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Want to Limit Congressional Terms? Vote for "None of the Above"

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O'Connor: Want to Limit Congressional Terms? Vote for "None of the Above"
**WANT TO LIMIT CONGRESSIONAL TERMS?
VOTE FOR "NONE OF THE ABOVE"**

I would feel better about voting if it felt true—If it felt like I was able to state what I think about our shared life by voting. Sometimes what I think is that none of the candidates offered on the ballot is worthy of office.¹

As long as American politics drifts away from democracy's dreams, the voters' only real choice will be to say no.²

I. INTRODUCTION

In the film *The Distinguished Gentleman*,³ Eddie Murphy plays a con artist named Thomas Jefferson Johnson. When the U.S. Representative from Johnson's district, a twenty-year incumbent named Jeff Johnson, dies in office, Thomas Jefferson Johnson decides to drop his first name, shorten his middle name to Jeff, and run for Congress. The new candidate reasons that the voters of his district are so used to voting for "Jeff Johnson" that they will fail to recognize that their incumbent has died. The new "Jeff Johnson" obtains all of the campaign memorabilia of the old "Jeff Johnson," cuts off the pictures of the deceased incumbent, and runs a campaign based solely on name recognition, encouraging voters to vote for "Jeff Johnson—the name you know." Remarkably, Eddie Murphy's character wins the election without making a single public appearance, and he spends the remainder of the film on Capitol Hill, working the "con of a lifetime."

Although *The Distinguished Gentleman* represents a parody of American politics,⁴ the film's message reflects the very real sentiments of some

* This issue went to press just after the unofficial returns for the November 1994 election had been calculated. For an analysis of the impact of this election on the arguments and premises set forth in this note, see *infra* note 273.

1. Anne Herbert, *None of the Above: A Way to Diminish the Number of Nasty and Stupid Political Campaigns, Candidates and Officeholders*, *WHOLE EARTH REV.*, June 22, 1990, at 58.

2. Nancy Gibbs, *Keep the Bums In*, *TIME*, Nov. 19, 1990, at 32, 42.

3. *THE DISTINGUISHED GENTLEMAN* (Hollywood Pictures 1992).

4. Although intended to be a parody, the premise behind *The Distinguished Gentleman* is not completely unrealistic. In the race for the 41st U.S. Congressional District of California in 1980, left vacant by the retirement of 28-year Republican incumbent Bob Wilson, the Democratic nominee was a state senator also named Bob Wilson. See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 92 (2d. 1987). Senator Wilson entered politics as Robert Wilson, but subsequently changed his ballot name to "Bob," in what was perceived as an attempt to profit from confusion with the U.S. Congressman. *Id.* The Republican nominee, Bill Lowery, went to great

Americans concerning politicians.⁵ Specifically, the film illustrates two common characteristics of modern American politics: voter apathy and public disgust with government. These two concepts, although seemingly inconsistent, are clearly interrelated.⁶ Scandals in Congress and stories of corruption and personal abuses of the powers of office abound in the news,⁷ and have

lengths to distinguish the two Bob Wilsons. *Id.* at 92-93. One Lowery television advertisement featured Representative Wilson standing in front of the Capitol saying, "This is Congressman Bob Wilson. Don't vote for me! Don't vote for Bob Wilson. Vote for Bill Lowery." *Id.* at 93. Bill Lowery won the election, but with only 55% of the vote. *Id.*

5. For an in-depth analysis of the diminishing public perception of politicians, see MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 1* (1977) ("The theme that the government is wrongfully influenced by an unrepresentative, illegitimate, or even conspiratorial group surfaces quite regularly in American political campaigns."). See also GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992). Public distrust of American politics is by no means a recent phenomenon. George Will notes that having fun at Congress' expense has long been an American tradition. *Id.* at 2. However, the public's estimation of Congress has seriously deteriorated in recent years. See *infra* note 8. One simple example of the public's disgust with its congressional representatives in Washington was illustrated by public billboards displayed along Interstate 80 in California in the autumn of 1991. WILL, *supra* at 12. The billboards, which advertised a local San Francisco morning news show, presented an image of the U.S. Capitol dome and the words: "Find out what they did to you last night." *Id.* (emphasis added). Will emphasizes the use of the preposition "to" to demonstrate the public anxiety over what "they," the representatives in Congress, are doing "to," and not "for," the people they represent. *Id.* at 13. Will asserts that this notion of congressional representatives "sticking" it to the people they represent is consistent with the current public perception of Congress. *Id.*

6. See *supra* note 4 and accompanying text.

7. Since our country's founding, 90 members of Congress have been indicted. More than half of these indictments (55) occurred after 1970. Of the 85 indictments occurring this century, 46 resulted in convictions, with 34 of those occurring since 1970. Claude R. Marx, *INVESTOR'S BUSINESS DAILY*, June 10, 1994, available in LEXIS, Nexis Library, CURNWS File.

On November 3, 1986, the press reported that the U.S. sent spare parts and ammunition to Iran. Over the ensuing months, the media discovered that additional arms sales were made to Iran, and that the profits were diverted to a fund for the Nicaraguan contras. See *THE WORLD ALMANAC* 528 (Pharos Books 1992) [hereinafter *WORLD ALMANAC*]. These reports instigated the Iran-contra scandal, which led to the Senate and House investigations of many top-level Reagan advisors and aides and the eventual conviction of Lt. Colonel Oliver North, a National Security Council staff member. *Id.*

A congressional scandal still fresh in the minds of many voters occurred in September of 1991, when the General Accounting Office reported that members of the House of Representatives had written 8331 checks against insufficient funds in a bank operated at the Capitol. *Id.* at 529. After considerable public protest, the House bank was shut down, and the names of all members who had overdrew their accounts were published. See Marx, *supra*.

Incumbent politicians have also been plagued by numerous sex scandals. Oregon Senator Bob Packwood became the object of a Senate Ethics Committee investigation into sexual harassment charges. See Rod Little, *The Cost of Keeping and Debating a Diary*, *U.S. NEWS & WORLD REPORT*, Nov. 15, 1993, at 14. As a result of this scandal, Packwood lost the confidence of many Oregon voters, as was evidenced by his narrow victory over a relatively unknown challenger in his bid for reelection to the Senate in 1992. See *WORLD ALMANAC, supra*, at 105. Further, the Senate's conduct in its investigation of Packwood's case was called into question by the public. See

contributed to an overall public distrust of Washington.⁸ And as the voters have become more disgruntled with their elected officials, their discontent has been expressed by record lows in voter turnout.⁹ Public distrust of elected representatives has resulted in voter apathy at the polls. The only winner to emerge from this vicious cycle¹⁰ has become a formidable player on the

Little, *supra*, at 14 (reporting that in the past congressional session, the Senate stopped all business for two days, putting off the approval of five state department appointees and President Clinton's crime bill, to debate whether to subpoena Packwood's diaries). More recently, a grand jury in Cook County, Illinois, indicted U.S. Representative Mel Reynolds on 20 criminal charges, ranging from sexual assault to obstruction of justice. See Andrew Fegelman & Robert Becker, *Reynolds Indicted in Teen Sex Scandal*, CHI. TRIB., Aug. 20, 1994, § 1, at 1. Reynolds is alleged to have sexually assaulted a 16-year-old woman who worked on his 1992 congressional campaign. *Id.*

President Clinton was in office for less than a year before being targeted for major scandals. See Mark Hosenball et al., *How Bad Is It?*, NEWSWEEK, Jan. 17, 1994, at 16 (describing Clinton's possible involvement in a failed real estate development known as Whitewater and a collapsed savings and loan association). In January of 1994, the Justice Department subpoenaed all of Clinton's files concerning the Whitewater real estate development, a severely mismanaged project headed by James McDougal, a close friend of President Clinton's, during Clinton's tenure as governor of Arkansas. *Id.* The subpoenas were served on the White House and six of the President's senior officials in an attempt to determine whether investors in the real estate venture, including the Clintons, benefitted from the questionable transactions by the savings and loan association that handled the development. *Whitewater Probe Widens as FBI Issues Subpoenas*, CHI. TRIB., Mar. 5, 1994, § 1, at 3 [hereinafter *Whitewater Probe*]. Whitewater never really got off the ground and ultimately failed, along with the savings and loan association owned by McDougal, amidst allegations of diverted funds and secret deals made with top officials within the governor's office. Hosenball, *supra*, at 17-18. White House counsel Bernard Nussbaum, one of the officials subpoenaed, resigned in the wake of questions over his contacts with the Treasury Department and possible conflicts of interest that may have compromised the investigation. *Whitewater Probe*, *supra*, at 3. Additionally, hearings held by the Senate Banking Committee in the summer of 1994 led to the resignations of Deputy Treasury Secretary Roger Altman and Jean E. Hanson, the Treasury Department's general counsel. See *Treasury Aide Quits Under Fire*, CHI. TRIB., Aug. 18, 1994, § 1, at 3 [hereinafter *Treasury Aide*]; *2nd Treasury Aide Resigns over Whitewater*, CHI. TRIB., Aug. 19, 1994, § 1, at 3.

8. An Associated Press poll, taken in the summer of 1992, revealed that only one percent of Americans (a percentage smaller than the poll's margin of error) trusted Congress to do the right thing "just about all the time." WILL, *supra* note 5, at 3. Moreover, approximately one-third of the respondents polled reported that they would almost never trust Congress to do the right thing. *Id.*

9. Voter participation has steadily declined in presidential election years since 1960, to a low of 50.11% of the voting-age population in 1988. See WORLD ALMANAC, *supra* note 7, at 470. Although in the 1992 election voter participation increased to 55.23% of the voting-age population, Curtis Gans, head of the Committee to Study the American Electorate, attributes the increase almost entirely to the independent candidacy of Ross Perot and says that the increase is most likely "temporary and not very likely to change the generally downward trend of voting participation in recent years." Adam Clymer, *Turnout at Polls Best Since '68*, HOUS. CHRON., Dec. 17, 1992, at A10.

10. Contemporary congressional elections are characterized by a cycle of incumbency which operates as follows: incumbents are so entrenched that few candidates of any merit are willing to challenge them, and the few who are willing to mount a campaign cannot rely on much assistance from a national party that essentially views them as a "sacrificial lamb." See Gibbs, *supra* note 2,

political front. This player is known as the entrenched incumbent.

Incumbency has been recognized as the single greatest phenomenon in contemporary congressional elections.¹¹ The advantages of incumbency, which include sizable campaign contributions from special interest groups and political action committees (PACs),¹² official allowances,¹³ free mailings,¹⁴ and greater constituent support through casework activities,¹⁵ are recognized as nearly invincible.¹⁶ The magnitude of these advantages is so great that in an increasing number of elections, incumbents face no major-party competition,¹⁷ thereby even denying voters the option of choosing between the lesser of two evils. In this light, it appears that the real decision for voters in many elections is whether to vote at all. Frustrated by a system that has become fixed on self-preservation,¹⁸ voters have embraced limitations on the terms of service of U.S. House and Senate members as a means of reforming the political system.¹⁹

at 32. As a result, the voters are left with the undesirable alternatives of either not voting at all or overlooking any shortcomings of the incumbent and sending him or her back for another term, which in turn reinforces the incumbent's aura of invincibility, discourages viable challengers, decreases voter choice, etc. *Id.*

11. See JACOBSON, *supra* note 4, at 25-26. "[N]early everything pertaining to candidates and campaigns for the House of Representatives is profoundly influenced by whether the candidate is an incumbent, challenging an incumbent, or pursuing an open seat." *Id.*

12. See *infra* notes 54-58 and accompanying text.

13. See *infra* notes 59-60 and accompanying text.

14. See *infra* note 61 and accompanying text.

15. See *infra* notes 62-64 and accompanying text.

16. See Gibbs, *supra* note 2, at 32; John H. Fund, *Term Limitation: An Idea Whose Time Has Come*, in *LIMITING LEGISLATIVE TERMS* 225, 236-37 (Gerald Benjamin & Michael J. Malbin eds., 1992). John Fund credits the high percentage of unopposed congressional races to the virtually "impossible task of unseating those in power," which stems from the "grossly unfair" advantages enjoyed by incumbents. *Id.*

17. Nearly 20% of those running for reelection in the House of Representatives in 1990 faced no opposition. Malcolm S. Forbes, Jr., *With All Thy Getting Get Understanding*, *FORBES*, Nov. 9, 1992, at 23. In 1988, 56 of the 435 seats in the House were uncontested. Fund, *supra* note 16, at 235.

18. Gibbs, *supra* note 2, at 32. Incumbents, both Democrat and Republican, dread doing anything that threatens their tenure by angering voters, such as making hard decisions, putting limits on their powers, or engaging in serious debate. David Axelrod, a consultant to the Chicago Democratic Party, states that such incumbents are "offensive to voters because of all their efforts to be inoffensive." *Id.* at 33.

19. In the 1992 election, term limit initiatives passed in all 14 states in which they appeared on the ballot. Thomas Galvin, *Limit Score a Perfect 14-for-14, But Court Challenges Loom*, *CONG. Q. WKLY. REP.*, Nov. 7, 1992, at 3593. Counting Colorado, which approved a term limit initiative in 1990, 181 members of the 103d Congress served under the specter of term limits. *Id.* After the 1994 election, a significantly larger number of members in the 104th Congress will serve under term limits. Hugh Dellios, *Angry Voters Have Their Say on Crime, Taxes and More*, *CHI. TRIB.*, Nov. 10, 1994, § 1, at 10. The issue was on the ballot in Alaska, Idaho, Maine, Massachusetts, Nebraska, Nevada, Utah, and Washington, D.C. *Id.* The initiative passed in every state except Utah, bringing the total number of states with congressional terms limits to 21, as well as the

The concept of term limits is not new to American politics. Term limits were a popular idea in the United States just before the Constitutional Convention.²⁰ However, the delegates to the Constitutional Convention unanimously voted to reject congressional term limits, and prohibited the states from limiting the re-election of their congressional delegates.²¹ The debate over term limits resurfaced during the 1940s, when a movement arose to limit the terms of the office of the President.²² The Twenty-Second Amendment to the Constitution²³ was ratified in 1951, limiting the tenure of the office of the President to two four-year terms. Recently, however, congressional scandals and public discontent with career politicians have revitalized the concept of term limits as a means of rectifying the trend of incumbency abuse.²⁴

District of Columbia. *Id.* In some states, House members will be required to step aside starting in 1998, and in all states with term limit initiatives, Senators will be forced to step down after 12 years. Galvin, *supra*, at 3593.

20. See Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415, 417 (1992). Term limits were included in the early constitutions of many of the states prior to the Constitutional Convention. *Id.* Further, the Articles of Confederation, adopted by the Continental Congress in 1788, called for a compulsory system of rotation in office for Congress. See Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 583 (1991). Under article V, section 2, delegates to Congress could serve for no more than three years in any six-year period. ART. OF CONFED. art. V, § 2. At the Constitutional Convention, this rotation policy was discarded with little or no debate. See 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 112 (1966). For a summary of the debate between the Federalists and Anti-Federalists over the need for a system of rotation in office, see Corwin, *supra* at 582-87.

21. 2 FARRAND, *supra* note 20, at 112.

22. For a discussion of the history of the Twenty-Second Amendment, see Julia C. Wommack, Comment, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1377-80 (1993). In 1796, George Washington set the precedent of an eight-year presidential tenure by refusing to run for a third term. *Id.* at 1377-78. This tradition continued unbroken until 1940 and 1944, when Franklin Roosevelt was elected to an unprecedented third and fourth terms. *Id.* at 1378. After the Republican Party regained control of Congress in 1946, it undertook the task of amending the Constitution by limiting the office of President to a tenure of two, four-year terms. *Id.* at 1378-79. On March 24, 1947, the Twenty-Second Amendment to the Constitution was proposed to the states, and after rejection in only two states, ratification was completed on February 27, 1951. *Id.* at 1379.

23. This amendment states:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

U.S. CONST. amend. XXII, § 1.

24. For a discussion of the abuse of incumbency, 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, 217-26 (1991) (arguing that the term limit movement is an outgrowth of a growing public perception that legislators are solely concerned with reelection and focus only on their desire for job security rather than on their responsibility to fulfill the public duties with which they are entrusted).

The constitutionality of state-imposed term limits will be heard by the Supreme Court on November 29, 1994, and will probably be decided in the spring of 1995.²⁵ Legal experts²⁶ predict that term limit supporters face an uphill battle in establishing the constitutionality of state-enacted congressional term limits, reasoning that such measures add to the three basic qualifications for federal office set forth under the Qualifications Clauses of the Constitution.²⁷ Others examine the constitutionality of term limits from the perspective of voter choice, reasoning that term limits infringe on the fundamental right of the electorate to vote for the candidate of their choice.²⁸ Under either analysis, state-enacted congressional term limits are likely to be held unconstitutional by the courts. Term limits could withstand constitutional scrutiny only if added by an amendment to the Constitution,²⁹ much as the

25. See *Justices to Rule on Congressional Term Limits*, CHI. TRIB., June 21, 1994, § 1, at 3 [hereinafter *Justices*]. The U.S. Supreme Court granted certiorari on June 20, 1994, to hear an appeal from a decision by the Arkansas Supreme Court that held that a term limits amendment added to the Arkansas Constitution in a 1992 referendum vote violates the federal Constitution. *Id.* See also Tony Mauro, *Term Limits Have Their Day but Still Face a Day in Court*, USA TODAY, Nov. 10, 1994, at 5A.

26. Galvin, *supra* note 19, at 3594 (citing Georgetown University law Professor Mark Tushnet and Duke University law Professor Walter Dellinger for the proposition that term limits are unconstitutional qualifications for federal office and are unlikely to be upheld by the courts).

27. The qualifications for membership in the House of Representatives are found in Article I, Section 2 of the Constitution: "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.

The qualifications for membership in the Senate are found in Article I, Section 3: "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.

In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court cited the debates at the Constitutional Convention and the post-Constitution debates over the Constitution's ratification for support that the above qualifications were "defined and fixed in the Constitution, and . . . unalterable by the legislature." *Powell*, 395 U.S. at 539 (quoting THE FEDERALIST PAPERS 371 (Mentor ed. 1961); see *infra* note 97).

28. For an analysis of term limits as an unconstitutional infringement on the fundamental right to vote for the candidate of one's choice, see Johnathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966, 968-76 (1993); Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155, 166-74, 184-85 (1991). See *infra* notes 159-85 and accompanying text.

29. Article V describes how the Constitution may be amended:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States . . .

U.S. CONST. art. V.

Twenty-Second Amendment limits presidential terms.³⁰ Consequently, the goals of term limitations, to remedy the problems of incumbency abuse and to provide greater voter choice, would best be achieved by alternative means.

Tired of entering the polling booths and having to choose between the lesser of two evils, more and more Americans are staying home and not exercising their right to vote.³¹ For those Americans who are voting, many do so without any sense of enthusiasm.³² Although the American government is premised on the belief that its legitimacy is derived from the consent of the governed,³³ one-sided elections, created by the presence of entrenched incumbents, have prevented many voters from exercising their true consent due to the inadequacy of the ballot options. It is time for American voters to once again be given a real choice in elections, the choice to say "no" by voting "none of the above."³⁴

A "none of the above" ballot option would provide voters with an

Thus, there are two general methods for amending the Constitution: (1) a congressional proposal to amend; and (2) a proposal to amend made by a national constitutional convention called for by two-thirds of the state legislatures. See Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1973 n.9 (1994). However, Kobach goes on to discuss a less traditional method for amending the Constitution, one followed during the passage of the Seventeenth and Nineteenth Amendments, that relies heavily on direct popular action through the state referendum and initiative process. *Id.* at 1972. Kobach concedes, however, that the availability of this alternative method depends on the constitutionality of the state-imposed initiative. *Id.* at 1976. Consequently, if state-imposed term limits were held unconstitutional, then "[p]roponents of term limits would be forced either to give up their struggle or to attempt one of the traditional routes of constitutional transformation." *Id.*

Just as the movements for the direct election of senators and women's suffrage were unlikely to have been implemented by one of the two traditional methods of constitutional amendment because members of Congress and state legislators had a direct stake in maintaining the existing institutional arrangement, term limits are also unlikely to be achieved by a constitutional amendment under Article V because such measures inherently threaten the existing institutional arrangement of Congress. *Id.* at 1974. Therefore, if state-imposed congressional term limits are struck down by the courts as unconstitutional, then the term limits movement, in all likelihood, will terminate.

30. See *supra* note 23.

31. See *supra* note 9.

32. See Marci McDonald, *Days of Big Decision in Washington*, MACLEAN'S, Mar. 16, 1992, at 32 (quoting Karlyn Keene, a polling expert in Washington's American Enterprise Institute, as stating that "[t]here is no one candidate [in the 1992 election] who has captured the public imagination").

33. This premise is based on the language of the Declaration of Independence: "[G]overnments are instituted among Men, deriving their just powers from the Consent of the Governed . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192 (1990).

34. See Micah L. Sifry, *Let 'em Vote for 'none of the above'*, NATION, Sept. 10, 1990, at 221 (calling for a "none of the above" ballot option for all elective offices).

opportunity to remove abusive incumbents from office, without having to send a vastly inexperienced and unknown challenger in their place.³⁵ Additionally, a "none of the above" ballot option would help curb the abusive trend currently pervading Congress by putting incumbents on alert that if they continue their abusive practices, the voters will have a legitimate means of voting them out of office.³⁶

This Note will address the problems created by the incumbency advantage and the corresponding abuses of career legislators, and will conclude that although term limits are not a constitutional means of congressional reform, a "none of the above" ballot option is a viable solution to the abuses of Congress, and one that does not restrict voter choice. The forms of incumbency abuse and the advantages and electoral security that incumbents enjoy will be analyzed in Section II of this Note.³⁷ Section III will take a closer look at the states' attempts to limit congressional terms, and will explain why such measures are unconstitutional and therefore an unviable solution to incumbency abuse.³⁸ Section IV will introduce the proposition of adding a "none of the above" option on all ballots for congressional office, will analyze the means of its execution, and will present examples of its application.³⁹ Finally, Section V will offer reasons why a "none of the above" ballot option will solve the problems of incumbency abuse, will offer methods of implementation, and will conclude that such an option is constitutional and the most effective means of providing a check on members of Congress.⁴⁰

II. ABUSE OF INCUMBENCY AND THE INCUMBENCY ADVANTAGE

*There is no distinctly native criminal class except Congress.*⁴¹

On June 17, 1972, five men were arrested for breaking into the offices of

35. A majority "none of the above" vote would result in a special election, with the candidates losing to "none of the above" in the general election banned from the ballot for the special election. See Sifry, *supra* note 34. Thus, with the entrenched incumbent now barred from the election ballot, the political parties face a more balanced contest with respect to electoral advantage and will nominate their strongest and most qualified candidate. See *infra* note 225. For a discussion of *how* the "none of the above" ballot option will work, see *infra* notes 219-225 and accompanying text. For a discussion of *why* a "none of the above" ballot option would work, see *infra* notes 244-249 and accompanying text.

36. See Chris Black, *The Political Revolution: How to Throw the Bums Out*, BOSTON GLOBE, Oct. 28, 1990, at A29.

37. See *infra* notes 41-74 and accompanying text.

38. See *infra* notes 75-207 and accompanying text.

39. See *infra* notes 208-43 and accompanying text.

40. See *infra* notes 244-71 and accompanying text.

41. Pete DuPont, *Rosty, Congress and the Rule of Law*, WASH. TIMES, June 26, 1994, at C1 (quoting Mark Twain).

the Democratic National Committee in the Watergate office complex in Washington, D.C.,⁴² and a turning point was marked in the American public's perception of its elected officials. The years following Watergate saw a fallout of voter confidence in the political system.⁴³ In recent years, numerous scandals involving many top-level U.S. government officials have been brought to the public's attention,⁴⁴ all contributing to a lack of trust in the government and a distaste for American politics. This lack of confidence has manifested itself as a downward trend in voter participation.⁴⁵

Commentators today describe a political system that is more dedicated to its own self-preservation than to providing real leadership.⁴⁶ Time and again examples of incumbent politicians abusing the powers of their elected office have been documented in the media.⁴⁷ Generally, methods of abuse by incumbents

42. WORLD ALMANAC, *supra* note 7, at 525. The Watergate break-in later led to charges of criminal conspiracy and obstruction of justice for attempting to cover up facts relevant to the investigation of the case. *Id.* at 525-26. These charges led to the resignation of several top officials of the Nixon administration, including Nixon aides H.R. Haldeman, John Ehrlichman, John Dean, and Attorney General Richard Kleindienst. *Id.* at 525. President Nixon resigned from office on August 9, 1974, after impeachment hearings against him had been initiated in the House Judiciary Committee. *Id.* at 526.

43. The sharp reduction in voter confidence in elected officials was noted by Congress' shift in party composition after the Watergate scandal. In the 1974 election, the Republicans, the political party of President Nixon, lost 49 seats in the House of Representatives and four seats in the Senate. JACOBSON, *supra* note 4, at 142-43.

44. *See supra* note 7.

45. WORLD ALMANAC, *supra* note 7, at 470. After the 1960 presidential election, in which 62.8% of the voting-age population participated, voter turnout steadily decreased, to a low of 53.5% of the voting-age population in the 1976 election. *Id.* In the 1988 election, voter participation was only 50.1% of the voting-age population, the lowest it has been for a presidential election since before the Great Depression. *Id.* Further, voter turnout has been substantially worse in off-year elections (no presidential race). The turnout rate was only 36.4% of eligible adults in 1990, tying the 1986 election as the second lowest since 1942. *See* Gibbs, *supra* note 2, at 32. In the 1994 election, voter turnout was estimated at 38.7% of the eligible electorate. *Voter Turnout 38.7%, Up Slightly from Last Two Midterm Elections*, CHI. TRIB., Nov. 10, 1994, § 1, at 21. Although the turnout was up from prior off-year elections, Curtis Gars, of the nonpartisan Committee for the Study of the American Electorate, was not "encouraged at all" with the increase "because it's driven by people's anger with the system rather than their faith in the system." *Id.* Furthermore, although the turnout in the 1992 presidential election increased to 55.23%, this rise can be attributed to the independent candidacy of Ross Perot, and is not likely to change the downward trend in voter participation experienced in recent years. *See* Clymer, *supra* note 9, at A10.

46. Gibbs, *supra* note 2, at 32.

47. *See supra* note 7; Jonathan Rowe, 'No' to Term Limits, CHRISTIAN SCI. MONITOR, Oct. 24, 1991, at 11. The American public has grown to hold its elected officials in Congress in diminishing esteem. News stories of House members overdrawing their congressional bank accounts and voting for congressional pay increases have contributed to an overall distrust of elected officials. *Id.* *See also* Ed Magnuson, *You Sold Your Office*, TIME, Nov. 26, 1990, at 35 (describing the savings and loan scandal and the ethical lapses of the "Keating Five"). The Keating Five were five U.S. Senators who were accused of improperly intervening with federal banking industry regulators on

include the use of official power for private enrichment and the use of governmental resources for the purpose of maintaining oneself in power.⁴⁸ While the use of one's elected office for private gain often conflicts with the voters' best interests, the use of the powers of office for the sole purpose of maintaining one's tenure is even more detrimental, as it deprives the electorate of their right of self-government.⁴⁹ Yet such practice is commonplace, and is even to be expected in politics today, creating an almost insurmountable advantage for incumbents. A study conducted by Common Cause⁵⁰ revealed that in 1988, a congressman was more likely to die during his term than be defeated for reelection.⁵¹ In 1990, nearly one out of every five incumbents running for reelection in the House faced no opposition, and only twenty-three

behalf of a savings and loan institution run by Charles Keating. *Id.* The Senators were allegedly prompted by Keating's large contributions to their reelection campaigns. *Id.*

48. For a discussion of the methods of incumbency abuse, see Gardner, *supra* note 24, at 220-21. Gardner offers graft and patronage as examples of the use of office for private enrichment. *Id.* at 220. Graft includes the personal use of public property and the acquisition of personal business opportunities through governmental contacts and inside information. *Id.* The Keating Five, *supra* note 47, who procured campaign contributions through their governmental contacts, present a recent example of graft.

Patronage is the use of governmental influence to obtain jobs or business opportunities for associates, friends, or relatives. Gardner, *supra* note 24, at 220. The Clintons can partially attribute their current troubles with Whitewater, *supra* note 7, to their practice of patronage. See Howard Fineman et al., *Hillary's Trouble*, NEWSWEEK, Mar. 14, 1994, at 24. Several of the major players in Whitewater are close Clinton friends and associates appointed to prominent positions in either Clinton's administration as Governor of Arkansas or his current White House administration. *Id.* Among the Clinton appointees currently being investigated are Bernard Nussbaum (former White House counsel), Vincent Foster Jr. (former deputy White House counsel who committed suicide in July of 1993), William Kennedy (associate White House counsel), Harold Ickes (White House deputy chief of staff), and Webster Hubbell (former associate attorney general of Arkansas). *Id.* Foster, Kennedy, and Hubbell were all partners with Hillary Clinton in the Rose Law Firm in Little Rock, Arkansas. *Id.* Additionally, Roger Altman, the Deputy Treasury Secretary who resigned amid accusations of misleading Congress with his testimony concerning Whitewater, is a close friend of President Clinton. See *Treasury Aide*, *supra* note 7.

49. Gardner, *supra* note 24, at 220-21. Gardner states that a fundamental aspect of American society is that the choice of whom shall govern, and on what terms, is one for the people, and not for the government. When government officials use the power of office to dictate or to improperly influence decisions about who will hold office, the basic right of self-government is undermined.

For the political heirs of men who pledged their 'lives, [their] fortunes, and [their] sacred honour' to the pursuit of political freedom and self-determination, there can be little doubt that the government's abuse of the powers of incumbency for the purpose of perpetuating its own power is one of the worst possible offenses against the polity.

Id. at 221 (quoting THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776))

50. Common Cause is a Washington, D.C. based citizens lobby which advocates higher ethical standards in government. Joshua Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913, 1917 (1992).

51. Black, *supra* note 36, at A29. Common Cause reported that in 1988, 98% of all incumbents were returned to Congress. *Id.*

of the 406 incumbents who sought reelection faced financially competitive races.⁵²

Incumbents possess enormous advantages that enable them to maintain a secure hold on their elected offices.⁵³ The most obvious advantage of incumbency is money.⁵⁴ Under the current system of campaign finance, incumbents enjoy significant fund-raising advantages and are capable of vastly outspending their challengers.⁵⁵ The spending gap between incumbents and their challengers has substantially increased in recent years.⁵⁶ This incumbent advantage in campaign finance is largely attributable to political action committees, who primarily give campaign contributions to incumbents.⁵⁷ Incumbents have a practical monopoly on contributions from these special interest groups, who in return desire access to legislators on issues impacting

52. *Id.*; Gibbs, *supra* note 2, at 34. In 1993, only 23 challengers were able to raise even one half of the total amount of campaign funds spent by the incumbent. *Id.* For an analysis of the 1994 election, see *infra* note 273.

53. For a general discussion on the advantages of incumbency, see Corwin, *supra* note 20, at 571-76.

54. The costs of financing a political campaign have drastically increased in recent years. In 1990, the average costs of a campaign for the House of Representatives was \$273,811, while those in the Senate had to raise an average of \$9000 a week for six years (\$2,808,000) in order to finance the costs of reelection. Gloria Borger et al., *Out of Order!*, U.S. NEWS & WORLD REPORT, Oct. 22, 1990, at 32. As the costs of seeking election have increased, campaign money has become a primary concern of candidates. See JACOBSON, *supra* note 4, at 49. The success of candidates on election day "is a direct function of how much campaign money they raise and spend." *Id.*

55. Corwin, *supra* note 20, at 574.

56. *Id.* Corwin cites statistics from the 1974 and 1988 campaigns. While the average House incumbent spent roughly \$56,539 in the 1974 election, which was about 41% more than the \$40,015 spent by the average challenger, by 1988, the average House incumbent was outspending the average challenger by a margin of 318%, roughly \$378,000 to \$119,000. See also Gibbs, *supra* note 2, at 34 (reporting that in the 1990 House elections, two sitting Congressmen alone—Stephen Solarz of New York and Mel Levine of Los Angeles—raised more campaign money one month before the election than all of the 331 challengers combined).

57. Gibbs, *supra* note 2, at 34. Current estimates indicate that more than 10,000 lobbyists work in Washington. *Congressional Panel Agrees on Bill to Rein in Lobbyists*, CHI. TRIB., Sept. 27, 1994, §1, at 8. These lobbyists form political action committees (PACs). In 1990, PACs gave 19 times more in monetary contributions to sitting members of Congress than they gave to challengers. Gibbs, *supra* note 2, at 34. See also *Texas Lawmakers Find Health PACs Generous*, CHI. TRIB., Jan. 12, 1994, § 1, at 7 (reporting that two U.S. Congressmen from Texas, who have helped steer the drive for health care reform, are among the largest recipients of campaign contributions from health-care PACs). Medical and insurance PACs have contributed \$1.09 million to the reelection campaigns of Senator Phil Gramm since he was first elected to the House in 1978, a sum greater than that contributed to any other member of Congress. *Id.* Gramm has authored his own health-care reform proposal that has been backed by the insurance industry. *Id.* Additionally, Representative Mike Andrews, who assisted in writing a bipartisan health plan to work with the private insurance system, has received \$530,658 from medical and insurance PACs during his six terms in office, placing him among the nine highest House recipients of contributions from medical and insurance PACs and first among his Texas colleagues. *Id.*

their particular interest.⁵⁸

The powerful monetary advantage of incumbents provides them with a host of other benefits. Incumbents can hire large staffs of loyal supporters and can recruit a glut of campaign workers to obtain access to the local press and media and to court influential people from the district.⁵⁹ Incumbents can also exploit the financial perks of office. In addition to their salary, members of Congress receive travel, office, staff and communication allowances amounting to a budget of over one million dollars for the two-year House term, all of which can be used to increase candidate visibility in the home district.⁶⁰ Another significant perk of the office is the franking privilege, which allows incumbents to blanket their districts with voluminous free mailings that are essentially thinly disguised campaign endorsements.⁶¹

Another advantage of incumbency is the ability of sitting members of Congress to enhance their status with constituents through casework. Casework involves helping constituents with the problems they experience with the bureaucracy.⁶² Congressmen have the influence to expedite bureaucratic decisions, as they wield control over the budgets and program authorizations that bureaucrats desire.⁶³ With the growth of the federal bureaucracy, incumbents have had greater opportunities to engage in casework activities, thereby increasing the electoral support of their constituents.⁶⁴ As challengers have no such control over bureaucrats, they are not capable of using casework as a means of creating voter support.

Incumbents also enjoy a favorable status among their constituents due to the

58. See Forbes, *supra* note 17, at 23; Borger, *supra* note 54, at 33 (arguing that because incumbents rarely lose, their lengthy tenure gives them substantial influence over special interests).

59. Forbes, *supra* note 17, at 23; see also Gloria Borger, *The Reform War*, U.S. NEWS & WORLD REPORT, Aug. 31, 1992, at 54 (reporting that congressional staffs have grown from 2000 employees to 12,000 since 1947). For a discussion of the benefits of large congressional staffs for incumbents, see Fiorina, *supra* note 5, at 56-60.

60. JACOBSON, *supra* note 4, at 37.

61. *Id.* Jacobson reports that the franking privilege has significantly grown in use "over the last 25 years and shows no sign of leveling off. During any given congressional session, the volume of franked mail naturally tracks the election cycle, peaking in the months preceding an election." *Id.* at 60-61. In 1987 alone, almost one billion pieces of franked mail were sent at a cost to the taxpayers of \$91.5 million. Borger, *supra* note 54, at 31.

62. For a discussion on constituency service in the form of casework activities and the increased electoral support such assistance provides incumbents, see Corwin, *supra* note 20, at 573.

63. FIORINA, *supra* note 5, at 43. ("In a very real sense each congressman is a monopoly supplier of bureaucratic unsticking services for his district.")

64. Corwin, *supra* note 20, at 573 (noting that the significant growth of the federal bureaucracy since World War II has fortified casework as a source of the incumbency advantage).

institutional structure and political processes of Congress.⁶⁵ Congress works under a decentralized committee system in which assignments are based on member preference and seniority.⁶⁶ This structure allows members to specialize in those legislative areas where the interests of their constituents can best be served.⁶⁷ Additionally, incumbents are often able to strike deals with other incumbents in which favors are granted and returned that provide constituents with benefits.⁶⁸ Challengers are outside this congressional network and thus are not capable of reaping its benefits.

Finally, it is important to note that the advantages of incumbency have been enhanced by the decline in the role of political parties.⁶⁹ The recent increase

65. See JACOBSON, *supra* note 4, at 34-35. "If a group of planners sat down and tried to design a pair of American national assemblies with the goal of serving members' reelection needs year in and year out, they would be hard pressed to improve on what exists." *Id.* (quoting DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 81-82 (1974)).

66. For a description of the institutional structure of Congress and the committee assignment process, see David W. Rohde & Kenneth A. Shepsle, *Democratic Committee Assignments in the House of Representatives: Strategic Aspects of a Social Choice Process*, 67 AM. POL. SCI. REV. 889 (1973). The creation of a committee structure for a new Congress is characterized by a five stage process: (1) the committee configuration in the previous Congress; (2) the election results; (3) the requests for assignments by newly elected members and by returning members who held assignments in the committee configuration of the previous Congress; (4) the establishment of size and party ratios for committees in the new Congress; and finally (5) the committee assignments by each party's Committee on Committees for the new Congress. *Id.* at 890-91. The election (stage two) disrupts the initial conditions of stage one by altering the aggregate party proportions in each house, requiring the renegotiation of the committee structure by party leaders. *Id.* Party leaders then face the task of reestablishing the size and party ratios of committees (stage four), and filling vacancies on committees based on the demand for such positions by newly elected members and returning members (as expressed at stage three). *Id.*

67. *Id.* at 891 (discussing the importance of committee assignments for members of Congress in achieving their goal of reelection). "A 'good' assignment may greatly enhance his value to his constituents and provide unusual opportunities to publicize his activities in Congress; here he can develop the expertise and the reputation as a 'specialist' that will enable him to influence his colleagues and important national policies." *Id.* (quoting CHARLES CLAPP, THE CONGRESSMAN: HIS WORK AS HE SEES IT 207 (1963)). See also Jacobson, *supra* note 4, at 35.

68. For an analysis of legislative deference among congressional incumbents, see generally Emerson M.S. Niu & Peter C. Ordeshook, *Universalism in Congress*, 29 AM. J. POL. SCI. 246, 249-53 (1985) (arguing that it is in the interest of each member of Congress to negotiate passively with the others and to accede to any attempt to form a universalistic coalition among incumbents, which will ultimately maximize the net benefits accruing to his or her constituency, which in turn increases the probability of his or her reelection).

69. For an analysis of the declining significance of party labels in elections, see MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS 1-2 (1991) (discussing the degree to which reference points other than political parties, such as incumbency, have become increasingly influential in political elections). In the 1980 National Election Study, 45% of the study sample agreed that "it would be better if, in all elections, we put no party labels on the ballot." *Id.* at 35. Similarly, 37% of the study believed that "political parties don't really make any difference anymore." *Id.* For an analysis of the role of party labels in the 1994 election, see *infra* note 273.

in split-ticket voting⁷⁰ demonstrates the decreasing importance of political partisanship in voter choice.⁷¹ Consequently, recent elections have been characterized by candidate-centered politics, where candidates can no longer depend on party partisanship as a secure source of support, but must capitalize on the resources available to them to build strong personal followings.⁷² Thus, in contemporary politics, it appears that the real competition is no longer "between Republicans and Democrats but between all those already in office and those seeking to replace them."⁷³ Because of the advantages outlined above, this is a competition almost always won by the individual currently in office.⁷⁴

III. TERM LIMITS—A GOOD IDEA BUT AN UNVIABLE SOLUTION

Despite a growing anti-incumbent sentiment among the American public due to scandals in Congress and rampant abuse of the powers of office,⁷⁵ incumbents still have fared exceedingly well at the ballot-box.⁷⁶ In 1990,

70. Split-ticket voting, as opposed to straight-line voting, involves dividing one's vote between the political parties for different offices in any given election. *Id.* at 34.

71. *See id.* at 31-46. If straight-line voting is prevalent, then the results of the election for one office, say the President, should provide a fairly accurate prediction of the results of the elections of other offices, such as Congress or Governor. *Id.* at 36. On the other hand, if voters cast their ballots on the basis of factors other than party, then greater disparities are expected in the vote won by candidates on the same ticket, indicating a greater prevalence of split-ticket voting. *Id.* Based on the election results of 1900, when straight-line voting was largely predominant, one could closely predict (with an accuracy of greater than 80%) how a state would vote for Congress and governor by its vote for president. *Id.* at 36-37. In 1950, the accuracy of predicting a state's vote for Congress or governor based on its vote for president had decreased to just above 60%. *Id.* at 37. By the 1980s, knowing a state's presidential vote was virtually no help in predicting its vote for other offices, as the correlation of voting patterns between the president and other offices had declined to under 15% for the offices of President and Congress and less than 5% for the offices of President and Governor. *Id.* Such statistics are clearly indicative of an increase in split-ticket voting.

72. Corwin, *supra* note 20, at 574. In building personal followings, incumbents seek to project an image of invulnerability that will discourage the well-financed and politically experienced challengers from entering the campaign race. *Id.* In general, incumbents have been largely successful in creating an aura of invincibility that sufficiently suppresses the political aspirations of the most qualified challengers and keeps them from running for office. *Id.* at 574-75. *See supra* notes 50-51 and accompanying text.

73. Gibbs, *supra* note 2, at 33. For an analysis of the 1994 election, see *infra* note 273.

74. *See supra* notes 51-52 and accompanying text.

75. *See supra* note 7.

76. The 1992 election evidenced the staying power of incumbents, notwithstanding their scandals in office and other personal shortcomings. Eloise Salholz et al., *Who's In, Who's Out in the New Congress*, NEWSWEEK, Nov. 1992, Special Election Issue, at 17. In the Senate race, Senator John Glenn of Ohio and Senator John McCain of Arizona, both members of the "Keating Five," *supra* note 47, were reelected despite their involvement in the highly publicized savings and loan scandal. Salholz, *supra* at 18. Representative Joe McDade was reelected to a sixteenth term

ninety-six percent of incumbent U.S. representatives and all but one incumbent senator were successful in their reelection bids.⁷⁷ However, 1990 will also be remembered for the state initiatives passed by the voters of three states to limit the terms of their legislators.⁷⁸ In 1992, the term limit movement gained significant momentum as voters in fourteen states passed initiatives limiting the tenure of their elected officials in Washington.⁷⁹ Furthermore, term limit initiatives were passed by the voters of six additional states and the District of Columbia in the 1994 election, bringing the total number of states with term

in the House, notwithstanding his indictment only six months earlier for allegedly extorting more than \$100,000 in bribes, favors, and illegal gratuities. *Id.* Several House incumbents also came away unscathed from the banking scandal. *See supra* note 7. Representative Ron Coleman of Texas won reelection despite writing 697 bad checks on the House bank account. Salholz, *supra* at 18. Representatives Bill Goodling of Pennsylvania and Henry Waxman of California also were reelected after writing 430 and 434 bad checks respectively. *Id.*

Perhaps the best known example of an incumbent who was so entrenched in the system as to be unaffected by scandal and personal attacks was former House Ways and Means Chairman Dan Rostenkowski. The 18-term incumbent from Illinois has been the target of a two-year federal investigation into his personal and campaign finances. Ray Gibson & Flynn McRoberts, *Legal Fees Eat at Rostenkowski Funds*, CHI. TRIB., Mar. 5, 1994, § 1, at 5. On May 31, 1994, a federal grand jury indicted Rostenkowski on 17 counts of embezzlement and corruption. David Dahl, *Trouble Looming for Democrats*, ST. PETERSBURG TIMES, June 2, 1994, at 1A. The indictment alleged a 20-year pattern of corruption, including diversion of more than \$500,000 of taxpayers' money to phantom employees on the payroll, private gifts paid for with public monies, and House stamp vouchers used to obtain cash for personal expenditures. *Id.*; DuPont, *supra* note 41. Yet through the March 1994 Democratic primary, Rostenkowski continued to lead in public opinion polls taken within his district. *See* Thomas Hardy, *Rostenkowski Leads, But Cullerton Keeps Pace*, CHI. TRIB., Mar. 7, 1994, § 1, at 1. Rostenkowski's continued popular support up until the 1994 election stemmed from his image as a "powerful figure on Capitol Hill," which earned him the reputation of the "symbol of incumbency." *Id.* at 6. For an analysis of the 1994 election, see *infra* note 273.

77. *See* Gibbs, *supra* note 2, at 32; Corwin, *supra* note 20, at 569.

78. *See* Sula Richardson, *Congressional Terms of Office and Tenure: Historical Background and Contemporary Issues*, CONG. RES. SERVICE, Report No. 91-880 GOV, 56-58 (1991). Oklahoma became the first state to limit the tenure of its state legislators when voters passed an initiative on September 18, 1990, limiting the members of the state legislature to a cumulative total of 12 years in either or both houses. *Id.* at 57. On November 6, 1990, California voters approved a term limit initiative that restricted the tenure of the state representatives to six years and the state senators to eight years. *Id.* On the same date, Colorado voters passed their limitation initiative which confined the tenure of Colorado state legislators to a consecutive eight-year term in either house. *Id.* at 58. Further, Colorado became the first state to also limit the terms of its federal representatives by purportedly imposing a limit of twelve years on the tenure of U.S. Senators and U.S. House Members. *Id.*

79. *See* Galvin, *supra* note 19, at 3593-94. The states that passed term limit initiatives in 1992, joining Colorado which passed its limitation on congressional terms in 1990, were Arizona, Arkansas, California, Florida, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming. *Id.* at 3594. For a compilation of the specific provisions of each state's ballot initiative limiting congressional terms, see Sula P. Richardson, Note, *Term Limits for Federal and State Legislators: Background and Recent State Activity*, CONG. RES. SERVICE, Report No. 93-122 GOV, 21-25 (1993).

limits to twenty-one, as well as Washington, D.C.⁸⁰ These initiatives reflect the widespread public support for term limits.⁸¹ Thus, although voters overwhelmingly continue to return their representatives to Congress, it appears that the decision to do so may be more the result of the absence of viable challengers than of popular support and genuine approval of the incumbent.⁸² Unable to vote incumbents out of office due to their substantial electoral advantages,⁸³ voters have instead turned to term limits as a means of halting the abuses of incumbency.

Both sides of the term limit debate make persuasive arguments. Proponents of limiting the tenure of members of Congress argue that term limits force members to direct their attention to policy-making and lawmaking issues, and reduce the constant preoccupation with reelection.⁸⁴ Proponents further argue that term limits also offset some of the advantages inherent in incumbency,⁸⁵ diminish the dominance of seniority and increase the role of merit in determining the power structure in Congress, bring new members to Washington with fresh ideas, and revive the concept of the "citizen legislator," which characterizes the job of legislator as one of a public servant for a brief time, rather than as a career legislator bent on his or her own gain.⁸⁶

On the other hand, term limit opponents argue that limiting the tenure of members of Congress arbitrarily forces out of office many competent and experienced legislators, which in turn increases the power of the permanent

80. See Dellios, *supra* note 19, § 1, at 10. Term limits were on the 1994 ballot in Alaska, Idaho, Massachusetts, Maine, Nebraska, Nevada, Utah, and the District of Columbia. *Id.* The initiative passed in every state except Utah. *Id.*

81. See Richardson, *supra* note 78, at 46-48. Public sentiment for limiting the tenure of members of Congress has gained momentum within the last three decades. *Id.* at 46. In 1964, 49% of the respondents to a Gallup Poll favored limiting U.S. Senators to two, four-year terms, and 48% of the respondents favored limiting U.S. Representatives to three, four-year terms. *Id.* By 1981, 61% of the respondents to a Gallup Poll favored legislation limiting the terms of U.S. Senators, and 59% of the respondents favored limiting the terms of House Members. *Id.* at 47. Most recently, an NBC News/Wall Street Journal Poll taken in October of 1990 showed the highest support for term limits, with 72% of the respondents in favor of limiting the terms of U.S. House and Senate Members. *Id.* at 48.

82. See *infra* notes 213-18 and accompanying text.

83. For a listing and explanation of the electoral advantages of incumbents, see *supra* notes 53-68 and accompanying text. For an analysis of the 1994 election, see *infra* note 273.

84. See Richardson, *supra* note 78, at 39-40.

85. See *supra* notes 53-68 and accompanying text.

86. See Richardson, *supra* note 78, at 39-40 (listing additional arguments in favor of term limits).

bureaucracy.⁸⁷ Furthermore, those opposing limiting congressional terms argue that such measures infringe upon the right of voters to determine who shall serve and for how long,⁸⁸ decrease competition in elections prior to an incumbent's maximum tenure,⁸⁹ and are unnecessary as terms are already limited through elections.⁹⁰

Although 181 members of the 103rd Congress served under term limits, the future of their limited tenure remains questionable. While the constitutionality of term limits is currently being argued in the courts, the issue is set to be decided by the Supreme Court in the spring of 1995.⁹¹ Many legal experts⁹² agree that term limit opponents are likely to be pleased with the Court's decision on the issue, because such measures violate the Qualifications Clauses of the Constitution⁹³ and infringe on the fundamental right of citizens to vote for the candidate of their choice.⁹⁴ Therefore, the term limit initiatives passed by the

87. *Id.* at 41. The permanent bureaucracy includes the congressional staff and agency personnel. *Id.* By disqualifying experienced members of Congress from future office, term limits would correspondingly increase the power of this bureaucracy, as new and inexperienced members would be dependent on assistance from both their staff and government agencies in getting started. See Tom Teepen, *Term Limits Are a Cop-Out for a Democracy*, ATLANTA J. & CONST., Nov. 5, 1991, at A19. In the process, power would be transferred from the elected officials to the unelected bureaucracy. *Id.*

88. For a discussion of the right to vote for the candidate of one's choice, see *infra* notes 159-185 and accompanying text.

89. Richardson, *supra* note 78, at 41. Under a system of term limits, challengers are likely to wait until the election years when the incumbents are forced to retire, in order to face an opponent on a more level playing field. *Id.* In these interim elections then, competition from challengers would be reduced, which in turn will decrease voter choice. See *id.*

90. *Id.* at 40. The 1992 election appears to lend strong support to the argument that congressional terms are already limited through the election process. This election produced the largest freshman class in Congress in years, with 117 new members in the House of Representatives and 13 Senate newcomers. Stephen H. Wildstrom & Richard S. Dunham, *Washington Is Becoming a City of Amateurs*, BUSINESS WEEK, Oct. 11, 1993, at 47. However, the large turnover in Congress in 1992 was not necessarily attributable to incumbents losing at the polls. To the contrary, a majority of the newcomers to Congress won their seat as the result of the incumbent's retirement, and not by defeating the incumbent in an election. *Id.* Therefore, the argument that terms in Congress are naturally limited by elections is not as persuasive as it may at first seem. Rather, it appears that what is naturally limiting congressional terms is the decision of some incumbents to retire.

91. See *Justices*, *supra* note 25. The U.S. Supreme Court has granted certiorari to hear an appeal from a decision of the Arkansas Supreme Court that struck down a term limits amendment to the Arkansas Constitution as unconstitutional. *Id.* The case will be argued before the Supreme Court in November 1994 and will probably be decided in the spring of 1995. *Id.* See also Mauro, *supra* note 25, at 5A.

92. See *supra* note 26.

93. See *supra* note 27.

94. See *infra* notes 159-85 and accompanying text.

states are likely to be struck down as unconstitutional.⁹⁵

95. The language of the various state initiatives establishing congressional term limits differs from state to state. See Richardson, *supra* note 79, at 21-25. In some states the law takes the form of a statute, while in other states term limits are enforced through a constitutional amendment. *Id.* The term limitations range from 6 years to 12 years for members of the House of Representatives, while Senators are uniformly limited to 12-year terms. *Id.* The most important variation, however, is between those initiatives that allow for write-in candidacies and those that provide for a maximum length of office beyond which a member of Congress is prohibited from serving again. *Id.* For the purposes of this note, only those term limit initiatives that specify maximum tenures of office, beyond which future service is absolutely forbidden, are analyzed.

Those states with term limit initiatives that permit write-in candidacies have a stronger argument in the face of a constitutional challenge. By allowing for the reelection of those incumbents who have reached their term limitation as write-on candidates, the term limit does not act as an additional qualification for membership in Congress, but merely acts as a qualification for the right to appear on the ballot, which is permissible under the Times, Places, and Manner Clause of the Constitution. See *infra* notes 118-58 and accompanying text. The Supreme Court has upheld state provisions on access to the ballot as valid regulations of elections under the Times, Places, and Manner Clause. See *Storer v. Brown*, 415 U.S. 724 (1974); *infra* notes 125-35 and accompanying text. Further, the First Circuit Court of Appeals has stated that the issue in determining whether a state restriction on elections is a qualification or a manner regulation "is whether the candidate 'could be elected if his name were written by a sufficient number of electors.'" See *Hopfmann v. Connolly*, 746 F.2d 97, 103 (1984) (citing *State v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)). Thus, as the extent to which a restriction bars a candidate from reelection determines whether it is a qualification or a manner regulation, those state initiatives that provide for write-in candidacies have a better chance of withstanding constitutional scrutiny, as under such provisions incumbents do not face a complete bar to election, but are merely denied a specific line on the ballot. *But see infra* notes 196-98 and accompanying text.

The legal analysis of write-in voting is currently the subject of dispute. Prior to the Supreme Court's decision in *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), the federal courts of appeal were divided on the constitutionality of laws banning write-in voting. The Fourth Circuit held that any ban on write-in voting violates the First and Fourteenth Amendments, see *Dixon v. Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989), while the Ninth Circuit held that a state may have a compelling interest in banning write-in voting that overrides any First or Fourteenth Amendment rights of the voters, see *Burdick v. Takushi*, 937 F.2d 415, 419-21 (9th Cir. 1991). On appeal from the Ninth Circuit's decision, the Supreme Court affirmed and resolved the conflict by holding that write-in voting is not constitutionally protected, and that even complete bans on write-in voting do not unreasonably restrict a voter's interest in free speech. See *Burdick*, 112 S. Ct. at 2067-68. However, three Justices of the Court joined in a dissent that criticized the majority for ignoring the significant burden the write-in ban imposed on the individual's right to cast a meaningful vote for the candidate of his or her choice. *Id.* at 2068-72. The dissent reasoned that for those who are affected by write-in bans, "[t]he infringement on their right to vote for the candidate of their choice is total." *Id.* at 2070. The majority's decision in *Burdick* has been widely criticized as denying voters their rights as citizens in a democratic society, and the Supreme Court has been urged to reconsider its decision and hold that write-in voting may not be constitutionally banned. See generally Michele Logan, Note, *The Right to Write-in: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727 (1993).

Due to the current controversy over the constitutionality of write-in voting, and because many states do not have statutes providing for such a right, term limit laws that allow for write-in candidacies may not provide sufficient protection for the individual's right to vote for the candidate of his or her choice. For an analysis of the right to vote for the candidate of one's choice, see *infra* notes 159-85 and accompanying text. As a detailed analysis of the constitutionality of term limit

A. Term Limits As Substantive Qualifications for Congress

The Qualifications Clauses of the Constitution set out the basic age, citizenship, and residency requirements for membership in both the House of Representatives and the Senate.⁹⁶ Although the text of these clauses do not explicitly state that the three requirements contained therein are to be the exclusive criteria for membership in Congress, the Supreme Court has indicated that neither Congress nor the states has the authority to add to the qualifications contained in the Constitution.⁹⁷ The Court has relied on the proceedings at the Constitutional Convention and the debate in the states on the ratification of the Constitution in determining that it was the original intent of the Framers that the qualifications enumerated in the Constitution were to be fixed and unalterable by either Congress or the states.⁹⁸ Therefore, an analysis of the drafting of the Qualifications Clauses at the Constitutional Convention is necessary in order to discuss the Supreme Court's interpretation of these provisions.

One of the debates at the Constitutional Convention concerning the Qualification Clauses centered on a proposal to give Congress the power to add property qualifications as a prerequisite for membership in either House.⁹⁹ The Convention defeated not only this proposal, but also voted against a proposal to

laws providing for write-in candidacies by incumbents would require much speculation about the future treatment of write-in voting by the courts and the states, this note focuses only on term limit laws that set maximum lengths of office beyond which incumbents are prohibited from serving again.

96. See *supra* note 27.

97. *Powell v. McCormack*, 395 U.S. 486 (1969). In *Powell*, the Supreme Court noted that Powell and the petitioners relied heavily on constitutional scholar Charles Warren's analysis of the constitutional debates in arguing "that the proceedings manifest the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution." *Id.* at 532. While admitting that the debates were subject to other interpretations, the Court concluded that "the records of the debates, [when] viewed in the context of the bitter struggle for the right to freely choose representatives which had recently concluded in England . . . indicate that petitioners' ultimate conclusion is correct." *Id.* For Charles Warren's analysis on the convention debates concerning the Qualifications Clauses, see CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 412-26 (1928).

98. *Powell*, 395 U.S. at 533-34; "The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." *Id.* at 532-41 (quoting 2 FARRAND, *supra* note 20, at 249-50). See also Latz, *supra* note 28, at 166-73 (discussing the Supreme Court's historical analysis of the Qualifications Clauses in the debates at the Constitutional Convention and the state ratification debates).

99. See Warren, *supra* note 97, at 416-21. On August 6, 1787, the Committee of Detail reported to the Convention a proposed property qualification for membership in Congress that read as follows: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall deem expedient." *Id.* at 418.

give Congress the power to establish membership qualifications in general.¹⁰⁰ The Convention agreed with Virginia delegate James Madison that granting Congress the authority to regulate its own qualifications would provide the Legislative Branch with a dangerous power, and that the qualifications of the elected were "fundamental articles in a Republican Government and ought to be fixed by the Constitution."¹⁰¹ Also in agreement was Alexander Hamilton, who later wrote in the Federalist Papers that "[t]he qualifications of the persons who may choose or be chosen, . . . are defined and fixed in the Constitution, and are unalterable by the legislature."¹⁰²

The Supreme Court, in *Powell v. McCormack*,¹⁰³ relied heavily on the views of Madison and Hamilton in its interpretation of the Qualifications Clauses.¹⁰⁴ At issue in *Powell* was a House resolution that prevented Adam Clayton Powell from taking his seat in the House of Representatives, despite his compliance with the standing qualifications for eligibility enumerated in the Constitution.¹⁰⁵ The resolution was based on the findings of a House Select Committee that Powell had diverted government funds for personal use and had

100. *Id.* at 419-21. After the Committee of Detail reported the proposal for granting Congress the authority to establish property qualifications for its membership, Gouverneur Morris, a delegate from Pennsylvania, moved to strike out the words "with regard to property" from the provision. *Id.* at 420. The effect of deleting these words would have been to allow Congress to establish any qualifications which it deemed "expedient," thus granting Congress the power to set its own qualifications in general. On August 10, 1787, the Convention defeated the proposal for adding property qualifications by a vote of seven states to three, and defeated the proposal to give Congress the power to establish its qualifications in general by a vote of seven states to four. *Id.* at 420-21. As Warren concludes:

Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence.

Id. at 421.

101. *Id.* at 420.

102. THE FEDERALIST No. 60, at 394 (Alexander Hamilton) (Modern Library ed. 1937). *The Federalist Papers* appeared at regular intervals in the New York press beginning in October of 1787. They were designed primarily as campaign documents to support ratification of the Constitution. See Edward Mead Earle, *Introduction to THE FEDERALIST* at x (Modern Library ed. 1937). The Supreme Court has relied heavily on the reference to *The Federalist Papers* in the state debates over ratification of the Constitution as evidence that the qualifications for membership in Congress set forth in the Constitution were meant to be fixed and not subject to additions or alterations. See *Powell v. McCormack*, 395 U.S. 486, 539-40 (1969). See also THE FEDERALIST No. 52, at 342 (James Madison) (Modern Library ed. 1937) ("The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention.").

103. 395 U.S. 486 (1969).

104. *Id.* at 533-41.

105. *Id.* at 489.

filed false expense reports with the House.¹⁰⁶ To decide whether it was barred from hearing the case under the political question doctrine, the Court had to determine whether the House had the power to set additional qualifications beyond the standing requirements enumerated in the Constitution.¹⁰⁷

John McCormack, Speaker of the House and the respondent in *Powell*, argued that under the Constitution's Judging Clause,¹⁰⁸ Congress had the power to be the judge of the qualifications of its own members.¹⁰⁹ The Court disagreed and held that the House's power under this provision was limited to judging a member's compliance with the standing qualifications enumerated in the Qualifications Clauses.¹¹⁰ The Court found that Congress lacked the authority under the Constitution to add qualifications for its own membership, as such power would essentially give the House the ability to determine who

106. *Id.* at 490.

107. *Powell v. McCormack*, 395 U.S. 486, 518-20 (1969). It is well established that the federal courts will not hear cases involving political questions. See *Coleman v. Miller*, 307 U.S. 433 (1939). One of the primary reasons for the non-justiciability of political questions is the separation of powers within the federal government. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). In *Baker*, the Supreme Court announced a series of factors, at least one of which must be present in order to make an issue a non-justiciable political question. *Id.* The first factor listed was "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department" *Id.* In *Powell*, John McCormack, Speaker of the House of Representatives, and the other respondents argued that *Powell's* case presented a political question because, under Article I, Section 5 of the Constitution (the "Judging Clause"), there had been a "textually demonstrable constitutional commitment" to the House of Representatives of the "adjudicatory power" to determine *Powell's* qualifications for membership in Congress. *Powell*, 395 U.S. at 519. Thus, in determining whether *Powell's* case presented a political question, the Court was required to interpret the meaning of the Judging Clause:

[W]e must first determine what power the Constitution confers upon the House through Art. I, § 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. Respondents maintain that the House has broad power under § 5, and, they argue, the House may determine which are the qualifications necessary for membership.

On the other hand, petitioners allege that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution.

Id. at 519-20.

Thus, if a historical analysis of the Judging Clause disclosed that the Constitution gave the House the power to set qualifications for its members and to judge whether prospective members meet those qualifications, then the issue of membership qualifications for Congress was committed to the legislative branch and was judicially unreviewable by the courts. *Id.*

108. The Judging Clause states: "Each House shall be the judge of the elections, returns and qualifications of its own members . . ." U.S. CONST. art. I, § 5, cl. 1.

109. *Powell v. McCormack*, 395 U.S. 486, 519 (1969).

110. *Id.* at 550. The Court concluded that the Judging Clause was, at most, a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution. *Id.* at 548. Therefore, the Court was not barred from adjudicating *Powell's* claim under the "textual commitment" prong of the political question doctrine. *Id.* at 548.

may be excluded from its ranks.¹¹¹ The Court concluded that the “‘qualifications’ expressly set forth in the Constitution . . . establish ‘standing incapacities,’ which could be altered only by a constitutional amendment.”¹¹²

Although the *Powell* Court was explicit with respect to the authority of Congress to alter or add to the qualifications set forth in the Constitution, it did not explicitly speak to the ability of the states to act in this area. However, a review of several federal and state court decisions reveals that the states are likewise barred from imposing additional qualifications on candidates for Congress.¹¹³ These courts, applying the same reasoning as that of the Supreme Court in *Powell*, have rejected such state-imposed qualifications as stricter residency requirements,¹¹⁴ bars on current state officeholders,¹¹⁵ bars

111. *Id.* at 547-48. The Court noted James Madison’s warning at the Constitutional Convention that to grant to either House the power to expel members under the guise of judging qualifications established by Congress would be vesting “an improper and dangerous power in the Legislature.” *Id.* See WARREN, *supra* note 97, at 420.

The Court also emphasized the Convention’s decision to require a two-thirds vote, rather than a majority vote, to expel a member from Congress as proof that the qualifications set forth in the Constitution were meant to be fixed. *Powell*, 395 U.S. at 536. On August 10, 1787, the Convention was presented with the proposal from the Committee of Detail to empower each House with the authority to expel its members. Madison, observing “that the right of expulsion was too important to be exercised by a bare majority of a quorum[,] . . . moved that expulsion should be allowed only with the concurrence of two thirds of the members.” WARREN, *supra* note 97, at 424. Madison’s motion was unanimously approved. *Id.* The Supreme Court took special notice of this decision in *Powell*:

Thus, the Convention’s decision to increase the vote required to expel, because that power was ‘too important to be exercised by a bare majority,’ while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.

Powell, 395 U.S. at 536.

Charles Warren also found it difficult to imagine that the Convention would require a two-thirds vote to expel, but at the same time allow each House to exclude a member based on additional qualifications established by a mere majority vote. WARREN, *supra* note 97, at 424.

112. *Powell*, 395 U.S. at 522.

113. For a listing of federal and state court decisions holding that the states are not free to impose additional qualifications on congressional candidates, see Levy, *supra* note 50, at 1928; Latz, *supra* note 28, at 180-83. See also *State v. Crane*, 197 P.2d 864, 869-874 (Wyo. 1948) (examining early state cases rejecting state attempts to add to the qualifications for congressional office and concluding “that no state can alter the qualifications imposed by the Federal Constitution”). See *infra* notes 114-17.

114. *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (D.N.M. 1972) (“The New Mexico scheme adds an impermissible requirement of at least two years residency to the qualifications for United States Senator and is therefore void.”); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (“There being no such requirement in the Constitution itself, a state cannot require that a Representative live in the District from which he was nominated.”); *Hellman v. Collier*, 141 A.2d 908, 911-12 (Md. 1958) (“[T]he states have no authority to require a residence by a candidate for Representative in any particular district, so long as he be an inhabitant of the state.”).

on convicted felons,¹¹⁶ and additional oath requirements.¹¹⁷ Thus, although the Constitution does not explicitly bar the establishment of additional membership requirements for Congress beyond those enumerated in the Qualifications Clauses, judicial interpretation of these clauses indicates that the qualifications set forth in the Constitution are fixed, and may not be altered or added to by either Congress or the states. Because term limits bar an entire class of potential candidates from running for reelection based on their prior service, these initiatives impose an additional qualification for membership in Congress and should be struck as unconstitutional. Therefore, term limit supporters have turned to other constitutional provisions to defend the validity of their reform.

B. Term Limits As Times, Places, and Manner Regulations

In light of the difficulties presented by the qualifications argument, advocates of congressional reform argue that term limits are not substantive qualifications for Congress, but are merely times, places, and manner regulations of the elections of members of Congress.¹¹⁸ In interpreting the Times, Places, and Manner Clause of the Constitution, in comparison with the

115. *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970) (striking down a Florida statute disqualifying all candidates for public office who are currently state, county, or municipal officeholders and who fail to resign from their current office not less than ten days prior to qualifying for the office they intend to seek); *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948) (holding that the Qualifications Clauses of the U.S. Constitution are supreme and therefore overrule the provision of the Wyoming Constitution declaring the Wyoming Governor to be ineligible for any other office during the elected term).

116. *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *State ex rel. Eaton v. Schmahl*, 167 N.W.2d 481 (Minn. 1918). Minnesota law had prohibited any person who had been convicted of a felony from voting in any election. *Danielson*, 44 N.W.2d at 485. As voting eligibility was a prerequisite in Minnesota to be eligible for any office, state or federal, convicted felons were consequently barred from federal office. *Id.* at 485-86. The Minnesota Supreme Court held in both *Danielson* and *Eaton* that prohibiting felons from running for Congress violated the Qualifications Clauses. "The office of representative in [C]ongress is a federal office created by the United States [C]onstitution. The qualifications of those who aspire to or hold this office are prescribed by the United States [C]onstitution, and the state may not enlarge or modify such qualifications." *Id.* at 486.

117. *Shub v. Simpson*, 76 A.2d 332 (Md. 1950) (striking down a provision of the Maryland Subversive Activities Act of 1949 that required all candidates for public office to file an affidavit stating that he or she was not a subversive person, as defined by the Act).

118. Article I, Section 4 of the Constitution states: "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 . . ." U.S. CONST. art. I, § 4, cl. 1. For a discussion of the constitutionality of the imposition of term limitations on members of Congress under the Times, Places, and Manner Clause, see Levy, *supra* note 50, at 1935-39; Mansfield, *supra* note 28, at 985-994; 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, 46-54 (1992).

Qualifications Clauses, the judiciary has made a distinction between procedural and substantive regulations for candidacy.¹¹⁹ While procedural regulations established by either Congress or the states generally are constitutional under the Times, Places, and Manner Clause, substantive regulations generally are not constitutional under the Qualification Clauses.¹²⁰ Thus, any attempt to disguise substantive rules as times, places, and manner regulations must ultimately fail.

The Supreme Court has held that the states retain significant authority with respect to the procedural regulation of elections under the Times, Places, and Manner Clause.¹²¹ The two primary procedural regulations the Court has recognized involve ballot access provisions and resign-to-run provisions.¹²² Term limit supporters argue that the line of cases denying ballot access to independent party candidates in congressional elections justifies a broad reading of the Times, Places, and Manner Clause, under which the states may impose their own substantive qualifications for congressional office.¹²³ These decisions, however, do not support such an expansive interpretation of the Times, Places, and Manner Clause, and only permit states to deny ballot access for valid procedural reasons.¹²⁴

In *Storer v. Brown*,¹²⁵ the Supreme Court upheld a California law that barred independent candidates from the ballot for all elected public offices if they had voted in the primary election or had a registered affiliation with a

119. See Mansfield, *supra* note 28, at 985 (“[C]ourts 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.”).

120. See Eid & Kolbe, *supra* note 118, at 46-54. The Times, Places, and Manner Clause authorizes the states to establish procedural rules that regulate the machinery of federal elections. On the other hand, the Qualifications Clauses are substantive rules that define who is eligible to serve in the House and Senate. Eid and Kolbe argue that these three clauses are “part of a coherent scheme” that “cannot be read in isolation.” *Id.* at 47. Thus, “[i]mporting 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.” *Id.*

121. *United States v. Classic*, 313 U.S. 299, 311 (1941) (“[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.”).

122. For a listing and brief discussion of ballot access and resign-to-run cases and their significance to the constitutional analysis of congressional term limits, see Eid & Kolbe, *supra* note 118, at 47-54; Levy, *supra* note 50, at 1936-38; Mansfield, *supra* note 28, at 987-993.

123. Miles C. Cortez, Jr. & Christopher T. Macaulay, *The Constitutionality of Term Limitation*, 19 COLO. LAW. 2193, 2194 (1990). Cortez and Macaulay argue that according to the reasoning of the courts in the ballot access cases, the states may establish additional qualifications for Congress according to “a flexible standard in which legitimate state interests protected by the law in question are weighed against the interests of persons adversely affected by the qualification.” *Id.*

124. Eid & Kolbe, *supra* note 118, at 47.

125. 415 U.S. 724 (1974).

qualified political party within one year prior to the primary election.¹²⁶ The Court recognized that substantial state regulation of elections, under the authority granted by the Times, Places, and Manner Clause, is necessary if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."¹²⁷ The Court noted that because the law did not discriminate against independents and did not completely bar them as a group from the ballot, it was not a substantive regulation but was a valid procedural regulation which was an important part of the election process.¹²⁸

Similarly, in *Williams v. Tucker*,¹²⁹ a three judge district court in Pennsylvania upheld a state statute preventing an incumbent representative who had been defeated in his party's primary election from having his name placed on the general election ballot as an independent candidate.¹³⁰ The court, relying heavily on the Supreme Court's opinion in *Storer*, recognized the state's

126. *Id.*

127. *Id.* at 730. The need for such procedural regulations was to be determined by a consideration of the "facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

128. *Storer*, 415 U.S. at 733-35. "The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id.* at 733. For the majority of candidates, a primary election victory is their "route to the ballot" for the general election. Recognizing this, California passed a law in 1959 prohibiting defeated primary candidates from then running as independents in the general election. *Id.* at 734-35. The aim of this law was to prevent losers of the primary election from continuing intraparty feuds and to limit the names on the ballot for the general election to the winners of the primary elections and those independents who properly qualified to appear on the ballot. *Id.* at 735. Under this system, "[t]he people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively." *Id.* The Court went on to note that the California law in question had similar purposes to that of the 1959 provision:

It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

Id. Thus, this law was an attempt to regulate the manner of elections in California and did not create new qualifications that barred an entire class of candidates from the ballot. *Id.* at 733-35.

129. 382 F. Supp. 381 (M.D. Pa. 1974).

130. *Id.* at 383. Pennsylvania's election code established two methods of nomination for political office that provided the exclusive routes to the general election ballot: a candidate could either (1) seek to obtain his political party's nomination by way of the primary election; or (2) file nominating papers signed by a certain number of independent voters. *Id.* The law challenged in *Williams* basically required candidates to choose between these two methods, thus barring candidates who had failed to win their party's primary from then filing nomination papers as an independent in order to get on the general election ballot. *Id.* at 386.

legitimate interest in "regulating the number of candidates on the ballot."¹³¹ The court explicitly rejected the plaintiff's argument that the state law denying ballot access added qualifications for membership in Congress beyond those enumerated in the Constitution.¹³² According to the court, the statute merely regulated the manner of holding elections and in no way imposed additional qualifications for office.¹³³

The federal judiciary has indicated that the ballot access cases cannot be read as term limit supporters suggest: as allowing substantive limitations on candidacy.¹³⁴ Instead, this line of cases merely affirms the states' authority under the Times, Places, and Manner Clause to monitor the procedural regulations of federal and state elections.¹³⁵ Therefore, any attempt to masquerade substantive qualifications as procedural times, places, and manner regulations, as term limit proponents endeavor to do, must be held unconstitutional.

The other line of cases that term limit supporters most frequently rely on in arguing for an expansive interpretation of the Times, Places, and Manner Clause involves state laws prohibiting state officials from running for Congress unless they first resign their current office.¹³⁶ However, term limit advocates are also misguided in their reliance on these cases. In analyzing the constitutionality of resign-to-run provisions, the courts have used an approach similar to that used in the ballot access cases.¹³⁷ Specifically, the courts have determined whether the state law, although enacted under the pretext of regulating elections, essentially acts as an additional qualification for

131. *Id.* at 388 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)). The *Williams* court, in upholding Pennsylvania's ballot access provision, listed several of the same state interests that were recognized by the Supreme Court: "[T]he State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting . . ." *Id.*

132. *Williams*, 382 F. Supp. at 388.

133. *Id.* Thus, the court found that Pennsylvania's ballot access law was a valid procedural regulation under the state's authority to regulate the times, places, and manner of federal elections, and not an invalid substantive regulation that violated the Qualifications Clauses. *Id.*

134. See *Mansfield*, *supra* note 28, at 989.

135. See *supra* notes 128, 133 and accompanying text.

136. See *Eid & Kolbe*, *supra* note 118, at 50-54. Term limit advocates argue that the resign-to-run cases support the idea that the Times, Places, and Manner Clause gives states the authority to override the standing qualifications enumerated in the Constitution "when necessary to protect the integrity of congressional elections." *Id.* at 52 (citing Steven Glazier, *Each State Can Limit Re-Election to Congress*, WALL ST. J., June 19, 1990, at A20).

137. *Eid & Kolbe*, *supra* note 118, at 51. See also *Levy*, *supra* note 50, at 1938.

congressional candidates.¹³⁸ Resign-to-run provisions have withstood constitutional scrutiny because such conditions merely regulate the conduct of state officeholders, rather than bar potential candidates from running for federal office.¹³⁹

138. See Levy, *supra* note 50, at 1938. Levy argues that cases in this area show that if the resign-to-run requirement is indirect and advances a legitimate state interest, then there is a strong probability of it being upheld. *Id.* On the other hand, if the regulation acts as a flat prohibition on individual candidates with certain characteristics, other than age, residency, and citizenship, then the law is beyond the scope of the state's power under the Times, Places, and Manner Clause. *Id.* See also Eid & Kolbe, *supra* note 118, at 51.

139. Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983). It appears that the more recent line of cases upholding resign-to-run laws as valid times, places, and manner regulations is inconsistent with the earlier line of cases striking down as unconstitutional qualifications state laws that bar current state officeholders from federal office. See *supra* note 115. A resign-to-run provision essentially makes current state officials ineligible for federal office for as long as they remain in their state office, thus appearing to act just as much a burden on candidacy as a law barring state officeholders from federal office. The courts have struggled in their attempts to reconcile these two lines of cases. See Signorelli v. Evans, 637 F.2d 853, 858 (2d Cir. 1980).

In *Joyner*, the Ninth Circuit held that the type of law struck down in *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970), which prevented state officeholders from qualifying for election to another office without first resigning their current position, acts as a "resign to qualify to run" provision. *Joyner*, 706 F.2d at 1530. The court distinguished "resign to qualify to run" provisions, which unconstitutionally prohibit a candidate from qualifying for federal office, from resign-to-run provisions, which do not prohibit state officials from filing for nomination and qualifying for federal office, but merely require that they "resign or be removed from office" if they wish to "offer themselves for nomination or election" to Congress. *Id.* at 1531.

In *Signorelli*, the Second Circuit framed the distinction in terms of candidate choice. *Signorelli*, 637 F.2d at 858. Resign-to-run provisions provide potential candidates with the choice of running for Congress, but only if they are willing to resign their current state offices. *Id.* In comparing such laws with the type of statute struck down in *Stack v. Adams*, the court noted: "This indirect form of regulation is slightly different from those statutes that enforce the choice by denying the prospective candidate access to the ballot until he has resigned his [current office]." *Id.* (emphasis added).

Perhaps the best explanation for the courts reversal in opinion on the constitutionality of resign-to-run provisions is the manner in which the statutes have been worded. Earlier state provisions explicitly disqualified certain state officeholders from running for other offices, including Congress. See *State ex rel. Johnson v. Crane*, 197 P.2d 864, 864-65 (Wyo. 1948) (striking down Article IV, Section 2, of the Wyoming Constitution, which provided that the Governor of Wyoming shall not be "eligible to any other office during the term for which he was elected"). The courts held that such laws essentially rendered a class of officials ineligible for federal office and were therefore unconstitutional qualifications. See *State ex rel. Handley v. Superior Court of Marion County*, 151 N.E.2d 508 (Ind. 1958) (striking down an Indiana law making the governor ineligible for the office of U.S. Senator).

On the other hand, more recent resign-to-run provisions are worded solely in terms of the state's regulation of its government offices, rather than the state office as a means of disqualification for federal office. In *Signorelli*, the court upheld New York's law requiring state judges to resign their judicial office before campaigning for political office. *Signorelli*, 637 F.2d at 855. The court held that although the law placed an indirect burden on candidacy, it did not constitute an unconstitutional qualification since it was "designed to deal with a subject within traditional state authority," namely the regulation of its judges, an area in which New York's regulatory authority

Term limit proponents often cite the Supreme Court's decision in *Clements v. Fashing*¹⁴⁰ to support their claim that the Constitution allows states to impose substantive qualifications on candidates for Congress. However, a closer examination of the *Clements* decision and other resign-to-run cases shows that such reliance is misplaced. In *Clements*, the Court upheld article XVI, section 65 of the Texas Constitution, which forced incumbents in certain state elected offices to resign their office in order to run for congressional office.¹⁴¹ In judging its constitutionality, the Court found it necessary to examine Texas' resign-to-run provision in terms of the extent of the burden it placed on the candidacy of current public office holders.¹⁴² The determinative factor in sustaining the provision was that it did not act as an absolute bar on a certain class of candidates, but merely required candidates to resign from their current state office in order to seek another elected state or federal office.¹⁴³

A pair of federal appellate court cases also establish that resign-to-run provisions are constitutional under a Times, Places, and Manner Clause analysis, and not under a substantive Qualifications Clauses approach. In *Signorelli v. Evans*,¹⁴⁴ the Second Circuit upheld a New York statute requiring state judges

was plenary. *Id.* at 859. Similarly, in *Joyner*, the court distinguished between state laws flatly disqualifying state officials from federal office and those merely regulating the conduct of state officials seeking federal office.

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.

Joyner, 706 F.2d at 1528.

Regardless of how one perceives the constitutionality of state regulations concerning a state officeholder's eligibility for federal office, neither view lends support for the constitutionality of term limits. State laws limiting the terms of members of Congress create a direct bar to candidacy for an identifiable class of individuals—incumbents. Such provisions cannot be classified as regulations of the conduct of state officials because members of Congress are officers of the federal government. Thus, they are not amenable to the regulatory authority of the states. Therefore, term limits cannot be upheld as valid state regulations of the manner of elections, and should instead be struck down as imposing an additional qualification for congressional membership.

140. 457 U.S. 957 (1982).

141. *Id.* at 960. Article XVI, Section 65 of the Texas Constitution provided that the announcement by certain state officials of their candidacy for any state or federal elected office, when the unexpired term of the office then held exceeded one year, acts as an automatic resignation of the office then held. *Id.*

142. *Id.* at 966.

143. *Id.* at 971 ("The provision's language and its history belie any notion that Section 65 serves the invidious purpose of denying access to the political process to identifiable classes of potential candidates.").

144. 637 F.2d 853 (2nd Cir. 1980).

to resign from their judicial office before running for political office.¹⁴⁵ The court held that although the law imposed an indirect burden on the candidacy of state judges, it did not constitute an unconstitutional qualification because it placed no absolute obstacle between state judges and the ballot.¹⁴⁶ Judges were still free to seek federal office and the people were free to vote for them.¹⁴⁷ Similarly, in *Joyner v. Mofford*¹⁴⁸ the Ninth Circuit distinguished between state regulations that barred potential candidates from running for federal office, and those which merely regulated the conduct of state officials by requiring them to resign their state office before running for federal office.¹⁴⁹ In upholding a provision of the Arizona Constitution that prohibited all state salaried elective officeholders from offering themselves for nomination for federal office before the final year of their term, the court concluded that such a regulation imposed only an indirect burden on potential candidates for Congress.¹⁵⁰ The court reasoned that the burden on candidacy, imposed by resign-to-run provisions such as the one in the Arizona Constitution, "is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress."¹⁵¹

Thus, the resign-to-run cases indicate that the states have the authority to impose indirect requirements on congressional candidates, provided that they serve such legitimate state interests as regulating the conduct of state officeholders.¹⁵² However, the states may not prescribe substantive qualifications on such candidates under the guise of regulating elections or state officials.¹⁵³

145. *Id.* at 855.

146. *Id.* at 858-59. In upholding New York's resign-to-run provision, the *Signorelli* court also made the distinction between state regulations aimed solely at the candidate's eligibility for congressional office, and those regulations aimed instead at the conduct of state office. *Id.* at 859. The court noted that this distinction "suggests that 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." *Id.* As the regulation of state judges was an area in which New York's regulatory authority was plenary, the resign-to-run provision did not violate the Qualifications Clauses. *Id.*

147. *Id.* at 858.

148. 706 F.2d 1523 (9th Cir. 1983).

149. *Id.* at 1528.

150. *Id.* at 1531. The *Joyner* court found that Arizona's resign-to-run provision merely regulated the conduct of state officeholders by requiring them to resign their state offices if they decided to run for federal office before the final year of their terms. *Id.* Such a provision did not impose a fourth qualification on candidates for Congress because it did not completely bar state officeholders from seeking federal office. *Id.*

151. *Id.* at 1528.

152. See *Levy*, *supra* note 50, at 1938.

153. *Id.*

To summarize, in analyzing the constitutionality of election regulations under the Times, Places, and Manner Clause, a two-part inquiry is usually applied.¹⁵⁴ First, the courts ask whether the state law in question regulates election procedures for congressional candidates.¹⁵⁵ If so, then the courts determine whether the state has a legitimate interest in regulating elections.¹⁵⁶ However, if the state statute is found not to regulate election procedures, but instead acts as a substantive barrier to the election process for an entire class of candidates, such as incumbents, then the Times, Places, and Manner Clause is clearly inapplicable.¹⁵⁷ Term limits disqualify incumbents as a class from standing for reelection, and thus act as an absolute barrier to candidacy and membership in Congress. Term limit initiatives therefore violate the Qualifications Clauses of the Constitution,¹⁵⁸ and such a constitutional infirmity cannot be cured by masking the qualifications as "procedural" regulations under the Times, Places, and Manner Clause. Consequently, term limit supporters will face substantial constitutional obstacles in arguing their case in front of the Supreme Court, both in terms of the qualifications such initiatives impose on the right to candidacy and the infringement they create on the right to vote.

C. Term Limits As a Limitation on Voter Choice

In arguing in support of the adoption of the Constitution, Alexander Hamilton asserted that a fundamental principle of representative democracy is that "the people should choose whom they please to govern them."¹⁵⁹ At the Constitutional Convention, James Madison observed that this principle could be "undermined as much by limiting whom the people can select as by limiting the franchise itself."¹⁶⁰ This principle reflected the Federalist theory of representation, that of a process through which those most qualified would be

154. See Eid & Kolbe, *supra* note 118, at 50.

155. *Id.*

156. *Id.* The courts have recognized a variety of state interests in regulating elections. For example, in the ballot access cases, the Supreme Court has held that the states have a legitimate interest in regulating the number of candidates on the ballot. *Storer v. Brown*, 415 U.S. at 732; see *supra* note 128. In the resign-to-run cases, the federal courts have held that a state's interest in regulating the conduct of its government officials, a subject within traditional state authority, is sufficient justification for election regulations that pose an indirect burden on candidacy. *Signorelli v. Evans*, 637 F.2d at 859; see *supra* note 146.

157. See *supra* notes 119-20 and accompanying text.

158. For an analysis of term limits under the Qualifications Clauses, see *supra* notes 96-117 and accompanying text.

159. *Powell v. McCormack* 395 U.S. 486, 547 (1969) (quoting 2 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (J. Elliot ed., 1837) [hereinafter ELLIOT'S DEBATES]).

160. *Powell*, 395 U.S. at 547.

chosen to govern by and for the people.¹⁶¹ The Federalists rejected the system of compulsory rotation in congressional office that had been in place under the Articles of Confederation,¹⁶² arguing that because compulsory rotation disqualified those in office from being reelected, rotation would deny voters the ability to return to office those best suited to govern them.¹⁶³ Furthermore, the Federalists noted that rotation was inefficient, in that it precluded the benefits to be gained from the accumulated experience of those who had already served in Congress.¹⁶⁴ The Federalists were successful in their arguments, and the system of compulsory rotation was rejected at the Constitutional Convention with surprisingly little debate.¹⁶⁵

For the same reasons that compulsory rotation was rejected by the delegates to the Constitutional Convention, term limits must also fail, insofar that they limit the right of the people to "choose whom they please to govern them."¹⁶⁶ Incumbent members of Congress have been selected by their constituents to represent their respective districts in Congress. Term limits eliminate incumbents as a class from the potential candidate pool, thereby significantly

161. See Corwin, *supra* note 20, at 585. The Federalists favored a republic that operated under a system of representative democracy, as opposed to the system of small, pure democracies of states that was advocated by the Anti-Federalists. *Id.* at 584-85. Under a system of pure democracy, the public was subject to the "mischiefs of passion," under which a common passion or interest would be felt by all and the rights of property and personal security were made subordinate to the will of the majority. See THE FEDERALIST NO. 10, at 58 (James Madison) (Modern Library ed. 1937). Under a republic, on the other hand, a system of representation would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *Id.* at 59. The goal of preserving the potential for reelection was critical to this federalist theory of representative democracy. Corwin, *supra* note 20, at 585.

162. Under the Articles of Confederation, a delegate to Congress could serve for no more than three years in any six-year period. ART. OF CONFED. art. V, cl. 2.

163. For a thorough discussion of the Federalist—Anti-Federalist Debate over a system of compulsory rotation for political office, see Corwin, *supra* note 20, at 582-587. The Federalists viewed a system of compulsory rotation as completely impractical to the goal of preserving for voter choice by safeguarding the prospects of choosing those best suited to govern. *Id.* at 585. Robert R. Livingston, arguing against rotation in the debates over ratification of the Constitution in New York, saw the value of voter choice as predominant: "The people are the best judges of who ought to represent them. To dictate and control them, to tell them whom they shall not elect is to abridge their natural rights." *Id.* at 585 (quoting 2 ELLIOT'S DEBATES, *supra* note 159, at 292-93).

164. Corwin, *supra* note 20, at 585-86. In the New York debates over ratification of the Constitution, Robert Livingston argued against the former system of compulsory rotation, noting the nullification of experience under such a system. *Id.* "The acquisition of abilities is hardly worth the trouble, unless one is to enjoy the satisfaction of employing them for the good of one's country. We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity?" *Id.* at 585-86 (quoting 2 ELLIOT'S DEBATES, *supra* note 159, at 292).

165. Corwin, *supra* note 20, at 583.

166. ELLIOT'S DEBATES, *supra* note 159, at 257.

limiting the right of the voters to choose their own representatives in Congress. Thus, another argument underlying the case against term limits is that they infringe upon the fundamental right of the electorate to choose whom they wish to represent them.¹⁶⁷

“[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.”¹⁶⁸ This idea of the consent of the people as the source of the government’s legitimacy is expressed in the Constitution’s provisions dealing with elections and representation.¹⁶⁹ The primary means by which the people exercise their sovereignty is through elections, under which the people place their consent to be governed in the hands of their congressional representatives.¹⁷⁰ The Supreme Court has recognized the importance of elections to the people, holding that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”¹⁷¹

In light of the tenet of American government that the citizenry is the ultimate sovereign,¹⁷² the value of voter choice implies that the electorate should have the maximum substantive choice possible.¹⁷³ When a voter’s choice of a representative is restricted because of a substantive limitation on the candidacy of the voter’s preferred representative, then the voter is partially stripped of his or her sovereignty.¹⁷⁴ From this perspective, voters should be able to vote for the candidate of their choice, rather than being limited to

167. For a discussion of the right to vote for the candidate of your choice as fundamental and its relevance to the debate over term limits, see Latz, *supra* note 28, at 166-73, 184-85; Mansfield, *supra* note 28, at 975-76.

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

169. Numerous provisions of and amendments to the Constitution deal with elections, voting, and representation. U.S. CONST. art. I, §§ 1-4; art. II, § 1, amends. XII, XIV-XV, XVII, XIX-XX, XXII-XXIV, and XXXVI.

170. Gardner, *supra* note 168, at 213-14.

171. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Court went on to note that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Id.*

172. Mansfield, *supra* note 28, at 975. The Constitution itself was ordained and established by “the People of the United States.” U.S. CONST. pmbl.

173. Mansfield, *supra* note 28, at 975.

174. *Id.* The voter’s choice of candidates is his or her expression of consent to be governed. *Id.* However, when the voter’s preferred candidate is barred from the election despite meeting all of the qualifications for office, the critical connection between voter choice and consent is severed because the voter’s consent cannot be given to the candidate of his or her choice, but must be given to a less favorable candidate. *Id.* In such circumstances, the ultimate choice of the voters do not reflect their true consent, because the voters were prevented from casting their vote for their first choice. *Id.*

selecting a representative from a slate of government-approved candidates.¹⁷⁵ Since term limits strip some voters of the right to vote for the candidate of their choice, such measures must be struck as unconstitutional.

The Supreme Court has held that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."¹⁷⁶ The Court has also held that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹⁷⁷ The federal courts have followed the lead of the Supreme Court in recognizing as fundamental the right to vote for the candidate of one's choice and the right to associate for the advancement of one's political beliefs.¹⁷⁸ In *Williams v Rhodes*,¹⁷⁹ the Supreme Court struck a series of Ohio election laws, holding that the laws placed unconstitutional burdens on the right to associate for the advancement of political beliefs and the right to cast one's vote effectively.¹⁸⁰ The Court noted that "[b]oth of these rights, of course, rank among our most precious freedoms."¹⁸¹

Although the Court has admitted that not every voter can be assured that a candidate of his or her liking will be on the ballot, it has concluded that the states may not manipulate the election process by qualifying the eligibility of a class of candidates in such a way that will unnecessarily infringe on the voters'

175. *Id.*

176. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court further held that the right to vote for the candidate of one's choice can be denied just as effectively by a diminution of the weight of a citizen's vote as by eliminating the right altogether. *Id.*

177. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court has given special recognition to the right to associate for the advancement of one's political beliefs and the importance of elections and candidate choice in exercising this right, "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

178. For cases discussing the right to vote for the candidate of one's choice, see *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Powell v. McCormack*, 395 U.S. 486, 534-35 (1969). For cases discussing the right to association for the advancement of one's political beliefs, see *Williams*, 393 U.S. at 30; *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). For an analysis of cases holding these rights as fundamental, see *Latz, supra* note 28, at 184-87.

179. 393 U.S. 23 (1968).

180. *Id.* at 30.

181. *Id.* See also *Anderson*, 460 U.S. at 787-88 (recognizing as fundamental the rights of voters to associate and to choose among candidates).

fundamental rights to associate and to vote for the candidate of their choice.¹⁸² The Court has further indicated that the right to associate for the advancement of political beliefs can be significantly burdened by laws barring candidates from an election.¹⁸³ Therefore, although the courts have “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself,”¹⁸⁴ they have also indicated that the states may not impose electoral regulations that significantly burden the voting and associational rights of voters.¹⁸⁵

By disqualifying incumbents from seeking reelection, term limits deny some voters the right to associate for the advancement of the political beliefs that they share with the incumbent. Term limits force these voters to associate with the political beliefs of lesser known candidates, with whose views they may disagree. Furthermore, term limits also significantly burden the right of many voters to vote for the candidate of their choice by disqualifying an entire class of potential candidates who are otherwise eligible to run. Therefore, because term limits, by disqualifying incumbents as a class, substantially infringe on a voter’s right of association and right to vote for the candidate of one’s choice, such initiatives must be struck as unconstitutional.

The term limit initiatives passed by the voters in fifteen states disqualify an entire class of potential candidates from elections on the basis of their prior service in Congress.¹⁸⁶ Such laws clearly impose an additional qualification on membership in Congress, beyond the age, citizenship and residency requirements enumerated in the Constitution.¹⁸⁷ Because these three qualifications have been held to be fixed and not subject to additions or alterations, term limits violate the Qualifications Clauses of the Constitution and, barring a constitutional amendment, will probably be held unconstitutional.¹⁸⁸ Such measures may not be disguised as times, places, and manner regulations, because term limits place substantive restrictions on candidacy, and are not mere

182. *Lubin*, 415 U.S. 709, 716 (1974). In *Lubin*, the Court struck down a California statute that required a filing fee of over \$700 in order to be placed on the ballot in the primary election for County Supervisor, while providing no other means of access to the ballot. *Id.* at 710. In its decision, the Court noted that the law denied voters the ability to vote for indigent candidates whose views the voters associated with, but who could not afford the filing fee. *Id.* at 716. The Court concluded that the process of qualifying candidates for the ballot could not “constitutionally be measured solely in dollars.” *Id.*

183. *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983) (holding Ohio’s early filing deadline as an unconstitutional burden on the associational rights of a candidate’s supporters).

184. *Id.* at 788 n.9.

185. *Id.* at 780.

186. See *Richardson*, *supra* note 79, at 21-25.

187. See *supra* note 27.

188. See *supra* notes 96-117 and accompanying text.

procedural regulations of elections.¹⁸⁹ Finally, term limits substantially infringe on the fundamental rights of voters to associate for the advancement of political beliefs and to vote for the candidate of their choice.¹⁹⁰ Therefore, the constitutionality of state-imposed term limitations on members of Congress is highly questionable.

In *Thorsted v. Gregoire*,¹⁹¹ a U.S. District Court in Seattle, Washington struck down the term limits initiative passed by the voters of that state.¹⁹² The court found that the initiative acted as a complete bar to reelection for incumbents, thereby unconstitutionally excluding a class of candidates otherwise qualified under Article I of the Constitution.¹⁹³ Further, the court held that the law unconstitutionally burdened voter choice¹⁹⁴ and the voters' freedom of association for the advancement of political beliefs.¹⁹⁵ But perhaps most detrimental to the term limit movement was the court's ruling that the law's provision for a write-in candidacy for incumbents who have reached their maximum tenure did not save the term limit initiative.¹⁹⁶ The court noted the substantial unlikelihood of winning a write-in campaign,¹⁹⁷ and concluded that "[d]enial of ballot access [by name] ordinarily means unelectability."¹⁹⁸ Thus, the court in *Thorsted* indicated that even those term limit initiatives that provide for a write-in vote for incumbents who have reached the limit of their service may not survive a constitutional test.¹⁹⁹

On March 7, 1994, the Arkansas Supreme Court held that the term limits amendment that had been added to the state constitution through a 1992

189. See *supra* notes 118-58 and accompanying text.

190. See *supra* notes 159-85 and accompanying text.

191. 841 F. Supp. 1068 (W.D. Wash. 1994).

192. *Thorsted v. Gregoire* was a consolidation of two cases: *Thorsted v. Gregoire* and *Colony v. Munro*. U.S. House Speaker Tom Foley was one of the plaintiffs who challenged the constitutionality of the Washington term limits initiative in *Colony v. Munro*.

193. *Thorsted*, 841 F. Supp. at 1082.

194. *Id.* at 1079. "A state may not diminish its voters' constitutional freedom of choice by making would-be candidates for Congress ineligible on the basis of incumbency or history of congressional service." *Id.*

195. *Id.* at 1080. "[It] is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . ." *Id.* (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

196. *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994).

197. *Id.* The state in *Thorsted* conceded that no candidate in Washington's history had ever been elected to Congress by a write-in vote. *Id.*

198. *Id.* Despite the provision for a write-in candidacy, the court found that the term limits initiative had the "practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement." *Id.*

199. See *supra* note 95.

referendum vote violated the U.S. Constitution.²⁰⁰ In addition to limiting the number of terms that can be served by state executive officers and state legislators, Amendment 73 to the Arkansas Constitution also provided that persons having been elected to three or more terms as a member of the U.S. House of Representatives and persons having been elected to two or more terms to the U.S. Senate would not be eligible to appear on the ballot for election to the House and Senate, respectively.²⁰¹ The court concluded that the federal limits acted as restrictions on the eligibility of incumbents to stand for election to Congress, and violated the Qualifications Clauses of the U.S. Constitution.²⁰² Further, the court dismissed the argument by term limit supporters that Amendment 73 was merely a regulatory measure falling under the Times, Places, and Manner Clause as an "effort to dress eligibility to stand for Congress in ballot access clothing."²⁰³ Finally, similar to the *Thorsted* court, the Arkansas Supreme Court recognized that although an incumbent ineligible under Amendment 73 could still run as a write-in candidate for Congress, such a "glimmer[] of opportunity" could not protect the provision from constitutional attack.²⁰⁴

U.S. Term Limits²⁰⁵ and Winston Bryant, the Arkansas Attorney General, appealed the Arkansas Supreme Court's decision to the U.S. Supreme Court. On June 20, 1994, the Supreme Court granted certiorari to hear their appeal and to ultimately decide whether states can limit the terms that members of Congress

200. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 357 (Ark. 1994).

201. *Id.* at 352.

202. *Id.* at 355. The Arkansas Supreme Court noted that:

Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, [are] a conclusion that makes eminently good sense. If there is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the states would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid.

Id. at 356.

203. *Id.* at 356-57. Term limit supporters in Arkansas attempted to argue that Amendment 73 was merely a ballot access amendment that fell within the state's authority to regulate the times, places, and manner of elections pursuant to Article I, Section 4 of the Constitution. See *supra* note 118. The court interpreted the amendment as excluding a broad category of persons from seeking election to Congress and not a mere exercise of regulatory power. *U.S. Term Limits*, 872 S.W.2d at 357. The court reasoned that the intent and effect of the amendment was "to disqualify congressional incumbents from further service." *Id.*

204. *Id.*

205. U.S. Term Limits is a national, non-profit organization devoted to persuading Americans to limit congressional, state, and local terms. See *generally* *Poll Results Show Strong Support for Term Limits*, P.R. NEWSWIRE, Mar. 5, 1994.

may serve.²⁰⁶ Consequently, the future viability of term limits is definitely at risk, and term limit initiatives appear destined for a short existence. While a constitutional amendment for congressional term limits would overcome the unconstitutionality of the state-imposed initiatives, the likelihood of two-thirds of Congress or three-fourths of the state legislatures proposing to limit their own tenure is slim.²⁰⁷ Therefore, advocates of congressional reform must think of alternative solutions to the problems of incumbency abuse in order to achieve their objectives.

IV. "NONE OF THE ABOVE"

Although currently receiving a great deal of attention, term limits are only one weapon in the arsenal of congressional reform advocates. Supporters of term limits can choose from internal reforms within the congressional system,²⁰⁸ campaign finance reform,²⁰⁹ or reforms in the electoral system²¹⁰ as alternative means of correcting the problems of incumbency abuse. Unfortunately, although none of these measures face the constitutional problems inherent in term limits, the effects of such reforms would not be felt for years, and their implementation is unlikely because they threaten the security of the politicians who would have to vote for them.²¹¹ Therefore, additional inquiries must be made in the search for the solution to the problems created by

206. See *Justices*, *supra* note 25, at 3. The Supreme Court's grant of certiorari in the Arkansas term limits case was characterized as a decision to move "quickly to resolve a constitutional debate with high political stakes." *Id.*

207. See *supra* note 29.

208. See Wommack, *supra* note 22, at 1413-14 (arguing that various internal reforms will result in improved representation by once again focusing Congress' concentration on effective policy-making). Wommack first suggests that Congress set an agenda and act upon it to ensure that issues are met. *Id.* at 1414. Second, strong party leadership must be rejuvenated in order to give direction to legislative goals. *Id.* Finally, the tenure of committee chairpersons must be limited to eliminate long-term ties from being forged with special interest groups and bureaucrats. *Id.* at 1415-16.

209. *Id.* at 1416-19. Examples of the campaign finance reforms suggested by Wommack include campaign-spending caps, a system of public financing of congressional campaigns, restrictions on the franking privilege and other perks of incumbency, and equal media access for challengers. *Id.* at 1417. See also Rowe, *supra* note 47, at 11; Keith White, *Fear of Term Limits Drives Campaign Finance Reform*, GANNETT NEWS SERVICE, Apr. 1, 1991, available in LEXIS, Nexis Library, ARCNWS File (advocating campaign finance reform instead of term limits as a means of remedying the abuses of incumbency).

210. See Micah L. Sifry, *Whom to Elect? None of the Above*, N.Y. TIMES, Oct. 23, 1990, at A23. Sifry argues that an overhaul of the electoral system will diminish the advantages of the entrenched incumbent. *Id.* Reforms made in the system should include same-day voter registration, lower barriers to ballot access, limits on the length of campaigns, and free television time for candidates of all parties. *Id.*

211. See Sifry, *supra* note 34, at 238 (arguing that the major political parties see such reforms as threats to their continued vitality, making it extremely difficult to build a movement that would force the legislature to respond).

those incumbents who abuse the system, yet are impervious to defeat.²¹²

The reason that many incumbents enjoy such large electoral victories²¹³ is that they face vastly inexperienced and many times reluctant opponents who lack the financial and organizational backing necessary to mount a serious challenge to the incumbent.²¹⁴ Crippled by a lack of resources, such challengers are unable to make the voter contacts that are critical to winning an election.²¹⁵ Without contact with the voters, these challengers remain fairly unknown to a large majority of the electorate.²¹⁶

Such challengers do not represent viable alternatives for voters in congressional elections.²¹⁷ Instead, the voter's only real choice in many contemporary elections is whether to cast another vote for an already entrenched incumbent, or not to vote at all. As long as the voters feel that this is their only choice, it is unlikely that many of them will exercise their right to vote because the right has no real meaning. The American people must once again be given a real choice in federal elections. They must be given the choice to vote "no."

212. See *supra* note 76.

213. In the 1988 House election, 20 incumbents received more than 90% of the vote; 356 (70%) of the incumbents who won received 65% of the vote. Fund, *supra* note 16, at 235. Only 38 of the 435 members won by less than 55% of the vote, which is the normal definition of a landslide victory. The average incumbent carried 73.5% of the vote. *Id.* For an analysis of the 1994 election, see *infra* note 273.

214. JACOBSON, *supra* note 4, at 45. Jacobson notes that most campaign contributors are more willing to contribute to nonincumbent candidates in races that are expected to be close. *Id.* at 48. Since campaign resources are limited, "most contributors deploy them where they have the greatest chance of affecting the outcome; they try to avoid wasting money on hopeless candidates." *Id.* Generally, more money is expected to be contributed to candidates running for open seats than to challengers facing entrenched incumbents. *Id.* And when contributions are given to challengers, more is given to challengers facing incumbents who had smaller margins of victory in the previous election. *Id.* Therefore, challengers facing deeply entrenched veteran incumbents who have enjoyed large margins of victory receive little in the way of financial contributions or other assistance from the traditional campaign contributors or the political parties, who essentially view such challengers as "sacrificial lambs."

215. *Id.* at 116. "Voters are more than twice as likely to report contact of every kind [mail, television and radio advertisements, etc.] with incumbents than with challengers in House races. Almost every voter was reached in some way by the incumbent, while a majority of voters had no contact at all with the challenger." *Id.* (referring to the 1984 congressional elections). Jacobson credits this discrepancy in voter contact to the vastly underfunded campaign coffers of the majority of challengers. *Id.* at 137.

216. The more contacts a candidate makes with the voters, the more likely it is that the voters will remember the candidate and like something about him or her. *Id.* at 118. Therefore, a candidate who is unable to make contacts with his or her constituents will likely remain unknown to the voters.

217. If a challenger lacks the financial resources to make contacts with voters, he or she will remain largely unknown to the voters. And if the voters know relatively little about a candidate, they have will have no basis upon which to cast a vote for the candidate.

If the congressional challenger does not present a viable alternative to an abusive incumbent, then the voter should be able to opt for "none of the above" (NOTA).²¹⁸

A. "None of the Above" and How It Would Work

In order to work, a "none of the above" option should appear on all general election ballots for federal office, excluding the presidency.²¹⁹ If a majority of the votes were cast for NOTA, then a special election would be held, pursuant to the special election laws of each state for filling a vacant office.²²⁰

218. For a general discussion of the "none of the above" ballot option, see Sifry, *supra* note 34; John H. Fund, *None of the Above as a Ballot Choice*, NEW REPUBLIC, Nov. 25, 1991, at 28.

219. The Twenty-Second Amendment limits the office of the President to two, four-year terms. See *supra* note 23. Therefore, because any one individual can only be an incumbent President for one election (assuming he or she did not assume office in mid-term), any advantage gained from incumbency is already limited by law to a duration of four years. Although possible, it is difficult for a President to become significantly "entrenched" in a four-year period. Furthermore, because of the power and influence at stake in the office of the President, each political party is guaranteed to nominate a serious challenger to run against an incumbent President. Thus, American voters will always have a meaningful choice when voting for President. As a NOTA ballot option would be introduced as a means of reducing the incumbency advantage and providing voters with a real choice in federal elections, such an option is unnecessary for the office of President, because the incumbency advantage is not as significant for the President as it is for Congress, and because voters already are provided with a meaningful choice for President. Finally, although the authority to regulate the procedure of congressional elections is left to the states under the Constitution, *supra* note 118, the regulation of the election for President and Vice-President is explicitly provided for in the Constitution. See U.S. CONST. art. II, § 1, cl. 2, *superseded by* U.S. CONST. amend. XII. Therefore, a NOTA ballot option will be excluded from the office of the President to avoid any state entanglement with the manner of choosing a President and Vice-President as set forth under the Twelfth Amendment.

220. See U.S. CONST. art. I, § 2, cl. 4, which provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies" (referring to the House of Representatives). The Seventeenth Amendment to the Constitution states:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

U.S. CONST. amend. XVII (emphasis added).

The federal courts have held that the states have wide discretion in the regulation of special elections. See *Fortson v. Morris*, 385 U.S. 231 (1966); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982); *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991); *Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968). When U.S. Senator John Heinz died in an airplane accident in 1991, the Governor of Pennsylvania ordered a special election to be held in accordance with state law. *Trinsey*, 941 F.2d at 225. John Trinsey, a candidate hoping to fill Heinz's vacancy, filed a lawsuit against the Pennsylvania Board of Elections, alleging that the Pennsylvania special election law violated the Seventeenth Amendment because it allowed political parties to nominate candidates for a special election without a popular primary election. *Id.* at 226. The Third Circuit rejected Trinsey's argument and held that the Seventeenth Amendment allowed state legislatures to exercise

Political parties would then nominate candidates by a method of their own choosing,²²¹ with the limitation that those candidates who lost to NOTA could not be renominated for that term. Third party and independent candidates would be eligible for the special election,²²² provided that they satisfied the state's

reasonable discretion in determining the method to fill vacant Senate seats. *Id.* at 234. The court held that the political parties' choice to nominate candidates for the special election by a state committee instead of a primary election was due to the exigent circumstances presented by the special election and in no way violated the Constitution. *Id.* at 235.

In *Valenti*, the Governor of New York temporarily appointed a candidate to fill the U.S. Senate vacancy created by Robert F. Kennedy's assassination until a special election could be held at the next general election. *Valenti*, 292 F. Supp. at 853. The district court upheld New York's special election law, focusing on the Seventeenth Amendment's grant of power to state legislatures to regulate special elections. *Id.* at 855. Specifically, the court ruled that the last phrase of the Seventeenth Amendment, "as the legislature may direct," was dispositive of the Constitution's grant of authority to the states to regulate special elections. *Id.*

In general, the courts have permitted a broad exercise of state legislative authority with respect to the regulation of special elections because of the unique circumstances under which special elections are held. See Jeffrey D. Mohler, *The Constitutional Requirements for Special Elections*, 97 DICK. L. REV. 183, 202 (1992). Granted that NOTA does not prevent a situation comparable to the exigency of an assassination or an airline disaster, but there has been no indication by the courts that the "uniqueness" or "exigency" of the circumstances under which special elections may be held is to be construed narrowly. See *Fortson v. Morris*, 385 U.S. 231 (1966). In *Fortson*, the Supreme Court upheld a provision of the Georgia Constitution that called for a special election to be held by the Georgia state legislature from the two candidates receiving the highest number of votes for governor in the event that no candidate for governor received a majority vote in the regular election. *Id.* at 232-33. In affirming Georgia's special election law, the Court specifically noted that Georgia already provided for two primary elections and a general election before a special election by the legislature became necessary. *Id.* at 234. In light of the Supreme Court's decision in *Fortson*, the requirement of a special election under a NOTA plan in the event that "none of the above" wins a majority of the general election vote is likely to be upheld as a permissible exercise of a state's legislative authority to regulate special elections.

Although it is possible that NOTA would significantly increase the frequency of special elections at first, NOTA would eventually reduce the incumbency advantage to the point that potential opponents would be capable of mounting serious challenges to incumbent candidates. See *infra* part V.A. Thus, as voters gained greater choice among candidates for federal office, the need to vote for NOTA would decrease, and the frequency of special elections would return also decrease. In this respect, the temporary increase in special elections that NOTA would create would not justify completely preempting the states' authority to regulate special elections in favor of Congress or the courts.

221. The states are not necessarily required to hold a primary election in nominating a candidate for a special election. See Mohler, *supra* note 220, at 193. Other possibilities include nominating a candidate by a state committee or nominating convention. *Id.* In *Trinsey v. Pennsylvania*, a Pennsylvania district court held that the states have the authority to abolish the primary election and allow the political parties to establish their own nomination procedures for special elections. *Trinsey*, 941 F.2d at 234. The court found that due to the exigent circumstances surrounding a special election, political parties could nominate candidates by a state committee. *Id.*

222. However, those candidates appearing on the general election ballot and losing to "none of the above" would be prohibited under the NOTA law from appearing on the special election ballot as a candidate of a third party or as an independent candidate. Such a provision has been upheld by the federal courts as a valid procedural regulation of the times, places, and manner of elections.

filing requirements to get on the ballot.

The names of those candidates appearing on the original ballot and losing to NOTA would be barred from the special election ballot,²²³ although such candidates would be free to conduct a write-in campaign in those states that provide for a write-in vote.²²⁴ "None of the above" would not appear on the special election ballot, because the abusive incumbent would have already been voted out of office. Moreover, NOTA's objective of providing the voters with greater candidate choice is likely to have been achieved with a special election, because both political parties are on a level playing field with respect to electoral advantage in a special election and it is in each party's best interest to nominate

See Storer v. Brown, 415 U.S. 724 (1974); *Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974); *supra* notes 123-35 and accompanying text.

223. The courts have explicitly found that state laws that prevent candidates defeated in the primary election from obtaining a position on the general election ballot are constitutional under the states' authority to regulate the times, places, and manner of elections. *See Williams v. Tucker*, 382 F. Supp. 381, 383 (M.D. Pa. 1974); *supra* notes 129-33 and accompanying text. The Supreme Court has reasoned that these laws achieve legitimate state interests, which include preventing the primary losers from continuing intraparty feuds and to properly limit the names on the general election ballot to winners of the primary elections and those independents who properly qualified to appear on the ballot. *See Storer v. Brown*, 415 U.S. 724, 735 (1974); *supra* note 128. These same aims justify barring those candidates losing to NOTA in the general election from appearing on the ballot for the special election.

224. For a discussion of the constitutionality of the write-in vote, *see Logan, supra* note 95. It is important to note that allowing those candidates that lose to NOTA in the general election to conduct write-in campaigns in the special election does not violate the principles established in the ballot access cases. *See supra* notes 123-35 and accompanying text. The Supreme Court has noted two state interests in restricting access to the ballot: preventing continuing intraparty feuds and providing the voters with understandable choices on the ballot. *See Storer*, 415 U.S. at 735. Specifically, the Court has indicated that the only understandable choices for a general election ballot are the winners of the primary elections and the independents and third-party candidates who properly qualify for the ballot. *Id.* A NOTA system preserves both of these state interests.

First, a write-in candidate's name does not appear on the ballot. The only means of obtaining access to the ballot for such candidates is by having their names written in by the voters. Therefore, the names appearing on a special election ballot under a NOTA system would be properly limited to the candidates nominated by their political parties and third-party candidates and independents who properly qualify for the ballot. Voters choosing NOTA in the general election thus would not be confused by once again finding a losing candidate's name on the ballot for the special election. Second, the chance of perpetuating intraparty feuds by allowing candidates that lose to NOTA in the general election to conduct write-in campaigns in the special election is remote, considering the substantial unlikelihood of winning a write-in campaign. The courts have noted the improbability of being elected as a write-in candidate, observing that "[d]enial of ballot access ordinarily means unelectability." *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994). Only three candidates for the U.S. House of Representatives have been elected by a write-in vote since 1958, and only one candidate for the U.S. Senate has won a write-in campaign since 1954. *Id.*

the most qualified candidate.²²⁵ Therefore, voters will be presented with viable alternatives on the special election ballot and the need for NOTA will have been eliminated.

B. Examples of "None of the Above"

The rationale behind a "none of the above" ballot option for federal elections is not as alien a concept to the U.S. electoral process as it may at first seem, especially in light of the value of electoral choice emphasized by the Constitution and case law.²²⁶ In fact, several derivatives of the proposed NOTA system are currently practiced in the United States, and support the viability of making a "none of the above" ballot option a reality.

1. The Judicial Referendum Process

The American belief in freedom of choice in the election of government officials requires that voters be able to exercise a choice beyond simply voting "yes" for an entrenched incumbent running unopposed or abstaining from the right to vote altogether. This belief is evident in the referendum process used by many states for the election of judges.²²⁷ In these states, sitting judges must win the confirmation of the voters in an "up-or-down" referendum in order to retain their judicial office.²²⁸ Although the vast majority of judges are retained, the possibility of defeat remains real, and is likely when the voters believe that judges are abusing the powers of their judicial office.²²⁹ The "up-

225. This, of course, implies that political parties may not always nominate the most qualified candidate for the general election. Such a presumption is not unreasonable. The electoral odds of a challenger defeating a deeply entrenched incumbent who has already served a number of terms in office are almost always slim, even if the incumbent has been the target of scandals or other negative press. See *supra* note 76. These odds influence the type of candidate that political parties nominate. "[E]xpectations about the likelihood of electoral success influence the decisions of potential candidates and campaign contributors. The better the electoral odds, the stronger the candidate who runs, and the more money contributed to his campaign." JACOBSON, *supra* note 4, at 48. Therefore, it is not unreasonable to anticipate that political parties will not always put forth their most qualified candidate against a long-term incumbent, as the odds of unseating an entrenched incumbent are remote. In such races, parties are more likely to nominate a "sacrificial lamb." In open elections, on the other hand, where no incumbent is running, the odds of winning are more balanced, and parties are prompted to put forth their strongest candidate. Because special elections under a NOTA system would always be open elections, it is reasonable to conclude that it would be in each party's best interest to nominate their most qualified candidate.

226. For a discussion of the value of voter choice, see *supra* notes 168-81 and accompanying text.

227. See Fund, *supra* note 218, at 28 (comparing the referendum process applied by many states for the retention of judges with a "none of the above" ballot option for political elections); see also Sifry, *supra* note 34, at 222.

228. Fund, *supra* note 218, at 28.

229. *Id.*

or-down" referendum process for the confirmation of judges gives voters an alternative to voting abusive judges back in office. Unfortunately, this alternate is not available for federal political elections. A "none of the above" ballot option would extend to voters an alternative choice to an abusive incumbent congressman, a choice that is critical to the legitimacy of American government.

2. Nevada

In 1975, Nevada state legislator Don Mello introduced a bill to add a "none of the above" option on all statewide ballots and on the ballot for President and Vice-President.²³⁰ The bill was enacted into law in 1976 and remains on the books eighteen years later.²³¹ Although Mello's original bill would have provided for a special election when NOTA received a majority vote, this provision was dropped from the bill prior to its passage into law.²³² Thus, Nevada's NOTA law has no real "bite." If NOTA receives a majority vote, the "flesh-and-blood" candidate receiving the next highest vote total still takes office. Although such a winner may be humiliated, he or she still takes office.²³³

In 1976, the year of its enactment in Nevada, NOTA received forty-seven percent of the vote in a republican legislative primary for the Nevada House of Representatives.²³⁴ The "victorious" republican nominee, who received the second highest vote total with twenty-nine percent of the vote, went on to be soundly defeated in the general election.²³⁵ Other significant NOTA victories in Nevada include a close second place finish in the 1980 Democratic

230. Black, *supra* note 36, at A29. Representative Mello originally introduced the bill as a means of fighting low voter turnout and voter apathy, two characteristics of the post-Watergate climate. See Ellen Goodman, 'None of the Above' Is Candidate for 90's, ST. LOUIS POST-DISPATCH, Oct. 15, 1990, at 3B.

231. Nevada's NOTA law provides in part:

Every ballot upon which appears the names of candidates for any statewide office or for President and Vice President of the United States shall contain for each office an additional line equivalent to the lines on which the candidates' names appear and placed at the end of the group of lines containing the names of the candidates for that office. Each additional line shall contain a square in which the voter may express his choice of that line in the same manner as he would express his choice of a candidate, and the line shall read "None of these candidates."

NEV. REV. STAT. § 293.269 (1993).

232. Black, *supra* note 36, at A29. The special election provision of Nevada's NOTA law had to be dropped due to logistical reasons. The Nevada Legislature meets only once every other year. Thus, in the event of a NOTA victory, it would be impossible to call a special election with the legislature out of session. *Id.*

233. *Id.*

234. Sifry, *supra* note 34, at 239.

235. *Id.*

Presidential primary,²³⁶ second place finishes in both gubernatorial primaries in 1990,²³⁷ and six outright victories in state elections since 1976.²³⁸ Clearly, the choice presented by NOTA is one that has been valued and utilized by the Nevada voters.

Although Nevada's NOTA law lacks any real force because of its failure to provide for special elections in the event that NOTA wins, the impact of the law has not gone unfelt.²³⁹ When NOTA wins an election, it completely humiliates the "victorious" candidate who finishes second. Such an embarrassing "win" forces the victors to rethink their positions on serving in office and makes them more responsive to the constituents that they represent.²⁴⁰ "If enough people refuse to give consent, that will so withdraw the sense of desperately-needed legitimacy from politicians that it might bludgeon them into cleaning up their act."²⁴¹ However, the full impact that a NOTA ballot option may have on an abusive political system will not be felt so long as Nevada is unable to provide for a special election in the event that NOTA wins the general election.

3. Other States

Although Nevada is currently the only state with a "none of the above" line on its election ballots, other states are also beginning to recognize NOTA's appeal. Bills have been introduced in the legislatures of four states that would give voters the choice to vote for "none of the above."²⁴² Moreover, three of

236. *Id.* Former President Jimmy Carter barely defeated NOTA in Nevada's 1980 Democratic primary, winning 38% of the vote to NOTA's 34%. NOTA finished above Senator Edward Kennedy in the same primary. Goodman *supra* note 230, at 3B. See Black, *supra* note 36, at A29.

237. Goodman, *supra* note 230, at 3B.

238. Black, *supra* note 36, at A29. Two of these victories occurred in 1986, when NOTA topped the primary ticket of both parties in the race for state treasurer. Goodman, *supra* note 230, at 3B.

239. Black, *supra* note 36, at A29.

240. Don Mello, the state legislator who introduced Nevada's NOTA law, maintains that NOTA has had an impact on Nevada state politics, despite the lack of any real enforcement of a NOTA victory through special elections. *Id.* Mello asserts that NOTA acts as a humiliation tactic against the candidates, forcing those who lose to NOTA or who barely defeat NOTA to reconsider their practices upon assuming office. *Id.*

241. Black, *supra* note 36, at A29 (quoting Theodore Lowi, a professor of government at Cornell University).

242. In Rhode Island, State Representative Rodney Driver introduced a bill in the Rhode Island General Assembly that would give voters the option to choose "none of the above" on their ballots for legislative and statewide offices. 'None of the Above' Option Proposed for R.I. Voters, UPI, Feb. 27, 1991, available in LEXIS, Nexis Library, ARCNWS File. Driver was motivated to introduce the bill after noting that over 40% of the races for state legislative seats in 1990 were uncontested. *Id.* Colorado State Senator Tilman Bishop introduced a bill in the state legislature on February 15, 1993, that would permit Colorado voters to choose "none of the above" in any race

these bills would force a new election with new candidates in the event that NOTA won the general election.²⁴³ While the future of these NOTA bills is being debated in the state legislatures and their effect remains to be seen, their increased popularity illustrates that "none of the above" is a viable solution for an increasingly frustrated electorate wanting to solve the problems created by an unresponsive federal government.

V. "NONE OF THE ABOVE"—A GOOD IDEA AND A VIABLE SOLUTION

A. "None of the Above"—Why It Will Work

Placing a "none of the above" option on all ballots for federal office would reestablish a meaningful choice in congressional elections. Instead of being forced to give consent to unpopular incumbents who have lost sight of their responsibilities to the people who elected them, voting for "none of the above" would allow voters to withhold their consent to govern from such incumbents, without having to send unknown challengers to Washington in their place. At a minimum, because a NOTA ballot option would threaten both incumbents and challengers alike, it would force the candidates to address the issues of the campaign seriously.²⁴⁴ By including a NOTA option in pre-election opinion polls, voters could express their dissatisfaction with candidates engaging in negative campaigning,²⁴⁵ and a large NOTA vote in the pre-election polls

on the ballot. *Colorado Bill Backs 'None of the Above'*, L.A. TIMES, Feb. 17, 1993, at A9 [hereinafter *Colorado Bill*]. In Georgia, House Bill 739, introduced in early 1993, would allow a "none of the above" box on the ballot for all municipal elections. Julie K. Miller, '93 *Georgia Legislature Election Reform*, ATLANTA J. & CONST., Feb. 27, 1993, at B3. Finally, in Texas, State Representative Billy Clemons filed a bill that would include a "none of the above" choice on the ballot for state and county elections. Christy Hoppe, *Capitol Gallery*, DALLAS MORNING NEWS, Mar. 11, 1993, at 14D.

243. The Rhode Island, Colorado, and Texas bills all provide for a new election if NOTA receives the majority vote for an office. However, only the Colorado bill applies to federal as well as state elections. See *Colorado Bill*, *supra* note 242, at A9. The Georgia bill provides for NOTA only on an experimental basis, and does not require a special election when NOTA wins the general election. Miller, *supra* note 242, at B3.

244. See Sifry, *supra* note 210, at A23. Sifry argues that the threat of a high NOTA vote would induce candidates to address the real issues of the campaign because any negative campaign antics could be repudiated by the voters with a NOTA vote. *Id.*

245. Until recently, negative advertising in the form of harsh personal attacks on one's challenger was considered a sign of desperation. See JACOBSON, *supra* note 4, at 84. Negative campaigning was viewed as a means of last resort for challengers far behind in the polls and was rarely responded to by incumbents hoping to avoid the unwarranted attention. *Id.* This is no longer the case. Contemporary campaign consultants are convinced that negative advertising works: "Negative . . . campaigning is a natural component of present-day electoral politics." *Id.* at 85. Negative advertising has become such a recognized campaign tactic that 75 firms now specialize in "opposition research." See Jon Margolis, *Political Pros Take Center Stage*, CHI. TRIB., Mar. 1,

could induce politicians to focus instead on the real issues of the campaign.²⁴⁶

Because a majority "none of the above" vote would remove an abusive incumbent from office, NOTA offers an immediate and absolute means of eliminating the advantages of incumbency.²⁴⁷ Moreover, even if NOTA receives less than a majority vote, it can still go a long way in diminishing the incumbency advantage. A large NOTA vote, even if not enough to unseat an abusive incumbent, would at least call his or her longevity into question, which in turn would cause political action committees and other moneyed interests to think twice before heavily investing in that incumbent's next campaign.²⁴⁸ Further, once the uncertainty of an incumbent's continued vitality is exposed by a significant NOTA vote, the image of the entrenched politician is shattered, thereby increasing the chances that the opposing political party will recruit serious opponents with greater legislative experience to challenge the incumbent in the next election.²⁴⁹

For voters tired of the continuing reelection of abusive incumbents, NOTA offers a much more selective means of breaking their power structure than do term limits. Although there is no doubt that term limits would work in removing abusive incumbents from office, such initiatives apply across the board to all incumbents, such that honest, diligent, and genuinely popular incumbents

1994, § 1, at 6. In 1994, it is estimated that candidates will spend \$16 million for the services of such firms, "whose employees search arrest and divorce records, past stock and bond dealings, home purchases and mortgages and just about any other trace an opposing candidate may have left behind." *Id.*

Negative campaigning is an unwelcome component in the minds of the voters. In 1988, the Markle Commission on the Media and the Electorate found that Americans were so displeased with the negative campaigning and lack of issues in the current presidential election that more than half of the electorate refused to exercise their right to vote. See Black, *supra* note 36, at A29.

246. See Sifry, *supra* note 210, at A23. Sifry argues that a NOTA ballot option could function as a public veto against negative advertising. *Id.* With a NOTA ballot option, people could express their disgust with this practice, thereby reducing the incentive to engage in such tactics by threatening the candidates with the possibility of "mutually assured destruction" should they choose to launch personal attacks on one another. *Id.* With the elimination of negative campaigning, candidates are likely to turn to the real issues of the campaign. *Id.*

247. For a listing and discussion of some of the factors comprising the incumbency advantage, see *supra* notes 53-68 and accompanying text. Under this proposal, however, an incumbent losing to NOTA in the general election would still be able to conduct a write-in campaign in the special election, but the likelihood of mounting a successful write-in campaign would be remote. See *supra* notes 197, 224.

248. Sifry, *supra* note 34, at 223. Further, a significant NOTA showing in a pre-election opinion poll would persuade large campaign contributors to spread their resources more evenly, due to the realization that no incumbent's tenure is definite. *Id.*

249. As the likelihood that the incumbent will win reelection decreases, the likelihood of the challenger's success increases, which influences stronger challengers to run against the incumbent. JACOBSON, *supra* note 4, at 48.

would also be removed from their elected positions. Under a NOTA plan, competent congressional members who sincerely place the interests of their constituents first would not be barred from office, but could continue to serve as long as the voters continued to give them their consent at the polls. NOTA would provide incumbents an incentive for honest and genuine service, because at the first indication of abuse of office or other scandal, voters would be armed with a mechanism for voting the incumbents out of office. Therefore, NOTA would enable voters to remove abusive incumbents from office, but not at the expense of sweeping able and popular incumbents out of Congress as well.

Finally, in those districts where incumbents have so successfully created an aura of invincibility such that potential opponents are discouraged from even mounting a challenge, allowing the incumbent to run unopposed, a "none of the above" ballot option offers voters the only other choice on the ballot. American voters should not have to go to the polls and either vote "yes" for an abusive and entrenched incumbent or otherwise abstain from voting in that particular election. NOTA can help alleviate the abuses of incumbency, diminish the strength of the incumbency advantage, and provide voters with a meaningful choice in federal elections. Therefore, provided that there are feasible means of implementation, and no constitutional infirmities, NOTA appears to be a more adequate solution to the abuses of entrenched incumbents than are term limits.

B. Methods for Making "None of the Above" a Reality

Placing "none of the above" as an option on ballots for federal election is not a goal that will be achieved overnight. It is likely to be met with much resistance by most state legislators and members of Congress.²⁵⁰ This difficulty may explain the states' reluctance to recognize NOTA as an alternative means of congressional reform. But this is not to say that a NOTA ballot option is not a viable solution. One must remember that even the right to vote did not come easily for a majority of our population.²⁵¹ Practical methods for implementing a NOTA ballot option for federal elections do exist, and the creation of such a voting option is a definite possibility.

Perhaps the most obvious means of implementing a NOTA ballot option is by federal or state law. The Constitution grants to the states the authority to regulate the times, places, and manner of U.S. congressional elections.²⁵²

250. See *infra* note 254.

251. African-Americans did not gain the right to vote until the Fifteenth Amendment was ratified in 1870; and it was not until the Nineteenth Amendment was ratified in 1920 that women could vote. See *WORLD ALMANAC*, *supra* note 7, at 537-38.

252. U.S. CONST. art. I, § 4, cl. 1.

However, Congress has the authority to make or alter such state regulations at any time.²⁵³ Therefore, a federal statute providing for a NOTA option on all ballots for congressional office would be binding on the states. Unfortunately, the possibility of a federal NOTA law is slim, as most members of Congress are not likely to be receptive to, much less in favor of, what is essentially a public veto of their unlimited tenure in office.²⁵⁴

For similar reasons, a state law placing NOTA on ballots for federal office is also questionable. Many state legislators have aspirations for higher office on the federal level, and thus would not want to create the possibility of a public veto of their future staying power in Congress by enacting a law that would place "none of the above" on the ballot. Moreover, most state legislators wish to remain in good standing with their federal counterparts, and voting to enact a state law adding a NOTA option to federal ballots has the potential to jeopardize this relationship. Thus, although possible, it is unlikely that a state legislator would vote for a bill that would place NOTA on congressional ballots.²⁵⁵

As state and federal elected officials are the individuals who stand to lose under a NOTA ballot option, it is unreasonable to expect that they be the individuals responsible for bringing such an option into existence. A more logical choice for the creation of a ballot option for "none of the above" is those individuals who are most likely to benefit from a NOTA option; namely, the electorate. If a NOTA option is going to appear on ballots for congressional office, then the movement to achieve this goal must come from its most ardent

253. *Id.* An example of an area where Congress has acted to preempt state regulations of federal elections is in campaign finance. The Federal Election Campaign Act of 1971 ("FECA") reformed several areas of campaign finance. 2 U.S.C. §§ 431-56 (1988). The Supreme Court upheld Congress' ability to regulate certain areas of campaign finance in *Buckley v. Valeo*, 424 U.S. 1 (1976). See also David K. Neidert, *Campaign Reform: Fifteen Years after Buckley v. Valeo*, 17 J. CONTEMP. L., 289, 289 (1991). Therefore, the times, places, and manner of holding elections is not an area of the law where state sovereignty is absolute, and regulation of such procedures is within Congress' constitutional scope of authority.

254. However, those members of Congress who honestly serve their constituents and take the responsibilities of their office seriously may be confident enough with their congressional record to support a NOTA law. But the possibility of a majority of Congress supporting NOTA remains highly unlikely. See Sifry, *supra* note 210 (arguing against the likelihood of the enactment of any type of congressional reform by the members of Congress whose security would be threatened by such reforms).

255. However, a state law providing for a NOTA ballot option is not completely unreasonable. One need only look to the example set by Nevada in placing a NOTA option on its election ballots to see that state legislators are not wholly unreceptive to such an option. Furthermore, bills are currently pending in four states that would provide for a "none of the above" option on the ballots for either municipal, county, state, or federal office. See *supra* note 242. Therefore, given the right amount of pressure from constituents and state citizens, the possibility of state laws requiring a NOTA ballot option for federal elections is very real.

supporters, the frustrated voting public.

A number of alternative means are available by which American voters can work toward obtaining a line for "none of the above" on ballots for federal office. The strongest and most immediate means under which NOTA can be made a reality by voters is through the initiative and referendum process.²⁵⁶ Under this process, state citizens would have to petition to get a "none of the above" ballot option initiative on the next election ballot. Then, if in the next general election the NOTA initiative received a majority vote, the NOTA ballot option would become state law. While the success of the state initiative process is illustrated by the unanimous victory of term limits in all fourteen states having a term limit initiative on their 1992 ballot,²⁵⁷ such a means of implementation is limited because the referendum process is available in only twenty-three states.²⁵⁸ Therefore, alternative methods of placing NOTA on the ballot must be examined for those states without an initiative process.

In order to get "none of the above" on the ballot in those states without an initiative or referendum process, voters must pressure their state legislators to enact a law providing for a NOTA ballot option. Although voters are likely to be met with much resistance by state legislators for the reasons set forth above, state-enacted NOTA laws are not impossible. The experience in the state of Nevada is concrete evidence of the possibility of state-created NOTA ballot options.²⁵⁹ By applying constituent pressure, either through widespread write-in campaigns or elections, voters might be able to convince their state representatives to consider a NOTA ballot option. If a number of states are capable of independently enacting a NOTA ballot provision, then other states might be encouraged to join the bandwagon. Finally, if enough momentum is gained, then the possibility of two-thirds of the state legislatures calling for a convention to amend the Constitution to provide for a NOTA ballot option

256. The current term limit laws of the twenty-one states were all passed by state initiatives. See Galvin, *supra* note 19, at 3593. This fact is a strong indication that the initiative process could be used to pass a NOTA provision into law. As both term limits and a NOTA ballot option are designed to achieve the same ends of eliminating incumbency abuse and the incumbency advantage, those citizens who voted in favor of limiting congressional terms are also likely to be very receptive to a NOTA ballot option. Further, because NOTA does not appear to suffer from the constitutional defects that are likely to invalidate term limits, the initiative process is a valid means for placing NOTA on the ballot.

257. See Galvin, *supra* note 19, at 3593.

258. Kobach, *supra* note 29, at 1974.

259. See *supra* notes 230-41 and accompanying text. Additionally, four states have bills currently pending that would call for the placement of a NOTA option on election ballots. See *supra* notes 242-43 and accompanying text.

would not be out of the question.²⁶⁰

Although no minor task, creating a statutory right to vote for "none of the above" by any one of the alternative means outlined above is entirely possible. Although the financial costs of implementing such a system could be substantial, steps can be taken to meet such costs and keep them at a minimum. Reform measures in the area of campaign finance could be required in conjunction with the enactment of NOTA laws. For example, provisions could be attached to the states' NOTA statutes requiring political parties to contribute a percentage of their campaign expenditures to a state fund for the holding of special elections in the event of a NOTA victory. The candidates themselves could also be targeted for contributions to the fund in the event of a loss to NOTA in the general election, thereby encouraging potential candidates to give the decision to run serious consideration before exposing themselves to economic liability. Finally, those who will benefit most from a NOTA vote, the electorate, could also contribute to a NOTA fund for the holding of special elections. By giving voters the option of checking a box on their state tax returns that would donate one dollar or more of their tax refunds to a NOTA fund, the states could help pay the costs of holding special elections, and at the same time monitor the public's opinion of the NOTA option. State election commissions, similar to the Federal Election Commission that enforces the Federal Election Campaign Act,²⁶¹ could be charged with the responsibility of enforcing the NOTA laws and overseeing the NOTA campaign fund.

While the costs of executing a system providing for a NOTA ballot option may be high at first, such costs are likely to diminish as voter choice increases. After the initial introduction of a NOTA ballot option, voters are likely to opt for "none of the above" as a means of venting their dissatisfaction and frustration with the current state of "politics-as-usual," thereby necessitating the need for special elections and the corresponding costs of holding such elections. Eventually, however, only serious candidates will emerge,²⁶² which would have the corresponding effect of reducing the NOTA vote, thus driving down the need for special elections and their transaction costs. As a result, while the costs of a NOTA system may be greater than the current costs of holding elections, such costs could be paid by the political parties supporting the candidates, the candidates themselves, and the electorate. Furthermore, the need for special elections is likely to decline as the NOTA vote takes effect and more

260. For a discussion of the ability of voters to amend the U.S. Constitution, see Kobach, *supra* note 29 (retracing the steps of the campaigns that brought about the passage of the Seventeenth and Nineteenth Amendments and comparing these movements to the current campaign for congressional term limits).

261. 2 U.S.C. § 437(c) (1988).

262. See *supra* notes 247-49 and accompanying text.

serious candidates are recruited for congressional office. Therefore, provided that NOTA suffers from no constitutional infirmities, "none of the above" is quite capable of becoming a reality.

C. The Constitutionality of "None of the Above"

A "none of the above" ballot option will not suffer from the constitutional defects that are likely to nullify term limits. First, unlike term limits, the placement of a line for "none of the above" on ballots for federal office in no way imposes an additional qualification on membership for Congress. While term limits create an absolute barrier to the candidacy of certain incumbents, based on the length of their prior service,²⁶³ a NOTA ballot option creates no such substantive qualifications on candidacy. NOTA merely adds to the options on the ballot. It does not remove certain ballot options based on unconstitutional qualifications. Incumbent candidates are entirely free to seek reelection under a NOTA plan. It is only after they have had a fair opportunity to campaign for office and seek reelection, and have failed to obtain the consent of the voters by losing to "none of the above," that incumbents are denied access to the ballot. Thus, NOTA does not act as a bar to candidacy for incumbents, and it cannot be said to impose any additional qualifications for membership in Congress.

Neither can it be argued that NOTA is essentially an additional qualification for candidacy disguised as a times, places, and manner regulation of elections. To the contrary, NOTA is, in its essence, a valid procedural regulation of elections that is entirely within the states' authority under the Times, Places, and Manner Clause of the Constitution.²⁶⁴ "None of the above" is merely an addition to the choices offered on the ballot. It is in no way a burden on the ability of those candidates meeting the qualifications enumerated in the Constitution to run for Congress. Although candidates losing to NOTA in the general election would be barred from appearing on the ballot for the special election, such a provision is a valid ballot access regulation under the Times, Places, and Manner Clause, and is justified by the states' interest in regulating the number of candidates on the ballot.²⁶⁵ Therefore, a NOTA ballot option

263. For an analysis of term limits as substantive qualifications for membership in Congress, see *supra* notes 96-117 and accompanying text.

264. For a discussion of the states' ability to regulate elections under the Times, Places, and Manner Clause, see *supra* notes 118-58 and accompanying text.

265. Barring candidates losing to NOTA in the general election from appearing on the ballot for the special election is practically indistinguishable from the ballot access provision upheld in *Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). The Pennsylvania statute at issue in *Williams* prevented candidates losing in the primary election from obtaining a position on the ballot for the general election. *Id.* at 384. In upholding the statute, the court recognized the state's "legitimate interest[s] in regulating the number of candidates on the ballot," preventing the "clogging of its election machinery," and avoiding "voter confusion." *Id.* at 388.

plan would not place any substantive limitations on candidacy, but would merely regulate the manner of congressional elections, which is entirely within the states' authority under the Constitution.

A "none of the above" ballot option would in no way burden the right to vote freely for the candidate of one's choice.²⁶⁶ Instead, NOTA preserves this right, especially in situations where the voters are represented by honest and diligent incumbents who are respected and appreciated by their constituents. Such incumbents have earned the esteem of the voters and are the preferred candidate of their constituents, yet term limits would deny the voters the opportunity to vote for these incumbents. Under a NOTA law, however, a voter's right to vote for a genuinely popular, long-term incumbent is not infringed, as such candidates remain free to seek reelection for as many terms as the voters will allow. Furthermore, even if an incumbent loses to NOTA in the general election, the voter may still vote for the incumbent in the special election by writing in the incumbent's name on the ballot. Thus, the right to vote for the candidate of one's choice is preserved in both the general and special elections.

Finally, NOTA would not infringe on the right of individuals to associate with a candidate's political beliefs. Incumbent candidates are free to advance the political goals of their party, provided that they win reelection by defeating their challengers, including NOTA. Although NOTA may make incumbents mend their ways to win reelection, it cannot be said that it bars them as a group from the election ballot. Thus, NOTA preserves for incumbents and their supporters the right to associate for the advancement of their political beliefs. This right is preserved through the continued freedom of incumbents to seek reelection under a NOTA plan.

A NOTA ballot option does not suffer from the constitutional infirmities that have undermined term limits in the U.S. district courts and the Arkansas

A state would have similar interests in barring candidates losing to NOTA in the general election from gaining access to the ballot in the subsequent special election. Because a majority of voters have already expressed their discontent with such candidates by voting for "none of the above," allowing the losers to then appear on the special election ballot would only confuse the voters by indicating that their first vote did not really count. Such a signal is not one that the government can afford to send to an already disgruntled and frustrated voting public, and neither is it one that the state governments must send in light of their authority to regulate access to the ballot. The states have a legitimate interest in regulating the number of candidates on the ballot, and barring candidates who lost in a primary election from appearing on the ballot in the general election is just as much a valid expression of this interest as is barring candidates who lost to NOTA from appearing on the ballot for a subsequent special election.

266. For a discussion on the right to vote for the candidate of one's choice, see *supra* notes 159-85 and accompanying text.

Supreme Court,²⁶⁷ and that are likely to be the ultimate demise of state-imposed term limits in the United States Supreme Court.²⁶⁸ As there is no apparent constitutional basis upon which to successfully defeat a NOTA ballot option, and as viable means of implementation exist, NOTA appears capable of achieving the objectives that term limits cannot—diminishing the incumbency advantage and providing greater voter choice in elections.

VI. CONCLUSION

Although public suspicion of government is by no means a new phenomenon in America,²⁶⁹ recent opinion polls reveal a shocking distrust of what has become known as the "Washington establishment."²⁷⁰ An Associated Press opinion poll taken in the summer of 1992 found that only one percent of Americans trusted Congress to do the right thing "just about all the time."²⁷¹ Congressional scandals and stories of abuses of the powers of office have left Americans frustrated by an increasingly unresponsive government. Yet, despite all the talk of "tossing the bums out" of office,²⁷² incumbents are returned to Congress in overwhelming numbers. The reason for this high rate of reelection of incumbents notwithstanding an angry electorate is the significant advantage incumbents enjoy in the form of electoral security. Indeed, in many congressional races, the incumbent is so entrenched that the opposing party faces little chance of mounting a successful campaign, resulting in the selection of the usual "sacrificial lamb" to challenge the incumbent. In such races, voters are not left with much of a choice in their election of a representative. Instead, the real choice seems to be whether to vote at all.

While the problem of the entrenched incumbent would be eradicated by the enactment of congressional term limitations, the constitutionality of such measures, barring a constitutional amendment, is highly questionable. Furthermore, under a system of term limits, qualified and experienced incumbents who are genuinely popular are automatically removed from office. Although alternative solutions to incumbency abuse exist, such as campaign finance reform or reforms of the electoral system, the enactment of such measures is unlikely as they threaten the security of the politicians responsible for creating them. Thus, the power to remedy the problems of incumbency

267. See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994); *supra* notes 191-206 and accompanying text.

268. See *Justices*, *supra* note 25, at 3.

269. See *WILL*, *supra* note 5, at 2.

270. See *FIORINA*, *supra* note 5, at 2-3.

271. *WILL*, *supra* note 5, at 2-3. See *supra* note 8.

272. Stephen H. Wildstrom et al., *Talk of 'Tossing the Bums Out' May Be More Than Just Talk*, *BUSINESS WEEK*, Mar. 23, 1992, at 43.

abuse must be vested in those who stand to gain the most from immediate change: the voters. Voters in those states with an initiative and referendum process should push for a "none of the above" ballot option on all ballots for federal office.

A NOTA ballot option would permit voters to avoid returning to office abusive incumbents who have lost sight of their responsibilities to the people, without having to send completely unknown challengers in their place. At the same time, NOTA would not prevent constituents from voting for genuinely respected and honest incumbents who diligently serve the public. At a minimum, because NOTA would threaten both incumbents and challengers alike, a large NOTA vote would strongly encourage the candidates to refrain from negative campaigning and to address the issues seriously. Finally, a "none of the above" ballot option would benefit the voters by increasing the value of their choice in elections; a NOTA ballot provision offers a more selective means to diminishing the advantages and abuses of incumbency than do term limits.²⁷³

Blair T. O'Connor

273. The Republican Party swept to victory across the nation in the 1994 election. See Steve Komarow, *Republican Storm Claims Big Names*, USA TODAY, Nov. 9, 1994, at 1A. The Republicans regained control of the Senate after eight years and ended a 40-year Democratic reign in the House of Representatives. *Id.* See also Steve Daley, *GOP Poised to Gain Control of U.S. House*, CHI. TRIB., Nov. 9, 1994, § 1, at 1; Steve Daley, *Democrats Looking for a Silver Lining*, CHI. TRIB., Nov. 10, 1994, § 1, at 12. Republican challengers defeated such prominent Democratic incumbents as Senator Jim Sasser of Tennessee, Senator Harris Wofford of Pennsylvania, Representative Dan Rostenkowski of Illinois, and House Speaker Tom Foley of Washington. Judi Hasson & Steve Komarow, *Voted Out*, USA TODAY, Nov. 10, 1994, at 4A.

Despite the breadth of the Republican Party's sweep of Congress, the 1994 election results are in no way indicative of the elimination of incumbency as a dominant factor in American politics. Every Republican congressional incumbent was reelected to another term. Charles M. Madigan, *For Most, Incumbency Was No Burden*, CHI. TRIB., Nov. 10, 1994, § 1, at 1, 26. Furthermore, several notable Democratic incumbents were returned to Congress, including Senator Ted Kennedy from Massachusetts, Senator Charles Robb from Virginia, Senator Dianne Feinstein from California, Representative Richard Gephardt from Missouri, and Representative John Conyers from Michigan. See *Final Election Results*, USA TODAY, Nov. 10, 1994, at 10A-13A (breaking down election results state-by-state). At the last count before this issue went to press, only 32 incumbent congressional Democrats were defeated, 15 of whom were freshman who came to Congress on President Clinton's coattails. Madigan, *supra*, § 1, at 1. But an even stronger indication of the staying power of incumbents in the 1994 election is the fact that of the four House members seeking reelection under indictment, only Dan Rostenkowski of Illinois lost. Paul Leavitt et al., *Indicted Congressmen*, USA TODAY, Nov. 9, 1994, at 3A. Representative Joseph McDade of Pennsylvania (indicted for taking bribes from military contractors), Representative Mel Reynolds of Illinois (indicted for sexual abuse, child pornography and obstruction of justice), and Representative Walter Tucker of California (indicted for taking bribes as a mayor before being elected to Congress) were all reelected to another term. *Id.* Thus, the message to be taken from the 1994 election was not "throw the rascals out," but "throw [some of] the [Democratic] rascals out!" *Id.*

The real theme from the 1994 election did not appear to be one of anti-incumbency, but rather

one of anti-Clinton. See Richard Benedetto, *The Message from Voters: Listen Up*, USA TODAY, Nov. 10, 1994, at 3A ("For many voters, the election was a referendum on Clinton. Half of GOP voters said a reason for their vote was to express opposition to him."). Republican Senator Phil Gramm of Texas, a likely candidate for President in 1996, agreed that the 1994 election was "a referendum against the Clinton administration." Richard Wolf, "Time for a Change," *Say Voters*, USA TODAY, Nov. 10, 1994, at 1A-2A. Therefore, rather than being a sign of the reduction in strength of the incumbency advantage in congressional elections, the 1994 election can be viewed more as an expression of the voters' dissatisfaction with the Clinton administration. Viewed in this light, the 1994 election can be seen as an exception to the trend toward candidate-centered politics, and is not likely to reverse the declining significance of party labels in elections.

Despite the Republican revolution in Congress, the 1994 election still demonstrates the need for ballot reform in America. The defeat of Dan Rostenkowski, who was first elected to Congress in 1958, reveals the unpleasant alternatives that voters face at the ballot box. Michael Flanagan, the 32-year-old Republican challenger who, in his first bid for public office, defeated Rostenkowski, has been deemed a "political neophyte," relatively unknown to the voters. See Hanke Gratteau & Laurie Cohen, *Flanagan Ousts a City Powerhouse*, CHI. TRIB., Nov. 9, 1994, § 1, at 1. Peg Roth, a Democratic committee member from Rostenkowski's district, stated: "I don't think the voters here have a clue what they did." Hanke Gratteau, *All Along, Rostenkowski Knew It Was Over*, CHI. TRIB., Nov. 10, 1994, § 1, at 1 (referring to the election of Michael Flanagan). The *Chicago Tribune* ran an article on Flanagan the day after his election, informing the voters about the man they had elected and predicting what type of legislator he would be. See Peter Kendall & Laurie Cohen, *Rostenkowski's Replacement Flanagan a True Conservative*, CHI. TRIB., Nov. 9, 1994, § 1, at 27. Therefore, Rostenkowski's defeat only reinforces the argument that entrenched incumbency has left the voters with no real choice at the ballot box. Often, when voters decide to oust a scandalous incumbent, their only alternative is to send an unknown and inexperienced challenger to Congress in the incumbent's place. A "none of the above" ballot option, on the other hand, would provide voters with an opportunity to remove both the abusive incumbent and the unknown challenger from the ballot, and encourage the political parties to nominate qualified, experienced candidates for the subsequent special election.

From the perspective of the incumbents, at worst the 1994 election can be seen as a sign that if incumbents push the voters too far, then they may be called upon to answer for their conduct. At best, the election can be seen as a sign that incumbents' conduct would have to be extremely egregious to threaten their tenure. But from the perspective of the voters, the 1994 election signifies that the lack of voter choice continues to persist as a serious problem in congressional elections.

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