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State-Imposed Congressional Term Limits: What Would the Framers of the Constitution Say?

Justice Holmes observed that government is an experiment. The people are the conductors of that endless experiment and have the right to tinker with it as they choose, free of unwarranted interference.

*Justice Steele Hays*¹

I. INTRODUCTION

The debate over congressional term limits dates back to the United States Constitution's abandonment of the rotation in office required by the Articles of Confederation.² Rotation in office was heavily debated by the Framers of the Constitution, but ultimately was discarded.³ Thomas Jefferson was one of the leading advocates of rotation in office and was disappointed that it was left out of the Constitution.⁴ As a result, the number of terms a U.S. Senator or Representative may serve is not limited by the Constitution itself. Recently there has been widespread public support for some type of congressional term limits.⁵ This raises the question of whether the Framers of the Constitution would support congressional term limits if they were here today.

Part II of this Comment describes the various methods that could be used to implement congressional term limits, and then reviews the various authorities arguing for and against state-imposed congressional term limits. Part III examines the

1. U.S. Term Limits, Inc. v. Hill, No. 93-1240, 1994 WL 72581, at *22 (Ark. Mar. 7, 1994) (Hays, J., dissenting), *petition for cert. filed sub nom.* U.S. Term Limits, Inc. v. Thornton, 62 U.S.L.W. 3642 (Mar. 17, 1994) (No. 93-1456).

2. ARTICLES OF CONFEDERATION art. V (1777); see *infra* note 81 and accompanying text.

3. See, e.g., Erik H. Corwin, Recent Development, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 582-87 (1991).

4. Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155, 157 (1991).

5. A 1990 Gallup Poll showed that 73% of Americans favored term limits for members of Congress. Corwin, *supra* note 3, at 570 n.9. Interestingly, a 1993 Gallup Poll showed that only one in four people approved of the job Congress is doing overall, but a solid majority of the people said their own representative deserved re-election. Richard Benedetto, *Congress Scorned; GOP Scores Points*, USA TODAY, Nov. 8, 1993, at 5A.

Framers' intent concerning term limitations, and the implications concerning state-imposed congressional term limits. Part IV concludes that state-imposed congressional term limits are entirely consistent with the intent of the Framers of the Constitution.

II. THE CURRENT DEBATE OVER CONGRESSIONAL TERM LIMITS

A. *Constitutional Amendment Limiting Congressional Terms*

One way to implement congressional term limits would be through a constitutional amendment similar to the Twenty-Second Amendment, which limits the President to two terms.⁶ Congressional term limits were considered, but ultimately rejected, when the Twenty-Second Amendment was added to the Constitution.⁷ In spite of public support for congressional term limits,⁸ Congress is unlikely to propose such an amendment anytime soon.⁹

The Constitution also authorizes two-thirds of the states to call a Constitutional Convention which could propose a congressional term-limit amendment.¹⁰ The amendment would be

6. U.S. CONST. amend. XXII, § 1.

7. Tiffanie Kovacevich, Comment, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 PAC. L.J. 1677, 1682 (1992).

8. See *supra* note 5. Then-President George Bush also expressed his support for a constitutional amendment limiting congressional terms. Robert Shogan, *Bush Gives Impetus to Term Limits*, L.A. TIMES, Dec. 13, 1990, at A32.

9. "It is unrealistic to expect two thirds of the members of both houses to vote for a proposed amendment limiting their own career prospects." Corwin, *supra* note 3, at 578. In 1991 alone eight different bills were introduced in Congress which focused solely on congressional term limits. Kovacevich, *supra* note 7, at 1683 & n.47. "The real problem for the term-limit movement in Congress . . . is that the bills are unlikely to move out of the Judiciary Committee—ever." Corwin, *supra* note 3, at 578 n.60 (quoting Susan B. Glasser, *Advocates of Congressional Term Limits Push for Votes in Ariz., Wash., Ohio, Fla.*, ROLL CALL, Feb. 14, 1991). One of the reasons for this is that Jack Brooks, Chairman of the House Judiciary Committee, was elected to Congress in 1952 and apparently plans on staying there. George F. Will, . . . *And Across the Nation*, WASH. POST, June 24, 1993, at A19. In 1993, a proposed constitutional amendment had only 89 of the necessary 218 supporters to discharge the bill from the judiciary committee. Kenneth J. Cooper & Richard Morin, *Time Runs Out on N.J. Term Limit Plan*, WASH. POST, July 4, 1993, at A16.

However, not all congressmen have been hostile to a constitutional amendment. Congressman Bill Gradison stated: "We have to decide if we really trust the people. If we do, the Congress will eventually submit a constitutional amendment for congressional term limitations to the states with or without recommendation—and then abide by the results." George F. Will, *Term Limits: Let the States Decide*, WASH. POST, Nov. 26, 1992, at A29.

10. U.S. CONST. art. V.

valid upon the ratification of three-fourths of the states;¹¹ however, this has never been done successfully.¹²

B. State-Imposed Congressional Term Limits

In light of the lack of congressional term limits in the Constitution, and Congress' apparent unwillingness to propose such an amendment, some states have taken it upon themselves to impose term limits on the U.S. Senators and Representatives from their respective states.¹³ Colorado was the first to adopt state-imposed congressional term limits in 1990,¹⁴ and in 1992 all fourteen states voting on state-imposed congressional term limits passed initiatives imposing such limits.¹⁵ In 1994, at least five of the eight remaining states using the initiative process are likely to have initiatives on congressional term limits on their ballots.¹⁶ Only once, in Washington, has an initiative on this issue failed in a statewide vote; yet, Washington passed it the following year.¹⁷

11. *Id.*

12. Corwin, *supra* note 3, at 578. Nevertheless, the state legislatures of Utah and South Dakota have passed "resolutions calling for the convocation of a constitutional convention to adopt a congressional term-limit amendment." *Id.* at 570 & n.13.

13. ARIZ. CONST. art. VII, § 18; ARK. CONST. OF 1874 amend. LXXIII, § 3; COLO. CONST. art. XVIII, § 9a; FLA. CONST. art. VI, § 49(b); MICH. CONST. art. II, § 10; MO. CONST. art. III, § 45(a); MONT. CONST. art. IV, § 8; NEB. CONST. art. XV, § 20; OHIO CONST. art. VI, § 8; OR. CONST. art. II, § 20; S.D. CONST. art. III, § 32; CAL. ELEC. CODE § 25003(a) (West Supp. 1994); N.D. CENT. CODE § 16.1-01-13.1 (Supp. 1993); WASH. REV. CODE § 29.68.015 to .016 (Supp. 1994); WYO. STAT. § 22-5-104 (Supp. 1993).

14. Jeffrey L. Sedgwick, *The Legal Parameters of Term Limitations for United States Congressmen and Senators*, NAT'L LEGAL CENTER WHITE PAPER, No. 3, Apr. 1993, at 2.

15. *Id.*; accord Robert Reinhold, *Move to Limit Terms Gathers Steam After Winning in 14 States*, N.Y. TIMES, Nov. 5, 1992, at B8 (reporting the voting percentages in each of the fourteen states that voted on term limitations); George F. Will, *What Voters Did for the System*, WASH. POST, Nov. 12, 1992, at A21 (reporting that term limits received more votes in 14 states than Perot did in 50 states and that 83% of House incumbents ran essentially unopposed).

16. Debbie Howlett, *An "Anti" Electorate Tries to Regain Control*, USA TODAY, Oct. 26, 1993, at 5A.

17. *Id.* The first time that the initiative was on the ballot in Washington, "House Speaker Tom Foley actively campaigned against the measure as being too draconian," and the initiative failed. *Id.* The following year, Foley spent more time campaigning for re-election, and less time campaigning against the initiative, and the initiative passed. *Id.*

C. *The Debate over State-Imposed Congressional Term Limits*

Although the constitutionality of these state-imposed congressional term limits has been questioned, the U.S. Supreme Court has not yet decided a case challenging them. However, the Speaker of the House, Tom Foley, who was elected to Congress in 1964, has already filed a lawsuit in federal district court against the people of Washington challenging the constitutionality of Washington's term limits.¹⁸ In February 1994, that court ruled that the Washington term limits are unconstitutional.¹⁹ Additionally, in March 1994, the Arkansas Supreme Court ruled, five to two, that Arkansas' term limits are unconstitutional.²⁰ Both the Washington and Arkansas cases are expected to be appealed to the U.S. Supreme Court.²¹ The Washington case has been appealed to the Ninth Circuit, and in the Arkansas case a petition for certiorari was filed with the U.S. Supreme Court on March 17, 1994.²² In the meantime, commentators are already debating the constitutionality, and overall desirability, of state-imposed congressional term limits.²³

18. See Debbie Howlett, *Speaker Foley Challenges Home-State Term Limit*, USA TODAY, June 8, 1993, at 8A; Will, . . . *And Across the Nation*, *supra* note 9, at A19.

19. Thorsted v. Gregoire, 841 F. Supp. 1068, 1084-85 (W.D. Wash. 1994).

20. U.S. Term Limits, Inc. v. Hill, No. 93-1240, 1994 WL 72581, at *8 (Ark. Mar. 7, 1994), *petition for cert. filed sub nom.* U.S. Term Limits, Inc. v. Thornton, 62 U.S.L.W. 3642 (Mar. 17, 1994) (No. 93-1456).

21. Susan B. Glasser, *Arkansas Term Limits Case Now Likely to Be First at Supreme Court*, ROLL CALL, Mar. 10, 1994, available in LEXIS, News Library, Papers File.

22. U.S. Term Limits, Inc. v. Thornton, 62 U.S.L.W. 3642 (Mar. 17, 1994) (No. 93-1456).

23. See Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992) (arguing that term limits change incentives facing legislators, and their expected behavior, for the worse); 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) (arguing that term limits which only require rotation out of office, rather than a total prohibition on future terms, are constitutional); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991) (arguing that the Constitution does not deprive state citizens of the power to impose election qualifications in addition to those enumerated in Article I of the Constitution); William Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 HARV. J.L. & PUB. POL'Y 95 (1993) (arguing that term limits would foster the type of government envisioned by the authors of *The Federalist Papers*); Latz, *supra* note 4 (analyzing the various constitutional challenges that can be made to state-imposed congressional term limitations); Nelson W. Polsby, *Some Arguments Against Congressional Term Limitations*, 16 HARV. J.L. & PUB. POL'Y 101 (1993) (arguing that term limits are unconstitutional and will weaken Congress and decrease the influence that Congress has in the American political system); Stephen J. Safranek, *Term Lim-*

This Comment will not focus on many of the issues involved in the debate over state-imposed congressional term limits. The reader is encouraged to turn to the numerous sourc-

itations: Do the Winds of Change Blow Unconstitutional?, 26 CREIGHTON L. REV. 321, 323 (1993) (discussing how courts might analyze the constitutionality of term limits in light of relevant historical sources and concluding that Colorado term limits are constitutional); Sedgwick, *supra* note 14 (arguing that a state may constitutionally impose congressional term limits under the Times, Places & Manner Clause of the Constitution); Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992) (arguing that term limits are unconstitutional when enacted through voters' initiatives and that term limits are inconsistent with the original intent of the Framers of the Constitution); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 TEX. L. REV. 865 (1993) (arguing that term-limit initiatives are permissible additions to the qualifications set forth in Article I of the Constitution); Anthony E. Gay, Comment, *Congressional Term Limits: Good Government or Minority Vote Dilution?*, 141 U. PA. L. REV. 2311 (1993) (arguing that term limits would cause a detrimental shift in power from the legislative to the executive branch of government, reducing the influence of minorities in national politics); Kovacevich, *supra* note 7 (arguing that a constitutional amendment is the only way to limit the terms of congressmen); Joshua Levy, Note, *Can They Throw the Bums out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913 (1992) (arguing that states do not have the power to impose congressional term limits); Jonathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966 (1993) (arguing that term limits are unconstitutional in light of the Framers' social contract theory because the Constitution requires the maximum amount of substantive voter choice possible); Julia C. Wommack, Comment, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361 (1993) (arguing that state-imposed term limits containing a "write-in" clause are constitutional but that the goals of term limits will best be achieved by alternative methods); Corwin, *supra* note 3 (arguing that term limits are unconstitutional and will not accomplish their underlying goals); *Are Term Limits Constitutional? The Voters Have Spoken. Now the Courts Must Decide*, CAL. LAW., Feb. 1993, at 35 (1993) (discussion between Joseph Remcho, who is representing the California Legislature in efforts to strike down term limits, and Dan Rodriguez, a professor of law at Boalt Hall, on the constitutionality of term limits); see also CENTER FOR LEGISLATIVE STUDIES, NELSON A. ROCKEFELLER INST. OF GOV'T, LIMITING LEGISLATIVE TERMS (Gerald Benjamin & Michael J. Malbin eds., 1992) (giving comprehensive coverage of the history, likely effects, and pros and cons of term limits); GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992) (advocating term limits as necessary political reforms); Thomas E. Cronin, *Term Limits—A Symptom, Not a Cure*, N.Y. TIMES, Dec. 23, 1990, § 4, at 11 (arguing that term limits are an illusory quick-fix for a symptom rather than a cure for governmental problems); *The Inconsistency of Term Limiters*, CHI. TRIB., Nov. 7, 1992, § 1, at 22 (editorial arguing that term limits eliminate good members of Congress whom the people would happily re-elect if given the chance).

In November 1993, Judge Malcolm R. Wilkey, who served on the Federal Court of Appeals for the D.C. Circuit from 1970 to 1985, gave six lectures on constitutional reform at Brigham Young University's J. Reuben Clark Law School. Among the reforms discussed by Judge Wilkey were congressional term limits. Audio recordings of these lectures are on file at the J. Reuben Clark Law School. Judge Wilkey plans on publishing a book on constitutional reform in the near future.

es previously cited for further discussion of those issues. Instead, the remainder of this Comment will focus on the intent of the Framers of the Constitution concerning congressional term limits. This Comment intentionally passes on a detailed discussion of the Washington, Arkansas, and other court cases arguably relevant to this issue. Both the Washington and Arkansas cases summarily treat state-imposed congressional term limits as an additional qualification to be a U.S. Senator or Representative without sufficiently explaining why or how these term limits constitute a qualification.²⁴ This type of analysis clouds the determination of the Framers' intent concerning term limits, which the Arkansas case concedes is inconclusive²⁵ and the Washington case blatantly mischaracterizes.²⁶ The U.S. Supreme Court has yet to rule on state-imposed congressional term limits, and this Comment proposes that when that determination is finally made, it should be firmly grounded in the intent of the Framers.

III. THE FRAMERS' INTENT CONCERNING TERM LIMITS

A. *Rejection of Rotation-in-Office Requirement*

The Framers of the Constitution considered, and rejected, requiring rotation in office as under the Articles of Confederation.²⁷ However, it does not necessarily follow that the Framers would be against any term limits, especially those imposed by the individual states. The only conclusion that can be safely drawn is that the Framers decided against requiring rotation in office on a national scale at that point in time. It is important to examine the nature of politics at the time the Constitution was drafted in relation to the nature of politics today. Only then can we understand the Framers' intent concerning the term limits that have recently been enacted.

Additionally, the various state-imposed congressional term limits do not necessarily resemble the rotation-in-office require-

24. See *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1075-83 (W.D. Wash. 1994); *U.S. Term Limits, Inc. v. Hill*, No. 93-1240, 1994 WL 72581, at *6 to *8 (Ark. Mar. 7, 1994), *petition for cert. filed sub nom. U.S. Term Limits, Inc. v. Thornton*, 62 U.S.L.W. 3642 (Mar. 17, 1994) (No. 93-1456). Although the Washington case does address the various methods of analyzing term limits, even its Tenth Amendment analysis assumes that these term limits are qualifications. See *Thorsted*, 841 F. Supp. at 1082-83.

25. See *Hill*, 1994 WL 72581, at *6.

26. See *Thorsted*, 841 F. Supp. at 1078-79.

27. See *supra* notes 2-4 and accompanying text.

ment considered by the Framers. In fact, the congressional term limits that have been enacted vary from state to state. For example, some states only limit an incumbent's access to the ballot after a set number of terms, and it is theoretically possible for an incumbent to remain in office by winning a write-in campaign.²⁸ Other states have come closer to rotation-in-office requirements by defining the limits in terms of a maximum number of years allowed in office over a specified period of time,²⁹ or by only prohibiting consecutive terms.³⁰ Very few states purport to put an absolute ban on further service as a representative or senator after a set number of terms or years.³¹ These are only a few examples of the many intricate differences between the state-imposed congressional term limits. Thus, this Comment only focuses on the ability of the individual states to generally impose limits in light of the Framers' intent, rather than addressing specific provisions.

B. Politics and the Framers of the Constitution

1. No career politicians

When the Constitution was drafted, career politicians were virtually unheard of. The Framers of the Constitution did not contemplate people making a career of politics; instead, their elected officials were amateur politicians from all walks of life, some of whom served their country and the people at great personal sacrifice.³² When George Washington was elected as the first President of the United States, he was "reluctant 'in the evening of life to exchange a peaceful abode for an ocean of difficulties,'" yet he boldly stepped forward and faithfully served his country.³³

The Framers of the Constitution engaged in politics during a time when "[e]very new election in the States [was] found to change one half of the representatives."³⁴ *The Federalist Pa-*

28. See, e.g., FLA. CONST. art. VI, § 4(b).

29. See, e.g., WYO. STAT. § 22-5-104 (Supp. 1993).

30. See, e.g., COLO. CONST. art. XVIII, § 9a.

31. But see, e.g., MO. CONST. art. III, § 45(a).

32. Malcolm R. Wilkey, Lecture at Brigham Young University's J. Reuben Clark Law School (Nov. 11, 1993) (audio recording on file at the J. Reuben Clark Law School).

33. GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 469 (New York, D. Appleton & Co. 1885).

34. THE FEDERALIST No. 62, at 389 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

pers point out that "[f]rom this change of men must proceed a change of opinions; and from a change of opinions, a change of measures."³⁵ *The Federalist Papers* describe the Senate as "an assembly of men called for the most part from pursuits of a private nature, *continued in appointment for a short time*."³⁶ Additionally, it was thought to be important that men take knowledge gained in private life to the legislature:

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private life as well as public stations.³⁷

Therefore, the Framers clearly anticipated a good deal of turnover in Congress. Consequently, it is not surprising that the Framers would deem rotation in office an unnecessary requirement under those circumstances.

2. *The people as the ultimate source of power and a representative government accountable to the people*

The Federalist Papers paint a picture of politics and democracy as seen through the eyes of the Framers of the Constitution. James Madison wrote that "to preserve the spirit and the form of popular government" should be "the great object to which our inquiries are directed."³⁸ He noted "that the ultimate authority . . . resides in the people alone" and that the government is "substantially dependent on the great body of the citizens of the United States," with the elected officials acting as "agents and trustees of the people."³⁹ The Framers understood that the government must have the public confidence,⁴⁰ yet politicians may sometimes "forget their obliga-

35. *Id.* *The Federalist Papers* go on to point out that "a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success." *Id.* However, the Framers noted that a certain extent of turnover in Congress is desirable, as opposed to having little or no turnover, in order to fuel the infusion of fresh opinions and measures into the national government.

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

37. THE FEDERALIST No. 53, at 335 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

38. THE FEDERALIST No. 10, at 55-56 (James Madison) (Henry C. Lodge ed., 1902); see Kristol, *supra* note 23, at 95.

39. THE FEDERALIST No. 46, at 292 (James Madison) (Henry C. Lodge ed., 1902).

40. THE FEDERALIST No. 62, at 390 (Hamilton or Madison) (Henry C. Lodge

tions to their constituents, and prove unfaithful to their important trust."⁴¹ Consequently, it was considered to be important that elected representatives be accountable to the people whom they purport to represent.

Although no term limits were written into the Constitution, the Framers acknowledged that term limits are one of the most effective ways to "maintain a proper responsibility to the people,"⁴² and that "frequent elections" would instill in the elected representative "an habitual recollection of their dependence on the people."⁴³ *The Federalist Papers* also noted "that the government in general should have a common interest with the people, so it is particularly essential that the [legislative] branch . . . should have an immediate dependence on, and an intimate sympathy with, the people."⁴⁴

The Framers recognized a need to strike a balance between a representative's dependence on the people and stability in the government.⁴⁵ Although accountability requires a period in office sufficiently long to accomplish desired objectives,⁴⁶ lifetime tenure would be "repugnant to the genius[] of America."⁴⁷ Likewise, re-election "as a matter of course" would not serve as a check to make the elected official accountable.⁴⁸

In 1776, John Adams noted that "a republic 'is an empire of laws, and not of men.'"⁴⁹ He continued: "The principal difficulty lies, and the greatest care should be employed, in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel,

ed., 1902).

41. *Id.* at 387.

42. THE FEDERALIST No. 57, at 356 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

43. *Id.* at 357-58.

44. THE FEDERALIST No. 52, at 329 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

45. THE FEDERALIST No. 37, at 217-18 (James Madison) (Henry C. Lodge ed., 1902).

46. THE FEDERALIST No. 63, at 392-93 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

47. *Id.* at 394-95.

48. THE FEDERALIST No. 53, at 338 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

49. John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies* (1776), in MICHAEL KAMMEN, *DEPUTYES & LIBERTYES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA* 199, 200 (1969).

reason, and act like them."⁵⁰ This is what the Framers of the Constitution attempted to accomplish.

3. *The people's ability to "choose whom they please to govern them"*

Alexander Hamilton stated "that the people should choose whom they please to govern them."⁵¹ This is entirely consistent with the theme of a representative government which is accountable to the people (in whom the ultimate source of power resides). It does not necessarily follow from Hamilton's statement that the people have an absolute right to elect whom they please. Exactly what, then, did Hamilton mean by his statement?

First of all, it is important to remember that Hamilton's oft-quoted statement was made at a point in history when Senators were chosen by the state legislatures, and not directly by the people.⁵² If the people had an absolute right to elect their representatives, why would the Senators be elected by the legislative bodies instead of directly by the people as was the House of Representatives?⁵³ Additionally, the Constitution itself requires that members of Congress (and the President) satisfy certain specified qualifications,⁵⁴ making it impossible, for example, for the people to choose a twenty-year-old person to govern over them as President of the United States, no matter how strong the public support for such an individual. Thus, Hamilton's statement must be taken in light of the political circumstances described above. Hamilton recognized that the ultimate source of the government's authority is the people, and that such a representative government should be accountable to the people, allowing them to "choose whom they please to govern them."⁵⁵

50. *Id.*

51. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., reprint ed. 1987) (2d ed. 1888) [hereinafter DEBATES] (quoting Alexander Hamilton).

52. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

53. See U.S. CONST. art. I, § 2, cl. 1.

54. See U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl.

5.

55. 2 DEBATES, *supra* note 51, at 257.

C. *The Politics of Today*

The politics of today stand in stark contrast to that experienced by the Framers of the Constitution. Consequently, before passing judgment on state-imposed congressional term limits, it is important to compare the politics of today to that envisioned by the Framers.

1. *Career politicians*

Today we have career politicians who are virtually guaranteed re-election.⁵⁶ In 1988, "more congressmen left office because of death (seven) than were defeated at the polls (six)."⁵⁷ Turnover in the House of Representatives is generally less than the turnover in the former Soviet Politburo.⁵⁸ No longer do we have a continual infusion of fresh opinions and measures into the government. No longer do we have men "called for the most part from pursuits of a private nature, *continued in appointment for a short time*."⁵⁹ Two prime examples of this are Tom Foley, Speaker of the House, and Jack Brooks, Chairman of the House Judiciary Committee. Tom Foley was elected to Congress in 1964, and Jack Brooks was elected in 1952.⁶⁰ It is hard to imagine that either of these Representatives has anything new to contribute to the government of this country. It is also hard to believe that the Framers of the Constitution anticipated such perpetual service in Congress when they decided not to include in the Constitution a rotation-in-office requirement.

"The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society . . ."⁶¹ Opponents of such limits claim that term limits rob Congress of the most qualified individuals, those with experience and knowledge.⁶²

56. In 1992, 83% of House incumbents ran essentially unopposed. Will, *supra* note 15, at A21.

57. Kristol, *supra* note 23, at 97.

58. Ronald D. Rotunda, *No Impediment to Term Limits*, WASH. POST, Feb. 13, 1993, at A31.

59. THE FEDERALIST No. 62, at 388 (Hamilton or Madison) (Henry C. Lodge ed., 1902) (emphasis added).

60. Will, . . . *And Across the Nation*, *supra* note 9, at A19.

61. THE FEDERALIST No. 57, at 356 (Hamilton or Madison) (Henry C. Lodge ed., 1902).

62. See, e.g., Polsby, *supra* note 23, at 104-05. Alexander Hamilton declared

If term limits would result in less capable, less experienced, and less responsible people running for Congress, indeed, such measures would be undesirable. If, however, one randomly compares five House members who have been in Congress less than twelve years with five who have been there longer, it is unlikely that he will find that the senior representatives possess a greater degree of wisdom, knowledge, and technical mastery than their junior colleagues.⁶³

On the contrary, term limits may actually increase the likelihood of attracting the type of men envisioned by James Madison, and the other Framers, to the government.⁶⁴

The current system prevents legislators, especially in the House of Representatives, from achieving significant power until they have attained seniority. It discourages people who have accomplished something in other walks of life from running for Congress. Such individuals are put off by the notion that they will have to serve as members of Congress for fifteen or twenty years before they have amassed enough influence for their voices to be heard by the others on Capitol Hill.⁶⁵

Term limits would be an important step towards breaking down these seniority barriers that are discouraging qualified people from running for Congress, thereby giving the people greater freedom of choice in elections. With more and more members of Congress subject to state-imposed term limits, "the seniority system will not long endure as a means of allocating political power and Federal largess. Term-limited members of Congress will have different incentives from career politicians. They will work to change the rules of the House and Senate under which political power is allocated."⁶⁶ This will be a big step towards giving the political power back to the people where it belongs.

that the ability to be re-elected "is necessary to enable the people, when they see reason to approve of [a representative's] . . . conduct, to continue him in his station, in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration." THE FEDERALIST No. 72, at 451 (Alexander Hamilton) (Henry C. Lodge ed., 1902).

63. Kristol, *supra* note 23, at 98-99.

64. *Id.* at 98.

65. *Id.*

66. Mark P. Petracca, *Term Limits Set Us on the Road to Democracy*, N.Y. TIMES, Nov. 20, 1992, at A30 (letter to the editor written by a professor of political science).

2. *A supposedly representative government which is no longer accountable to the people*

The re-election as a matter of course enjoyed by incumbents today has destroyed the accountability of Congress to the people. No longer do we have elected officials who retain a common interest with the people; indeed, some politicians have spent so much time in Washington D.C. that one wonders if they remember what their home state is really like. Roger Sherman warned that this might happen when he advocated annual elections for U.S. Representatives during the Constitutional Convention. "The representatives ought to return home and mix with the people. By remaining at the seat of government, they will acquire the habits of the place, which might differ from those of their constituents"⁶⁷

Congress is rapidly losing the public confidence,⁶⁸ and has proven to be unresponsive to its true source of power, the people. Otherwise, Congress would respond to the will of the people and at least submit to the people for ratification a constitutional amendment limiting terms. Instead, Congress is doing the exact opposite and defiantly resisting the people who elected them, by opposing the people's attempts to limit congressional terms. "Politicians react to term limits as vampires do to the cross."⁶⁹ A prime example of this is Speaker of the House Tom Foley's lawsuit challenging the term limits enacted by his constituents.⁷⁰

Not all members of Congress are unresponsive and unaccountable to the people. Senator Malcolm Wallop of Wyoming, an excellent example of an elected representative who recognizes that the people are the true source of his authority, is willing to abide by their wishes. Senator Wallop has declared that he will not seek a fourth term out of respect for Wyoming voters' belief in term limits, even though he could serve two

67. CONSTITUTIONAL CHAFF: REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 7 (Jane Butzner ed., 1970) (quoting Roger Sherman).

68. "A recent Gallup Poll showed that only 20% of respondents said they believe that they can trust the federal government all or some of the time—little more than half the percentage during the Watergate scandal in 1974." Robert Shogan, *Public Discontent for Lawmakers Hits New High; Drastic Reforms Gain Favor*, L.A. TIMES, Mar. 10, 1994 at A5; see also *supra* note 5 and accompanying text.

69. Robert D. Novak, *Term Limits: In Trenton . . .*, WASH. POST, June 24, 1993, at A19.

70. See *supra* notes 18-19 and accompanying text.

more terms under Wyoming's recently enacted legislation.⁷¹ Perhaps if more members of Congress were like Senator Wallop, formal term limitations would be unnecessary. Unfortunately, that is not the case.

3. *The people's ability to "choose whom they please to govern them"*

One of the main arguments used by opponents of state-imposed term limitations is the people's right of choice. They invariably quote Alexander Hamilton's statement that "the people should choose whom they please to govern them."⁷² What these opponents fail to realize is that the state-imposed congressional term limits have been imposed by the voice of the people in all fifteen states which currently have such limits.⁷³ The people have asked for an alternative to incumbents. State-imposed congressional term limits implemented by the people are merely the result of the people exercising their right to choose whom they please to *not* govern them. Surely the people have greater freedom to choose whom they please under state-imposed congressional term limits than they did when the state legislatures chose the Senators. It is possible that voter apathy might be attributable, in part, to the feeling that the incumbent is going to win anyway, so why bother voting. State-imposed term limits will help to dispel that perception and once again empower the people to exercise their right of choice.

D. *State-Imposed Congressional Term Limits Would Be a Step Toward the Type of Government Envisioned by the Framers*

In short, "the spirit and the form of popular government" envisioned by the Framers of the Constitution⁷⁴ no longer exists. In light of today's political exigencies, congressional term

71. *Wyoming Senator Limits His Own Term*, CHI. TRIB., Sept. 11, 1993, § 1, at 8.

72. 2 DEBATES, *supra* note 51, at 257; see, e.g., Latz, *supra* note 4, at 171; Kovacevich, *supra* note 7, at 1702; Corwin, *supra* note 3, at 588.

73. In 1993, the state legislature of New Jersey almost became the first state legislature to impose congressional term limits. See Novak, *supra* note 69, at A19. However, the New Jersey Senate failed to even vote on the bill even though the State Assembly had already voted in favor of it. Cooper & Morin, *supra* note 9, at A16.

74. See THE FEDERALIST No. 10, at 55-56 (James Madison) (Henry C. Lodge ed., 1902).

limits, particularly state-imposed term limits enacted by the voice of the people—the true source of power, are entirely consistent with the intent of the Framers of the Constitution. Congressional term limits “would change the culture of Congress and the culture of our politics” for the better.⁷⁵

*E. Congressional Term Limits Are Necessary to
Prevent the People from Becoming Sheep
and the Government the Shepherd*

In the early 1800s, Alexis de Toqueville described the sort of despotism that America had to fear as a democratic nation.⁷⁶ He stated:

[Americans] are constantly excited by two conflicting passions: they want to be led, and they wish to remain free. As they cannot destroy either the one or the other of these contrary propensities, they strive to satisfy them both at once. They devise a sole, tutelary, and all-powerful form of government, but elected by the people.⁷⁷

Such a government does not necessarily tyrannize the people, but it is dangerous just the same.

The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till [they are] . . . reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.⁷⁸

The ability to elect government officials alone will not prevent this type of despotism. “By this system the people shake off their state of dependence just long enough to select their master and then relapse into it again.”⁷⁹ Even Thomas Jefferson warned, “If [the people] become inattentive to the public affairs, . . . Congress and Assemblies, Judges and Governors, shall all become wolves.”⁸⁰

75. Kristol, *supra* note 23, at 99.

76. 2 ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 316-21 (Phillips Bradley ed. & Henry Reeve trans., Alfred A. Knopf, Inc. 1972) (1835).

77. 2 *id.* at 319.

78. 2 *id.*

79. 2 *id.*

80. Letter from Thomas Jefferson to Col. Edward Carrington (Jan. 16, 1787),

Due to the nature of politics at the time the Constitution was drafted, this sort of despotism had little chance of actually occurring. Frequent turnover in Congress and accountability to the people kept the government in check. However, that is not true today. At the risk of sensationalizing the issue, when voters file to the polls and unconsciously re-elect the same members of Congress time after time after time, one has to wonder if they are much more than sheep blindly following a shepherd. This appears to be contrary to the type of government envisioned by the Framers.

F. The Constitutional Framework and Its Intended Application

The Articles of Confederation mandated that the state delegates to Congress would rotate on a regular basis by stating, "[N]o person shall be capable of being a delegate for more than three years in any term of six years."⁸¹ This rotation-in-office requirement was not carried over into the United States Constitution. Instead, the Constitution sets forth the number of years that U.S. senators and representative serve in a single term, but it is silent regarding the number of terms a senator or representative may serve.

1. The Times, Places and Manner Clause v. the Qualifications Clauses

Much of the debate over state-imposed congressional term limits has attempted to define the issue in terms of either the Times, Places and Manner Clause,⁸² or the Qualifications Clauses⁸³ of the Constitution. However, it is not clear that

quoted in GARRETT W. SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 69-70 (1991).

81. ARTICLES OF CONFEDERATION art. V (1777).

82. "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 Place of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.

83. "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." U.S. CONST. art. I, § 2, cl. 2.

"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." U.S. CONST. art. I, § 3, cl. 3.

state-imposed congressional term limits fit neatly into either one of these characterizations. This leaves unanswered the question: what was the Framers' intent concerning congressional term limits, particularly those that might be imposed by the individual states?

a. *The Times, Places and Manner Clause (Manner Clause)*. The Manner Clause gives the individual states the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," but reserves to Congress the power to alter the state regulations by law.⁸⁴ This Clause "met with little discussion in the [Constitutional] Convention."⁸⁵ However, it was hotly debated during the state ratifying conventions.⁸⁶ The states "were disturbed by the word 'manner' because they thought it had virtually unlimited meaning" and "gave Congress ultimate and unfettered discretion to alter elections. No other entity, legislative, executive, or judicial, state or federal, could control this discretion."⁸⁷ Proponents of the Constitution argued "that the federal government would restrain itself from abusing this power unless the federal government's very existence was threatened."⁸⁸ Alexander Hamilton argued that the reason Congress was given ultimate power in this Clause was "to prevent the dissolution of the federal government by the states."⁸⁹ Many states called for an amendment limiting Congress' power to enact regulations under the Manner Clause to "cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress."⁹⁰ Such an amendment was never adopted.

It appears that the Manner Clause was intended to give the states broad powers in regulating federal elections, and that Congress would only intervene if the states took action that threatened the existence of the federal government. It would be difficult to characterize state-imposed term limitations as threatening the existence of the federal government. However, it is not entirely clear that such limits can properly

84. U.S. CONST. art. I, § 4, cl. 1.

85. Safranek, *supra* note 23, at 328.

86. *Id.* at 329-40.

87. *Id.* at 331.

88. *Id.* at 334.

89. *Id.* at 341.

90. *Id.* at 332.

be characterized as permissible state regulations of federal elections under the Manner Clause.

b. The Qualifications Clauses. Opponents of state-imposed term limits argue that states are adding a qualification to those enumerated in the Constitution—that the candidate not have already served for more than a specified number of years. They claim that the list of qualifications in the Constitution has “been interpreted consistently and correctly by the courts as setting maximum requirements that may not be altered by Congress or the states.”⁹¹ Proponents of state-imposed congressional term limits argue that “the discussion of the qualifications [at the Constitutional Convention], the wording of the Qualifications Clause[s], and the structure of the Constitution all suggest that the qualifications for senators and representatives were meant to ensure that states sent minimally qualified candidates to Congress.”⁹² Unlike the Manner Clause, the Qualifications Clauses were not the subject of significant debate at the Constitutional Convention.⁹³ “The [sparse] debate over the Qualifications Clause[s] in the state ratifying debates stands in stark contrast to the breadth and ferocity of the argument over the [Manner] Clause.”⁹⁴

“Joseph Story often is considered one of the preeminent sources of constitutional interpretation because of his propinquity to the era of ratification and his long tenure on the Supreme Court.”⁹⁵ Opponents of state-imposed term limits rely on the fact that “Story thought that the enumeration of qualifications in the Constitution excluded all other qualifications.”⁹⁶

It is far from clear that Joseph Story’s view of the exclusivity of the Qualifications Clauses is the correct one, or that state-imposed congressional term limits are even contrary to his view. Whether these term limits can even be characterized as a “qualification” is more of a debate over semantics than it is over constitutional interpretation. Like the Manner Clause analysis, the analysis of the Qualifications Clauses seems a bit forced. “The lack of any evidence indicating a limitation on the

91. Corwin, *supra* note 3, at 579.

92. Safranek, *supra* note 23, at 350.

93. *Id.* at 350-54.

94. *Id.* at 354.

95. *Id.* at 344.

96. *Id.* at 358.

states to add qualifications, at a convention that was called in large measure to limit state power, is as determinative as history can be."⁹⁷

2. *The Tenth Amendment*

If state-imposed congressional term limits cannot be properly characterized as falling under the Manner Clause or the Qualifications Clauses, what is left? The Tenth Amendment is a catch-all provision that specifically reserves to the respective states any "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."⁹⁸ If neither the Manner Clause, nor the Qualifications Clauses adequately address the issue of state-imposed congressional term limits, then it may be proper to analyze it under the Tenth Amendment.

Regarding his interpretation of the Qualifications Clauses, "[Joseph] Story admitted that no less an authority than Thomas Jefferson had opposed [his] view."⁹⁹ Jefferson believed "that the Tenth Amendment provides the states and the people with any power not given explicitly to the federal government."¹⁰⁰ Jefferson further elaborated this view by stating, "To take a single step beyond the boundaries thus specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition."¹⁰¹ Thus, "[t]he Qualifications Clause[s], being expressed in the negative, merely set[] forth minimum qualifications beyond which the states are free to add."¹⁰² This line of reasoning is consistent with the form of government described in *The Federalist Papers*—one in which the ultimate power and authority resides in the people, giving the people control over their elected representatives.

Joseph Story "added that even if one conceded that states have the power to add qualifications, state legislatures are not the entity capable of exercising this power, only the people of

97. *Id.* at 353.

98. U.S. CONST. amend. X.

99. Safranek, *supra* note 23, at 358.

100. *Id.* at 358-59.

101. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY* 41, 42 (1991).

102. Safranek, *supra* note 23, at 358-59.

the state have this power."¹⁰³ In all fifteen states imposing congressional term limits, these limits have been enacted by the voice of the people declaring their will. "Story admitted that his position was not conclusive. Instead, he thought his theory shifted the burden of proof to the states to show that they have the power to add qualifications beyond those found in the Constitution."¹⁰⁴ The presently enacted state-imposed congressional term limits have carried this burden of proof.

IV. CONCLUSION

The Constitution should be interpreted as a flexible document capable of adapting to present day exigencies in light of the Framers' intentions. Even the Framers themselves, or at least some of them, never imagined that the political structure they created would have the longevity it has enjoyed. James Madison objected that one member of the House for every forty thousand inhabitants would render the House excessive with the impending increase in population.¹⁰⁵ Nathaniel Gorham replied, "The government . . . will not last so long as to produce this effect. Can it be supposed that this vast country, including the western territory, will one hundred and fifty years hence remain one nation?"¹⁰⁶ Despite these doubts, the government has lasted, but it must adapt to conform more closely to the Framers' vision if it is to ultimately survive.

The government must acknowledge that its ultimate source of power is the people and once again become accountable to the people for its actions. The voice of the people has spoken, and the people want congressional term limits. "Term limitation is a first step on the arduous road leading to the restoration of political institutions that are capable of nurturing representative democracy, democratic citizenship and the ennobling art of self-government."¹⁰⁷ If Congress is truly a representative body which is responsive to the people, then it should propose an amendment to the Constitution limiting congressional terms and present it to the people for ratification. Congress' refusal to do so is the best evidence that it is not the representative body that the Framers of the Constitution envisioned,

103. *Id.* at 359.

104. *Id.*

105. BANCROFT, *supra* note 33, at 294.

106. *Id.* at 294-95.

107. Petracca, *supra* note 66, at A30.

thus giving credence to the argument that the Framers would support today's state-imposed congressional term limitations. It is a sad fact that if the states are not allowed to impose congressional term limits, Congress never will, in spite of the will of the people—the supposed ultimate source of power.

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