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (excluding responsibility in the case of mental disease or defect).

⁸¹ Compare satirist Tom Lehrer's comment on a 1960s recording that Massachusetts was the only state to have three senators (referring to Massachusetts native Robert F.

voters may choose their representatives in Congress. The citizenship requirement also prevents undue foreign influence in the federal legislature.⁸² The age requirement is slightly more problematic, for it is unclear why a person who is old enough to drink, vote, and enter contracts may not also serve in Congress.⁸³ Apparently the members of the Constitutional Convention doubted a younger person's ability to serve effectively as a legislator.⁸⁴ Perhaps a way to think of the age requirement is that it does not regulate *whether* a candidate may run but only *when* she can run (*i.e.*, after she has attained the requisite age).⁸⁵

Thus, the standing qualifications are definitions necessary for establishing and preserving a representative legislature. The goal of the Framers in setting the standing qualifications was not to limit substantive voter choice, but rather to establish minimum standards for representation in Congress.⁸⁶ Though the standing qualifications may incidentally restrict voter choice, they are only a minimal procedural burden. The Constitution itself provides that Congress and the states may regulate the procedure of elections.⁸⁷ The Constitution allows these minimal procedural burdens on voter choice only because they are necessary to establish and preserve the federal legislature.

2. *Powell v. McCormack Supports Unfettered Voter Choice*

Though the Supreme Court has never directly barred Congress or the states from superadding legislative qualifications, in *Powell v. McCormack*⁸⁸ the Court gave its most detailed reading of the philosophy and history of the Qualifications Clauses. This reading strongly confirms the value of substantive voter choice.

Kennedy, then a senator representing New York). TOM LEHRER, *THAT WAS THE YEAR THAT WAS* (Reprise 1965).

⁸² A legislator may be a naturalized citizen as well. This requirement differs from Article II, § 1, cl. 5 of the Constitution, which requires that the President be a "natural born Citizen."

⁸³ Apparently some of the Convention delegates shared this sentiment. When discussing the age qualification for Representatives, James Wilson of Pennsylvania said he "was against abridging the rights of election in any shape. It was the same thing whether this were done by disqualifying the objects of choice, or the persons chusing." DRAFTING THE U.S. CONSTITUTION *supra* note 23, at 242.

⁸⁴ *See id.*

⁸⁵ Josh Swift suggested this idea to the author.

⁸⁶ This view is supported by the Convention's consideration and rejection of a requirement that legislators hold a certain amount of property. *See* WARREN, *supra* note 28, at 416-19.

⁸⁷ *See infra* part II.B.1.

⁸⁸ 395 U.S. 486 (1969).

a. *The Facts and Holding of Powell v. McCormack*

In November 1966 Representative Adam Clayton Powell won election to the 90th Congress,⁸⁹ but allegations that he had misappropriated public funds during earlier terms in Congress and abused the process of the New York courts tainted his election.⁹⁰ Because of Powell's alleged wrongdoing, the House did not seat him when it seated other members-elect in January 1967.⁹¹ The House formed a Select Committee to determine Powell's eligibility to sit in the 90th Congress.⁹² The Committee's report found that while Powell had met the standing qualifications of Article I, Section 2, Clause 2, he had "asserted an unwarranted privilege and immunity from the processes of the courts of New York; that he had wrongfully diverted House funds for the use of others and himself; and that he had made false reports on expenditures of foreign currency to the Committee on House Administration."⁹³ The House voted in March 1967 to exclude Powell and declare his seat vacant.⁹⁴

Powell and several of his constituents then sued John McCormack, the Speaker of the House.⁹⁵ Powell claimed that the standing qualifications in Article I, Section 2, Clause 2 were the exclusive qualifications for membership in the House of Representatives.⁹⁶ In the Supreme Court, McCormack argued that the issue of the qualifications of a member-elect of the House was a non-justiciable political question.⁹⁷ McCormack claimed that Article I, Section 5, which states that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members,"⁹⁸ is a "textually demonstrable constitutional commitment of the issue to a coordinate political department."⁹⁹ According to McCormack, the power of the

⁸⁹ Powell had previously served in Congress as well. *See id.* at 489-90.

⁹⁰ *See id.* at 490, 492.

⁹¹ *Id.* at 490.

⁹² *Id.*

⁹³ *Id.* at 492 (citing H.R. REP. NO. 27, 90th Cong., 1st Sess. 31-32 (1967)).

⁹⁴ H. R. RES. 278, 90th Cong., 1st Sess. (1967) (enacted).

⁹⁵ Powell also joined several other members and non-elected employees of the House in his suit. *See Powell*, 395 U.S. at 493.

⁹⁶ *Id.*

⁹⁷ McCormack also argued that the litigation was moot, that the Speech and Debate Clause barred judicial review of the House's actions, that Powell's exclusion was consistent with the House's power to expel members, and that the Court had no subject matter jurisdiction to hear the case. *Id.* at 495.

⁹⁸ U.S. CONST. art. I, § 5, cl. 1.

⁹⁹ *Powell*, 395 U.S. at 518 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

House to judge the qualifications of its members and exclude¹⁰⁰ whom it wished is plenary and judicially unreviewable.¹⁰¹

In an opinion by Chief Justice Warren, the Court held that "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."¹⁰² McCormack had conceded that Powell met the standing qualifications, and "since [Powell] was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership."¹⁰³ Though Chief Justice Warren discussed the Qualifications Clauses throughout the *Powell* opinion, the Court based its decision solely on Article I, Section 5, which states that the House has the power to judge the qualifications of its members.¹⁰⁴ The holding is thus limited to the proposition that Congress'¹⁰⁵ power to judge the qualifications of its members under Article I, Section 5 extends only to determining whether the member has met the standing qualifications found in the Constitution.

b. *The Powell Court's Reading of the History and Philosophy of the Qualifications Clauses Supports the Value of Substantive Voter Choice*

In reaching this holding, however, the majority read the history and philosophy of Article 1, Section 2 in a way that supports the value of voter choice. Speaker McCormack claimed that both English and American practice supported the view that Article I's qualifications were merely "standing incapacities" to membership but that Congress still retained its power to exclude members for other reasons.¹⁰⁶ The Court firmly rejected McCormack's claim in its

¹⁰⁰ McCormack argued that the House's refusal to seat Powell in the 90th Congress was in substance an exercise of the House's undisputed power, under Article 1, § 5, cl. 2, to *expel* a Representative for any reason upon a two-thirds vote of the House. The Court found that the action was an *exclusion*. It did not reach the issue of whether the House's action would have been constitutional had the House first seated Powell, then expelled him. *See Powell*, 395 U.S. at 511-12.

¹⁰¹ *Id.* at 519.

¹⁰² *Id.* at 548. Justice Stewart dissented on mootness grounds. *Id.* at 559 (Stewart, J., dissenting).

¹⁰³ *Id.* at 550.

¹⁰⁴ Cortez & Macaulay, *supra* note 69, at 2194.

¹⁰⁵ Even though the facts in *Powell* only concern the House's attempts to exclude a Representative, the holding is based on Article 1, § 5, cl. 1, which applies to the Senate as well. *See Powell*, 395 U.S. at 522 n.44; Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1, 45 n.239 (1992).

¹⁰⁶ *Powell*, 395 U.S. at 522.

reading of the history and philosophy of the Qualifications Clauses.¹⁰⁷

The Court first examined English pre-Convention precedent¹⁰⁸ and concluded:

[After a] long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention . . . the House of Commons . . . repudiated any “control over the eligibility of candidates, except in the administration of the laws which define their [standing] qualifications.”¹⁰⁹

The “long and bitter struggle” refers to the conflict over the English Parliament’s exclusion of John Wilkes from the House of Commons. The House of Commons excluded Wilkes in 1769 for publishing attacks on ministers of the King.¹¹⁰ Though his district continued to elect Wilkes to Parliament, the House of Commons did not seat him until 1782.¹¹¹ The Court’s opinion characterizes the right violated by Parliament as the “right of the British *electorate* to be represented by men of their own choice.”¹¹² Put another way, the Court observed that the House of Commons, though a representative body itself, could not foreclose the electorate’s choice of representatives.

Next, the Court examined the proceedings of the U.S. Constitutional Convention of 1787. The Court noted that the Convention adopted age, residency, and citizenship requirements for legislators with little debate.¹¹³ Proposed property requirements were more controversial, however.¹¹⁴ The Court quoted Madison’s argument that allowing Congress to set property qualifications would vest the legislature with too much power.¹¹⁵ If Congress could set the qualifications of its members, according to Madison, it might render the electoral system ineffective by setting qualifications that only persons of the legislature’s choice could meet.¹¹⁶ Consequently, the

¹⁰⁷ For a discussion of the history of term limits prior to the Constitutional Convention, see Barnicle, *supra* note 10, at 416-20.

¹⁰⁸ *Powell*, 395 U.S. at 522-31.

¹⁰⁹ *Id.* at 528-29 (quoting T. MAY’S PARLIAMENTARY PRACTICE 66 (T. Webster ed., 13th ed., 1924)).

¹¹⁰ WILLIAM HOLDSWORTH, 10 A HISTORY OF ENGLISH LAW 99-100 (1938).

¹¹¹ *Id.*

¹¹² *Powell*, 395 U.S. at 528 (emphasis added).

¹¹³ *Id.* at 532-33.

¹¹⁴ George Mason, representing Virginia, proposed property qualifications for legislators. Charles Pinckney and General Charles C. Pinckney, both of South Carolina, wanted to include property qualifications for the Executive and Judicial branches. See WARREN, *supra* note 28, at 417.

¹¹⁵ *Powell*, 395 U.S. at 533-34 (quoting 2 Farrand 249-50).

¹¹⁶ *Id.*; see also THE FEDERALIST NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that “an exclusive power of regulating elections for the national

Convention rejected the proposed property qualifications.¹¹⁷ The Court concluded that "on this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the 'indisputable right [of the people] to return whom they thought proper' to the legislature."¹¹⁸

The narrow holding of *Powell* does not prohibit a state from limiting the terms of its representatives. Dicta and the general tenor of the opinion, however, support the thesis that substantively unfettered voter choice is a primary value in congressional elections:¹¹⁹

Had the intent of the Framers emerged from [the historical] materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel.¹²⁰

Indeed, the opinion suggests that the principle of elector choice was the chief reason that the Framers chose to limit Congress' power to exclude members-elect.

Term limitations undermine the Framers' clear intent that "the people should choose whom they please to govern them."¹²¹ Because term limitations would contract voter choice by adding to the minimal legislative qualifications of the Constitution, they are presumptively unconstitutional.

government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy").

¹¹⁷ After Benjamin Franklin observed that "[s]ome of the greatest rogues he was ever acquainted with, were the richest rogues," the Convention rejected Charles Pinckney's motion that all three branches of the federal government have property qualifications. WARREN, *supra* note 28, at 419.

¹¹⁸ *Powell*, 395 U.S. at 535 (footnote omitted) (quoting 16 PARL. HIST. ENG. 589 (1769)).

¹¹⁹ See *The Supreme Court, 1968 Term-Leading Cases*, 83 HARV. L. REV. 62, 77 (1969-1970).

¹²⁰ *Powell*, 395 U.S. at 547 (citation omitted).

¹²¹ *Id.*

B. Case Law Has Preserved the Distinction Between Substantive and Procedural Regulations, and Term Limitations Are An Unconstitutional Substantive Qualification for Congress

Accurate analysis of the constitutionality of term limitations requires preserving the distinction between procedural and substantive regulations of candidacy. This is because procedural regulations generally are constitutional under the Times, Places, and Manner Clause of Article I, Section 4,¹²² while substantive regulations generally are not (under the Qualifications Clauses jurisprudence).¹²³ Broadly, a procedural regulation affects *how* a legislator may gain election. A substantive regulation affects *who* may gain election. It is appropriate to classify term limitations as a substantive regulation because they affect a voter's choice of whom she can select as her representative.

Courts have often noted that the line between procedure and substance is not sharp.¹²⁴ As *Erie Railroad v. Tompkins*¹²⁵ and its progeny show, courts must nevertheless draw the line somewhere. Some supporters of term limitations argue that Congress' and the states' undisputed power to regulate the *manner* of elections¹²⁶ has, in effect, a substantive component.¹²⁷ This is true, insofar as any regulation marginally influences who can be elected. Term limitation supporters have tried to use this argument "to achieve indirectly what the Standing Qualifications Clauses directly forbid."¹²⁸ In the cases germane to term limitations, courts have drawn the line between substance and procedure by allowing a state to regulate elections so long as the regulation has a valid procedural purpose *and* does not prevent an entire group of candidates from running.¹²⁹ If an election regulation does foreclose a group from congressional candidacy, as a term limitation would, it is an unconstitutional additional qualification.¹³⁰ In the congressional qualifications context, then, a substantive regulation involves "a sweeping elimination of broad categories of people"¹³¹ from election eligibility.

122 For the text of this clause, see *supra* note 63.

123 See Eid & Kolbe, *supra* note 105, at 46-47.

124 See, e.g., *Brown v. Western Ry.*, 338 U.S. 294, 296 (1949).

125 *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

126 See U.S. CONST. art. 1, § 4, cl. 1.

127 Eid & Kolbe, *supra* note 105, at 46.

128 *Id.* at 47.

129 *Id.* at 47-50 (citing *Storer v. Brown*, 415 U.S. 724 (1973) and *Williams v. Tucker*, 382 F. Supp. 381 (D. Pa. 1974)).

130 See *id.* at 50.

131 *Signorelli v. Evans*, 637 F.2d 853, 859 (2d Cir. 1980).

1. *The Constitution Provides That Congress and the States May Regulate the Procedure of Congressional Elections*

The Constitution plainly gives Congress and the states power to regulate the procedure of Congressional elections. This comports with the value of substantive voter choice, since some minimal procedural regulations are necessary to allow effective representation at all.¹³² Article I, Section 4, Clause 1 states that “[t]he Times, Places and Manner of *holding* Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”¹³³ This language merely grants to Congress and the states the power to regulate the *procedure* of elections; it does not rule out substantive regulations.¹³⁴ The case law, however, does not support an interpretation of the language that allows Congress and the states to impose additional substantive qualifications on candidates for Congress.

2. *Term Limitations Are Not Procedural Times, Places, and Manner Regulations*

Supporters of term limitations argue that states may limit terms of federal legislators through the states' power to regulate elections under Article I, Section 4, Clause 1 of the Constitution.¹³⁵ Though the Supreme Court has never decided what restrictions are impermissible qualifications under the Qualifications Clauses,¹³⁶ other state and federal courts have provided a test to resolve such issues. In *Hopfmann v. Connolly*,¹³⁷ for example, the First Circuit held that “the test to determine whether or not [a] ‘restriction’ amounts to a ‘qualification’ within the meaning of Article I, Section 3, is whether

¹³² See *supra* part I.C.

¹³³ U.S. CONST. art. 1, § 4, cl. 1 (emphasis added).

¹³⁴ The Supreme Court has hinted that if Congress has a constitutional power to impose substantive qualifications, this power must come from Article I, § 4. In *Buckley v. Valeo*, the Court noted:

The power of each House to judge whether one claiming election as Senator or Representative has met the requisite qualifications cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office. Whatever power Congress *may* have to legislate such qualifications must derive from § 4, rather than § 5, of Art. I.

Buckley v. Valeo, 424 U.S. 1, 133 (1976) (emphasis added) (citation omitted); see Eid & Kolbe, *supra* note 105, at 45 n.241; Levy, *supra* note 3, at 1920.

¹³⁵ See Cortez & Macaulay, *supra* note 69, at 2194-96; see also Steven Glazier, *Each State Can Limit Re-Election to Congress*, WALL ST. J., June 19, 1990, at A18 (arguing that states can circumvent difficulty of passing a constitutional amendment limiting terms by using their constitutional power to regulate times, places, and manner of elections).

¹³⁶ Levy, *supra* note 3, at 1921.

¹³⁷ 746 F.2d 97 (1st Cir. 1984).

the candidate 'could be elected if his name were written in by a sufficient number of electors.'"¹³⁸ Term limitations would fail such a test, because they would categorically forbid voters from voting for an incumbent.

In an article defending the constitutionality of the federal term limitation amendment to the Colorado constitution, Miles C. Cortez, Jr. and Christopher T. Macaulay claim that the line of cases dealing with ballot access and resign-to-run laws¹³⁹ establish that "state action which protects a legitimate state interest can survive a Qualifications Clause attack even if an indirect burden on a candidate's access to the ballot results by the addition of a 'qualification.'"¹⁴⁰ Cortez and Macaulay base their conclusion, however, upon a misreading of the relevant case law.¹⁴¹

a. The Ballot Access Cases

Cortez and Macaulay cite *Storer v. Brown*,¹⁴² a ballot access case, for the proposition that a state may add substantive qualifications to the standing qualifications for Congress. *Storer* involved a challenge to a California statute that forbade independent candidates from appearing on the ballot in state or federal elections if they had been affiliated with a political party one year or less before the preceding primary.¹⁴³ According to Cortez and Macaulay, *Storer* held that states may establish additional qualifications according to "a flexible standard in which legitimate state interests protected by the law in question are weighed against the interests of persons adversely af-

¹³⁸ *Id.* at 103 (citing *State v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)).

¹³⁹ The classification of the Article 1, § 4 cases into ballot access and resign-to-run cases is from Eid & Kolbe, *supra* note 105, *passim*.

¹⁴⁰ Cortez & Macaulay, *supra* note 69, at 2196. Stephen Glazier follows a similar line of argument, *supra* note 136, at A18.

¹⁴¹ As Eid and Kolbe note, the claim that the Times, Places and Manner Clause supports term limitations relies on the faulty premise that

the Standing Qualifications Clauses are not the exclusive criteria for congressional service. It is beyond doubt that the Times, Places and Manner Clause lets states regulate the machinery of federal elections. But it does not empower states to deny congressional membership to persons who otherwise meet the standing qualifications of age, residency and citizenship. The Standing Qualifications Clauses of sections 2 and 3 are substantive rules, defining who is eligible to serve in the House and Senate, respectively. In contrast, Section 4 allows states to design the *procedures* for their election. Together, these three clauses are part of a coherent scheme; they simply cannot be read in isolation. Importing a substantive component into the word "Manner" so that states may define who is eligible to serve in Congress can have but one result: to achieve indirectly what the Standing Qualifications Clauses directly forbid.

Eid & Kolbe, *supra* note 105, at 46-47 (footnote omitted).

¹⁴² 415 U.S. 724 (1974).

¹⁴³ *See id.* at 726-27.

fectured by the qualification."¹⁴⁴ This is, however, an untenable reading of the case.

First, the candidates in *Storer* argued that the statute violated the Equal Protection Clause, the First Amendment, and the Qualifications Clauses.¹⁴⁵ The "flexible standard" that Cortez and Macaulay discuss relates only to the First and Fourteenth Amendment challenges, not to the Article I Qualifications Clauses challenges. After discussing the flexible standard test,¹⁴⁶ the Court noted:

Appellants *also* contend that [the California statute] purports to establish an additional qualification for office of Representative and is invalid under Art I, § 2, cl. 2, of the Constitution. The argument is wholly without merit The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.¹⁴⁷

The obvious inference is that the Court's earlier discussion of a flexible standard applied only to the appellants' argument that the California statute burdened First and Fourteenth Amendment rights.¹⁴⁸ Thus, *Storer* cannot be read to establish a flexible standard test for a Qualifications Clause challenge, simply because the California statute before the Court was not a qualification.

Second, the Court made clear that the ballot access limitations it held constitutional were merely *procedural* restrictions on candidacy. These procedural restrictions fall within the state's power to regulate the times, places, and manner of elections.¹⁴⁹ The Court characterized the California statute as "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents."¹⁵⁰ The California statute did not prevent a group of persons (in this case independent candidates) from gaining a place on the ballot.¹⁵¹ It was therefore not a substantive regulation. Rather, the statute was merely a times, places, and manner regulation of elections, akin to

¹⁴⁴ Cortez & Macaulay, *supra* note 69, at 2194.

¹⁴⁵ *Storer*, 415 U.S. at 727.

¹⁴⁶ *Id.* 729-30.

¹⁴⁷ *Id.* at 746 n.16 (emphasis added).

¹⁴⁸ For a discussion of term limitation challenges based on the First Amendment and Equal Protection Clause, see Latz, *supra* note 5, at 206-08.

¹⁴⁹ Eid and Kolbe concur in this reading of the case: "[*Storer*] permit[s] states to deny ballot access for valid *procedural* reasons. [*Storer* does not] let[] states impose their own substantive qualifications for holding congressional office." Eid & Kolbe, *supra* note 105, at 47.

¹⁵⁰ *Storer*, 415 U.S. at 733.

¹⁵¹ *See id.*

the nominating process.¹⁵² It was thus a valid procedural regulation. Cortez and Macaulay's claim that the *Storer* Court permitted a state to impose substantive limitations upon candidacy is erroneous because substantive limitations were not before the Court.

Cortez and Macaulay assert that another ballot access case, *Williams v. Tucker*,¹⁵³ supports their reading of *Storer*.¹⁵⁴ In *Williams*, a Pennsylvania statute prevented a congressional candidate¹⁵⁵ who had lost in the party primary from running as an independent in the general election.¹⁵⁶ Applying *Storer*, the district court held that the statute "merely regulates the *manner* of holding elections and does not add qualifications for office."¹⁵⁷ *Williams* thus holds that a state may regulate the procedure of elections without being vulnerable to a Qualifications Clauses challenge. According to Wall Street Journal commentator Stephen Glazier, *Williams* means that "states can restrict access of congressional incumbents to the ballot, by using one-year waiting periods before running for re-election, in order to pursue the [legitimate] state interest in an effective election process."¹⁵⁸ Again, supporters of term limitations (*e.g.*, Cortez, Macaulay, and Glazier) mistakenly read the case law as allowing substantive limitations on candidacy. The *Williams* opinion does not uphold the Pennsylvania statute because the state has followed the proper procedure to impose substantive limitations on an incumbent. Rather, the court upholds the statute because it is only a procedural regulation of elections.¹⁵⁹

b. *The Resign-to-Run Cases*

Resign-to-run laws are typically of two types. One requires prospective candidates who currently hold an office to resign as a condi-

152 See *id.* at 746 n.16.

153 382 F. Supp. 381 (M.D. Pa. 1974).

154 See Cortez & Macaulay, *supra* note 69, at 2194.

155 The candidate was an incumbent, but this is not important to the holding of the case.

156 *Williams*, 382 F. Supp. at 382-84.

157 *Id.* at 388 (emphasis added).

158 Glazier, *supra* note 136. Eid & Kolbe note Glazier's argument, *supra* note 105, at 57.

159 Eid and Kolbe suggest that *Storer* and *Williams* set forth a two-part test for time, place, and manner restrictions:

1) Does the state law in question regulate election procedures for congressional candidates, and 2) if so, does the state have a legitimate interest in those procedures that is sufficiently compelling to outweigh First and Fourteenth Amendment values? If however, a state law purports to disqualify an entire class of persons from standing for re-election—as congressional term limits would do in the case of incumbents—then the Times, Places and Manner Clause [Art. I, § 4, cl. 1] simply does not apply.

Eid & Kolbe, *supra* note 105, at 50.

tion to running for a new position. The other requires the officeholder to automatically resign her office upon filing her candidacy for another.¹⁶⁰ Term limitation supporters correctly note that courts have often upheld these laws.¹⁶¹ But they erroneously claim that the resign-to-run precedents establish that a state may limit the terms of legislators based on the state's compelling interest in limiting incumbency.¹⁶² For example, Glazier argues that:

[t]he thrust of [the resign-to-run] cases is that the actions of a democratically elected state government will not be frustrated by the "no additional qualifications" clauses, if the state limits candidates for its congressional races in a way that does not offend freedom of speech or equal protection and that pursues some state interest.

A state law restricting an incumbent in Congress from merely succeeding himself in that office after a number of years would pass these tests.¹⁶³

Once again, the term limit supporters err in their reading of the cases. An examination of the resign-to-run cases cited by Cortez, Macaulay, and Glazier shows that while a state may indirectly regulate incumbency under its power to control the procedure of elections, it may not impose a substantive bar to candidacy on incumbents as a group consistent with the Qualifications Clauses.

To illustrate, *Signorelli v. Evans*¹⁶⁴ concerned a provision of the New York Constitution that effectively required state judges to resign their judicial posts before running for other offices.¹⁶⁵ Signorelli, a New York state probate judge who wanted to run for Congress, challenged the state constitutional provision on the ground that it imposed an additional qualification in violation of Article I, Section 2, Clause 2 of the U.S. Constitution.¹⁶⁶ In a careful opinion, the Second Circuit found that New York's regulatory scheme does not *prohibit* incumbents from running for other offices.

¹⁶⁰ See, e.g., *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980).

¹⁶¹ See, e.g., *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983), cert. denied, 464 U.S. 1002 (1983).

¹⁶² Cortez and Macaulay claim that [i]f evidence establishes that election outcomes are predetermined or results guaranteed within two or three percentage points, the state has an obligation to adopt measures necessary to insure that the people are able to exercise the franchise in fair and open elections. There is no more basic area of legitimate and traditional state interest.

Cortez & Macaulay, *supra* note 69, at 2196.

¹⁶³ Glazier, *supra* note 136, at A18.

¹⁶⁴ 637 F.2d 853 (2d Cir. 1980).

¹⁶⁵ See N.Y. CONST. art. VI, § 20(b).

¹⁶⁶ *Signorelli*, 637 F.2d at 856. Signorelli also challenged the constitutional provision on First and Fourteenth Amendment grounds, but lost in the district court and did not appeal that holding. *Id.* at 856 n.1.

Rather, the scheme “confronts the prospective candidate with a choice: he may run for Congress if he is willing to resign his judgeship . . . New York places no obstacle between Signorelli and the ballot”¹⁶⁷ The court notes, however, that the choice the statute affords a candidate—to avoid the qualification by resigning—does not render the qualification constitutional.¹⁶⁸ Other courts have held that state laws that require a candidate for Congress to live in the local congressional district are an unconstitutional additional qualification even though a candidate could avoid this qualification simply by choosing to move to the district.¹⁶⁹

The *Signorelli* court conceded that New York’s scheme indirectly imposed an additional qualification on candidates for Congress.¹⁷⁰ The court observed, however, that the purpose of the New York scheme was not to regulate congressional elections, but to regulate state judicial elections: “a state regulation, though it functions *indirectly* as a requirement for Congressional candidacy, may not necessarily be an unconstitutional additional qualification if it is designed to deal with a subject within traditional state authority.”¹⁷¹

Term limitation supporters urge that this language allows states to impose term limitations because they are election regulations within the states’ authority.¹⁷² This argument relies on two mistaken premises. First, term limitation supporters assert that setting qualifications for Congress is a power traditionally within a state’s authority.¹⁷³ The history of the framing of the Constitution establishes, however, that the power to set qualifications for Congress is not within the traditional authority of a state to regulate elections.¹⁷⁴ During the Convention of 1787, the Committee of Detail proposed that the state legislatures be given the authority to set property qualifications.¹⁷⁵ The Convention firmly rejected this and also rejected a proposal that Congress have unlimited power to fix qualifications.¹⁷⁶ The *Signorelli* court repudiated the idea that the

167 *Id.* at 858.

168 *Id.*

169 *See, e.g.,* *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (1968) (holding that a state law which required a Congressional candidate to live within the district is an unconstitutional additional qualification).

170 *Signorelli*, 637 F.2d at 858.

171 *Id.* at 859 (emphasis added).

172 *See, e.g.,* *Cortez & Macaulay*, *supra* note 69, at 2194.

173 *See id.* at 2196; *see also* *Eid & Kolbe*, *supra* note 105, at 42-43 (observing that the Framers considered and rejected allowing the states or Congress to fix qualifications for Congress).

174 *See supra* part II.

175 *WARREN*, *supra* note 28, at 418.

176 *Id.* at 419.

states have power to set qualifications for Congress if the regulation dovetails with a power that is within "traditional state authority":

[I]t can be argued that New York's purpose is to regulate the judicial office that *Signorelli* holds, not the Congressional office he seeks. There is a distinct risk, however, that this line of argument . . . would permit the states, exercising their acknowledged authority to regulate occupations, to require lawyers to resign from the bar or business executives to resign corporate offices prior to seeking public office. But such a sweeping elimination of broad categories of people from those eligible for election would conflict with the expressed intent of the Framers to maintain broad public choice of elected representatives.¹⁷⁷

This dictum strongly suggests that states may not impinge upon the value of choice under the pretense that the state is exercising powers that are within its "traditional regulatory authority."¹⁷⁸

Second, term limitation supporters imply that a term limitation is merely an "indirect" qualification.¹⁷⁹ The *Signorelli* court, however, asserts that regulations which "sweeping[ly] eliminat[e] broad categories of people" from running for election are not merely indirect qualifications.¹⁸⁰ The court links this language with the Framers' expressed intent to allow broad choice of representatives.¹⁸¹ Because a term limitation thwarts a voter's choice of representatives by "sweepingly eliminating the category of incumbents," a court applying *Signorelli* should hold that a term limitation is an impermissible substantive regulation rather than merely an indirect qualification.

The other resign-to-run case that term limitation supporters often cite as authority for the constitutionality of term limitations is *Joyner v. Mofford*.¹⁸² The regulatory scheme at issue in *Joyner* was similar to that in *Signorelli*. Article 22, Section 18 of the Arizona Constitution provides that: "Except during the final year of the term being served, no incumbent of a salaried elective office . . . may offer himself for nomination or election to any salaried local, State or federal office."¹⁸³ An Arizona statute¹⁸⁴ provided that the state could force a state official who ran for a federal office in violation of this

¹⁷⁷ *Signorelli*, 637 F.2d at 859.

¹⁷⁸ The scheme at issue in *Signorelli* survived this challenge because it dealt with "specified state offices peculiarly within the essential regulatory authority of the states." *Id.* (emphasis added).

¹⁷⁹ See Cortez & Macaulay, *supra* note 69, at 2194.

¹⁸⁰ *Signorelli*, 637 F.2d at 859.

¹⁸¹ See *id.*

¹⁸² 706 F.2d 1523 (9th Cir. 1983).

¹⁸³ ARIZ. CONST. art. 22, § 18.

¹⁸⁴ ARIZ. REV. STAT. ANN. §§ 12-2041, 12-2042 (1982).

provision of the Arizona Constitution to resign from her office.¹⁸⁵ The combination of Article 22 of the Arizona Constitution and the Arizona forced resignation statute made this scheme in essence a resign-to-run regulation. In its Qualifications Clauses analysis, the Ninth Circuit distinguished between state laws that only regulate the actions of state officials and those that actually bar candidates from running for Congress. The former are merely indirect burdens on candidacy and, as such, are constitutional. The latter type of law, however, violates the Qualifications Clauses.¹⁸⁶ Because the Arizona scheme did not actually bar candidates from running for Congress, the court upheld the regulation against a Qualifications Clauses challenge.¹⁸⁷

3. *Term Limitations are an Unconstitutional Additional Substantive Qualification for Congress*

Term limitation supporters argue that term limitations are permissible procedural regulations, not prohibited substantive qualifications.¹⁸⁸ According to cases that interpret the Qualifications Clauses, however, a court should hold that a term limitation is an additional substantive qualification for Congress. *Joyner v. Mofford* gives the appropriate test for distinguishing substantive qualifications from procedural regulations:

The courts considering challenges to state laws relying on the Qualifications Clause have distinguished between state provisions which bar a potential candidate from running for federal office, and those which merely regulate the conduct of state officeholders. The former category of laws imposes additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office. The burden on candidacy, imposed by laws of the latter category, is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress.¹⁸⁹

¹⁸⁵ *Joyner*, 706 F.2d at 1526.

¹⁸⁶ *Id.* at 1528.

¹⁸⁷ *Id.* at 1533.

¹⁸⁸ See Cortez & Macaulay, *supra* note 69, at 2196; Latz, *supra* note 5, at 210.

¹⁸⁹ *Joyner*, 706 F.2d at 1528; see, e.g., *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (1962) (holding unconstitutional an Arizona law which provided that incumbent state officeholders would not be eligible for federal office); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (1974) (holding that the Nevada Secretary of State could not refuse to allow a state judge to file for election to the House of Representatives).

According to the *Joyner* court, a state bar on federal candidacy is allowable only if the primary purpose of the law is to regulate state officeholders.¹⁹⁰

For a court to declare a law unconstitutional under this test, the law must fail both an "effect" prong and a "purpose" prong. A law which has the effect of barring "a potential candidate from running for federal office"¹⁹¹ fails the effect prong. Congress and the states have the power to regulate the procedure of elections, and the states have the power to regulate their own officeholders.¹⁹² A procedural regulation whose purpose is merely "to regulate state officeholders and not to impose additional qualifications to serving in Congress"¹⁹³ will likely survive the purpose prong even though it fails the effect prong, because such a law is an allowable regulation of elections or of state officeholders which only indirectly burdens federal candidacy.

A term limitation fails both prongs, however, because both its primary purpose and its effect are to "bar a potential candidate from running for federal office."¹⁹⁴ Under *Joyner*, term limitations are not procedural regulations. Rather, they are a qualification that requires that candidates be non-incumbents in order to run for the federal legislature. Term limitations are substantive qualifications because they regulate *whom* a voter may choose as a representative. Because term limitations are extra-constitutional substantive qualifications, a court should hold them unconstitutional.

C. Some Constitutional Alternatives to Term Limitation Laws and State Constitutional Amendments

There are other possible solutions to the problem of congressional incumbency that would pass constitutional muster. This Section discusses the most important of these solutions and notes that while these proposals have the advantage of not impermissibly interfering with the value of substantive voter choice, they may not adequately address the problem of an entrenched Congress.

1. *Self-Imposed Term Limitations*

The simplest solution is a self-imposed term limitation. An historical example of this (in the presidential context) is the Twenty-Second Amendment. Before Franklin D. Roosevelt's tenure, two four-year terms was the voluntary "term limit" for presidents.

190 *Joyner*, 706 F.2d at 1528.

191 *Id.*

192 *See supra* part II.

193 *Joyner*, 706 F.2d at 1528.

194 *Id.*

George Washington established this precedent by refusing to seek a third term.¹⁹⁵ Roosevelt's decision to seek two additional terms led to the adoption of the Twenty-Second Amendment, which limits a president to two terms.¹⁹⁶ Even if Franklin D. Roosevelt's four elections are an historical aberration, voluntary term limitation may not be an entirely satisfactory solution to the problem of an entrenched Congress.

First, depending upon legislators to regulate their own terms is akin to letting the fox guard the hen house. The electorate's perception that an incumbency problem exists (note the recent spate of term limitation initiatives)¹⁹⁷ is evidence that voluntary term limitation does not work, at least not to the extent that the electorate wishes. Second, the structure of the federal system may actually disfavor candidates who express a desire to serve a limited number of terms. This is because the power and effectiveness of legislators increases as they remain in office.¹⁹⁸ A state can increase its influence in Congress, especially in the Senate, by encouraging its experienced legislators to remain in office and accumulate clout.¹⁹⁹ All other things being equal, a rational voter²⁰⁰ may vote for an incumbent representative rather than a challenger in the hope of obtaining an advantage in Congress over citizens in states with less senior representatives.²⁰¹

2. *Anti-Advantage Legislation*

Short of a constitutional amendment, the most viable solution²⁰² to the incumbency problem might be laws that attempt to

¹⁹⁵ See BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 13 (1963).

¹⁹⁶ See *id.*

¹⁹⁷ See *supra* note 2.

¹⁹⁸ Senator Dennis Deconcini (R. AZ), in explaining his repudiation of his initial decision to serve only two terms in the Senate, asked:

What would have been achieved had I left the Senate after two terms?

Other States would continue to reelect their Senators, increasing their seniority status and thus the representative political clout of their respective States. My State would have suffered as it would have been left with two Senators with a combined seniority of 2 years.

137 CONG. REC. § 579-01, 2483 (1991) (statement of Sen. Deconcini).

¹⁹⁹ *Id.*

²⁰⁰ Rational in an economist's sense, *i.e.*, a rational self-interest maximizer.

²⁰¹ Mark B. Liedl calls this the "ombudsman" theory of representation. Mark B. Liedl, *The Case For Limiting Congressional Terms*, 137 CONG. REC. § 579-01, at 2489.

²⁰² Erwin Chemerinsky suggests another way to address the incumbency problem. Professor Chemerinsky argues that the political process is often unable to effectively combat the problem of incumbency because incumbents accumulate an unfair advantage by manipulating the prerogatives of their office. Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 774-81 (1988). According to Chemerinsky, federal courts are the most efficacious forum to

nullify the inherent advantage incumbents have in a campaign.²⁰³ These anti-advantage laws would aim to level the political playing field so that voters can exercise choice more effectively. Anti-advantage laws could potentially address two principal criticisms of incumbency. The first criticism is that because incumbent legislators have direct access to the political process (*i.e.*, they make the laws) they are able to provide themselves with advantages that give them a material edge over challengers.²⁰⁴ The second criticism is that incumbent legislators receive the advantages of "political inertia."²⁰⁵ Voters are more likely to have information and positive attitudes about incumbents than they are about a challenger.²⁰⁶ Therefore, a challenger must expend much more money and time to overcome this advantage than if both candidates were running for the first time.

There are two possible types of anti-advantage laws, each aimed at a different criticism of incumbents. A passive anti-advantage law would address the first criticism by removing the advantages that incumbents have acquired through their access to and manipulation of the political process. For example, members of Congress have traditionally had a franking privilege.²⁰⁷ This allows them to send out certain types of mail at the taxpayer's expense, giving them a financial advantage over challengers who must pay for their own mailings.²⁰⁸ Under a passive anti-advantage approach, regulations would remove the franking privilege or other privileges that give incumbents an advantage over challengers.

Active anti-advantage laws would actually provide challengers with certain resources so that they can overcome the political inertia

combat abuses of incumbency, because courts feel less influence from the political process than do legislatures. *See id.* at 778. Chemerinsky claims that the First and the Fourteenth Amendments could support causes of action in anti-incumbency litigation, *id.* at 777-78, as could the fundamental right to vote found in *Reynolds v. Sims*; *id.* at 787-89. Chemerinsky concedes, however, that such litigation has been largely unsuccessful. *Id.* at 774; *see, e.g.*, *Winspisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929 (1980); *Public Citizen, Inc. v. Simon*, 539 F.2d 211 (D.C. Cir. 1976).

Without a significant revision in election law jurisprudence, such as Chemerinsky suggests, anti-incumbent litigation is an unpromising solution to the incumbency problem. *See also* Otteson, *supra* note 4, at 21-22 (arguing that judicial remedies are unsuited for resolving the incumbency problem).

²⁰³ Advantages of incumbency are summarized in GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 34-42 (2d ed. 1987).

²⁰⁴ *See* James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 *FORDHAM L. REV.* 217, 220 (1991).

²⁰⁵ *Cf.* WRIGHT, *supra* note 46, at 91 (suggesting that *ceteris paribus*, voters tend to vote for incumbents).

²⁰⁶ *See id.* at 111.

²⁰⁷ *See* HERBERT E. ALEXANDER, *MONEY IN POLITICS* 242 (1972).

²⁰⁸ *But cf. id.* (arguing that although some incumbents abuse the franking privilege during campaigns, most do not).

that benefits incumbents. These laws can function as a political handicap on incumbents. An example of an active anti-advantage law is a differential public campaign financing bill that allots more money to a challenger than to an incumbent. The allocation differential would be set at a proportion equivalent to the advantage that the incumbent enjoys due to her incumbency.²⁰⁹

Passive anti-incumbency laws are both more attractive and more workable than active anti-incumbency laws. First, the appearance that the government is actively taking sides in an election, as might happen with an active anti-advantage law such as a differential campaign funding bill, violates Hamilton's idea that the people (not the government) should choose their representatives.²¹⁰ Passive anti-advantage laws, however, put the government in a more neutral position regarding elections. This would lessen the risk of the government impinging on a voter's right of electoral choice.²¹¹ Second, the advantage that political inertia gives to an incumbent is hard to measure. The difficulties in calculating an appropriate handicap, necessary under an active anti-advantage law, would likely be intractable and would certainly give rise to litigation.²¹² Finally, Congress' self-interest would make it hesitant to approve of active anti-advantage legislation for the same reasons that legislators are unlikely to limit their own terms. Constituents could probably persuade Congress to remedy perceived abuses of the political system,²¹³ but it appears unlikely that a measure that gives extra campaign money to congressional challengers would gain much support from incumbents.²¹⁴

D. Bleeding the Constitutional Pressure Valve: Limiting the Terms of Senators and Representatives by Constitutional Amendment

Though this Note argues that the Constitution evinces a value of substantive voter choice, it would be anomalous to claim that citizens absolutely may not choose to limit the substance of their future choices. As Part I posits, one of the attributes of personal sovereignty is the power to choose to abandon a form of government. A

²⁰⁹ Cf. Wright, *supra* note 46, at 84-104 (attempting to estimate an incumbent's electoral margin). Wright is dubious that "the incumbent's electoral margin . . . is the result of the advantage of incumbency *per se*." *Id.* at 86.

²¹⁰ See 2 ELIOT'S DEBATES 257, *quoted in* Powell v. McCormick, 395 U.S. at 547 (1969).

²¹¹ Indeed, the argument might be that a measure such as eliminating the franking privilege would actually remedy an existing governmental bias against challengers.

²¹² See WRIGHT, *supra* note 46, at 84-104.

²¹³ See Gardner, *supra* note 205, at n.2.

²¹⁴ See ALEXANDER, *supra* note 210, at 242.

social contract that did not provide for such choices could not serve its Lockean legitimating function.

Article V does provide for such choices, of course. It may be that permissible sub-constitutional approaches to limiting the terms of legislators, such as voluntary term limitations and passive anti-advantage laws, will not satisfy the large number of people who support mandatory term limitations.²¹⁵ Though this Note has not resolved the policy arguments for and against term limitations, clearly there are strong claims on both sides.²¹⁶ It is also clear that a federal constitutional amendment limiting terms of legislators would be more difficult to achieve than sub-constitutional approaches, especially given the current well-funded opposition to term limitations.²¹⁷ In this case, however, the desire for a pragmatic solution to the problem of an entrenched Congress cannot transform an unconstitutional law into a constitutional one. Those who want mandatory limited legislative terms must follow the same path as those who wanted limited presidential terms. The only constitutional means to limit absolutely congressional terms is to amend the Constitution.²¹⁸

CONCLUSION

This Note argues that the value of voter choice underlies the Constitution's Qualifications Clauses, which prohibit term limitations. The constitutional value of choice is rooted in the political writings of John Locke. According to Locke, a democratic government can legitimately exercise power over its citizens only if they consent. The theory of consent becomes manifest in the political arena when a citizen chooses a representative in an election. Though the value of choice implies that voters should have the maximum substantive choice possible, procedural regulation of elections is practically necessary for the election process to function effectively.

²¹⁵ See, e.g., Timothy Egan, *The 1991 Election: Term Limits: State of Washington Rejects a Plan to Curb Incumbents*, N.Y. TIMES, Nov. 7, 1991, at A1; Glazier, *supra* note 136, at A18.

²¹⁶ See *supra* part II; AMERICAN ENTERPRISE INSTITUTE, *LIMITING PRESIDENTIAL AND CONGRESSIONAL TERMS* 18-25.

²¹⁷ Glazier notes that "members of Congress are more than 2-to-1 opposed to the idea" of limiting congressional terms by law. Glazier, *supra* note 136, at A18. The New York Times lists the following groups as having opposed Washington State Initiative 553, which would have limited the terms of Washington's federal congressional representatives: Phillip Morris USA, Washington State Labor Council, Kaiser Aluminum, the Association of Trial Lawyers of America, Boeing Co., and the National Rifle Association. Egan, *supra* note 216, at B9. See generally Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387-89 (1983) (giving an overview of the amendment process).

²¹⁸ See Eid & Kolbe, *supra* note 105, at 86.

This Note urges that courts should hold term limitations unconstitutional using principles enunciated in the current case law. The Constitution promotes substantive voter choice by fixing the exclusive qualifications for federal legislators in the Qualifications Clauses. After examining the history of congressional qualifications, the Supreme Court has found that the framers drafted the Qualifications Clauses with the value of voter choice in mind. The courts have supported this reading of the Constitution in a series of cases holding that, under the Qualifications Clauses, Congress and the states may not superadd substantive qualifications. The Constitution does allow Congress and the states to institute procedural regulation of elections. Term limitations, however, are substantive electoral regulations because they affect a voter's choice of representatives. Therefore, term limitations violate the Qualifications Clauses, and courts should hold them unconstitutional.

The Constitution's system of electing representatives to the federal legislature may be fundamentally flawed. Sub-constitutional approaches to limiting the terms of members of Congress, though constitutionally permissible, may not satisfactorily solve the problem of an entrenched Congress. The value of choice is illusory, according to some.²¹⁹ The Constitution may be inadequate to deal with congressional dysfunctionality in the late twentieth century.²²⁰ But these arguments are separate from the question of *how* such reforms may constitutionally be achieved. If term limitation supporters want to reform the election process by instituting mandatory term limitations, this reform must take place according to the procedures of change that the Constitution provides: the amendment or convention provisions of Article V.²²¹

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²¹⁹ Cf. Frady, *supra* note 39, at 36 (relating Jesse Jackson's characterization of the American bipartisan system as "one party with 'two names'").

²²⁰ James Otteson suggests that the congressional ratification route to amending the Constitution is unlikely to succeed because Congress is unlikely to ratify an amendment that runs counter to its self-interest. Otteson, *supra* note 4, at 34; cf. Latz, *supra* note 5, at 155 n.6 (noting that "eight different constitutional amendments limiting members' terms had been introduced in the 102nd Congress as of February 14, 1991," but that these had been unlikely to make it out of committee).

²²¹ *Id.*

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Sleri Lynn Johnson, B.A., J.D., Professor of Law
Lily Kahng, B.A., J.D., LL.M., Associate Professor of Law
Robert B. Kent, A.B., LL.B., Professor of Law, Emeritus
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Peter W. Martin, A.B., J.D., Jane M.G. Foster Professor of Law
JoAnne M. Miner, B.A., J.D., Senior Lecturer and Director of Cornell Legal Aid Clinic
Peter-Christian Müller-Graff, Dr. Jur., Visiting Professor of Law (Spring 1994)
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Gray Thoron, A.B., LL.B., Professor of Law

Elected Members from Other Faculties

Calum Carmichael, Professor of Comparative Literature and Biblical Studies, College of Arts and

Sciences

James A. Gross, Professor, School of Industrial and Labor Relations

Paul R. Hyams, Associate Professor of History, College of Arts and Sciences