Another Such Victory--Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation

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Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation

by

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Table of Contents

I. State-Imposed Term Limits: The Policy Debate ........ 1130
   A. Contemporary Arguments For and Against State-Imposed Term Limits ............................... 1131
   B. “Qualifications to Serve”: The Framers’ Views ...... 1137
   C. Term Limits and the Tenth Amendment: The Jefferson-Story Debate .................................. 1143
   D. The Historic Record: Some Initial Thoughts ........ 1151
II. State-Imposed Term Limits: The Constitutional Matrix .............................................. 1153
   A. Term Limits as “Additional Qualifications” or “Manner” Restrictions ............................... 1153
      (1) Powell v. McCormack and “Qualifications” .... 1153
      (2) Terms Limits as a Condition on the “Manner” of Elections ........................................ 1158
   B. Term Limits as a Burden on Free Speech or as a Basis of Electoral Integrity ...................... 1165

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* Associate Professor of Law, University of Arkansas. Many thanks to Henry Monaghan, whose comments were immensely helpful. And deep appreciation to AMK, my best friend and most insightful critic, who is to me as Pound was to Eliot, il miglior fabbro.

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Introduction

Pyrrhus, Plutarch tells us, surveyed the carnage at Asculum and declared, “If we are victorious in one more battle with the Romans, we shall be utterly ruined.”1 Twenty-three centuries later, champions of state-imposed limits on the number or timing of the terms an individual may serve in Congress may soon echo Pyrrhus’ words if they emerge “victorious” from what promises to be an intriguing legal struggle. The reasons for this Pyrrhic foreboding, however, have little to do with traditional arguments against term limits, and much to do with a provision of the Constitution regarded by some as “little more than an historical curiosity,”2 Section 2 of the Fourteenth Amendment.

1. 9 Plutarch’s Lives, Pyrrhus, ch. 21, 416-17 (B. Perrin trans., 1920) (“Αυτό μέντοι μάχη τού Ρωμαίους νικήτησεν, ἑπολούμεθα παντελῶς.”). Pyrrhus, King of the Greek city-state of Epirus, won two battles at Asculum in 280 B.C. at the cost of most of his commanders, his army, and his reserves. His famous line was uttered to one who congratulated him on his “success.” As quoted by Plutarch, the statement includes an important dimension not usually reflected in the popular paraphrase, the nature of the adversary. Individuals routinely describe virtually any costly triumph as a “Pyrrhic victory.” See, e.g., Walter Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1, 31 (1951) (“[T]he Government, therefore, has won many a suit but lost many a cause.”); Allan C. Hutchinson, Indiana Dworkin and Law’s Empire, 96 Yale L.J. 637, 659 (1987) (book review) (“The escape turns out to have been bought at too high a price—to be a Pyrrhic victory.”). For term limit devotees, though, just as for Pyrrhus, the nature of the opponent matters a great deal, for term limits inevitably must conform with the commands of the supreme legal force, the Constitution.

Our focus in this Article is not on the wisdom of state-imposed term limits, although that debate does provide a necessary context for our task. Our objective is, rather, to consider the implications of the mandate of Section 2 on the term limits controversy.

Section 2 provides,

When the right to vote at any election for . . . Representatives in Congress . . . is denied to any of the . . . inhabitants of such State, . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such . . . citizens shall bear to the whole number of . . . citizens . . . in such State. 3

This "historical curiosity" has received limited attention by the courts or in legal literature 4 and has been noticeably absent from the discussions of term limits appearing to date. 5 We suspect, however, that res-

3. U.S. Const. amend. XIV, § 2 (emphasis added). As originally ratified, Section 2 protected only the right to vote of "male inhabitants" and "male citizens" who were "twenty-one years of age," limitations rendered meaningless by the subsequent passage of the Nineteenth and Twenty-Sixth Amendments. Id.

4. We discuss the cases infra at text accompanying notes 324-362. We have found only four articles that discuss Section 2 at any length: Arthur Earl Bonfield, The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment, 46 Cornell L.Q. 108 (1960); Ben Margolis, Judicial Enforcement of Section 2 of the Fourteenth Amendment, 23 Law in Transition 128 (1963); William W. Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33; George David Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93 (1961). Section 2 is discussed in other materials, either as a necessary element in the history of the Fourteenth Amendment, see, e.g., Horace Edgar Flack, Ph.D., The Adoption of the Fourteenth Amendment 97-127 (1908), or as part of the ongoing argument about the extent to which the "original intent" of the Amendment's framers can be discerned—much less be deemed controlling. See, e.g., Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 64-68 (1977); Raoul Berger, The Fourteenth Amendment: Light from the Fifteenth, 74 Nw. U. L. Rev. 311, 318-21 (1979); Michael Klarmann, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 228-29 (1991); Neil K. Komesar, Back to the Future—An Institutional View of Making and Interpreting Constitutions, 81 Nw. U. L. Rev. 191, 208 (1987).

olution of the term limits debate demands that advocates on both sides revisit this constitutional question. We also sense that this journey will prove simultaneously exhilarating and uncomfortable for proponents of these measures. Section 2 affords a plausible constitutional foundation for a state initiative to limit the terms of its senators and representatives. But such limitations, if constitutional, may "deny" or "abridge" the right to vote in ways that pose the disquieting spectre of Section 2 sanctions against the offending state.6

Fourteen states had term limit measures on their ballots in the November 3, 1992 election,7 and it is anticipated that the voters in at

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6. Note that Section 2 also applies when a state "denies or in any way abridges" the right to vote for "the Executive and Judicial officers of a State, or the members of the Legislature thereof . . . ." U.S. Const. amend. XIV, § 2. For reasons explained infra at text accompanying notes 469-470, our focus in this Article is on the implications of Section 2 for state-imposed limits on the terms of United States Representatives. If our assumptions about Section 2 are correct, however, many of our conclusions apply with equal force when the state measure affects only the enumerated state offices.

7. These states were Arizona, Arkansas, California, Florida, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming. The Nebraska measure has since been invalidated in its entirety, see Duggan v. Beermann, 515 N.W.2d 788 (Neb. 1994) (stating failure to comply with state constitutional requirements regarding number of signatures on petition invalidates initiative), as have those portions of the Arkansas and Washington measures dealing with qualifications to serve in Congress. See U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994); Thorsted
least seven more will consider them in November 1994. Every measure that has come to a vote has passed, often by overwhelming margins. And while each enacted formulation is different in material respects, they all share one striking common denominator, a declaration of intent by voters to limit the number of terms an individual can serve in the United States Senate or House of Representatives. Term v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994). On June 20, 1994 the Supreme Court granted the requests for a writ of certiorari in two appeals of the Arkansas decision. See U.S. Term Limits, Inc. v. Thornton, 114 S. Ct. 2703 (1994), and Bryant v. Hill, 114 S. Ct. 2703 (1994). The cases were consolidated and will be heard together during the Court's October 1994 Term. The Court also refused requests for expedited consideration of the Washington state case. See Citizens for Term Limits, Inc. v. Foley, 114 S. Ct. 2727 (1994), and Gregoire v. Thorsted, 114 S. Ct. 2727 (1994).

8. These states are Alaska, Idaho, Maine, Massachusetts, Nevada, Oklahoma, and Utah. See Linda Greenhouse, Supreme Court to Decide if States Can Set Term Limits for Congress, N.Y. TIMES, June 21, 1994, at A1, A10. The Oklahoma measure was cleared for placement on the ballot over objections that the limits, if enacted, would be unconstitutional. The court did not resolve the question, stating that “we simply cannot say the opponents have carried their burden to show a clear and manifest facial unconstitutionality which in our view would be sufficient to interfere with the people’s right to vote on this important question.” In re Initiative Petition No. 360, State Question No. 662, 1994 WL 387370, at *5 (Okla. July 19, 1994). However, the court was also quite sensitive to the fact that the Supreme Court had agreed to hear the Arkansas case, see id., and we suspect term limit advocates should not read too much into the qualifying language.

9. The fifteenth state is Colorado, which passed a measure in 1990 designed to “broaden the opportunities for public service and ... assure that members of Congress are representative of and responsive to Colorado citizens” in 1990. See Colo. Const. art. XVIII, § 9a(1) (approved Nov. 6, 1990). The Colorado measure limits Senators and Representatives to, respectively, two and six “consecutive” terms, with “consecutive” defined as “at least four years apart.” Id. However, a measure certified for inclusion on the ballot in the November 1994 general election “would restrict members of the U.S. House to three consecutive terms of two years each . . . .” John Sanko, Two More Proposals Are Certified for November Ballot; Secretary of State OKs Voting on Term Limits and Change in Welfare, ROCKY MOUNTAIN NEWS, Sept. 1, 1994, at 8A.

The only recent measure to fail was in Washington in 1991, when that state’s voters defeated Initiative Measure 553 by a margin of 54% to 46%. See Timothy Egan, State of Washington Rejects a Plan to Curb Incumbents, N.Y. TIMES, Nov. 7, 1991, at B16. That defeat was reversed in 1992 with the passage of Initiative Measure 573, possibly because voters did not fear “losing influence in Congress” since it seemed clear that Washington would no longer be “the only state taking such a drastic measure.” Id. The margin of victory—52% to 48%—was, however, the smallest in the nation. See Robert Reinhold, Move to Limit Terms Gathers Steam After Winning in 14 States, N.Y. TIMES, Nov. 5, 1992, at B8 (listing results in each state).

10. The measures were approved “by a landslide average of 66%,” George F. Will, Term Limits: Let the States Decide, WASH. POST, Nov. 26, 1992, at A29, with margins ranging from a high of 77% to 23% in Wyoming to a low of 52% to 48% in Washington. See Reinhold, supra note 9, at B8. See also George F. Will, What Voters Did for The System, WASH. POST, Nov. 12, 1992, at A21 [hereinafter Will, What Voters Did] (“In 13 of the 14 [states], limits got more votes than Clinton got. Limits won more votes in 14 states than Perot won in 50 states.”)
limit supporters understandably have characterized the election results as a “mammoth mandate” and have declared that state-imposed term limits are “the first step in the liberation of a new energy for political elections,” dooming “cozy relationships between special-interest lobbyists and lifetime politicians.” Opponents of these provisions, predictably, have initiated a constitutional war against their “abomination,” believing that “[w]e should allow the public to select anybody they want, subject to the limitations of the Constitution.

Two skirmishes have been fought in this legal campaign. Each has given opponents of state-imposed term limits an initial legal victory in a dispute that poses two interrelated questions, only one of which will be resolved when the U.S. Supreme Court takes up this matter during its October 1994 Term. Obviously, the Court can, and

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11. Reinhold, supra note 9, at B8 (quoting James K. Coyne III). Mr. Coyne served a single term as a Representative from Pennsylvania from 1981 to 1983, founded Americans to Limit Congressional Terms, and is coauthor of Coyne & Fund, supra note 5. In what might be a tacit concession that the measures are largely hortatory, he also stated, “We now have a six-year window of opportunity to force, or persuade, Congress to do the right thing and pass it uniformly for the whole country by a Constitutional amendment.” Reinhold, supra note 9, at B8. The six-year window turned out to be much shorter than Mr. Coyne supposed. Both the federal district court in Washington and the Arkansas Supreme Court found the issues posed by the limits on congressional terms ripe for adjudication, even though the disqualifications would not begin to operate for a number of years. See Thorsted, 841 F. Supp. at 1074-75; U.S. Term Limits, 872 S.W.2d at 353-54.


13. Reinhold, supra note 9, at B8 (quoting Professor Gerald Gunther).

14. Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994) (holding the portions of the Washington measure involving U.S. Senators and Representatives unconstitutional under the Qualifications Clauses and the First and Fourteenth Amendments); U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994) (striking Arkansas limits on members of Congress as a violation of the Qualifications Clauses, while holding limits on state officers do not violate the First and Fourteenth Amendments), cert. granted sub nom. U.S. Term Limits, Inc. v. Thornton, 114 S. Ct. 2703 (1994), and Bryant v. Hill, 114 S. Ct. 2703 (1994). Neither side treated the decisions as anything other than preliminary bouts. The petition for a writ of certiorari in U.S. Term Limits was filed a scant two days after the Arkansas Supreme Court refused to reconsider its March 7th ruling. See U.S. Term Limits, Inc. v. Thornton, 62 U.S.L.W. 3642 (U.S. Mar. 29, 1994) (No. 93-1456) (noting filing of petition). Representative Thomas S. Foley of Washington characterized that decision as simply “an important framework for the resolution of one of the most important constitutional questions of the decade,” while Ms. Sherry Bockwinkel, one of the leaders of the movement that placed the initiative on the Washington ballot, stressed, “We need five votes on the Supreme Court, and that’s where we’re going.” Timothy Egan, Federal Judge Strikes Down Law Limiting the Terms of Lawmakers, N.Y. TIMES, Feb. 11, 1994, at A20. An attempt by the supporters of the Washington measure to skip the Court of Appeals for the Ninth Circuit and go directly to the Supreme Court was rejected by the Court. See Citizens for Term Limits, Inc. v. Foley, 114 S. Ct. 2727 (1994), and Gregoire v. Thorsted, 114 S. Ct. 2727 (1994) (granting the motions for expedited consideration and denying the petitions).
presumably will, address the threshold legal issue, whether state-imposed term limits are constitutional, particularly in light of the apparently clear dictates of the Qualifications Clauses in Article I. It is equally evident, however, that the Court cannot, and should not, tell us whether term limits are good policy, perhaps even necessary policy, in response to what many characterize as an increasingly entrenched political establishment.

Since the policy debate provides an essential context for exploring the constitutional issues, we begin this Article with a discussion of the policy questions posed by term limits. In Section I-A, we examine the recently enacted state limitations: their texts, the arguments enunciated in their favor, and the policy considerations raised by their opponents. Section I-B reviews the debate over term rotation and limitation at the time the Constitution was framed. Section I-C explores the opposing views of Thomas Jefferson and Joseph Story on whether the Tenth Amendment grants states the power to limit terms of national representatives.

The record indicates that a substantial number of the framers initially believed a constitutional amendment was required to secure "rotation" or term limits, suggesting that state-imposed limits on terms are unconstitutional. Simultaneously, we suspect that Jefferson had the upper hand in his debate with Story and that the Tenth Amendment offers a post-Qualifications Clauses modification of the constitutional scheme that recognizes residual state power over such matters.

Since the historical and textual evidence on term limits is inconclusive, we turn next to the constitutional inquiries raised most often in connection with term limits. Section II-A considers whether term limits are unconstitutional additions to the Qualifications Clauses in

15. The Qualifications Clauses state that "[n]o 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 th[at] State in which he shall be chosen" and repeat the formulation for Senators, changing only the age and citizenship requirements to, respectively, thirty and nine years. U.S. Const. art. I, §2, cl.2; art. I, §3, cl. 3. Both appeals confined the request for review to questions posed under Article I. See U.S. Term Limits, Inc. v. Thornton, 62 U.S.L.W. 3696 (U.S. Apr. 19, 1994) (listing question presented as "Does Article I of Constitution forbid state to decline to print on its election ballots names of multi-term incumbents in U.S. House of Representatives and Senate?"); Bryant v. Hill, 62 U.S.L.W. 3831 (U.S. June 6, 1994) (listing question presented as "Does state have power under Elections Clause . . . to restrict incumbent candidate's access to ballot in such manner, or do Qualifications Clauses . . . prohibit state from imposing such ballot restrictions?"). The Court may not reach the First Amendment question, even though that issue was addressed in the lower court opinion in the context of state office holders whose terms were limited by the Arkansas measure. See U.S. Term Limits, 872 S.W.2d at 359-60.
the context of what many regard as the definitive Qualifications Clauses case, *Powell v. McCormack*, and the significance of requirements held to be constitutionally acceptable as restrictions on the “manner” of elections. Section II-B explores whether term limits are burdens on the speech and association rights guaranteed by the First Amendment, and Section II-C examines prior debates and adjudications of related arguments.

Once again, the message that emerges is mixed. Traditional readings of *Powell* suggest that the age, duration of citizenship, and residency requirements stated in the Qualifications Clauses are exhaustive. But we suspect that these interpretations are incomplete. The statutory requirement that members of the House be elected from districts is generally considered a stipulation of the “manner” of election rather than a basis of qualification. But if that is the case we see no logical reason for not characterizing analogously state-imposed term limits as pertaining to the “manner” of election, a finding that suggests they also do not violate the Qualifications Clauses. Further, many laws designed and administered to protect the integrity of elections have been deemed permissible limits on speech, and not a violation of the First Amendment, even if they preclude a candidate from running in certain elections. Term limits also may be characterized fairly as measures to protect the integrity of the electoral process, with some room for them within the First Amendment.

Perhaps the most interesting finding presented in this Article is that virtually all of these issues have been debated or litigated before, albeit in different contexts. In every instance, either Congress or the courts has rejected the attempt to add qualifications. Moreover, as we indicate in Section III-C, courts in ten of the fourteen states that recently enacted such limits had invalidated measures closely akin to these initiatives even before the recent Arkansas and Washington decisions striking such measures. Many of the decisions have drawn on the same record and precedents now being debated, and the uniform refusal to sustain prior term limit measures casts serious doubt on the

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17. See infra text accompanying notes 201-214.
18. See infra text accompanying notes 216-248.
19. For a list of the states and decisions, see infra note 264. One of the ten states was Washington, a fact Judge Dwyer noted in his opinion in *Thorsted*. See *Thorsted*, 841 F. Supp. at 1077 (characterizing State *ex rel.* Chandler v. Howell, 175 P. 569 (Wash. 1918), as one of “the many [prior] state court decisions reaching the same conclusion”). Adding Arkansas, this means that eleven of the fifteen states with state-imposed limits have either held them unconstitutional or strongly suggested that they are.
likelihood that the new term limits will be upheld. Nonetheless, not one of these precedents definitively resolves the issue, particularly since no single decision has considered all of the evidence now available, much less the complicating issues addressed in this Article.

Given the lack of a conclusive answer to the constitutional questions as traditionally framed, we shift our focus to Section 2 of the Fourteenth Amendment and find two powerful arguments that alter the tone of the debate. After a brief exposition of the history of Section 2 in Section III-A, Section III-B explores the treatment of Section 2 by the courts and commentators. In particular, we focus on the views of Justice Harlan, who argued for a broad application of Section 2 recognizing inherent state authority over electoral matters, and the views of Professor Van Alstyne, who disputed Harlan's characterization of Section 2.

The implications of Section 2 regarding state regulation of the vote are considered in Section IV-A. A summary of the current application of Section 2 finds it to be a viable recognition of reserved state power over suffrage, subject only to certain limits imposed by subsequent constitutional amendments. The transition of suffrage from a nineteenth-century privilege to a twentieth-century right is examined in Section IV-B. In the contexts afforded by modern decisions, the ban on one person's candidacy for office imposed by term limits may be characterized as an "abridgment" of the right to vote within the meaning of Section 2.

The conclusions we draw from these decisions are modest, but they have broad implications. Initially, state-imposed term limits may be recognized as constitutional because Section 2 contemplates a much greater state power over franchise matters than is ordinarily acknowledged. However, any such "victory" for state-imposed term limits may also entail an extraordinary price in those states, regardless of whether the victory is predicated on Section 2. If a term limit "denies" or "in any way abridges" the right to vote, each enacting state may then be required to forfeit some or all of its representatives in Congress and some or all of its electoral votes.

20. The second Justice Harlan argued vigorously that Section 2 enshrined the power of states to condition or deny the right to vote. See, e.g., Reynolds v. Sims, 377 U.S. 533, 589-632 (1964) (Harlan, J., dissenting). We discuss Justice Harlan's arguments and the responses to them, infra at text accompanying notes 365-418.
Section 2 offers renewed hope for completing what some have characterized as "the unfinished business of the founding fathers," assuming, as their proponents do, that the framers left this question open. But Section 2 also threatens to transform term-limit triumphs into Pyrrhic victories of the worst possible sort. Term limits might provide a sound theoretical basis for measures designed to cycle individuals through Congress in a timely fashion. In return, however, they may also leave the electorate that enacts the limits with a substantially smaller delegation.

As is often the case in constitutional matters, these conclusions are by no means certain. Regardless, the meaning of Section 2 must be addressed in these debates, and if Section 2 does not apply, to paraphrase the second Justice Harlan, "we are at least entitled to be told why."22

I. State-Imposed Term Limits: The Policy Debate

Admittedly, there is something comforting in the idea that millions of Americans wish to employ the device of term limits to reclaim the government from a group of otherwise "extremely smart person[s] who went into politics anyway instead of doing something worthwhile for [their] country."23 The truth of such a charge is immaterial. What is important is that the people believe the situation requires their attention and have initiated a fundamental restructuring that may again "decide the important question: whether societies of [human beings] are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."24

Our primary purpose in this Article is not to debate the wisdom of term limits or to determine definitively the extent to which the historical record resolves the issue on one side or the other. Rather, we want to explore the constitutional implications of measures approved by voters that, for example, purport to make a person "permanently ineligible" to stand for election "if, by the start of the term in which the election is being held, that person will have served as a United

21. McAllister, supra note 12. McAllister treats the statement as a quote, but does not identify the speaker.
23. P. J. O’ROURKE, PARLIAMENT OF WHORES xix (1991). O’Rourke was speaking specifically of Senator Moynihan of New York, and it is probably unfair to treat his comment as a generic characterization of all members of Congress as "extremely smart."
States senator or a representative in Congress, or in any combination of those offices, for at least twelve years." But virtually all of the constitutional questions posed implicate either history or policy. Accordingly, we begin with a relatively brief exploration of those aspects of the debate.

A. Contemporary Arguments For and Against State-Imposed Term Limits

Today's term limit movement is about more than voters' anger with Congress, and state term limit laws reach much further than restricting congressional representation. For instance, some state laws restrict the length of service for governors while others restrict service in positions as diverse as cabinet officer, university regent, state superintendent of public instruction, and county council members and executives. The initiatives also display varying degrees of sophistication and, occasionally, defiance. One of the arguments against term limits is that states with such limits would be placed at a disadvantage in relation to those states that do not have them. The voters of Michigan, accordingly, instructed their public officials to "use their best efforts to attain such a limit nationwide," and the limits in Missouri "become effective [only] whenever at least one-half of the states enact term limits for their members of the United States Congress." Perhaps in anticipation of rulings against

25. N.D. CENT. CODE § 16.1-01-13 (1992) (enacted by initiated measure Nov. 3, 1992). The North Dakota measure is one of the more draconian, given its assignment of "permanent ineligibility."

26. See, e.g., MICH. CONST. art. 5, § 30 (approved Nov. 3, 1992) ("No person shall be elected more than two times."); MONT. CONST. art. IV, § 8(1)(a) (approved Nov. 3, 1992) ("8 or more years in any 16-year period.").

27. See, e.g., ARK. CONST. amend. 73, § 2(a)-(b) (approved Nov. 3, 1992) (three two-year terms as state Representative and two four-year terms as state Senator); MICH. CONST. art. 4, § 54 (approved Nov. 3, 1992) (elected no more than three times as representative or two times as senator); MO. CONST. art. III, § 8 (approved Nov. 3, 1992) ("No more than eight total years in any one house . . . nor more than sixteen years total in both houses."); OHIO CONST. art. II, § 2 (approved Nov. 3, 1992) (two successive terms as state senator and four successive terms as state representative).


29. NEB. CONST. art. VII, § 15 (approved Nov. 3, 1992). As indicated supra note 7, the Nebraska measure was invalidated in its entirety.

30. WYO. STAT. § 22-5-103(a)(i) (approved Nov. 3, 1992 as § 22.5-102).


32. MICH. CONST. art. II, § 10 para. 2 (approved Nov. 3, 1992).

33. MO. CONST. art. III, § 45(a)(1) (approved Nov. 3, 1992). Obviously, a substantial number of states must join the "movement" before this condition is met. Washington,
their constitutionality, proponents of term limits have also attempted to make term limits virtually a contractual matter between the voters and the individuals they elect. In Michigan, accordingly, a candidate for Congress now pursues the office mindful of her constituents' declaration that "federal officials" should "voluntarily... observe the wishes of the people as stated in this section, in the event any provision of this section is held invalid."34

It would be easy to dismiss these expressions as noble sentiments, but unrealistic ones, given the mixed message of the recent elections. Ninety-three percent of the House incumbents who ran in November 1992 were reelected,35 a result suggesting that while term limits themselves are becoming a fixture among American values, "[m]ost voters think better of their incumbents than worse."36 However, it would be a mistake to underestimate voters' anger and frustration expressed through passage of the term limit measures. The North Dakota measure, which contained an elaborate recitation of the justifications for such limits borne of frustration, made it abundantly clear that North Dakotans

[b]elieve this measure is constitutional and intend it to be so. Therefore, even if a court holds any portion of this measure unconstitutional, thereby substituting its own judgment for that we have expressed in enacting this measure, the Legislative Council shall re-

however, enacted a similar limitation that has been fulfilled. See WASH. REV. CODE §§ 29.68.015-016 (approved Nov. 3, 1992) (Sections "regarding candidates for federal elective office, are not effective until nine states other than Washington have passed" similar laws.).

34. MICH. CONST. art. 2, § 10 para. 3 (approved Nov. 3, 1992). Similar language was approved in Florida (Issue 5, § 3 (approved Nov. 3, 1992) (people "declare their intention that federal officials elected... will continue voluntarily to observe the wishes of the people as stated in this section")) and Oregon (OR. CONST. art. II, § 21, ¶ 1 (approved Nov. 3, 1992) ("[I]t is the expressed intent of the People of Oregon that their elected officials should respect the limits within this Act").

35. Will, What Voters Did, supra note 10, at A21. As one observer noted, "The term-limit votes presented a stark paradox. Even as voters passed them by margins of nearly 2 to 1 or larger, they handily re-elected most veteran incumbents to Congress." Reinhold, supra note 9, at B8.

36. Bill McAllister, Success of Term-Limit Measures Puts "Incumbents on Notice": Arizona Becomes the Final State to Approve King Holiday, WASH. POST, Nov. 5, 1992, at A37 (quoting Thomas E. Mann, Director Governmental Studies, Brookings Institution). On the other hand, Paul M. Weyrauch, a conservative supporter of term limits read the same results as an indication that voters "put their incumbents on notice: 'You're going to leave.' They did it in an antiseptic way: 'Nothing personal, but you're going to have to leave.'" Id. Of course, as Terry Eastland sadly notes, "The contradiction here is akin to the familiar one concerning federal spending: Americans seem to want to reduce spending in general but not when it comes to particular cases." Terry Eastland, The Limits of Term Limits, COMMENTARY, Feb. 1993, at 53.
quire the publisher of the North Dakota Century Code to include the text of this measure, in the manner as if not so held but with appropriate annotation, to stand as a testament to our expressed will, and as a memorial to the defiance of that will by whatever court holds this measure unconstitutional.37

These sentiments are unlikely to lead to the sort of constitutional struggle that forced the Court to remind us that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since [Marbury v. Madison38] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."39 But it is clear that the litigation initiated over term limits, which began before the measures were placed on the ballot in some cases,40 will be pursued with vigor and determination by citizens who have become completely frustrated with political incumbents.

The measures themselves tell us why. State term limit laws starkly proclaim that "[e]lected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people,"41 and that "[e]ntrenched incumbents have an inordinate advantage in elections because of their control of cam-

38. 5 U.S. (1 Cranch) 137 (1803).
40. A proposed initiative in Nevada was ruled unconstitutional and a place on the ballot denied when the court found limits on federal offices would be a "violation of the paramount law." See Stumpf v. Lau, 839 P.2d 120, 122-23 (Nev. 1992). Questions were raised, but not resolved, about the constitutionality of a proposed measure in Massachusetts. See Opinion of the Justices to the Senate, 595 N.E.2d 292, 301-02 (Mass. 1992) (refusing to answer "questions of first impression under the United States Constitution"). Pre-election challenges were filed and rejected in two states: Florida, see Advisory Opinion to the Att'y Gen.—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991), and Arkansas, see Plugge v. McCuen, 841 S.W.2d 139 (Ark. 1992). Both courts rejected the challenges for technical reasons that had little to do with the constitutional merits, although both decisions also generated strong dissents arguing vigorously that the measures were unconstitutional to the extent they limited federal terms. See Advisory Opinion, 592 So. 2d at 229-31 (Overton, J., concurring in part and dissenting in part); Plugge, 841 S.W.2d at 143-50 (Dudley, J., dissenting). In the Arkansas case, observers were treated to the spectacle of the citizens' group that sponsored the measure retaining counsel to intervene because the group does not trust the state to defend the amendment. See Rachel O'Neal, Term Limit Backers Hire Lawyer to Defend Amendment in Court, ARK. DEM.-GAZETTE, Dec. 31, 1992, at 1B. Moreover, Congress, with predictable enthusiasm, entered the dispute, authorizing Senate legal counsel to represent the two Arkansas Senators, who were named in the suit. See S. Res. 63, 103d Cong., 1st Sess. (1993) (enacted). As part of that process Senator Mitchell read into the record a brief argument that all such measures are unconstitutional, per the logic of Powell v. McCormack, 395 U.S. 486 (1969). See 139 CONG. REC. S1146-47 (daily ed. Feb. 3, 1993).
41. ARK. CONST. amend. 73 pmbl. (approved Nov. 3, 1992).
campaign finance laws and gerrymandering of electoral districts."\textsuperscript{42} Term limit propositions unambiguously express the belief that "federal officeholders have become too closely aligned with the special interest groups who provide contributions and support for their reelection campaigns, give them special favors, and lobby [them] for special interest legislation, all of which creates corruption or the appearance of corruption of the legislative system."\textsuperscript{43} These referenda express the view that term limits are not just desirable, but are essential for voters to eliminate a "self-perpetuating monopoly of elective office by a dynastic ruling class."\textsuperscript{44} Collectively, term limit measures express voters' frustrations that entrenched incumbents paralyze congressional will, frustrate change, and ensure that the few legislative initiatives that do emerge are "special interest legislation," operating "to the detriment of the people of [the] state."\textsuperscript{45}

The term limit measures also incorporate a related yet distinct argument, the belief that many of the recent congressional scandals occurred partly as a result of the curse of longevity. The California and Washington measures speak generically of "corruption or the appearance of corruption in the legislative system."\textsuperscript{46} And the voters of North Dakota, finding James Madison was wrong when he postulated that "the House of Representatives would always be responsive to the will of the people," have made clear their belief that "Congress has arrogated to itself powers not granted to the people, a recent notorious example being the bank of the House of Representatives in which members were allowed to kite checks."\textsuperscript{47}

We do not, at least for the purposes of this Article, judge the validity of the assumptions stated in these ballot measures or contest the inferences their supporters draw from them. Indeed, we suspect many of these contentions are virtually impossible to prove or disprove at this time, since much of the analytical case for term limits


\textsuperscript{45} Id.


remains inferential. All participants in the term limits debate must recognize that until recently “no model of a politician who cannot be reelected [existed],” making empirical analysis impossible since “the question of renewability of terms requires comparing the behavior of a politician who cannot be reelected with one who is focusing all of his [or her] efforts on maximizing votes in the next election.” Some initial conclusions can be drawn based on data suggesting the current system tends to place barriers between constituents and their elected representatives. However, the only “formal” study available is predicated on assumptions about legislative “impatience” and incentives to serve constituent interests; in theory, these are “powerful enough to place a heavy burden of proof on anyone arguing in favor of term limits,” but the conclusions remain largely modeled and inferential. And while proponents have alleged that term limits will open Congress up to historically underrepresented groups, all we know for certain at this time is that one likely effect of such measures will be for the dedicated, career politician to simply “move his office, and . . . considerable power, to the other end of the Capitol.”

In reality, it may be more than an insightful witticism that “[s]litting Congressmen are almost as likely to be sentenced to jail as

48. Cohen & Spitzer, supra note 5, at 484.
49. Id. Professors Cohen and Spitzer note that the issue is raised, but not resolved, for this very reason in at least one study. See id. (citing William R. Keech & Carl P. Simon, Inflation, Unemployment, and Electoral Terms: When Can Reform of Political Institutions Improve Macroeconomic Policy?, in THE POLITICAL PROCESS AND ECONOMIC CHANGE 77, 77-107 (Kirsten R. Monroe ed., 1983)).
51. Cohen & Spitzer, supra note 5, at 479. We use the term “formal” here as Cohen and Spitzer do. That is, they have constructed “models” and have attempted to “predict” in the “scientific” sense. Their analysis is provocative, but we are not convinced their findings are incontrovertible; too many variables and assumptions remain.
52. See, e.g., Jonathan Ferry, Women, Minorities and Term Limits: America’s Path to a Representative Congress, 3 U.S. TERM LIMITS OUTLOOK SERIES No. 2 (July 1994) (asserting that “[t]erm limits are the only viable political reform that will increase representation of these groups by breaking the hold of incumbency on the nation’s legislature”); John C. Armor, “Foreshadowing” Effects of Term Limits: California’s Example for Congress, 3 U.S. TERM LIMITS OUTLOOK SERIES No. 1 (July 1994) (arguing that California’s state term limits produced “massive change”).
53. Richard L. Berke, Unseated by Term Limits (But It’s Musical Chairs), N.Y. TIMES, Feb. 17, 1994, at A1 (discussing the possibility that Willie L. Brown, Jr., Speaker of the California State Assembly, will simply run for the State Senate once barred from the Assembly).
they are to be sent home by the voters. Since 1988, six Congressmen went home and five were sentenced to the slammer.”

Retention patterns have changed dramatically over the years, and the character of a Congress with a substantial proportion of long-term office holders will be different from one in which no member will have served for more than twelve years. Supporters believe, accordingly, that term limits offer at least one plausible means for the electorate to “promote varied representation, to broaden the opportunities for public service, and to make the electoral process fairer by reducing the power of incumbency . . .”

Clearly, a term limit promotes varied representation by denying individuals who have served a specified time further opportunities on the ballot, whether permanently, or for a certain period, or by allowing election only by write-in votes. The mandated shorter time in office would increase the number of individuals who would be elected to office during the same period, and a more diverse pool of officeholders may be elected. It is less certain whether term limits make the electoral process more fair. Even the most stringent term limits allow a member of Congress to serve three terms, a period of service that may well assist incumbents’ fund raising for reelection so long as seniority remains a factor of congressional power. Thus, if “fairness” is measured by the relative advantage of incumbent over challenger, term limits may not make a difference. However, even if seniority remains and the relationship between incumbent and political action committee persists, it is plausible that the financial benefits of incumbency will be greatly reduced; some groups or individuals may believe that the incentives to “invest” heavily in particular office holders no longer exist. And reduced financial benefits would tend to increase the likelihood of legislators eschewing the short-term gain of appeas-


55. The most “generous” limits bar representatives from reelection only after six consecutive terms and were enacted by Colorado, see supra note 9; Florida, see supra note 28; and South Dakota, see S.D. Const. art. III, § 32 (Constitutional Amendment A approved Nov. 3, 1992).


57. The Arkansas measure bars from the election for representative “[a]ny person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas.” Ark. Const. amend. 73, § 3(a) (approved Nov. 3, 1992).
ing major donors and, instead, pursuing the long-term needs and interests of the nation.\textsuperscript{58}

Virtually all of the policy arguments in the term limits debate assume that the public interest can be ascertained with some degree of certainty. This hypothesis is especially problematic in clashes between short-term, politically-appealing quick fixes and solutions taking a more measured, and sometimes politically painful, approach. Moreover, proponents of term limits also assume that the interests of the public and big donors are different. That proposition may add force to their argument, but may be incorrect.

We believe the case for term limits remains largely a matter of faith. However, the current debate concerning the wisdom of term limits is not without precedent, which may explain why one of the most prominent devotees of term limits, George Will, characterizes term limits as a “loving step” toward restoration of “a more reserved and respectful relationship [between the American people and] the First Branch of government, Congress.”\textsuperscript{59} This remark suggests that a balanced assessment of the term limits movement requires that we consider and account for the views of the framers.

B. "Qualifications to Serve": The Framers' Views

Term limits seem entirely consistent with Madison's notion that “it is essential to liberty that the government in general should have a common interest with the people.”\textsuperscript{60} This was especially important for the House of Representatives, which “should have an immediate dependence on, and an intimate sympathy with, the people,”\textsuperscript{61} and was intended to serve as a counterweight to the Senate, which was designed to eliminate the “mischievous effects of a mutable government” that would flow from “a rapid succession of new members.”\textsuperscript{62} Term limit proponents, accordingly, pepper their analyses with the statements of individuals like Charles Pinckney, who argued that pro-

\textsuperscript{58} We have avoided the broader implications term limits pose if they are universally adopted. Universal term limits might shift the balance of influence from small states with powerful incumbents to large states, even if they elect new representatives. Changes in the balance of power also depend on the extent to which other practices change, such as the current procedure for selecting committee chairs. We address only the constitutionality of state-imposed term limits.

\textsuperscript{59} WILL, RESTORATION, supra note 54, at 231.

\textsuperscript{60} THE FEDERALIST No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{61} Id.

tracted terms of service "wd. fix [the representatives] at the seat of Govt.,” where “[t]hey wd. acquire an interest there, perhaps transfer their property & lose sight of the States they represent.”63 And they note with particular force the sentiment of John Adams, who believed representatives should be elected once a year, “like bubbles on the sea of matter borne, they rise, they break, and to that sea return.”64

Nevertheless, it is one thing to agree that the framers sought responsive government and quite another to extrapolate from this that they viewed rigid term limits as an acceptable means to attain that end. Indeed, substantial evidence suggests to the contrary. Some of this reflects the deferential temper of the times; “[w]ithin the constraints that eighteenth-century political etiquette imposed, most delegates who were willing to retain their places in Congress were not likely to be turned out of office.”65 And some of it derived from the fact that many individuals either did not want to serve to begin with, refused reelection, or declined to attend legislative sessions; “[g]iven the recurring difficulties most states experienced in maintaining adequate representation at Congress, the assemblies were probably grateful to find individuals who were willing to serve there repeatedly.”66 But these realities do not fully explain the absence of express limitations in the Constitution, particularly since various framers made a strong case for what is modernly characterized as term limits that ultimately was rejected.

For instance, the first set of proposals actually placed before the Constitutional Convention stipulated that “the members of the first branch of the National Legislature ought to be . . . incapable of re-election for the space of after the expiration of their term of service and be subject to recall.”67 Introduced by Edmund Randolph, the so-called Virginia Plan expressed the views of individuals like George Mason, who argued that elected representatives should be subject to "periodical rotation," for “[n]othing so strongly impels a man to re-

63. 1 The Records of the Federal Convention of 1787, at 409 (Max Farrand ed., 1937) [hereinafter Farrand].
64. John Adams, Thoughts on Government, in The Political Writings of John Adams 84, 89 (George A. Peek, Jr., ed., 1954).
66. Id.
67. Id.
gard the interest of his constituents as the certainty of returning to the
general mass of the people, from whence he was taken, where he must
participate [sic] their burdens.” Mason was joined by others in this
belief. Jefferson, who was abroad at this time, would subsequently
lament the “abandonment . . . of the principle of rotation in office . . . ”
And when Elbridge Gerry listed his reasons for not signing the
Constitution “the duration and re-eligibility of the Senate” was
the first objection.

However, limitations on service, either by rotation or other
means, were opposed vehemently by individuals like Alexander Ham-
ilton. Hamilton maintained that “no government, founded on this
feeble principle, can operate well,” for “[w]hen a man knows he must
quit his station, let his merit be what it may, he will turn his attention
chiefly to his own emolument: nay, he will feel temptations, which
few other situations furnish, to perpetuate his power by unconsti-
tutional usurpations.” And even Roger Sherman, who stressed that
“Govt. is instituted for those who live under it” and “[t]he more per-
manency it has the worse if it be a bad Govt.,” was satisfied with
only “frequent elections,” sensing that periodic exposure to the peo-
ple would “preserv[e] th[e] good behavior” of those elected “because
it ensures their reelection.”

Consequently, the Constitution as ratified did not expressly limit
terms, either by rotation or any other means, and the available record
suggests that the individuals who framed the Constitution believed the
Qualifications Clauses had both the purpose and effect of leaving the
length of congressional tenure to the people through the simple, direct
device of the electoral process. Hamilton stressed, “The qualifications
of the persons who may choose or be chosen, as has been remarked
upon other occasions, are defined and fixed in the Constitution, and

68. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF
THE FEDERAL CONSTITUTION 485 (Jonathan Elliot ed., 1888) [hereinafter Elliot]. Mason
also observed, regarding the Senate, that “[i]t is a great defect . . . that they are not ineligible
at the end of six years” and that “[t]he biennial exclusion of one third of them will have
no effect, as they can be reelected.” Id.

69. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 THE WRIT-
INGS OF THOMAS JEFFERSON 327, 330 (H.A. Washington ed., 1853) [hereinafter JEFFER-
SON’S WRITINGS]. We discuss Jefferson’s views more fully infra at text accompanying notes
90-141.

70. 2 Farrand, supra note 63, at 632.
71. 2 Elliot, supra note 68, at 320.
72. 1 Farrand, supra note 63, at 423.
73. Id.
are unalterable by the legislature.”74 As Madison indicated, “The qualifications of the elected . . . have been very properly considered and regulated by the [C]onvention.”75 This allowed him to characterize the Qualifications Clauses as “reasonable limitations [that left] the door of this part of the federal government . . . open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”76

There were several reasons why the majority of the framers felt it important to leave control of the length of congressional tenure to the people, albeit through the means of periodic elections. Perhaps the most important was an abiding sense that experience in the office was a valuable characteristic. Madison, for one, argued that:

No [person] can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service.77

Moreover, he maintained this with full awareness of the possibility that some individuals would in fact serve for extended periods:

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members and the less the information of the bulk of the members the more apt will they be to fall into the snares that may be laid for them. This remark is no less

74. The Federalist No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Some proponents of term limits focus on Hamilton's use of the “legislature” and argue that this gives “the people” room to act. This is, we suspect, an approach that can succeed only to the extent one posits that the Tenth Amendment factors into the equation. For a discussion of this debate, see infra text accompanying notes 90-141.


76. Id.

77. The Federalist No. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961). If Madison was correct, a compelling argument can be made that the modern trend toward protracted service is a virtue rather than a vice. Given the exponential growth in the scope and complexity of matters subject to legislative control and oversight, eighteenth-century notions of the “proportion . . . of practical knowledge requisite to the due performance of the service” have little bearing on what is either necessary or appropriate today.
applicable to the relation which will subsist between the House of Representatives and the Senate.  

Madison and his colleagues embraced the possibility of extended tenure with a healthy appreciation of the risks they arguably ran. If "Parliamentary tyranny . . . was the principal cause of the American war of independence," then the face of tyranny was shaped in many ways by the virtually hereditary nature of a seat in Parliament. The problem was greater than that posed by the standing incapacities, which severely restricted eligibility to serve and were expressly addressed by the three simple limitations articulated in the Qualifications Clauses. The framers were not naive. They were presumably aware of the tendency on the part of some elected officials to pursue their own enrichment, an impulse typified by the comment that it was "reasonable [for] those who dedicate their time and fortune to the service of the Government [to] be entitled to a share of the rewards that are in its disposal." Hypocrisy and self-enrichment are then not vices exclusive to a modern, entrenched Congress, but were recognized evils in a Parliamentary system within which the same members who "separately . . . pursu[ed] the same traffic" in corruption spent "much of their public time . . . in stigmatizing the practice."

In spite of these clearly recognized dangers, the framers opted for a system in which it was incumbent on the people, themselves, to turn the entrenched representatives out, if and when they believed it warranted. The framers' perception that limits on terms required constitutional amendment had widespread support during the debate that led to the passage of the Bill of Rights. Jefferson, for example, generally praised the draft Constitution, but "strongly dislike[d] . . . the abandonment, in every instance, of the principle of rotation in office,

78. Id. at 335. Consistent with this, Jefferson noted subsequently that individuals elected to represent districts within which they did not live would presumably possess "such eminent merit and qualifications, as would make it a good, rather than an evil . . . ." Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), in 11 THE WORKS OF THOMAS JEFFERSON 379, 381 (Paul Leicester Ford ed., 1905) [hereinafter JEFFERSON's WORKS].

79. 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 102 (1938).

80. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *175-77.

81. The statement was made by one J. Garth, "a Whig who after seventeen years in Parliament held neither a place nor pension" and is quoted in 10 HOLDSWORTH, supra note 79, at 578 n.1. One might argue that the generous pension scheme that Congress has authorized for itself is an altruistic response to the dangerous assumptions implicit in Garth's statement. We do not.

82. Id. at 576 (quoting HORACE WALPOLE, 3 MEMOIRS OF GEORGE III 153).
and most particularly in the case of the President." He therefore maintained consistently that he was "anxious" for two amendments to the Constitution: "A bill of rights, which it is so much the interest of all to have," and a "[second] amendment . . . restoring the principle of necessary rotation, particularly to the Senate and Presidency: but most of all to the last." He was not alone. As part of the actual drafting process, Thomas Tudor Tucker, a Representative from South Carolina, moved various "propositions of amendment to the constitution of the United States," including:

Art. 1 sect. 2. clause 2. at the end, add these words, Nor shall any person be capable of serving as a Representative more than six years, in any term of eight years.

Clause 3. at the end, add these words, From and after the commencement of the year 1795, the election of Senators for each State shall be annual, and no person shall be capable of serving as a Senator more than five years in any term of six years.

Tucker's motion was defeated. While the record does not reveal the arguments raised against his suggestions, it is difficult to ignore the implications of his unsuccessful attempt to limit terms by amendment. Moreover, when Jefferson stressed that rotation had been abandoned, he highlighted an additional salient historical fact, the express limit on the number of years an individual could serve in

83. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 Jefferson's Writings, supra note 69, at 327, 330. He repeated this view in subsequent letters to Madison (July 31, 1788), id. at 443, 447, and Rutledge (July 18, 1788), id. at 433, 435.

84. Letter from Thomas Jefferson to Colonel Carrington (May 27, 1788), Jefferson's Writings, supra note 69, at 403, 404. Jefferson made it clear in a subsequent letter to J. Sarsfield (Apr. 3, 1789), id. at 17-18, that the "rotation" in question was patterned on Article V of the Articles of Confederation, under which delegates to Congress were appointed "annually." See Articles of Confederation art. V, cl. 1, in Documents Illustrative of the Formation of the Union of the American States 27, 28 (Charles C. Tansill ed., 1927) [hereinafter Tansill].

85. 1 Annals of Congress 790 (Joseph Gales ed., 1789) (debate on Aug. 18, 1789). Tucker also proposed limiting presidential terms, see id. at 791 ("[n]or shall any person be capable of holding" that office for "more than eight years in any term of twelve years"), and would have eliminated Congress's Article I, Section 4 power to "make or alter" election "time, place and manner" regulations. Id. at 790.

86. The record states simply that "[o]n the question, Shall the said propositions of amendments be referred to the consideration of a Committee of the Whole House? [I]t was determined in the negative." Id. at 792. Tucker proposed seventeen changes, including one that would have replaced the words "commander in chief" in Article II, Section 2, Clause 1 with the phrase "have power to direct (agreeable to law) the operations." Id. at 791. The negative vote may simply reflect problems with the sheer scope of what he sought.
Congress within a given period, found in the Articles of Confederation.87

The individuals who framed the Constitution seem to have made a conscious choice. They were aware of the problems that might arise when individuals served too long or badly. And they were familiar with, and expressly changed from, a government charter in which the prophylactic solution of express term limits was attempted. It is then not surprising that in the period immediately after ratification of the Constitution, a number of individuals discussing the possibility of state-imposed qualifications would conclude that such state actions were improper.88 Both the pre-ratification culture, as expressed in the Articles of Confederation, and the views of individuals intimately involved in the ratification debates, tended to indicate that the framers believed amendment was the means by which terms were to be limited, if at all. The eventual recourse to amendment to limit presidential terms89 is consistent with the positions taken by Jefferson and Tucker and lends credence to the notion that a similar course of action is required in the case of Senators and Representatives.

C. Term Limits and the Tenth Amendment: The Jefferson-Story Debate

One interesting, but often overlooked, aspect of the term limits debate is the Tenth Amendment’s bearing on the question. Is it possible that one of the powers not delegated to the United States, nor prohibited to the states, and therefore “reserved to States respectively, or to the people,” is the authority to impose limits on the terms served by United States Senators and Representatives?

The most compelling statement that the power to limit terms might be reserved to the states was offered by Jefferson in a letter to Joseph Cabell. Jefferson was responding to Cabell’s inquiry “whether the States can add any qualifications to those which the constitution

87. See Articles of Confederation art. V, cl. 2 (Mar. 1, 1781), in Tansill, supra note 84, at 28.
88. St. George Tucker, for example, noted that many additional state qualifications “may possibly be found to be nugatory, should any man possess a sufficient influence in a district in which he neither resides nor is a freeholder, to obtain a majority of the suffrages in his favor.” St. George Tucker, View of the Constitution of the United States, in 1 BLACKSTONE’S COMMENTARIES app. at 213 (St. George Tucker ed., 1803). Justice Story argued that “[i]t would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (photo. reprint 1991) (1833).
89. See U.S. Const. amend. XXII.
has prescribed for their members of Congress?" 90 Characterizing the
issue as one he had "never before reflected on," Jefferson indicated he
was inclined to change his initial, "off-hand opinion . . . that [states]
could not; that to add new qualifications to those of the constitution,
would be as much an alteration as to detract from them." 91 Jefferson
conceded, "[S]o I think the House of Representatives of Congress de-
cided in some case; I believe that of a member from Baltimore." 92
However, having been "induced . . . to look into the constitution," he
discussed at length why a different conclusion might now be
appropriate:

Had the constitution been silent, nobody can doubt but that the
right to prescribe all the qualifications and disqualifications of those
they would send to represent them, would belong to the State. So
also the constitution might have prescribed the whole, and excluded
all others. It seems to have preferred the middle way. It has exer-
cised the power in part, by declaring some disqualifications, to wit,
those of not being twenty-five years of age, of not having been a
citizen seven years, and of not being an inhabitant of the State at
the time of election. But it does not declare, itself, that the member
shall not be a lunatic, a pauper, a convict of treason, of murder, of
felony, or other infamous crime, or a non-resident of his district; nor
does it prohibit to the State the power of declaring these, or any
other disqualifications which its particular circumstances may call
for; and these may be different in different States. Of course, then,
by the tenth amendment, the power is reserved to the State. 93

The issue clearly struck a responsive chord for Jefferson, who had
once argued a "[second] amendment" was needed to "restore rota-
tion" 94 and was now reconsidering the question in light of the inter-
vening ratification of the Tenth Amendment. Jefferson had always
seen "neither reason nor safety in making public functionaries in-
dependent of the nation for life, or even for long terms of years," 95
believing the "power of removing . . . by the vote of the people, is a
power which they will not exercise . . . ." 96 Indeed, in 1776 Jefferson
had stressed the "danger which might arise to American freedom by

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90. Letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), in 11 Jeffer-
son's Works, supra note 78, at 379.
91. Id. at 379-80.
92. Id. at 380. The reference was clearly to the McCreery case, which we discuss infra
at text accompanying notes 249-251.
93. Id. at 380.
94. See supra text accompanying note 84.
95. Letter from Thomas Jefferson to James Martin (Sept. 20, 1813), in 6 Jefferson's
Writings, supra note 69, at 213.
96. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), supra note 69, at
330. Devotees of term limits will find solace in the words that followed, "and if they were
disposed to exercise it, they would not be permitted," id. at 330-31, which seem prophetic
continuing too long in office the members of the Continental Congress” and argued that they “shall not have served in that office longer than two years.”

These views had considerable support during the pre- and post-ratification years. The State of Virginia, for instance, included a rotation requirement in its initial Constitution, while the Articles of Confederation specified that “no person shall be capable of being a delegate for more than three years in any term of six years,” a formulation that presaged the approach proposed by Tucker eight years later.

However, that such limitations neither emerged expressly in the Constitution as ratified, nor prevailed during the initial attempts to amend it, proves no more than that a state’s ability to impose additional qualifications is not stated within the text of the Constitution itself. As Jefferson recognized:

If, wherever the Constitution assumes a single power out of the many which belong to the same subject, we should consider it as assuming the whole, it would vest the General Government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed.

The assumption of unspecified powers by the central government was exactly what the Tenth Amendment was designed to counter. By characterizing the specific question posed by Cabell as one he had “never before reflected on,” Jefferson seemed to affirm that his earlier views on the need for a “[second] amendment” had changed in light of

in light of the argument that a combination of perquisites, current campaign laws, and political action funds make it virtually impossible to defeat an incumbent.

97. 1 THE PAPERS OF THOMAS JEFFERSON 1760-1776, at 411 (Julian P. Boyd ed., 1950) [hereinafter JEFFERSON’S PAPERS]. Contrary to some accounts, there is no evidence that the Congress actually considered, much less embraced, this view. Eid and Kolbe state that “Jefferson’s colleagues defeated his resolution.” Eid & Kolbe, supra note 5, at 7 (citing Mike Kelly, Term Limits, Expand Democracy, INDEPENDENCE ISSUE PAPERS No. 10-90 (Independence Institute, Golden, Colo.), July 1, 1990, at 9). The editors of Jefferson’s papers, however, state that “[t]here is nothing in the Journals of Congress to indicate when, or even if, this Resolution was proposed.” JEFFERSON’S PAPERS, supra, at 411. Our independent review of the record accords with that of Jefferson’s editors: there is simply nothing in the published records of the Continental Congress to indicate that Jefferson’s proposal ever came forward.

98. The Virginia Constitution of 1776 provided for annual “rotation” of its members. See VA. CONST. OF 1776, in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, 3812, 3816 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe].

99. ARTICLES OF CONFEDERATION art. V, cl. 2 (Mar. 1, 1781) in Tansill, supra note 84, at 27.

100. Letter from Jefferson to Cabell, supra note 78, at 380-381.
the Tenth Amendment’s intervening, express reminder that certain powers were reserved to the states or people.

Justice Story disagreed vigorously and directly with Jefferson’s interpretation, observing, “It does not seem to have occurred to this celebrated statesman” that the Tenth Amendment “proceeds upon a basis, which is inapplicable to the case.”

That Amendment, he argued, “does not profess, and, indeed, did not intend to confer on the states any new powers; but merely to reserve to them, what were not conceded to the government of the union.” Since members of Congress “owe their existence and functions to the united voice of the whole, not of a portion, of the people,” the states “never possessed” the authority to prescribe qualifications for national officers. Accordingly, that power could not possibly have been “reserved” to them by the Tenth Amendment. Indeed, Story feared the consequences if the states were allowed to act, arguing that the authority to impose any qualification, however meritorious, also implied the power “to impose any other qualifications beyond those provided for by the constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the union.”

Story’s assumption that the Tenth Amendment is merely a “truism” or “tautology” is correct: for the purposes of the Tenth Amendment, the proper inquiry is “whether an incident of state sovereignty is protected by a limitation on” one of the national government’s enumerated powers. But Story’s characterization of the authority to appoint federal officials as one that “exclusively spring[s] out of the existence of the national government” was certainly an oversimplification at the time he wrote, and it may remain so today.

Under the Articles of Confederation, the states quite clearly exercised the sovereign power to “appoint representatives in the national government[.]” The Articles were an agreement between states that had “severally enter[ed] into a firm league of friendship with each other.” The Articles reserved to the states the power to

101. 3 Story, supra note 88, § 625.
102. Id.
103. Id. § 626.
104. Id. § 623.
107. Id.
108. 3 Story, supra note 88, § 626.
109. Id. § 625.
110. Articles of Confederation art. III, in Tansill, supra note 84, at 27.
appoint “delegates . . . annually . . . in such manner as the legislature of each state shall direct,” with “a power reserved to each state, to recall its delegates, or any of them, at any time . . . .”

Determinations regarding who would rotate into a federal congress were, accordingly, matters of state sovereignty and grace, and, for that matter, consistent with the notion that longevity of service was to be avoided.

Story was then wrong: the power to appoint at least some “officers of the union” predated the Constitution and was an attribute of state sovereignty. Accordingly, inquiries about the extent to which some or all of that power had been surrendered were quite appropriate. Moreover, he was also wrong about the nature of the post-ratification government for not all of its officers “owe[d] their existence” or exercised “functions . . . of the people.”

The Constitution crafted a government of and for “We the People of the United States” within which the members of the House of Representatives were “chosen every second Year by the People of the several States.” Senators from each state were, on the other hand, “chosen by the Legislature thereof.” As Madison stressed in The Federalist, this meant the Senate “derive[s] its powers from the States as political and coequal societies,” while “[t]he House of Representatives will derive its powers from the people of America;” the former was a “federal” entity, the latter, a “national” one.

The Seventeenth Amendment changed this in one respect. Popular election of Senators means these individuals now are chosen by the people themselves and represent them rather than the states per se. As a result, one factor that made “the appointment of senators . . . congenial with the public opinion” of the time was lost. Lacking an “agency in the formation of the federal government,” the post-Seventeenth Amendment Senate no longer “secure[s] the authority” of the states to determine who shall comprise its members. The basic design, however, remains; a popularly elected Senate in which each state has an “equal vote [that] is at once a constitutional recognition of the

111. Id. art. V, cl. 1.
112. 3 STORY, supra note 88, § 626.
113. U.S. CONST. pmbl.
116. THE FEDERALIST No. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961). See also 2 Elliot, supra note 68, at 319 (statement by Alexander Hamilton that “the equal vote in the Senate was given to secure the rights of the states”).
118. Id.
portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty.'

This is still a fundamental change from the approach taken under the Articles, in which the powers attributed to the national sovereign were characterized as ones exercised by “[t]he united states in congress assembled.”

But—as Story himself recognized—the Senate differed from the Confederation Congress only in that votes were cast by each individual senator, and the “very structure of the general government contemplated one partly federal, and partly national.” As a result, “No law or resolution can be passed without the concurrence first of a majority of the people,” that is the House of Representatives, “and then of a majority of the states,” that is the Senate.

In addition, the exercise of the power to amend the Constitution through the Seventeenth Amendment in ways that returned authority to the people highlights an important aspect of the Tenth Amendment, which speaks not simply of the powers of the states, but those of “the States respectively, or [of] the people.” Neither Jefferson nor Story account fully for this. Jefferson, in his letter to Cabell, ignores the people entirely, writing only that “by the tenth amendment, the power is reserved to the State.” Story makes an attempt, on the other hand, when he declares that “[t]he people of the State, by adopting the constitution, have declared what their will is, as to the qualifications for office.”

But this statement assumes its conclusion; that is, that the list in the Qualifications Clauses is exclusive. Story invokes the principle of *expressio unius est exclusio alterius* to bolster his position, but his argument cannot account for the negative wording of the applicable clauses, a drafting choice that seems to leave ample room for Jefferson’s approach.

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119. *Id.* at 378.

120. Article IX, for example, reserved the “sole and exclusive right and power of determining on peace and war” to these “united states.” *Articles of Confederation* art. IX, cl. 1, in *Tansill*, supra note 84, at 31.

121. *3 Story*, supra note 88, § 691.

122. *Id.* § 696.

123. *Id.* § 699. For an argument that the institutional importance of the Senate should be recognized, albeit one that does not dwell on the state representation role, see *Amar*, supra note 62.

124. U.S. CONST. amend X.

125. Letter from Jefferson to Cabell, supra note 78, at 380.

126. *3 Story*, supra note 88, § 627.

127. That is, if the text expresses one exception, it excludes all others.

128. Various individuals have argued that the negative wording of the Qualifications Clauses leaves room for state action. *See, e.g.*, *Hills*, supra note 5, at 112 (“A need for a federal ‘floor’ of qualifications hardly abrogates the state power to add qualifications.”).
The Congress created by the Articles of Confederation may well have been "dormant in times of peace[,] . . . possessed of but a delusive and shadowy sovereignty, with little more than the empty pag-pantry of office." But whether it was strong or weak as an absolute matter has little bearing on two critical questions: the scope and origins of "the power to appoint" the only "national" officers created by the Articles of Confederation, and the extent to which ratification of the new Constitution was an act by which the states ceded some, but not all, of that authority. Story's approach, in essence, treats the national government formulated by the Constitution as one that emerged, Venus-like, wholly formed from the sea. That was not the case. The Constitutional Convention was convened by the Articles of Confederation Congress for the express purpose ofremedying "de-fects in the present Confederation," the resulting document was presented to that same Congress for transmission to the states, and, after ratification by the ninth state, further action by that Congress was required "for the purpose of bringing the new government into operation."

The language as ratified was clearly a deliberate choice. Compare 2 Farrand, supra note 63, at 129 (summary of initial proceedings framing qualifications in a "positive" manner) with U.S. Const. art. I, § 2, cl. 2 (actual "negative" approach). The notion that the text stipulates minimal qualifications to which states might add is, accordingly, suggestive. It must, nevertheless, account for the strong counsel of individuals like Madison, who believed the Constitution left the "door" to service "open to merit of every description," The Federalist No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961), a characterization that leaves little room for this inference.

129. 2 Story, supra note 88, § 245. Story quotes a number of contemporary observers to this effect in id. §§ 246-247. For a summary of the competing theories and a defense of the idea that both the pre-Articles and Articles government exercised considerable power, see Eric M. Freedman, Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation, 60 Tenn. L. Rev. 783 (1993).

130. See Resolution of Congress (Feb. 21, 1787), in 3 Farrand, supra note 63, at 13.

131. See Resolution of the Federal Convention Submitting the Constitution to Congress (Sept. 17, 1787), in Tansill, supra note 84, at 1005; Resolution of Congress Submitting the Constitution to the Several States (Sept. 28, 1787), in id. at 1007.

132. We take no position on the question of whether the nine-state provision, which abandoned the unanimity requirement of the Articles, made "[t]he ratification of this Constitution . . . so repugnt [sic] to the Terms on which we are all bound to amend and alter the [Articles of Confederation], that it became a matter of surprise to many that the proposition could meet with any countenance or support." Luther Martin's Remarks before the Maryland House of Representatives (Nov. 29, 1787), in 3 Farrand, supra note 63, at 151, 159. For a sample of the debate on this question, see 4 The Founders' Constitution 647-71 (Philip B. Kurland & Ralph Lerner eds., 1987).

Jefferson believed state-imposed qualifications fell within the powers reserved under the Tenth Amendment. His position is both compelling in its own right and consistent with a view of government he had harbored for years. Others may have disagreed, but conflicting statements about the meaning of the Constitution as framed are not unusual and are largely beside the point if the text itself resolves the matter. Thus, Jefferson's observations cannot be lightly discarded, particularly by a legal community that has found his views persuasive in other contexts.\textsuperscript{134} Moreover, disputes about the precise scope of Article I in no way resolve the parallel possibility that subsequent amendments to the Constitution either recognize that option or create entirely new ones.\textsuperscript{135}

Of course, there are dangers in a system in which, as John Adams phrased it, a "Representative Assembly" is "in miniature, an exact portrait of the people at large" that "should think, feel, reason, and act like them."\textsuperscript{136} The "exact portrait" approach may be appropriate in England where Parliament is ostensibly the creation of its people and its powers are not constrained by a written constitution.\textsuperscript{137} We not only have such a Constitution, but have embraced a fundamental, written text in part because of the perceived need to occasionally

\begin{footnotes}
\textsuperscript{134} The best example of this is acceptance of Jefferson's "wall of separation between church and State," which surfaced for the first time in Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Reply to a Committee of the Danbury Baptist Ass'n, in 8 Jefferson's Writings, supra note 69, at 113), and has, depending on one's perspective, provided either a principled approach to church and state matters or a whipping horse ever since. Compare Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Jefferson in Reynolds with approval) with Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.") and Lee v. Weisman, 112 S. Ct. 2649, 2679-81 (1992) (Scalia, J., dissenting) (extolling prayer at public functions as a historically sound practice and noting Jefferson's practice of same).

\textsuperscript{135} Or, as Professor Akhil Amar has argued, that "[w]e the People of the United States—more specifically, a majority of the voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V." Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 458-59 (1994). Discussion of this "First Theorem" is well beyond the scope of this Article. It is, nevertheless, a variation on Hills's central argument, that there is a tenable distinction between state-imposed limits that are effected by "the people" themselves and those enacted indirectly by their representatives. See Hills, supra note 5, at 137-51. But as we will note, see infra note 174, Hills fails entirely to account for Powell, and that omission is probably fatal to his enterprise.

\textsuperscript{136} John Adams, Thoughts on Government, in 4 Papers of John Adams 86, 87 (Robert J. Taylor et al. eds., 1979).

\end{footnotes}
check majoritarian impulses. That Constitution articulated a powerful variation on Adams' sentiments when it created a Congress where power is shared by a "populist" House and a Senate that is "powerful, deliberative, [and] energetic," rather than simply "representative." The view that Congress should respond directly and immediately to the demands of the electorate finds at least some support in many of the great decisions of the Court, which articulate a belief that "since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsible to the popular will." Congress is, nevertheless, an institution that functions within a system that constantly checks the majoritarian impulse and should presumably be neither reflexively nor absolutely dedicated to total deference to "the people." This does not mean the people are powerless, and it may well be that the current movement toward term limits is equivalent in form and implication with those that led to the ratification of the Seventeenth and Nineteenth Amendments. But we do sense that considerable care must be expended on detailed consideration of just what powers the people and the states surrendered and that the Jefferson-Story exchange is a necessary part of that dialogue.

D. The Historic Record: Some Initial Thoughts

The case for term limits is an uncertain one if it is to be proven by resort to the historical record. It seems unlikely that the framers believed term limits were either necessary or appropriate, and those who did seek such limits expressed a belief that the Constitution itself needed to be modified. However, those judgments were framed during a period in which it was equally implausible that individuals elected to Congress would serve, as has Representative Jamie L. Whitten of Mississippi, for over fifty years. More tellingly, conditions

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139. Amar, supra note 62, at 1121.
142. Congressman Whitten was first elected to the 77th Congress at a special election in November 1941 and began his twenty-seventh term with the commencement of the 103d Congress in January 1993. See 1993-1994 Official Congressional Directory: 103d Congress 162 (1993). He was elected "on the strength of his prosecution of gamblers who came across the state line from Tennessee" and "fac[ed] few challengers until 1992 when he
have changed dramatically,\textsuperscript{143} as have the responsibilities of elected representatives. Thus, the assumptions the founders brought to bear in their discussions of these matters may no longer apply, just as views of what constitutes “cruel and unusual punishment” are now measured by “the evolving standards of decency that mark the progress of a maturing society”\textsuperscript{144} rather than the fate awaiting a felon in 1790. Given the changing standards, the issue may now be the extent to which other sections of the Constitution, particularly the Qualifications Clauses, are susceptible to a similar developmental treatment.

Any careful examination of the term limit debate rapidly transforms itself into a treatise on the general thrust and current direction of American democracy, an experiment that remains “the world's pre-eminent drama of popular sovereignty,”\textsuperscript{145} whose vitality has assumed special significance following the end of the Cold War and the collapse of the major Communist states. Although the controversies of congressional “paralysis” and “corruption” seem beyond dispute, it is far from certain whether term limits will cure these ills. Thus, the proverbial bottom line in the policy debate about term limits remains a fundamental dispute about which policy should guide the selection and retention of Senators and Representatives.

There are no immediate, practical answers. Fortunately, there are beacons that shed some light on how to assess policy decisions made by the framers, given the constitutional matrix within which the term limits litigation will be resolved.

\textsuperscript{143} The average life expectancy in 1790 “was probably about 35 years,” and “[a]most half of all deaths occurred in the first decade of life, with the following two decades the next most fatal.” George Rosen, \textit{Life Expectancy}, in \textit{4 DICTIONARY OF AMERICAN HISTORY} 148, 150 (1976). Individuals who reached the ages of 30 and 35—the thresholds selected for service as a Senator and President, respectively—were the exception and had good prospects for continued survival. These factors may have been important considerations for the framers, who seemed to value experience and mature judgment.

\textsuperscript{144} Trop v. Dulles, 356 U.S. 86, 101 (1958). Justice Scalia, of course, seems to disagree. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (arguing for an approach that embraces the narrowest and most specific historic tradition). This portion of Justice Scalia’s opinion commanded, however, the support of only himself and Chief Justice Rehnquist. See \textit{id.} at 132 (O'Connor & Kennedy, JJ., concurring) (rejecting “prior imposition of a single mode of historic analysis”).

\textsuperscript{145} \textit{WILL, RESTORATION}, supra note 54, at 231.
II. State-Imposed Term Limits: The Constitutional Matrix

The constitutional dimensions of the term limit debate have traditionally been viewed as two distinct, but interrelated, lines. That assumption is incomplete, as we will demonstrate when we turn our attention to Section 2 of the Fourteenth Amendment in Part III of this Article. A proper understanding of Section 2's role requires, however, that we sketch the parameters of the usual term limits dialogue. The first query within that discussion focuses on the extent to which the Qualifications Clauses in Article I exhaust the field. Did the framers, by expressly listing age, duration of citizenship, and place of residence, intend for those qualifications to remain the sole criteria of office? The second line of inquiry, usually undertaken only when the Qualifications Clauses argument does not offer resolution, explores the impact that other constitutional provisions have on "the individual’s right to vote and his right to associate with others for political ends," in particular, the freedom of speech and association guarantees of the First Amendment. We now consider each in turn.

A. Term Limits as "Additional Qualifications" or "Manner" Restrictions

(1) Powell v. McCormack and "Qualifications"

Most of the debate about the constitutionality of state-imposed term limits focuses on the Qualifications Clauses and, in particular, the Court's treatment of them in Powell v. McCormack. The immediate issue in Powell was whether the House could exclude Adam Clayton Powell, who had been accused of "deceiv[ing] the House authorities as to travel expenses" and "certain illegal salary payments." Powell was returned to Congress in spite of these difficulties, winning reelection in November 1966 by a wide margin over his nearest challenger. A special subcommittee of the House,

147. 395 U.S. 486 (1969). Powell was Chief Justice Warren's "last controversial majority opinion," The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 62 (1969); and one of history's ironies is that the decision Warren affirmed in part and reversed in part was written by the man who would succeed him, Warren Burger. See Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968). It is worth noting, however, that then-Judge Burger's opinion simply announced the result and his rationale. Judges McGowan and Levanthal concurred only in the result, and each filed a separate opinion. See id. at 605 (McGowan, J., concurring); id. at 607 (Levanthal, J., concurring).
149. Congressman Powell received 45,308 of the 61,187 votes cast, which was 74%. His Republican opponent received 10,711, which was 17.5%. See Brief for Petitioner at 5, Powell v. McCormack, 395 U.S. 486 (1969) (No. 138) in 68 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 415, 519
after an investigation marked by disputes about its authority even to undertake the task, found Powell’s actions “reflect[ed] discredit upon and br[ought] into disrepute the House of Representatives and its Members.” The House resolution, which recommended “public censure” and the payment of a fine, was rejected by the full House. Instead, the House passed a resolution in which it recognized that Powell “possesses the requisite qualifications of age, citizenship, and inhabitancy for membership,” but nonetheless “exclud[ed] Powell and direct[ed] that the speaker notify the Governor of New York that the seat was vacant.”

Powell and “thirteen electors” contested the decision, maintaining that Powell met the constitutional qualifications and that his “exclusion” violated a variety of constitutional guarantees. The district court held, “By reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter” and dismissed the complaint. That determination was affirmed by the court of appeals, after which Powell’s second petition for a writ of certiorari was granted. Characterizing the question as whether “the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications,” the Court held the House was “without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.”

While much of the discussion in Powell dealt with questions of justiciability, the focal point was clearly the history and terms of the

(Philip B. Kurland & Gerhard Casper eds., 1975). Powell also won the “special election called to fill the vacancy determined to exist by reason of his expulsion.” Powell, 395 F.2d at 579 n.1.

150. Powell, 395 F.2d at 584 (citing H.R. Res. 278, 90th Cong., 1st Sess. (1967)).
151. Id. at 583-84.
152. Id. at 584 (citing H.R. Res. 278, 90th Cong., 1st Sess. (1967)).
155. Id. at 359-60.
157. 393 U.S. 949 (1968). An earlier attempt to have the Court hear the case “prior to the judgment” of the court of appeals had been rejected. Powell v. McCormack, 387 U.S. 933 (1967).
158. Powell, 395 U.S. at 520.
159. Id. at 522.
160. Powell is routinely characterized as a separation of powers case, and the only dissenting vote was predicated on the assumption that Powell’s subsequent admission to the 91st Congress rendered the case moot. Id. at 559-74 (Stewart, J., dissenting). Justice
Qualifications Clauses, which the Court examined in considerable detail. The Court’s review indicated the clauses were deeply influenced by “the most notorious English election dispute of the 18th century—the John Wilkes case,” a “bitter struggle for the right of the British electorate to be represented by men of their own choice.” In the Court’s estimation, the Wilkes episode meant that “on the eve of the Constitutional Convention, English precedent stood for the proposition that ‘the law of the land had regulated the qualifications of members to serve in [P]arliament’ and [that] those qualifications were ‘not occasional but fixed.’” Thus, when the Court turned to the ratification debates, citing many of the same passages quoted by both sides in the modern term limits dispute, it stressed that “[t]he parallel between Madison’s arguments and those made in Wilkes’ behalf is striking.” The Court found, “It appears that on this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the ‘indisputable right [of the people] to return whom they thought proper’ to the legislature.”

Chief Justice Warren conceded various aspects of the record lacked clarity and, in particular, that the ratification “debates are subject to other interpretations.” Nevertheless, he found the “ultimate conclusion” in Powell was correct: Neither “branch of Congress [has] the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution.” The Court thus reaffirmed that “[t]he fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’” As a direct consequence, Congress was not free to simply “exclude” individuals duly elected by the people who met the constitutionally prescribed qualifications. The Powell decision also meant, “[a]s Madison pointed out at the Conven-

Douglas wrote separately to stress his conclusion that any “expulsion” required a two-thirds vote. *Id.* at 551-59 (Douglas, J., concurring).

162. *Id.* at 528.
163. *Id.* at 528 (quoting 16 *Parliamentary History of England* 589, 590 (1769)).
165. *Id.* at 535 (quoting 16 *Parliamentary History of England* 589 (1769)).
167. *Id.*
168. *Id.* at 547 (quoting 2 Elliot, *supra* note 68, at 257).
tion,” that “this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.”

The Court’s treatment of limitations on qualifications for office is routinely characterized as “exhaustive,” and as standing for the proposition that an “additional qualification is only acceptable if it is added to the Constitution by amendment.” It is then not surprising that both decisions striking state-imposed limits on congressional terms have treated Powell as dispositive. In Thorsted Judge Dwyer characterized the holding in Powell as “narrow,” but found nevertheless that “the [Supreme] Court [had] marshaled the historical and legal precedents showing that neither Congress nor the states can add to the Article I, Sections 2 and 3, qualifications.” The majority on the Arkansas court, in turn, described the House action at issue in Powell as an attempt to add a qualification and declared that “Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense.”

There are, however, reasons to believe that Powell may not have definitively answered the question, some of which have been suggested in the cases and commentary, and some of which have not.

For example, a number of commentators have stressed that the actual holding in Powell is confined to the specific question presented in the case: whether the House could exclude a member duly elected who met the constitutional qualifications. They argue that “Powell simply restricts the power of a single House of Congress from adding qualifications” and that “[n]othing in Powell states that the qualifications listed in the U.S. Constitution exclude qualifications from any other source.” What that “other source” might be is, however, difficult to discern. One suggestion is derived from the Court’s concession that various other constitutional provisions were “no less a ‘qualification’ within the meaning of Art. I, § 5, than those set forth in Art. I, § 2.” The argument becomes that “the three federal qualifications...
cations . . . can be construed to exclude any other qualifications that might otherwise be implicitly imposed by the U.S. Constitution." 176

This approach, derived from the expressio unius exclusio alterius maxim, 177 is troubling for a number of reasons. First of all, the various provisions listed by the Court are constitutional constraints. Those, we believe, differ in fundamental respect from limitations that might be imposed by entities acting outside prescribed constitutional avenues. More significantly, these additional "qualifications" lie entirely within the original text. This makes it reasonable, as Madison found in The Federalist, 178 to read the various clauses together as a unified statement of what the Constitution as ratified required. Speculation about whether a state might have elected a female representative in 1789, 179 or whether an individual who has been convicted in an impeachment proceeding should be seated before he is expelled, 180 might, accordingly, have a certain degree of intellectual interest. However, these considerations have little real bearing on the issues actually posed in the debate over the constitutionality of state-imposed term limits.

A second theory finds the "point" of the Qualifications Clauses "is to limit the federal control of the local decision; it is not to restrain the state peoples' decision embodied in the state constitutions." 181 Under this approach to Powell, supporters of state-imposed term limits argue the Constitution "makes only a few qualifications mandatory in order to allow the state peoples latitude in specifying other qualities that they will require from their representatives." 182 This is a variation on the rationale advanced by Jefferson in his letter to Cabell, and is a favorite of term limit supporters. The normal response is to refer

176. Hills, supra note 5, at 114. The primary example of an explicit constitutional requirement is the admonition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3.
177. See supra note 127.
178. See supra text accompanying notes 75-76.
179. This is the example Hills offers. Hills, supra note 5, at 114. It is problematic for any number of reasons, not the least of which is that the franchise was not extended to women in any state at that time, a necessary precondition for election. More to the point, as later observers recognized, see infra text accompanying note 455, it is unlikely Madison would have found the suggestion worth considering.
180. That, of course, is the issue posed by the election of former Judge Alcee Hastings to Congress in the wake of the Court's recent affirmation of the procedure used to impeach him in Nixon v. United States, 113 S. Ct. 732 (1993).
181. Hills, supra note 5, at 115.
182. Id.
largely to the arguments of Story\textsuperscript{183} and others,\textsuperscript{184} or to simply dismiss the point without explanation.\textsuperscript{185} As we have indicated, the assumptions Story brought to his treatment of this question are suspect as an absolute matter and subject to whatever additional pronouncements appear within the amended text.

Still, while textual silence may imply state latitude, it is an unsettling suggestion because it implies states are free to amend the Constitution in ways other than those specified in Article V.\textsuperscript{186} Those insisting Powell is not dispositive are unlikely to analogously argue that the state action limitations articulated in the First and Fourteenth Amendments leave states free to use the referendum process to establish a state church or to deny a particular group the equal protection of the laws. In fact, the Court has expressly repudiated the theory, stressing, "Fundamental rights may not be submitted to vote; they depend on the outcome of no elections,"\textsuperscript{187} and holding, "The fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause" as delineated by the Court in \textit{Reynolds v. Sims}.\textsuperscript{188}

\section*{(2) Terms Limits as a Condition on the "Manner" of Elections}

A more convincing argument characterizes "term limit[s] [as] better considered a regulation affecting the manner of an election" rather

\begin{thebibliography}{99}
\bibitem{183} See, \textit{e.g.}, Thorsted v. Gregoire, 841 F. Supp. 1068, 1082-83 (W.D. Wash. 1994) (relying largely on Story to find that the Tenth Amendment "cannot be read to allow states to limit their citizens' freedom of choice by adding qualifications for Congress").
\bibitem{184} See, \textit{e.g.}, 1 \textsc{Thomas M. Cooley, A Treatise on Constitutional Limitations} 64 (1868); 1 \textsc{James Kent, Commentaries on American Law} 229 (6th ed. 1848).
\bibitem{185} See, \textit{e.g.}, U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (Ark. 1994) (asserting without discussion or support, "This is not a power left to the states under the Tenth Amendment.").
\bibitem{186} We recognize that we have not accounted for Professor Amar's arguments in this regard. See Amar, \textit{supra} note 135.
\bibitem{188} Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 737 (1964). The issue in \textit{Lucas} was whether the Court should shy away from applying the rule articulated in \textit{Reynolds} where "a majority of the voters . . . indicate[d] a desire to be governed by a minority . . . ." Lisco v. Love, 219 F. Supp. 922, 944 (D. Colo. 1963) (Doyle, J., dissenting). That tracks rather closely the idea that courts should defer to the wishes of the electorate, even in the face of an express constitutional guarantee. Of course, the document was amended in the approved manner with the ratification of the Fourteenth Amendment, and the extent to which the "deny or abridge" language of Section 2 recognizes a degree of state authority over suffrage and qualifications is another question entirely.
\end{thebibliography}
than as a "qualification." The "regulating" function of a term limit focuses on the Constitution's express grant of authority to the states and proposes a "reasoned basis upon which to affix the manner regulation label to a term limitation." Reliance on this view is dangerous; the same constitutional provision acknowledging state power to regulate also provides that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." Thus, to the extent a state may impose term limits under the guise of a "time, place, and manner" regulation, the limit itself is subject to alteration, and potentially abolition, by Congress. This assumes Congress has the political will to negate a state's efforts to impose term limits, which proponents of term limits do not believe to be likely. However, Congress has evidenced a healthy, albeit devious, inclination to contravene the people's wishes when it suits its own entrenched purposes. The same members of Congress, willing to risk the wrath of voters by increasing their own compensation and finessing future increases into the simple device of annual cost of living ad-

189. Gorsuch & Guzman, supra note 5, at 355. See also Safranek, supra note 5, at 327-50 (extensive discussion of origins and meaning of the Time, Place and Manner Clause).


191. Gorsuch & Guzman, supra note 5, at 368. The argument is, by the authors' own admission, "a complex question of labelling and categorization." Id. We will not attempt to summarize or probe it, nor do we have to, since our point is more fundamental: on what principled basis can we draw a distinction between a congressional mandate that elections be by district and a state-imposed term limit?

192. U.S. CONST. art. I, § 4. The exception for the place a state selected its Senators was tied to the original determination that Senators "from each State" were to be "chosen by the Legislature thereof," U.S. CONST. art. I, § 3, a requirement eliminated by the popular election provisions of the Seventeenth Amendment. Congress now has as much authority over Senate elections as it does over those for Representatives, although the number of Senators per state may not vary without state consent, see U.S. Const. art. V, while the number of Representatives will change with each "apportionment," except that "each State shall have at Least one Representative." U.S. Const. art I, § 2. These realities factor into Section 2, which is expressly limited to "Representatives in Congress" in recognition of what historians have characterized as "the Great Compromise." See, e.g., Leonard W. Levy, Original Intent and the Framers' Constitution 38-39 (1988).

193. As the Court has stressed, "[t]he power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." Ex parte Siebold, 100 U.S. 371, 392 (1879). This expansive reading is consistent with Patrick Henry's observation that "[t]he power over the manner admits of the most dangerous latitude." 3 Elliot, supra note 68, at 175. See also XIII Letter of Agrippa to the Massachusetts Convention (Jan. 22, 1788), in 4 The Complete Anti-Federalist 102 (Herbert J. Storing ed., 1981) ("Of all the powers of government this is the most improper to be surrendered.").
adjustments,194 would certainly be even more willing to resist the will of the people when the stakes are raised to whether they will continue in office. Simple logic suggests as much. Many term limit measures, if characterized as a time, place, or manner regulation and left unrepealed, would serve as absolute bars to reelection. But a vote to abolish such measures would at least leave individual members of Congress free to plead their cases with the voters, an escape route that might well prove successful given the already-noted propensity on the part of the electorate to see evil in every elected representative but their own.195

A compelling case can then be made that Congress has everything to gain, and little to lose, by exercising its Article I power to void state-imposed limits on congressional terms. And these incentives may well be just as pronounced even where the measures offer “escape hatches,” such as the ability to run as a write-in candidate. The sparse prospects for success via such routes led both the Thorsted and U.S. Term Limits courts to reject Article I, Section 4 arguments. In Thorsted Judge Dwyer found that the measure was “aimed not at achieving order and fairness in the process but preventing a disfavored group of candidates from being elected at all.”196 He stressed, “The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954.”197 The Arkansas court, citing Thorsted, found “These glimmers of opportunity for the disqualified . . . are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack.”198 Moreover, while both courts cited Burdick in their opinions, neither discussed the implications of that decision’s holding that a state may constitutionally bar write-in candidacies outright.199


195. See supra note 36 and accompanying text.


197. Id.

198. U.S. Term Limits, 872 S.W.2d at 357 (citing Thorsted).

199. See Thorsted, 841 F. Supp. at 1080 (citing Burdick, 112 S. Ct. 2059, for the proposition that states may regulate to make elections “fair and honest” and orderly); U.S. Term
The idea that a term limit is a "manner" regulation seems, initially, counterintuitive. The assumption behind term limits is most likely that serving for a certain specified period renders one "ineligible" to serve again, subject only to whatever escape routes might be available. If that is the case, how can a term limit fall, not within the Qualifications Clauses, but rather within the inherent power of the state to regulate the time, place, and manner of elections, subject only to congressional override?

The answer to this question lies in the Court's long-standing acquiescence to another regulatory limit that looks very much like a qualification, but arguably is not: the division of states into congressional districts. Prior to 1842, members of Congress were elected at-large unless state law or practice provided otherwise. As Story noted, with regard to the Qualifications Clauses, "It is observable, that the inhabitancy required is within the state, and not within any particular district of the state, in which the member is chosen." In 1842, however, Congress invoked its power to regulate time, place, and manner to require that

in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.

This provision has remained in the Code ever since, with a few exceptions not material to our purposes. It does not require, in so many words, that a candidate for election actually live in his district. But the current stipulation requiring the Representative to be "elected from" that district strongly suggests that limitation, and it

Limits, 872 S.W.2d at 359-60 (using Burdick to support the propositions that "[s]eparating the rights of the candidate from those of the supporter may be difficult" and that "a more flexible standard" is now used in assessing burdens on voters).

200. Either by seeking another office, sitting out for a specified period, or pursuing reelection as a write-in candidate.

201. 1 Story, supra note 88, § 619. Story, drawing on the experience of England, thought this was a good thing: "It was found by experience, that boroughs and cities were often better represented by men of eminence, and known patriotism, who were strangers to them, than those chosen from their own vicinage." Id. A state-imposed district residency requirement thus became an evil to be avoided. Id. §§ 624, 629.


203. The provisions of the various state codes governing elections are generally now silent on this, reflecting decisions holding states could not require one to live in the district. See, e.g., Hellman v. Collier, 141 A.2d 908 (Md. 1958); State ex rel. Chavez v. Evans, 446 P.2d 445 (N.M. 1968).

is difficult to imagine a candidate seriously attempting to run as a representative "from" San Francisco while openly maintaining Los Angeles as his or her permanent place of residence. Substantial political liabilities arise when one does not live in the district or at least engage in the pious pretense of living there. Members of Congress go to absurd lengths to establish their residential bona fides, a long-evident political reality. In a nineteenth century commentary, for example, the author described one such "subterfuge" and warned that "[w]henever it becomes necessary to resort to a 'legal fiction' in order to accomplish any purpose, the wisdom of the law which is thus sought to evade becomes at once questionable."205 Indeed, while Jefferson was skeptical about the willingness of the people to exercise their power to remove incumbents via elections, he did believe "the partialities of the people [were] a sufficient security against [the] election" of a non-resident.206

Functionally, this requirement operates as an additional qualification, prescribed by Congress, as an expression of its Article I, Section 4 powers. More significantly, the Court has effectively recognized it as such. One illustration is the Court's discussion, in *Ex parte Siebold*, of the extent to which Article I, Section 4 authorized Congress to "interfere" with state regulation of elections.207 The Court gave this power an expansive reading: If Congress "chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially."208 The Court also noted, "Congress has partially regulated the subject heretofore," expressly citing the "law for the election of representatives by separate districts" and referring to other measures "fixing the time of election, and directing that the elections shall be by ballot."209 Subsequent cases and discussions have echoed this treatment. In *United States v. Gradwell*, for example, the Court observed, "Although Congress has had this power of regulating the conduct of congressional elections from the organization of the Government... [f]or more than 50 years no congressional action whatever was taken on the subject until 1842 when a law was enacted requiring that Representatives be elected by Districts."210

206. Letter from Jefferson to Cabell, supra note 78, at 381.
207. 100 U.S. 371 (1879).
208. Id. at 383.
209. Id. at 384.
210. 243 U.S. 477, 482 (1917).
However, these decisions do not contain an authoritative definition that, even remotely, favors treating a *residential* limitation as a time, place, or manner regulation. In contrast, there is judicial language casting doubt on the propriety of this characterization. In *McPherson v. Blacker*, for example, the Court stated:

The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.\(^{211}\)

And while the Court’s most exhaustive discussion of the statutory provision does speak in terms of “a complete code for congressional elections,”\(^{212}\) the enumeration of examples suggests nothing deviating from common understanding of the terms:

> [N]ot only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.\(^{213}\)

Our point is a simple one. If *Congress* may use its Article I, Section 4 “manner” powers to require that Representatives be elected from particular districts, why is a *state* barred from using the same residual power to limit terms? The only answer that makes sense is that the statutory language commanding the division of a state into districts does not expressly stipulate the individual must reside in that district. Neither the United States nor the various state codes contain such a requirement. And while the courts have held that the *states* have no power to enforce such provisions, no court has held that Congress cannot do so, and presumably would not, given the logic of *Ex parte Siebold* and the decisions that followed.

If one may infer that districts are a time, place, and manner limitation, it is only a small intuitive leap to analogously characterize a state-imposed term limit as such a regulation. From a constitutional standpoint, there is little discernible difference between a measure

\(^{211}\) 146 U.S. 1, 29 (1892). *McPherson* was one of a long line of cases stating “[t]he right to vote intended to be protected [by the Fourteenth Amendment] refers to the right to vote as established by the laws and constitution of the State.” *Id.* at 39. This perspective is, as we indicate *infra* at text accompanying notes 291-295, important for the purposes of understanding the scope and impact of Section 2.


\(^{213}\) *Id.* at 366.
barring an individual from the ballot because it would be his third "consecutive" term and a measure barring him because "[e]very candidate for election to the House of Representatives shall be a resident of the congressional district in which he seeks election."214 This assumes certain traditional assumptions about the meaning of "time, place, and manner" may be discarded, most notably, those arising under the First Amendment. There is little to distinguish a term limit from the measures at stake in many traditional First Amendment cases215 when the measures are distinguished as substantive, that is, content-based, or merely procedural, that is, content-neutral. A term limit is arguably procedural, and content-neutral, in the very limited sense that it bars individuals of all political persuasions from office. However, a term limit is substantive, and certainly content-based, when one looks at the type of speech (e.g., running for a specified political office) and the nature of the restriction (e.g., barring only those who have engaged previously in a specified period of such speech). Even so, the Court has clearly approved Congress's mandate of districts based on the only constitutional predicate for such action, the reservation to Congress of the power to regulate the "manner" of elections.

While we believe an argument might be made that the Powell decision defines and exhausts the field, several glaring anomalies remain unaddressed, and at least two pose major problems for those who argue that state-imposed limits are unconstitutional. The first unaddressed issue, the seeds of which lie within Jefferson's letter to Cabell, posits that there are strong historical bases for an inherent state power to limit terms within the Tenth Amendment's reservation of powers. The second unaddressed issue is the contention that a term limit is simply a permissible state "manner" regulation, recognizing that election from specified districts operates in precisely the same way. These two arguments are even more powerful than they first appear, given the guidance of Section 2. But before we consider Section 2, certain other issues must be addressed.

214. Hellman v. Collier, 141 A.2d 908, 909 (Md. 1958) (quoting Md. Code art. 33, § 158(c)). As we note, supra note 203, the provision was declared invalid.

B. Term Limits as a Burden on Free Speech or as a Basis of Electoral Integrity

The second major theme in the debate about the constitutionality of term limits is the extent to which such limits are subject to the free speech and association guarantees of the First Amendment. Two distinct, but inescapably interrelated, interests are at issue: the right of an individual to vote for the candidate of his or her choice and the prerogative of a particular person to be that candidate.

The Court has indicated, in no uncertain terms, that the individual “right of suffrage is a fundamental matter in a free and democratic society” and that “any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized.” 216 A state may employ certain routine administrative devices to insure that the right person casts the ballot and that the state completes its ministerial duties in a timely fashion. There is a “wide scope for exercise of [this] jurisdiction,” 217 even though regulations requiring a certain duration of residence, for example, may occasionally impose heavy burdens. 218 As the Court stressed in Storer v. Brown, “As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” 219 States may not, however, absolutely prohibit the exercise of the franchise, absent either conditions that demonstrably interfere with “intelligent use of the ballot” 220 or conduct that falls within the one express constitutional exception, Section 2’s allowance for individuals who have “participat[ed] in rebellion, or other crime.” 221

The right to be a candidate has also been recognized, albeit largely as one derived from the right to vote itself. An individual has no constitutionally protected right either to be elected or appointed to

218. Compare Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating Tennessee’s requirement of residence in the state for one year and in the county for three months) with Marston v. Lewis, 410 U.S. 679 (1973) (sustaining an Arizona rule given an “amply justifiable legislative judgment that 50 days rather than 30 is necessary”). We assume technological innovations have rendered most durational residency schemes tenuous.
220. Lassiter, 360 U.S. at 51. The specific issue in Lassiter was “[t]he ability to read and write,” id., which was sustained as an appropriate and neutral qualification.
221. U.S. Const. amend. XIV, § 2. This authority was expressly recognized in Richardson v. Ramirez, 418 U.S. 24 (1974).
HASTINGS LAW JOURNAL

a public office. However, candidates do “have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.” Federal election reforms imposing “substantial rather than merely theoretical restraints on the quantity and diversity of political speech” are therefore invalid. And state regulations imposing property qualifications or filing fees have been struck down when the Court found that they imposed conditions “not reasonably necessary to the accomplishment of the State’s legitimate election interests.”

In each instance, the Court was clearly assessing an amalgam of interests. The measures examined in Buckley v. Valeo burdened both candidate and voter, for they impaired “the ability of the citizenry to make informed choices among candidates for office,” considered an “essential” aspect of the election process; “for the identities of those who are elected will inevitably shape the course that we follow as a nation.” And when a state imposes a filing fee as a precondition to appearing on the ballot,

[The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

These decisions project a vision of an election system in which state-imposed limitations on the right of an individual to stand for re-

222. See, e.g., Snowden v. Hughes, 321 U.S. 1, 7 (1944) (the “right” to “be a candidate for and to be elected to public office upon receiving a sufficient number of votes . . . is one secured . . . by state statute”).
227. Lubin v. Panish, 415 U.S. 709, 718 (1974). The Court’s use of the phrase “reasonably necessary” is misleading since it implies use of the extraordinarily deferential “rational basis” level of review. Many of the Court’s decisions speak, however, of “close scrutiny.” See, e.g., Bullock, 405 U.S. at 144. As we note, see infra text accompanying notes 246-247, the Court will presumably, in the wake of Burdick v. Takushi, 112 S. Ct. 2059, 2064-65 (1992), use a “sliding scale” with the level of scrutiny varying according to the degree of “impairment.”
229. Lubin, 415 U.S. at 716. See also Bullock, 405 U.S. at 144 (voters are “substantially limited in their choice of candidates” by filing fees).
election appear to burden the rights of both the candidate and the voters who would select that candidate, particularly because “the rights of voters and the rights of candidates do not lend themselves to neat separation.”230 If, as some of the decisions imply, state-imposed term limits are subject to a form of strict scrutiny as a burden on the speech of voters, the ability of the state to sustain term limits is questionable in light of the availability of less burdensome approaches. One plausible argument in this vein is that a term limit denies “the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus [reducing] the opportunities of all voters to express their own political preferences.”231 If that characterization applies, strict scrutiny follows. The state must “demonstrat[e] . . . a[n] . . . interest sufficiently weighty to justify the limitation . . . and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.”232 Assuming, for the sake of argument, that a state is correct in asserting that the elimination of “corruption and the appearance of corruption” is a “compelling interest,”233 the state must still convince the Court that the means selected are narrowly tailored to effectuate that interest. That might be possible if sheer rotation of bodies is the only means to eliminate corruption. It is less likely if, as is almost certainly the case, legislative malfeasance can be addressed in ways that do not implicate the fundamental rights of voters and candidates alike.234

In contrast, the Court has also routinely sustained election regulations having both the purpose and effect of barring particular individuals from the ballot, and it has implied that many of these measures will be tested within the extraordinarily deferential “rational basis” regimen. In one recent consideration of the electoral restrictions, *Burdick v. Takushi*, the Court stated that while “[i]t is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure,’ . . . [i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes

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232. *Id.* (citations omitted).
234. This assumes that “narrowly tailored” means “least restrictive,” a proposition the Court rejected in the somewhat analogous context of the First Amendment time, place, and manner doctrine in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
through the ballot are absolute.” This means “[t]he mere fact that a State’s system ‘creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.’”

These decisions are consistent with a long-standing recognition that the time, place, and manner authority recognized in Article I means “government must play an active role in structuring elections.” The Court has sustained a variety of state regulations that arguably place exactly the same sort of restrictions on individual candidacy as a term limit. In Williams v. Rhodes, for example, the Court invalidated Ohio’s overly burdensome requirements that virtually precluded a new party from obtaining a place on the ballot. In Anderson v. Celebrezze, the Court rejected an early filing deadline Ohio had imposed on an independent candidate for the office of President. In doing so, however, the Court made it clear that it would balance the competing rights and interests of the parties and uphold “evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” Accordingly, ballot access limitations were appropriate since “[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.” And in Clements v. Fashing, the Court recognized the state’s authority to protect the integrity of the offices it created in upholding a state requirement for officeholders to resign from one office before running for another.

The net effect of these decisions is somewhat speculative because the Court clearly employs different approaches. The Court tests “heavy” burdens by requiring the state to show a “compelling” interest, while “slight” burdens are subjected to a much lower level of scrutiny. Thus, in one of its most recent pronouncements on election limitations, Hawaii’s ban on write-in voting was sustained in light of

236. Id. at 2063 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).
237. Id.
238. 393 U.S. 23 (1968).
240. Id. at 788 n.9.
the "easy access" afforded by virtue of the three means of ballot access Hawaii made available to potential candidates.\textsuperscript{243} That access was assessed, however, in the light of the "limited" burden imposed, a condition that would not necessarily be present in any particular term limit formulation.

Consequently, while term limits arguably run afoul of the First Amendment, one must take into account certain anomalies in the decisions of the Court and the approaches the various states have taken to limiting terms. For instance, while \textit{Burdick} suggests a state may bar an individual from the ballot, the conclusion that term limits themselves are constitutional is much too broad. Under the logic of the \textit{Burdick} decision, measures only forbidding an individual from appearing as a formal candidate might still be appropriate.\textsuperscript{244} Of course, \textit{Burdick} also means a state is not obligated to offer the write-in route to election, and if a state does not offer that option, the viability of any concomitant term limitation will depend on other factors.

At the other end of the spectrum, measures purporting to make an individual "permanently ineligible," like that approved in North Dakota,\textsuperscript{245} may push the envelope in ways the measure at issue in \textit{Burdick} did not. In finding the Hawaii measure "presumptively valid," the Court considered the burdens imposed to be "slight" and stressed that Hawaii offered ample alternative means by which candidates could place their names on the ballot.\textsuperscript{246} Where the term limit prohibition is absolute, the burden, presumably, will be more than a "slight" one. Moreover, many of the Court’s decisions seem to turn on the premise of a state having the right to "protect" its ballot from "frivolous" candidates.\textsuperscript{247} "Protecting the ballot" is not at issue when the question is one of term limitation, unless, of course, term limit devotees could convince the Court that repeated service is frivolous \textit{per se}, a rather suspect proposition.

\textsuperscript{243} \textit{Burdick v. Takushi}, 112 S. Ct. 2059, 2064-65 (1992). The dissent, stressing the local domination of the Democratic Party, disagreed with both the conclusion that adequate alternatives were available, \textit{id.} at 2068-69 (Kennedy, J., dissenting), and the assumption that the proffered state interests justified the ban, \textit{id.} at 2071-72.

\textsuperscript{244} Montana and California, for example, specifically allow candidates who might be barred from the ballot by their tenure to be elected as write-in candidates. \textit{See Mont. Const.} art. IV, § 8(3) (Constitutional Initiative 64 approved Nov. 3, 1992); \textit{California Term Limits Act of 1992 § 4(b)}, reprinted in \textit{Cal. Elec. Code} § 25003 (West Supp. 1994) (Proposition 164 approved Nov. 3, 1992).

\textsuperscript{245} \textit{See supra} note 25 and accompanying text.

\textsuperscript{246} \textit{Burdick}, 112 S. Ct. at 2064-65.

\textsuperscript{247} This was the characterization employed in \textit{Anderson}. \textit{See supra} text accompanying note 239-241.
Collectively, the various First Amendment decisions do not provide an absolutely clear answer. If elections function as a means by which the people "winnow out and finally reject all but the chosen candidates,"\(^{248}\) then state-imposed term limits are arguably inconsistent with the Court's admonition that it is the people themselves, through elections, who will make this determination. If, on the other hand, the power to regulate elections carries with it the inherent authority to dictate certain absolute limits on the choices the electorate may make, term limits may be an appropriate exercise of such authority.

C. A Necessary Consideration: Prior Debates and Adjudications of Similar Issues

One noteworthy facet of any litigation challenging term limits will be the extent to which many of the issues involved have already been resolved, either in Congress or court. Thus, while it may be true, in a certain constricted sense, that *Powell* says nothing about what states may do, the interpretive record is far from silent.

Questions arising from state-mandated congressional qualifications cropped up shortly after ratification of the Constitution. In 1807, for example, Joshua Barney sought to negate the election of Representative William McCrery, based on his failure to live in the part of the congressional district from which he was elected.\(^{249}\) The House of Representatives rejected this challenge by a vote of 89 to 18,\(^{250}\) following a report by the Committee of Elections declaring that Maryland's requirement "restricting the residence of the members of Congress to any particular part of the district for which they may be chosen is contrary to the Constitution of the United States . . . . [Thus], McCrery is entitled to his seat in this House."\(^{251}\) Similar questions were subsequently raised regarding the election of state judges to Congress during their judicial terms in violation of state constitutional provisions barring judges from serving in other offices until their judicial terms expired. In each instance, the individual whose election was chal-

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249. McCrery was seated in the House in 1807. His district was created by the Maryland Legislature and was to send two Representatives, one of whom lived in the City of Baltimore. McCrery, whose seat required city residence, lived in Baltimore County. *17 ANNALS OF CONG.*, 871 (1807).

250. *17 id.* at 1237.

251. *17 id.* at 871-72.
lenged—Lyman Trumbull\textsuperscript{252} and Samuel Marshall\textsuperscript{253} in 1856, and Charles Falkner\textsuperscript{254} in 1888—was allowed to take his seat after a vote of the House or Senate. Indeed, Faulkner was seated by unanimous vote.\textsuperscript{255}

Some term limit proponents, recognizing the implications of these early determinations, have suggested these congressional cases have limited precedential value.\textsuperscript{256} While this analysis has merit, it is unwise to discount the early cases for a number of reasons. The McCreery decision was a factor in the exchange between Jefferson and Cabell, a dialogue that cannot be discounted. Moreover, while the political ebb and flow within the various congressional debates sometimes led to official declarations that were less than decisive, the essence of the exchanges evidences a strong awareness of virtually all the arguments and authorities routinely cited as part of the current term limits debate. Additionally, the congressional cases must play some role in shaping modern understanding of the Qualifications Clauses, if only because the early judicial cases treated these decisions as applicable, often dispositive, precedent.\textsuperscript{257}

\textsuperscript{252} Judge Lyman Trumbull was seated in the Senate in 1856 to represent Illinois. The Illinois Constitution then required that “judges of the [state] supreme . . . court[,] shall not be eligible to any other office . . . in the United States, during the term for which they are elected, nor for one year thereafter.” ILL. CONST. OF 1848 art. V, § 10, \textit{in 2} Thorpe, \textit{supra} note 98, at 985, 999. Trumbull resigned from the state supreme court in 1853, although his term was not to expire until 1861. He was elected to the U.S. Senate in 1855. 25 CONG. GLOBE, 34th Cong., 1st Sess. 514, 547-52, 579-84 (1856). The Senate vote to seat Trumbull was 35 to 8. \textit{Id.} at 584.

\textsuperscript{253} A separate dispute under the same Illinois provision arose over the seating of Judge Samuel Marshall in the House. CONG. GLOBE, 34th Cong., 1st Sess. 865-68 (1856). Marshall was seated by a vote of 80 to 45. \textit{Id.} at 868.

\textsuperscript{254} Judge Charles Falkner was seated in the Senate to represent West Virginia despite a challenge based on a state constitutional article similar to the Illinois provision. 19 CONG. REC. 3 (1888).

\textsuperscript{255} \textit{Id.} at 54.

\textsuperscript{256} Mr. Hills compared the debates over the elections of McCreery and Trumbull. Hills, \textit{supra} note 5, at 123-33. He rightly concluded the emphasis of the speakers in McCreery’s case was more on the federalist principle involved than on the politics of the candidates. The focus in Trumbull’s case, however, was on whether to seat Trumbull, a moderate Democrat supported by Abraham Lincoln, or Governor Matteson, a radical Democrat supported by Stephen Douglas. From the limited consideration of the case then before Congress, Hills concluded that the McCreery case established only that legislatures may not add congressional qualifications. \textit{Id.} at 128. From the political focus in Trumbull’s case, Hills determined that the precedential effect of the case on the power of the states to add qualifications by state Constitution is less than conclusive. \textit{Id.} at 131.

\textsuperscript{257} \textit{See, e.g.,} State v. Russell, 10 Ohio Dec. 255, 259-61 (Cuyahoga Ct. Comm. Pleas 1900), rev’d \textit{in part on other grounds}, 20 Ohio C.C. 551 (Cuyahoga Cir. Ct. 1900), aff’d \textit{as modified without op.}, 63 N.E. 1133 (Ohio 1902) (Trumbull case basis of refusal to enforce
Courts have routinely thwarted state attempts to attach conditions to congressional service. States have attempted to require that candidates for the United States House live within a congressional district, and have tried to bar state judges from running for Congress. Candidates have been required to comply with state-imposed election spending limits. They have been told all elected officeholders must resign before running for Congress, and states have tried to bar anyone convicted of a state crime from candidacy. Admit-

state election expenditure law invalidating election of non-reporting candidates); State ex rel. Chandler v. Howell, 175 P. 569, 571 (Wash. 1918) (reciting the cases).


259. See Buckingham v. State ex rel. Killoran, 35 A.2d 903 (Del. 1944); State v. Superior Court, 151 N.E.2d 508 (Ind. 1958); Riley v. Cordell, 194 P.2d 857 (Okla. 1948); Ekwall v. Stadelman, 30 P.2d 1037 (Or. 1934); State ex rel. Chandler v. Howell, 175 P. 569 (Wash. 1918); State ex rel. Wet tengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946). The Wisconsin case is especially interesting since the individual who was allowed to run for the United States Senate, and was eventually elected, was Joseph McCarthy.


261. One of the more interesting cases arose in Florida, where two county sheriffs attempted to run for House seats without resigning. The state courts forbade Sheriff William Davis from filing, holding the requirement was not an additional qualification for Congress, but an obligation of the office of sheriff. State ex rel. Davis v. Adams, 238 So. 2d 415 (Fla. 1970). A three-judge federal court reached a different conclusion and allowed Sheriff Struck to file. State v. Adams, 315 F. Supp. 1295 (N.D. Fla. 1970). The state supreme court then stayed its judgment as a matter of comity, State ex rel. Davis v. Adams, 238 So. 2d 417 (Fla. 1970), and Justice Black, in a one-Justice opinion, affirmed the stay, observing that "[o]n balance, I am inclined to think the Court would hold that Florida has exceeded its constitutional powers." Davis v. Adams, 400 U.S. 1203, 1204 (1970). The same issue, albeit without the panoply of opinions, has arisen in other states. See Lowe v. Fowler, 240 S.E.2d 70 (Ga. 1977) (mayor not ineligible despite statute requiring resignation to run for House); State v. Superior Court, 151 N.E.2d 508 (Ind. 1958) (governor and lieutenant governor not barred from Senate); Richardson v. Hare, 160 N.W.2d 883, 887-88 (Mich. 1968) (sheriff not barred from running for judge, noting statute was amended to remove language affecting candidacy for U.S. Senate); Oklahoma State Election Bd. v. Coats, 610 P.2d 776 (Okla. 1980) (statute barring district attorney from candidacy for U.S. Senate during term); In re Opinion of the Judges, 116 N.W.2d 233 (S.D. 1962) ("above reasonable dispute" that Governor and Lieutenant Governor cannot be barred by state constitution from appointment to U.S. Senate during terms); State ex rel. Johnson v. Crane, 197 P.2d 864 (Wyo. 1948) (state constitution cannot bar Governor and Lieutenant Governor from becoming members of Congress during term).

262. See State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918) (candidate convicted of federal crime allowed on ballot for U.S. Senate); Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950) (candidate convicted of conspiracy to overthrow the federal government allowed on ballot for U.S. House); In re O'Connor, 17 N.Y.S.2d 758 (Sup. Ct. 1940) (neither belief in communism nor conviction of crime can bar access to ballot).
tedly, none of the challenges mounted against these measures has generated an opinion on the merits by the United States Supreme Court. But even though the litigation has been largely confined to the lower courts, and in particular state courts, these cases reveal how a court would treat virtually all of the measures recently enacted. Indeed, one of the most striking things about these cases is that ten of them had been brought before the highest courts of the fifteen states that now have term limits, and that these courts had, in effect, already declared similar measures unconstitutional before the November 1992 election.

Each of the decisions has followed a common line of reasoning. The courts begin by recognizing, for example, "the general rule is that when the constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are exclusive." The next step is usually the expression, in no uncertain terms, that the Qualifications Clauses exhaust the criteria for congressional candidacy, and the contested requirement is a "superaddition" or a further qualification. The court generally concludes by finding the limitation at issue either is unconstitutional in and of itself or merely "cannot affect the qualifications of a candidate." Or it finds that, as an attempt to enact a law beyond the state's power,

263. There are a few federal cases, but they do not add much to the analysis. See, e.g., Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984) (sustaining Massachusetts Democratic Party rule requiring candidate to secure 15% of vote at convention as prerequisite to challenge of party endorsement), cert. granted and judgment vacated, 471 U.S. 459 (1985), on remand, 769 F.2d 24 (1st Cir. 1985), cert. denied, 479 U.S. 1023, reh'g denied, 481 U.S. 1033 (1987); Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980) (New York "resign to run" provision valid measure protecting integrity of state government).

264. States that have enacted term limits whose supreme courts have already issued opinions suggesting additional state-enacted qualifications violate the Constitution are: Arizona, see Stockton v. McFarland, 106 P.2d 328 (Ariz. 1940); Florida, see State ex rel. Davis v. Adams, 238 So. 2d 415 (Fla. 1970); Michigan, see Richardson v. Hare, 160 N.W.2d 883 (Mich. 1968); Nebraska, see State ex rel. O'Sullivan v. Swanson, 257 N.W. 255 (Neb. 1934); North Dakota, see State ex rel. Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942); Ohio, see State v. Russell, 10 Ohio Dec. 255 (1900); Oregon, see Ekwall v. Stadelman, 30 P.2d 1037 (Or. 1934); South Dakota, see In re Opinion of the Judges, 116 N.W.2d 233 (S.D. 1962); Washington, see State ex rel. Chandler v. Howell, 175 P. 569 (Wash. 1918); and Wyoming, see State ex rel. Johnson v. Crane, 197 P.2d 864 (Wyo. 1948). Of the other five states, one has held the limits on state offices are constitutional. See Legislature State of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991), cert. denied, 112 S. Ct. 1292 (1992), and cert. denied, Californians for Better Gov't v. Legislature State of Cal., 112 S. Ct. 1293 (1992).


266. See, e.g., Ekwall, 30 P.2d at 1040; Opinion of the Justices, 116 N.W.2d at 233.

267. See, e.g., Russell, 10 Ohio at 263.

268. See, e.g., Thorson, 6 N.W.2d at 92.

269. See, e.g., Stockton, 106 P.2d at 331.
the act was not within the state's authority or, as a consideration of a power beyond the state's authority, that the state court did not have jurisdiction to decide the issue.

The apparent ease with which these courts have uniformly found such measures unconstitutional is all the more striking, given that ten of the jurisdictions that have rejected attempts to add "qualifications" are states that embraced term limitations during recent elections. Significantly, in each instance, the court characterized the restriction at issue as a qualification. In so doing, the courts have defined "qualification" broadly, although they have distinguished requirements based upon the congressional position sought from requirements based exclusively on a state position held. For instance, the Oklahoma Supreme Court sustained a requirement for local district attorneys to resign from office prior to running for election to any other office, including one in Congress. The court held the requirement was an obligation of the state office already held and was neither a bar to or a qualification for Congress. The opinion was tailored carefully to follow the same court's earlier holding that the state constitution could not prevent a state judge from becoming a candidate for United States Senator, although one person could not run for both offices simultaneously.

A different representation of the issue might lead to a different result. The best illustration, which we have already discussed, is to characterize term limits simply as attempts to regulate the "manner" of election and to assume that they are an extension of the power expressly reserved to the states by the Elections Clause in Article I. It also means that how one characterizes the burdens imposed by a particular measure is extraordinarily important. In the Washington State case the court found that the initiative was "unduly restrictive." The plain purpose of the measure was to "prevent[ ] a disfavored group of candidates from being elected at all," and the alternate

270. See, e.g., Ekwall, 30 P.2d at 1040; O'Connor, 17 N.Y.S.2d at 759; Stockton, 106 P.2d at 331; Crane, 197 P.2d at 867, 874.
272. At least one court simply defined qualifications to be synonymous with "eligibility and competency to hold the office if chosen." Id. at 511.
273. Oklahoma State Election Bd. v. Coats, 610 P.2d 776, 776 (Okla. 1980). This is consistent with the position the Court took in Clements v. Fashing, 457 U.S. 957 (1982).
274. Coats, 610 P.2d. at 780.
276. See supra text accompanying notes 189-215.
278. Id. at 1081.
avenue of write-in candidacy was illusory.\textsuperscript{279} The same was true in Arkansas where “[t]hese glimmers of opportunity” were “so faint” that the limits imposed on federal terms could not withstand scrutiny.\textsuperscript{280} Interestingly enough, however, limits on state officeholders in Arkansas were “sufficiently rational and even compelling when weighed against the residual burden placed on the rights and privileges of elected officeholders and those desiring to support them.”\textsuperscript{281} Why the electoral prospects of state office candidates were any less faint than their congressional counterparts was never explained.\textsuperscript{282} Perhaps the assumption was that the state interest in regulating state offices was so compelling that any barrier, even one suspect under the tolerant \textit{Burdick} standard, was permissible.

In addition, decisions evaluating various limits on congressional eligibility have uniformly omitted any discussion of the extent to which Section 2 might govern the issue. This omission is easily understood given the nature of the opinion writing process: One opinion will tend to follow the next, in form as well as in substance. More importantly, whether a law violates the Qualifications Clauses is an inquiry independent from other constitutional tests. A limit on candidacy may, for example, violate the Qualifications Clauses, but not abridge the First Amendment right to vote for the candidate of one’s choice. In the same manner, a term limit might not constitute a qualification, but may nevertheless “deny” or “in any way abridge” the right to vote in ways contemplated by Section 2.

The converse might also be true; there is no reason a single regulation must affect federalism and the right to vote in exactly the same manner or extent. The resulting inquiry is likely to turn on matters of degree: Is a term limit an alteration of the attributes that make a candidate competent to hold office? More specifically, does it alter these attributes to such an extent as to be a “qualification”? An independent question is whether a term limit is a sufficient abridgment of the right of the citizen to vote for the candidate of choice, a denial or

\begin{itemize}
  \item \textsuperscript{279} Id.
  \item \textsuperscript{280} U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (Ark. 1994).
  \item \textsuperscript{281} Id. at 360.
  \item \textsuperscript{282} The court stated it had “already referred in this opinion to those legitimate interests in the political process which are protected under the First and Fourteenth Amendments.” Id. at 359. The reference was to its discussion of standing, within which it cited \textit{Anderson} and \textit{Thorsted}. As indicated, see supra text accompanying notes 240-241, \textit{Anderson} spoke of the “integrity and reliability of the electoral process itself,” 460 U.S. at 788 n.9, a characterization of term limits Judge Dwyer rejected. \textit{See Thorsted}, 841 F. Supp. at 1081.
\end{itemize}
abridgment of the right to vote. A term limit may not so change the attributes required to hold or attain an office as to be a superadded qualification, but still may abridge the right of citizens to vote in some lesser way. Such a limit, without actually violating the Qualifications Clauses, will violate Section 2.

Finally, there is the problem of amendments to the Constitution. The Qualifications Clauses must be read in the light of all of the amendments that might modify them. State regulation of the right to vote is the sole object of the Fifteenth Amendment and a major concern of the Fourteenth, and these amendments possibly change the textual delimitation of state powers referred to in the original text of the Constitution. As the Court recognized in *Guinn v. United States*, "the very command of the [Fifteenth] Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals." Thus, to the extent either Amendment enshrines an allowance of state denial or abridgment of the right to vote, all earlier and inconsistent clauses were modified.

### III. Section 2 and State-Imposed Term Limits:
The Analytic Matrix

As we stressed at the outset, perhaps the most important element of the term-limits debate is the extent to which one can postulate the framers' dispositive intent. Those relying on *Powell* in this regard focus on what they believe to be the intent of the Qualifications Clauses, arguing there is no room for state action. Clearly, the rejection of the Tucker amendments by the First Congress provides one possible affirmation of the framers' desire to leave matters to the people, via the elective process, rather than mechanical limits. But Jefferson appears to have disagreed, and the meaning of "the record" is less clear than originally foreseen. Moreover, whatever that original intent might have been in 1787, it is subject to and qualified by any intervening actions of the people, speaking through the amendment process outlined in Article V. The missing constitutional ingredient, up until now, has been Section 2 of the Fourteenth Amendment.

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A. The Drafting and Enforcement of Section 2: From a "Most Important" Provision to "Quaint Corner of the Constitution"

We have already noted that modern observers tend to characterize Section 2 as an "historical curiosity" and suggest that "[p]resumably, the efficacy of other efforts to vindicate the right to vote, precludes any further effort to invoke this provision of the Constitution." This does not mean Section 2 is never discussed in the context of voting rights. But when it is mentioned, it is generally treated as a pawn in the larger dispute over the original intent of the Fourteenth Amendment, an invocation that does little to imbue this provision with independent value or significance. We suspect, however, that Section 2 may soon become something more than "[a] quaint corner of the Constitution, read only by the antiquarian, [that is] of no consequence whatever." The individuals who crafted the Fourteenth Amendment certainly had a different impression. Thaddeus Stevens, for example, characterized what became Section 2 as "the most important [section] in the article." This statement was notably disingenuous, for Stevens and his allies had their eyes on more mundane matters than the textually express objective of securing the vote for the recently freed

285. Compare Raoul Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 Ohio St. L.J. 1, 17 (1986) (Section 2's "limited sanction against discrimination in voting bars an inference that it was prohibited altogether") and Klarman, supra note 4, at 228 ("Section Two ... plainly assumed the lawfulness of racial discrimination in voting") with Komesar, supra note 4, at 8 ("Section two reflects only that racial restrictions on voting were not included in section one. It does not necessarily imply that they were excluded.").
286. Irving Younger, Prosecuting, 73 Minn. L. Rev. 829, 845 (1989). The article is a posthumous excerpt from Professor Younger's unpublished autobiography and details some of the exploits of Victor Sharrow, a "Section 2 warrior" whose efforts we chronicle infra at text accompanying notes 346-362.
287. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). The provisions of Section 1 were described, in turn, simply as "just," with the purpose of that section being to "cure" a constitutional "defect" by making these aspects of our "organic law" applicable against the states. Id. The floor debates and some of the committee reports have been collected in The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments (Alfred Alvins ed., 1967) [hereinafter Alvins] and Statutory History of the United States: Civil Rights (Part I) (Bernard Schwartz ed., 1970). The full report of the Joint Committee on Reconstruction and an extensive commentary may in turn be found in The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, 50 (Benj. B. Kendrick ed., 1914) [hereinafter Journal]. Unfortunately, each collection omits some materials especially pertinent to our purposes. We have, accordingly, cited the original records whenever possible.
slaves by penalizing states that did not comply. Accordingly, the first of the measures to emerge from the Joint Committee on Reconstruction did not express the more familiar, and more frequently construed, equal protection and due process guarantees ultimately set forth in Section 1 of the Fourteenth Amendment. Rather, the proposal consisted of a single section dealing with the apportionment of Representatives, within which “denials” or “abridgments” of individuals “on account of race or color” would result in the exclusion of “all persons of such race or color . . . from the basis of representation.”

This approach to the drafting of what would become the Fourteenth Amendment was one of two originally suggested within the Committee, and the choices the Committee made in this regard are instructive, for the rejected language took the direct route to freedman suffrage: “[A]ll provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.” The bare record of the Journal of the Joint Committee does not indicate why the later proposal became “the basis of their action,” only that it did so by a vote of eleven in favor and three against. However, it is quite clear that there was considerable opposition within both the Committee itself and Congress as a whole to any measure that would strip the states of their power to control suffrage and elections. On January 22, 1866, the Committee rejected two proposals that would have given Congress express control over “elective” rights and “the elective franchise.” During the ensuing floor debate on the emerging recommendations, proponents stressed that the proposed Amendment left matters with the states, and that the decision to do so was a pragmatic one. As Senator Howard stated:

It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out,

288. J. Res. 51, 39th Cong., 1st Sess. (1866). The measure passed in the House, CONG. GLOBE, 39th Cong., 1st Sess. 538 (1866), but failed in the Senate id. at 1289. For more detailed recitations of the events leading to what we now know as Section 2 than is necessary for our purposes, see FLACK, supra note 4, at 97-127, and Zuckerman, supra note 4, at 94-107.
289. JOURNAL, supra note 287, at 50.
290. Id. at 51.
291. Id. at 54-55.
I certainly should secure suffrage to the colored race to some extent at least. . . . 292

The final version, he stressed, was a question not of what he, the Senate, or the House might wish, but what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions? . . .

The committee was of the opinion that the States were not prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. 293

The result was "The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." 294 The theory underlying the section was "few States would exercise" this power "to any great extent, since the penalty was so severe as to prevent it." 295 What became Section 2 was then both the focal point in the initial post-Civil War efforts to enfranchise the newly freed slaves and, until the ratification of the Fifteenth Amendment on February 3, 1870, the only available means for achieving that end.

However, any suggestion that the Fifteenth Amendment rendered Section 2 superfluous is misleading. 296 The Fifteenth Amendment had the express purpose and effect of reversing the earlier determination to avoid any direct grant of suffrage for the freed slaves. But, as was the case with the Fourteenth Amendment, the drafting and ratification of the Fifteenth Amendment reflected a complex amalgam of sensitivity to human rights and sheer politics. In his notification of the Amendment's ratification to Congress, President Grant conjured up the image of both the representation formula Section 2 was designed to replace 297 and the discredited Dred Scott v. . . .

292. CONG. GLOBE, 39th Cong., 1st Sess 2766 (1866). Howard assumed the lead role in securing passage in the Senate in the absence of the Chairman of the Committee, Senator Fessenden, who was ill.

293. Id.

294. Id.

295. FLACK, supra note 4, at 115-16. The individuals who framed the section would likely not, however, have been particularly disappointed if the section was invoked, since, as we will indicate shortly, there was something more afoot than a simple desire to see that justice was done in state implementation of control over the franchise.

296. That is, as we have indicated, the characterization voiced in CORWIN, see supra note 284, and other authorities, such as the Congressional Research Service edition of the Constitution, supra note 2.

297. As ratified, the Constitution allocated Representatives "according to their respective Numbers, which shall be determined by adding the whole Number of free Persons . . .
Sandford\textsuperscript{298} when he described the Amendment as one “which makes at once 4,000,000 people voters who were heretofore declared by the highest tribunal in the land not citizens of the United States, nor eligible to become so . . . .”\textsuperscript{299} President Grant then praised the new Amendment as “a measure of grander importance than any other one act of the kind from the foundation of our free Government to the present day.”\textsuperscript{300} For the individuals who introduced and supported it, however, the “controlling motive” behind the Fifteenth Amendment was “the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States,”\textsuperscript{301} and, in particular, “to save the Republican party from defeat by granting universal Negro suffrage by an amendment . . . .”\textsuperscript{302}

It is just as important to recognize that, whatever else the actual impact of the Fifteenth Amendment on Section 2 might be, it was manifestly not a measure that was intended to disturb the threshold powers of the states. As the Court emphasized in its first examination of the later Amendment:

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education.\textsuperscript{303}

The state’s inherent power to exclude would-be voters was, obviously, subject to the possible sanction of a proportionate reduction, but that

\textsuperscript{298} 298. 60 U.S. (19 How.) 393 (1857).

\textsuperscript{299} 299. President Ulysses S. Grant, Message to the Senate and House of Representatives (Mar. 30, 1870) in \textit{7 A Compilation of the Messages and Papers of the Presidents 1789-1897}, at 55-56 (James D. Richardson ed., 1898).

\textsuperscript{300} 300. Id.

\textsuperscript{301} 301. \textit{JOHN M. MATHEWS, The Legislative and Judicial History of the Fifteenth Amendment} 21 (1909). Mathews attributes this to an emerging realization that “most of the ex-Confederate States had in large measure been rehabilitated” in the wake of the Fourteenth Amendment and legislative measures that flowed from it. \textit{Id.} at 20-21.

\textsuperscript{302} 302. \textit{WILLIAM GILLETTE, The Right to Vote: Politics and the Passage of the Fifteenth Amendment} 34 (1965). Gillette assigns this motive to Thaddeus Stevens and notes that Stevens’s views on the matter of suffrage shifted as the political tides ebbed and flowed. \textit{Id.} at 35. \textit{See also id.} at 56-58 (noting threats to passage posed by “Republican dissension” and the embrace of “Negro suffrage as a political necessity” by many northern Republicans).

\textsuperscript{303} 303. United States v. Reese, 92 U.S. 214, 217-18 (1875).
power did exist. "The States, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters, and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge."\textsuperscript{304}

This view of state authority was consistent with a line of decisions in which the Court stressed repeatedly that "[t]he right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State."\textsuperscript{305} Moreover, these interpretations conveyed a second perspective on the "right" to vote that remains in force today, one that recognizes that "while the right of suffrage is established and guaranteed by the Constitution . . . it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."\textsuperscript{306} The Court's initial, negative view of a Fifteenth Amendment that conferred "no affirmative right to the colored man to vote"\textsuperscript{307} gradually changed to a more positive image within which "it is easy to see that under some circumstances [the Amendment] may operate as the immediate source of a right to vote."\textsuperscript{308} The Court would presage future developments, in \emph{Yick Wo v. Hopkins}, with its recognition that "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights."\textsuperscript{309} Nevertheless, the promise implicit in these and similar statements remained largely unfulfilled, "a seed planted for the future, struggling for life in the harsh soil of post-reconstruction voting rights repression."\textsuperscript{310}

Furthermore, the Fifteenth Amendment made Section 2 unnecessary only if Section 2's sole objective was to enfranchise the freedmen by exacting a penalty for the failure to do so. As the history of Section 2's adoption indicates, that was not what many of the key framers

\begin{footnotes}
\item[304] Id. at 219.
\item[306] Lassiter v. Northampton County Bd. Elections, 360 U.S. 45, 51 (1959). In \textit{Lassiter} the Court sustained a literacy test requirement, \textit{id.} at 51-52, a decision that, as a matter of constitutional interpretation, remains valid today.
\item[307] \textit{Ex parte Yarbrough}, 110 U.S. 651, 665 (1884) (citing Reese, 92 U.S. at 218).
\item[308] Id.
\item[309] 118 U.S. 356, 370 (1885).
\end{footnotes}
actually had in mind. Rather, Section 2 was primarily intended as a means by which the Republicans would preserve their political power. The Republican members of the Committee and Congress were acutely aware of the fact that giving the vote to millions of freedmen in the South would mean a substantial increase in the number of congressional seats allocated to their opponents. Fearing the consequences of such a shift in the political balance, the proportional reduction provision in Section 2 became a way to ensure the southern states would not reap such benefits. This meant "in the end the determination of the congressional plan of reconstruction was not left to the most able and statesmanlike congressmen, but to mere politicians who acted almost entirely from motives of party advantage." In practical terms, it also meant the implementation of the section's commands remained subject to the ebb and flow of the political tides. Thus, when Thaddeus Stevens stressed that the provisions of the amendment were not self-executing and, in particular, that Congress "must legislate for the purpose of ascertaining the basis of representation," he predicted a fact of life that would render Section 2 largely dormant for over a century.

While Congress initially seemed to take the promise implicit in the constitutional command seriously, the first effort to enforce Section 2 died quickly. Congress adjourned before the House could act on a Senate resolution "inquiring into the propriety" of "reporting a bill for the apportionment of representatives in compliance with the provision of section two of the fourteenth amendment ..." And

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311. Indeed, some have argued "[e]nfranchisement of the colored race at that time was a political mistake, even in the best interest of the colored race." WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 15 (1898). Guthrie characterized Section 2 as "fair and just," id., and stated, "Had the South promptly and graciously accepted this clause ... and afforded some protection to the negroes, no one can doubt that the Fifteenth Amendment would never have been adopted." Id.

312. JOURNAL, supra note 287, at 294-95.

313. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866). We do not believe this characterization means courts have no role in enforcing the amendment, an interpretative approach some have taken. See infra text accompanying notes 330-332. Rather, we read Stevens's remarks as an expression of a practical problem, the need to ascertain the number of Representatives authorized and the distribution of those seats between the states.

314. In stating this we only concede the obvious, that the treatment of Section 2 by the Congress and the courts makes it clear that there is as yet no room for Section 2 in the modern political inn. We do not, quite obviously, believe these judgments are constitutionally sound.

315. CONG. GLOBE, 40th Cong., 3d Sess. 158 (1868) (statements of Senators Harlan and Trumbull). The resolution was directed to the Committee on the Judiciary and, as
while compliance with Section 2 became a major theme in the development of the Ninth Census in 1870, actual execution of that process produced less than satisfying results. The Director of the Census, "in compliance with what was believed to be the requirements of the [F]ourteenth [A]mendment to the Constitution," added questions to the census "for determining these two classes of the population."\(^3\) The collected data was subsequently considered by the Forty-Second Congress,\(^3\) and a provision that would have had the effect of actually reducing representation after adoption of the 1872 apportionment was approved.\(^3\) During that apportionment, however, the complaint was voiced that "[t]he census takers do not appear to have comprehended it, and certainly have failed to grapple with it... The small numbers set down in the census tables to each State as affected by this amendment are confessedly unreliable, and, if considered, will not materially affect the result."\(^3\) Consequently, the general consensus was that the census reports detailed "abridgments" that were "too insignificant" to warrant any action.\(^3\)

introduced, would have "instructed" the Committee to report such a bill. Id. Senator Trumbull, however, found that to be "a pretty strong resolution," id., and proposed the modification, which was accepted.

316. Report of the Superintendent of the Ninth Census, 1 Ninth Census of the United States xxviii (1872). This action followed on the heels of extensive congressional debate about the matter, the details of which, along with those of subsequent events, may be found in Zuckerman, supra note 4, at 107-16. It is worth noting that the census report stated "[n]o anticipations were entertained that the results of these inquiries would be of value for the purpose for which directly they were introduced" and the task was undertaken because "the Department would not be clear if it neglected" to do so. 1 Ninth Census, supra at xxviii.


318. Id. at 713. As we indicate, see infra text accompanying note 485, this approach suggests individuals considering enforcement of Section 2 at the time it was framed did not believe the seats lost would be reallocated to other states.

319. Id. at 670 (remarks of Sen. Morrill). See also id. at 83 ("The Secretary of Interior says officially that the result is not satisfactory or trustworthy."). For statements indicating a desire to enforce Section 2, see id. at 65 (Rep. Willard, noting the property qualifications in Pennsylvania and Georgia); id. at 83 (Rep. Willard, noting Georgia tax to be paid by all males over 22). What was or was not an abridgment was, however, a matter of perspective, given Congressman Shellabarger's contention that Ohio's one-year residency requirement was "a mere regulation to secure the purity of election." Id. at 81.

320. The data in the table, id. at 83, suggest the need for caution. Even leaving aside the casualties inflicted during the Civil War and the fact that women and children were part of the overall population count, it is difficult to believe that of the 1,184,109 persons living in Georgia, only 234,971 were "[m]ale citizens of the United States 21 years of age and upward," and that of those only 1,064—in a state that had a poll tax—had their right to vote abridged. Similar anomalies were evident in the numbers for each southern state.
Section 2's commands were added to the United States Code in 1872, and serious attempts to compel Congress to recognize and invoke Section 2 in recognition of the South's refusal to let African-Americans vote were made at the turn of the century and in the period immediately preceding the passage of the Voting Rights Act of 1965. Many individuals argued vigorously for Section 2 to be invoked to force Southern states to remove the various invidious impediments those states placed in the path of citizens attempting to exercise the franchise. These efforts were made in vain and did not lead to anything even remotely approximating a declaration by Congress recognizing that representation "shall" be reduced whenever the right to vote is denied or in any way abridged. Rather, the initiatives invariably died in committee. These failures to act tended to verify the absence of a collective will to secure equality of treatment. They also underscored the extent to which Section 2's arguably draconian remedies created a poison pill no sensible politician could be induced to swallow.

The same failure to act, unfortunately, describes the actions of the courts, which have generally treated Section 2 as a provision that posed problems best avoided. There have been rare exceptions. In 1873, for example, Justice Hunt—sitting as a Circuit Justice in New York—rejected Susan B. Anthony's claim that she had the right to vote, observing that Section 2

assume[s] that the right of male inhabitants to vote was the especial object of its protection, [and] it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby conceded to the states as a state's right.

323. Both the Bonfield and Margolis articles, supra note 4, for example, were written as eloquent but ultimately unsuccessful briefs for congressional and judicial enforcement of Section 2.
324. United States v. Anthony, 24 F. Cas. 829, 831 (C.C.N.D.N.Y. 1873) (No. 14,459) (emphasis added). Justice Hunt supported this approach by stressing the express protection of male rights in the Fourteenth and Fifteenth Amendments. Id. He also cited the now infamous Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), a decision in which—to his credit—he did not join the declaration that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life." Id. at 141 (Bradley, J., concurring).
However, misogyny aside, the courts have tended to shy away from any attempt to invoke Section 2. Thus, when Eugene Dennis argued that one member of the House Committee on Un-American Activities, John E. Rankin of Mississippi, "[was] not a member of Congress at all" in light of "the election laws and practice of Mississippi," the court of appeals characterized the assertion that the Committee's action was invalid as "closely approach[ing] the fantastic" and "sheer nonsense," citing in support of its conclusion one of the very few "reasoned" explications of Section 2, *Saunders v. Wilkins.*

In *Saunders* the Court of Appeals for the Fourth Circuit rejected an attempt to use Section 2 to attack the Virginia poll tax. Saunders had sued to have his name placed on the ballot in the 1944 election as a candidate for the office of "member of the House of Representatives from the State at large," alleging that the poll tax had the purpose and effect of abridging the right to vote and required both reduction in the state's delegation and election of the remaining members at-large. The court dismissed his complaint, holding "this contention presents a question political in its nature which must be determined by the legislative branch of the government and is not justiciable."

This conclusion, given then-prevailing notions of what constituted a political question, was probably appropriate. Prior to *Baker v. Carr,* the Court treated virtually every case posing representation issues as one subject to the "exclusive authority" of Congress, making them a political question. The invocation of Section 2 by one of his victims is, accordingly, paradoxical, given what we suspect Section 2's proper role might be vis-à-vis such limitations.

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325. Dennis v. United States, 171 F.2d 986, 992 (D.C. Cir. 1948). Dennis's conviction was, of course, subsequently affirmed by the Supreme Court in an abandonment of the First Amendment in the face of the McCarthy-fueled Red Scare of the period. See Dennis v. United States, 341 U.S. 494 (1951). As we have already noted, see supra note 259, Senator McCarthy was the beneficiary of a decision that struck down a state-imposed limit on his candidacy. The invocation of Section 2 by one of his victims is, accordingly, paradoxical, given what we suspect Section 2's proper role might be vis-à-vis such limitations.

326. Dennis, 171 F.2d at 992-93.

327. 152 F.2d 235, cert. denied, 328 U.S. 870 (1946), reh'g denied, 329 U.S. 825. As we make clear, our characterization of the decision as "reasoned" refers only to the fact that the court purported to examine the issue with some care. Id. at 235-36.

328. Virginia was entitled to nine Representatives under the 1940 reapportionment. Saunders argued the poll tax abridged the right to vote of 60% of the population and required the delegation be reduced to four. If that was the case, the Representatives would need to be elected at large, consistent with the Court's holding in Smiley v. Holm, 285 U.S. 355 (1932). Saunders also maintained the tax posed equal protection problems, a contention dismissed on the authority of *Breedlove v. Suttles,* 302 U.S. 277 (1937), in which the Court, citing *Minor v. Happersett,* 88 U.S. (21 Wall.) 162 (1874), held that "the State may condition suffrage as it deems appropriate." *Breedlove,* 302 U.S. at 283.

329. *Saunders,* 152 F.2d at 237.
“political thicket” it ought not enter.\textsuperscript{330} The tortured logic of \textit{Saunders}, however, revealed a court struggling to avoid the issue, rather than one trying to determine whether the Constitution had been violated. The question presented was “political,” the court reasoned, because of the uncertain effect of poll taxes “or other qualifications for voting” in other states, if and when Section 2 was applied to the practices of other states.\textsuperscript{331} We find it difficult to understand, however, what difference possible loss of representation in other states made. The complaint before the court did not require it to determine the overall composition of Congress, which at that time arguably was a political determination.\textsuperscript{332} The central issue in \textit{Saunders} was whether an abridgment existed in Virginia, and, if so, whether there should be a reduction of Virginia’s total number of representatives from the nine to which Congress had declared it entitled.

Most courts subsequently recognized, as Professor Emerson predicted,\textsuperscript{333} that the holding in \textit{Saunders} would not survive the Court’s reassessment of the political question doctrine in \textit{Baker}.\textsuperscript{334} Other judicial roadblocks were needed, and soon appeared. In \textit{Lampkin v. Connor},\textsuperscript{335} for example, the plaintiffs attacked a variety of allegedly discriminatory voting practices in three southern states. The district court dismissed the complaint, finding that the plaintiffs lacked standing and, in the alternative, that they could not obtain “the relief they seek” since Congress had not expressly “implemented” Section 2.\textsuperscript{336}

Once again, the logic embraced was suspect. With regard to the standing question, the court stated it would be “sheer speculation” that an alteration in the allocation of representatives would follow if Section 2 were applied.\textsuperscript{337} The court also alleged it was “problematical” that the states in question, if confronted by the spectre of reduction in representation, would end the disputed practices.\textsuperscript{338} The first

\begin{itemize}
  \item \textsuperscript{330} Colgrove v. Green, 328 U.S. 549, 554, 556 (1946) (opinion of Frankfurter, J.).
  \item \textsuperscript{331} \textit{Saunders}, 152 F.2d at 238.
  \item \textsuperscript{332} However, that issue is now clearly justiciable. See United States Dep’t Commerce v. Montana, 112 S. Ct. 1415 (1992) (rejecting state challenge to the loss of one seat after the 1990 census, but finding the issue justiciable).
  \item \textsuperscript{333} “Similarly, \textit{[Baker]} may even open up such questions as federal court enforcement of Section 2 of the fourteenth amendment . . . .” Thomas I. Emerson, \textit{Malapportionment and Judicial Power}, 72 YALE L.J. 64, 66 (1962).
  \item \textsuperscript{334} See, \textit{e.g.}, Carey v. Klutznick, 637 F.2d 834, 838 (2d Cir. 1980); United States v. Sharrow, 309 F.2d 77, 80 (2d Cir. 1962).
  \item \textsuperscript{335} 239 F. Supp. 757 (D.D.C. 1965).
  \item \textsuperscript{336} \textit{Id.} at 762.
  \item \textsuperscript{337} \textit{Id.} at 760.
  \item \textsuperscript{338} \textit{Id.} at 762.
\end{itemize}
of these assertions ignored the plain language of both Section 2 and the parallel United States Code provision, which declare that representation shall be reduced, not that it might be reduced, if only one of the constitutional actors finds the will to do so. The second assertion, that a state might opt to continue the improper practice, in turn, is irrelevant. Section 2 was not inserted in the Fourteenth Amendment as a declaration that states must extend the franchise. Instead, it was the product of a deliberate decision to offer the states an option regarding the scope of the right to vote and to signal the consequences if a state decided to deny, or in any way abridge, the voting rights of particular individuals.

The argument regarding congressional implementation rested on the assumption that a lack of data documenting the extent to which the right to vote had been denied or abridged ended the matter. The court stressed that Congress had not asked the Census Bureau to collect the information and that the President, who is to inform Congress as to “the number of Representatives to which each state would be entitled,” could not make the appropriate factual determinations. This is, to say the least, a curious approach to what would otherwise appear to be a constitutional mandate. Courts do not, for example, characterize equal protection or due process claims mounted pursuant to Section 1 of the Fourteenth Amendment as ones in which the availability of constitutional protection depends on the extent to which Congress has acted. Indeed, the right to be free from invidious racial discrimination in the public schools was recognized in spite of congressional inaction and the continuing enforcement of such policies in the schools of the District of Columbia. Moreover, one also wonders just what congressional action is required, since the command articulated in Section 2 also appears in the United States Code. When the district court stated in Lampkin that the parallel provision in the United States Code “is merely declaratory of § 2 of the Fourteenth Amendment” and “does not implement that constitutional provision,” it chose to ignore a constitutionally enacted expression of national policy because Congress had not previously taken some indeterminate additional steps, a state of affairs that stands the Supremacy Clause on its head.

340. The court characterized “the controversy here” as one “concern[ing] only the question of legal authority without involving a factual dispute,” making it fit for summary judgment. Lampkin, 239 F. Supp. at 763.
The court of appeals affirmed the district court ruling in Lampkin in the light of the subsequent passage of the Voting Rights Act of 1965, an action the court characterized as "Congress . . . select[ing] its own method of insuring the right of all citizens to vote."343 The panel found "Congress has, thus, acted vigorously and comprehensively to remove the obstacles to voting of which the appellants complain" and that allowing the suit to go forward "would not afford [these actions] the respect an Act of Congress deserves."344 It cautioned, however, that "we think it also premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say."345 This statement seems to reject the district court’s suspect approach to Lampkin’s Section 2 claim and to affirm that Section 2 may still be invoked. However, it would be a mistake to read too much into this, for Section 2 continues to be honored more in the breach than the observance, as the futile efforts of Victor Sharrow, on Section 2’s behalf, establish.

Sharrow, described by the late Professor Younger as Section 2’s "only champion," was the aberrant sort of person who, while in law school, "did not rest content with merely reading the opinions in the case book; he read the Constitution itself. And in the Constitution he made what was to him a remarkable discovery."346 Obviously, that find was Section 2, which Sharrow embraced with a fervor that generated innumerable lawsuits and a privately published book expressing his disdain for those who could not see that the single “living provision providing for the apportionment of Representation” was “the one and only [S]ection 2 of the 14th Amendment.”347

Sharrow mounted, as far as we can determine, at least ten legal assaults invoking Section 2, each of which failed.348 The first apparently occurred in 1960, when he refused to fill out the required census

344. Id. at 511.
345. Id. at 512.
346. Younger, supra note 286, at 841, 845.
347. Victor Sharrow, Unconstitutional Congressional Government 58 (1960). The book is a delight—in a perverse sort of way. It was written by someone who reminded the reader that "Victor Sharrow rhymes with Clarence Darrow" and who predicted, incorrectly, that the book would "cause the biggest political explosion in the United States since the 'century' old, misnamed, Civil War . . . ." Id. at 1.
348. These include the decisions we discuss below, as well as Sharrow v. Reagan, 697 F.2d 297 (2d Cir. 1982); Sharrow v. Myerson, 646 F.2d 562 (2d Cir. 1980), cert. denied, 452 U.S. 939 (1981); Sharrow v. Holtzman, 614 F.2d 1290 (2d Cir. 1979), cert. denied, 449 U.S. 840 (1980). There are no lower court citations for another decision, Sharrow v. Abzug, cert. denied, 415 U.S. 958, reh'g denied, 416 U.S. 952 (1974).
form ""specifically to raise a constitutional case and controversy to determine whether the census law was constitutional.""§49 Sharrow was convicted of violating the statutory requirement that one answer census questions.§50 He appealed, but the court rejected his attempt to invoke Section 2, stating ""[t]he denial of the suffrage is a complex question, and it has been thought inappropriate to use census forms in order to obtain information relative thereto.""§51 That being the case, ""there was nothing unconstitutional in the omission from the census form of a question relating to disenfranchisement.""§52

Chief Judge Lumbard, in a concurring opinion, made it clear the only issue for the panel, vis-a-vis the conviction, was whether the requirement that one answer census questions was itself constitutional.§53 Sharrow, accordingly, took a new tack, arguing in a series of cases that the Census Bureau had violated the implicit command of Section 2 by failing to collect information regarding denials or abridgments of the right to vote.§54 The courts conceded that Sharrow presented complex and potentially important constitutional questions, assuming a denial or abridgment had occurred.§55 The problem, of course, was that the Census Bureau had not gathered the data, and Sharrow himself had not ""undertake[n] the Herculean task of compiling the necessary statistics,""§56 to demonstrate—at least to the courts'
satisfaction—the "alleged continued disenfranchisement of voters in States." Once again, Sharrow lacked standing.

Quite apparent in these decisions is a judicial inclination to avoid, rather than resolve, the issues. Some of the courts' hesitancy was Sharrow's fault: he arguably sued the wrong people and raised the wrong claims. However, if "apportionment practice would seem to indicate that at least the first sentence of Section 2 has been considered mandatory," we wonder why the second is not also, unless "shall" somehow changes meaning in the transition from apportionment to reduction in representation. Moreover, it is difficult to understand why Victor Sharrow was not allowed to challenge the candidacy of someone running for a seat that might not legally exist or why, in the alternative, the Census Bureau is not obligated to gather the data necessary to determine whether there is an office for which a candidate may run.

B. Reappraising Section 2: Idle Comment or Constitutional Command?

Today, Section 2—when discussed at all—is generally characterized as a provision "that became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment." It is, by virtue of "the efficacy of the other efforts to vindicate the right to vote," relegated to the constitutional backwaters. Our reading of the record leads us to the conclusion that these impressions are incorrect. Moreover, little can be found in the limited amount of judicial or scholarly debate that has taken place to disabuse us of this conclusion.

357. Sharrow v. Brown, 319 F. Supp. at 1016. See also Sharrow v. Peyser, 443 F. Supp. at 325 (Sharrow "has not established that the alleged failure to enforce" Section 2 "has resulted in a detriment to his rights of representation").
359. Sharrow v. Brown, 447 F.2d at 97-98 ("Sharrow has not sued the Secretary of Commerce, nor the President, nor the Clerk of the House of Representatives."). This, presumably, was why he selected Ronald Reagan as his target in the equally unsuccessful, but unreported, Sharrow v. Reagan, 697 F.2d 297 (2d Cir. 1982).
360. Sharrow v. Brown, 447 F.2d at 98 ("Because of our disposition of the present appeal, we do not reach many of the difficult problems of constitutional interpretation raised by [Section 2] not argued by Sharrow.").
361. Id. at 98 n.9.
362. As we indicate elsewhere, see infra note 437 and accompanying text, "shall" is the language of command, "mandatory and not precatory." Banner Indus. v. Central States Pension Fund, 875 F.2d 1285, 1288 n.2 (7th Cir. 1989).
363. MATHEWS, supra note 301, at 14.
364. CORWIN, supra note 284, at 529.
The most important champion of Section 2 was the second Justice Harlan, who argued vigorously in his dissent in *Reynolds v. Sims* that Section 2 "expressly recognizes the States' power to deny 'or in any way' abridge the right of their inhabitants to vote for the members of the [State] Legislature."365 In a subsequent dissenting opinion, he further observed, in an almost plaintive manner, "If that history does not prove what I think it does, we are at least entitled to be told why."366

Justice Harlan stressed that "[t]he [Fourteenth] Amendment is a single text"367 and insisted that "[t]he comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today."368 In this instance, the "result" that concerned him was the belief that the Equal Protection Clause somehow restricted certain choices available to the states, at least as a matter of the original understanding of the Amendment.369 Probing deeply into the history and events surrounding the drafting and adoption of the Amendment, Justice Harlan concluded that Congress "deliberately chose not to interfere with the States' plenary power . . . to control voting rights because [they] believed that if such restrictions were included, the Amendment would not be adopted."370 Thus, as discussed previously, the states retained the "express power" to "deny or abridge" a "right" they granted, subject only to the "remedy" set forth in Section 2, if and when the states acted in that manner.

As various commentators have stressed, Justice Harlan's analysis has never been directly addressed by other members of the Court. Neither Chief Justice Warren, writing for the majority in *Reynolds*, nor Justice Stewart, performing the same task in *Carrington*, dealt expressly with what Justice Harlan had to say, a silence commentators


368. Id.

369. See id. at 590-91 ("[H]ad the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures.").

370. Id. at 607 (emphasis added). Justice Harlan’s examination of the record appears id. at 595-608 and stresses, among other facts, statements of the individual framers of the amendment to the effect that "[t]he second section leaves the right to regulate the elective franchise with the States, and does not meddle with that right." Id. at 601 (quoting Senator Howard, CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)).
have found "remarkable and confounding" for it seemed "tacitly to have conceded the argument, if not the vote." This has prompted even those observers who harbor reservations about Justice Harlan's conclusions to concede that "[t]he persistence with which [he] has maintained his position is completely understandable," since "[n]either in [Reynolds] nor in any of the other reapportionment cases did any member of the Court fault [his] historical presentation." Despite the lack of rebuttal from other members of the Court, it has not led them to embrace his position, largely because of a belief that "the language of the Equal Protection Clause 'is plainly capable of being applied to all subjects of state legislation' and it is broad enough to include the claim to political equality recognized in the Reapportionment Cases."

An abiding belief that the exalted commands of Section 1 should be read expansively does not mean Justice Harlan's reading of Section 2 is incorrect. Rather, advocates for an appropriately "modern" interpretation argue Justice Harlan's views should be discounted in light of competing objectives, goals to be attained largely through a more "elastic" reading of the interrelationship between Sections 1 and 2, recognizing that "contemporary circumstances, scarcely foreseeable even by the most visionary reconstructionists, are so vastly different." This is not necessarily an inappropriate approach to a Constitution that lacks "the prolixity of a legal code" and whose "nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Nevertheless, it is an approach to the text that ignores, rather than explains, the individual role and meaning of its constituent parts. Such an approach, arguably, is a luxury academics enjoy. But

371. Carl A. Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 SUP. CT. REV. 1, 75.
372. Van Alstyne, supra note 4, at 36.
373. Id. at 35.
374. Auerbach, supra note 371, at 75 (quoting Alexander Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 59-61 (1955)). See also The Supreme Court, 1963 Term, 78 HARV. L. REV. 248, 249 (1964) ("Mr. Justice Harlan's historical evidence is persuasive, and a rebuttal must look beyond the apparent intent of the framers to the organic nature of the Constitution.").
375. Van Alstyne, supra note 4, at 37.
376. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). As we have stressed, see supra text accompanying notes 311-314, there is ample room to dispute just what the "important objects designated" within the Fourteenth and Fifteenth Amendments might actually have been. For current purposes, we simply note the language of the amendments themselves and the conclusions that follow.
we would normally expect that the Court itself would refuse to remain silent in the face of a position espoused with the sort of vehemence employed by Justice Harlan. Quite the contrary, the Court has been surprisingly unwilling to respond to the challenge in the only post-Reynolds cases in which Section 2 has been mentioned, Richardson v. Ramirez\textsuperscript{377} and Hunter v. Underwood.\textsuperscript{378}

In Richardson the Court considered an equal protection challenge to California’s decision to deny the voting franchise to three convicted felons who had been paroled. Focusing directly on the language in Section 2 that made an exception for “participation in rebellion or other crime,” the Court held that

the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.\textsuperscript{379}

The majority in Richardson acknowledged Justice Harlan’s position in Reynolds and Carrington, characterizing it as an assertion that “[Section] 2 is the only part of the Amendment dealing with voting rights.”\textsuperscript{380} But they stated they

[N]eed not go nearly so far as Mr. Justice Harlan, [given] the demonstrably sound proposition that [Section] 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section] 2 imposed for other forms of disenfranchisement.\textsuperscript{381}

Whether or not one need “go so far” as Justice Harlan, it was apparent that most members of the Court were willing to make at least a tacit concession to certain aspects of his reasoning, admissions that are highly significant for our purposes. For example, the majority in Richardson declared, “[T]he framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here.”\textsuperscript{382} They also rejected an attempt to characterize

\begin{itemize}
\item \textsuperscript{377}. 418 U.S. 24 (1974).
\item \textsuperscript{378}. 471 U.S. 222 (1985).
\item \textsuperscript{379}. Richardson, 418 U.S. at 54.
\item \textsuperscript{380}. \textit{Id.} at 54-55.
\item \textsuperscript{381}. \textit{Id.} at 55.
\item \textsuperscript{382}. \textit{Id.} at 43.
\end{itemize}
Section 2 as "an accident of political exigency," stressing "[i]t is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means."383 That meaning was captured by Justice Marshall's dissent, in which he declared that Section 2 "put Southern States to a choice—enfranchise Negro voters or lose congressional representation."384 Thus, while the other members of the Court remained silent in the face of Justice Harlan's assault, they seemed quietly to apply that aspect of his analytic framework that treated Sections 1 and 2 as parts of a whole.

Hunter, in turn, involved a provision in the Alabama Constitution of 1901, disenfranchising felons who committed "any crime . . . involving moral turpitude."385 The Court found that Section 182, while neutral on its face, "was motivated by a desire to discriminate against blacks on account of race and . . . continues to this day to have that effect. As such, it violates equal protection under Arlington Heights."386 The Court considered, and rejected, an argument predicated on Section 2, stating that "we are confident that Section 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates Section 1 of the Fourteenth Amendment."387 That depiction of Section 2, of course, simply means that the Court will not use it to "revive" state actions that otherwise run afoul of the Amendment, and is consistent with the view expressed by some that "[S]ection two reflects only that racial restrictions on voting were not included in section one. It does not necessarily imply that they were excluded."388 That proposition, however, says nothing about what follows when a state action denies or abridges in ways that do not reflect racial animus.

Justice Harlan's analysis has not been completely ignored. Professor Van Alstyne, for one, examined the same history and reached the opposite conclusion, albeit, as he noted, one predicated on emphasizing different portions of the record. Perhaps the most important

383. Id. at 55.
384. Id. at 74 (Marshall, J., dissenting). Justice Marshall, accordingly, quarreled not with the majority's analysis of Section 2, so much as with what he characterized as its assumption that the "special penalty" in Section 2 could be treated as "the exclusive remedy for all forms of electoral representation." Id.
386. Id. at 233. That is, under the doctrine articulated in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the state was unable to show the section would have been enacted absent the "motivating" factor of racial discrimination.
388. Komesar, supra note 4, at 208.
aspect of Van Alstyne's analysis is his emphatic rejection of Justice Harlan's characterization of the Amendment as a "single text." Professor Van Alstyne stressed that "the Fourteenth Amendment was a package of proposals, the more significant of which were pieced together from independent bills offered by different men at different times and originally debated in Congress as wholly separate amendments." This allowed him to read the equal protection guarantee in Section 1 independently and expansively and meant he found no problem in extending that provision to voting.

Professor Van Alstyne's approach has appeal, assuming that the objective is to explain how the final package was crafted and that the developmental process should dictate how one reads the language that emerged. But these assumptions run contrary to established interpretive canons, which postulate that one starts with the text and resorts to secondary materials and rules of construction only when the text itself is unclear. More to the point, the strength of Professor Van Alstyne's arguments discounting the specific statements quoted by Justice Harlan depends on our willingness to accept his version of events, when the most he seemingly can say for it is that it "makes fully as much sense . . . as the preemptive view proffered by Mr. Justice Harlan." 390

In the immediate context of this concession, this means statements by Thaddeus Stevens suggest "that § 2 no more recognizes a right of states to disfranchise Negroes under § 1, than a separate statute forfeiting the right to vote of a criminal convicted of larceny recognizes his right to commit larceny." The problem with this comparison is that his example is, to say the least, infelicitous and at odds with the actual history of Section 2. Criminal sanctions both recognize society's judgment that certain acts are not to be tolerated and articulate a punishment scheme to be applied if and when these prohibitions are ignored. But as we have already seen, Section 2 did not tell the states they could not "deny" or otherwise "abridge" the right to vote. Indeed, the individuals who crafted that provision went to great lengths to explain both that the states retained that power and

389. Van Alstyne, supra note 4, at 43. Professor Van Alstyne is not the only one to discuss Section 2, but his is the most detailed examination of Justice Harlan's position yet made.
390. Id. at 58.
391. Id. at 59
that Section 2 simply made it clear what the consequences would be if they exercised it. 392

Moreover, as the Court stressed in Richardson, Section 2 by its express terms recognizes the right of states to deny the franchise for "rebellion, or other crime." 393 This exception to the proportionate reduction mandate, using normal principles of construction, seems to acknowledge a preexisting power while exempting from sanction one aspect of its exercise. That is, using Justice Harlan's approach, voting matters are left to the states, subject to the understanding that if a state denies or abridges in any way whatever right to vote it might confer, in ways other than those expressly excepted, then certain consequences will follow.

As Professor Van Alstyne observes, that approach may have had the immediate practical effect in 1866 of "preserving Republican control of Congress." 394 But it says nothing about how other matters—discussed in other sections of the Amendment—play themselves out. For example, Professor Van Alstyne quotes at length from a statement by Representative Bingham in which Bingham described Section 2 as simply "a penalty for a violation on the part of the people of any State of the political right of franchise guaranteed by the Constitution to their free male fellow-citizens of full age." 395 This characterization, repeated twice in response to questions from other individuals during the debate, 396 seems damning—at least in response to, as Bingham expressed it, whether the reduction provisions operate "in aid of the [Article IV, Section 4] guarantee [of a Republican Form of Government], not in avoidance of it." 397 But it is also a curious interpretation since one does not normally expect to find penalties for violation of the Constitution within the text itself. As Chief Justice Marshall made clear long before the adoption of the Amendment, "[A]n act of the legislature, repugnant to the constitution, is void." 398 That being the

392. See supra text accompanying notes 311-314 and infra text accompanying notes 400-401.
393. See U.S. Const. amend XIV, § 2.
394. Van Alstyne, supra note 4, at 58.
396. Id.
case, there appears to be no need for a further "penalty," unless other objectives are sought.\footnote{399}

One possible explanation is that Bingham believed it essential to place the penalty within the Constitution itself, lest a state against whom it was inflicted attempt to raise an Article IV, Section 4, objection if the penalty were merely the creature of statute. Interestingly, Representative Boutwell seemed to have this view in mind in 1869 when he characterized Section 2 as "a political penalty for doing that which in the first section it is declared the State has no right to do."\footnote{400} Boutwell's subsequent remarks, however, belie any notion that the courts may not themselves recognize and impose the penalty:

We were then acting in the presence of the fact that many States of the Union were doing that which the first section declared they had no right to do. It was uncertain when Congress would exercise the power conferred by the fifth section of the fourteenth amendment, and in order that the States should not take advantage of their own wrong during the period while Congress might be inactive a penalty was provided.\footnote{401}

More to the point, one can certainly argue that the Court itself recognized distinctions between and among the various sections of the Fourteenth Amendment and the means to be employed to enforce them. In The Civil Rights Cases, for example, the Court stressed a close relationship between Sections 1 and 5 when it asked, with regard to the latter provision:

To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectively null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to.\footnote{402}

\footnote{399. Unless, of course, the objective is not simply to protect rights, but to keep the South in its conquered, dependent state. That, as we have indicated, was exactly what the Radical Republicans sought, and we believe Professor Van Alstyne did not adequately account for this reality.}

\footnote{400. CONG. GLOBE, 40th Cong., 3d Sess. 558-60 (1869).}

\footnote{401. Id. With regard to the measures being debated, which extended suffrage to the freedmen and tracked what eventually became the Fifteenth Amendment, Boutwell observed "[p]ower was given to Congress to remedy this evil, and that power Congress is now called upon to exercise." Id. One difficulty with this is that the vision of the Amendment proposed by Stevens and Boutwell was not shared by all of their colleagues. Moreover, their remarks are contrary to the then-appropriate distribution of powers reflected either in the text of the Amendment itself or, as indicated above, in the decisions of the Court that followed in its wake.}

\footnote{402. 109 U.S. 3, 11 (1883).}
Viewed in this manner, Sections 1 and 5 articulate not only certain guarantees, but also the means for attaining them—congressional action. Section 2, in turn, expresses a slightly different goal and recognizes, within the context of that objective, the more sweeping, inherent authority states exercised in matters affecting the franchise. And because of potential conflicts with other sections of the Constitution, Section 2 contained an express constitutional penalty.

This reading is entirely consistent with the then-accepted, albeit now-discarded, characterization of voting as a mere political privilege the state graciously confers. It also makes sense regardless of the analytic path taken: Harlan’s unified view of the Amendment or Van Alstyne’s fragmented approach.

Taken together, either interpretation—that of Justice Harlan or that of Professor Van Alstyne—is permissible, depending on which pieces of the record one selects and how one chooses to view them. This is not unusual given the problems posed when resorting to legislative history. Of course, the problem need not arise if one posits that the language of the Amendment is susceptible to a clear interpretation. We believe such a clear interpretation is certainly possible, particularly if one recognizes the political chicanery that attended the drafting and embrace of Section 2.

More importantly, contemporaneous decisions of the Court treated Section 2 as an express recognition of the inherent power of the states over voting matters. In one of the very few cases squarely to consider Section 2, Minor v. Happersett, the Court lent credence to this view when—upon considering Section 2—it observed, “Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants?” The answer, at least at that time,

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403. Notions regarding the uses and abuses of legislative history, particularly in light of what many have characterized as “the new textualism,” are beyond the scope of this Article. For a brief treatment that sketches the history and parameters of the dispute, see Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 MINN. L. REV. 241 (1992). For the views of some of the main combatants, see Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845 (1992); Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581 (1989-90); Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277 (1990).

404. Minor, 88 U.S. (21 Wall.) at 174. The approach articulated in Minor prevailed until the transformation of voting from a privilege to a fundamental right in Baker. See, e.g., Snowden v. Hughes, 321 U.S. 1 (1944) (Court refuses to consider whether state’s refusal to place name of nominated candidate on ballot raises claim under Civil Rights Act); Pope v. Williams, 193 U.S. 621 (1904) (individual entering state must declare intent to become citizen and resident one year before registering to vote). For general discussions
was simple: "[t]he Constitution has not added the right of suffrage to
the privileges and immunities of citizenship."[405] State practices con-
trolled, and those usages made it clear that "in no State were all citi-
zens permitted to vote"—certainly not individuals like Virginia Minor,
who was, after all, a "mere" woman.[406]

One year later, Justice Hunt echoed many of these sentiments:

By the second section of the Fourteenth Amendment, each
State had the power to refuse the right of voting at its elections to
any class of persons; the only consequence being a reduction of its
representation in Congress, in the proportion which such excluded
class should bear to the whole number of its male citizens of the age
of twenty-one years. This was understood to mean, and did mean,
that if one of the late slaveholding States should desire to exclude
all its colored population from the right of voting, at the expense of
reducing its representation in Congress, it could do so.[407]

Justice Hunt spoke in dissent, but his observations were well within
the view of state power articulated in a line of decisions in which the
Court consistently presented a history of the Reconstruction Amend-
ments that made it quite clear the states controlled the voting
franchise, subject only to whatever "nondiscrimination" principles
might be articulated in the amendments themselves. As the Court ob-
erved in 1872:

A few years' experience satisfied the thoughtful men who had been
the authors of the other two amendments that, notwithstanding the
restraints of those articles on the States, and the laws passed under
the additional powers granted to Congress, these were inadequate
for the protection of life, liberty, and property, without which free-
dom to the slave was no boon. They were in all those States denied
the right of suffrage. The laws were administered by the white man
alone.[408]

Justice Hunt stressed,

A higher privilege was yet untouched; a security, vastly greater than
any thus far given to the colored race, was not provided for, but, on
the contrary, its exclusion was permitted. This was the electe

of the history and issues, see Bernard Grofman, Voting Rights, Voting Wrongs:
The Legacy of Baker v. Carr (1990); Frederic S. Le Clercq, The Emerging Federally Se-
cured Right of Political Participation, 8 IND. L. REV. 607 (1975); Alexander Athan Yanos,
Note, Reconciling the Right to Vote with the Voting Rights Act, 92 COLUM. L. REV. 1810

406. Id. at 172.
408. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872). Indeed, the Court argued
with regard to Section 5 that "[w]e doubt very much whether any action of a State not
directed by way of discrimination against the negroes as a class, or on account of their race,
will ever be held to come within the purview of this provision." Id. at 81.
franchise,—the right to vote at the elections of the country, and for
the officers by whom the country should be governed.\textsuperscript{409} The Thirteenth and Fourteenth Amendments being insufficient, then, the Fifteenth followed: “The negro having, by the [F]ourteenth [A]mendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.”\textsuperscript{410}

The specific holding of \textit{Minor}, that Missouri did not violate the Fourteenth Amendment when it denied women the right to vote, has been superseded by the Nineteenth Amendment. And the views expressed in \textit{Reese} about the permissible scope of various federal statutes enacted pursuant to the Fourteenth and Fifteenth Amendments have, in turn, been modified by a Court willing to give a much more expansive reading to the authority conferred.\textsuperscript{411} These developments, however, say nothing about the nature and scope of Section 2 itself, as a matter of either original intent or modern interpretation. More importantly, the vision of Section 2 articulated in \textit{Minor}, voiced so soon after the section’s ratification, cannot be lightly discarded given the settled doctrine that “a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.”\textsuperscript{412} This is especially appropriate in voting cases since, as the Court stressed in \textit{Powell}, “[t]he relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen’s intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.”\textsuperscript{413}

Finally, while the Court’s treatment of the franchise has changed dramatically since Section 2 was framed, that transformation does not mean the state’s role has somehow vanished. Neither the Court nor the individuals who framed the Fourteenth Amendment viewed the right to vote as “fundamental.” Rather, all characterized voting as a “political” rather than “civil” right,\textsuperscript{414} a distinction that resulted in ju-

\textsuperscript{409} \textit{Reese}, 92 U.S. at 247 (Hunt, J., dissenting).
\textsuperscript{410} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) at 71.
\textsuperscript{412} \textit{Myers v. United States}, 272 U.S. 52, 175 (1926).
\textsuperscript{413} \textit{Powell}, 395 U.S. at 547.
dicial scrutiny of state actions that would be cursory at best. As the Court observed in 1849:

Certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given.

\[415\]

Baker and Reynolds obviously altered the constitutional calculus in one sense by recognizing the fundamental importance of the right to vote. But this new approach means only that the States must allege "compelling" justifications when they deny or abridge the right and that the means selected must be narrowly tailored. It does not indicate the states have no role.

Indeed, the often repeated contention that classifications involving fundamental rights and suspect classes are assessed within a matrix where that which is "strict in theory" is "fatal in fact" is misleading, at least for the purposes of reaching a proper understanding of modern equal protection theory. Clearly, the purpose of the test is not simply to invalidate perforce any and all burdens on fundamental rights. Rather, the Court has eschewed all "absolutist" approaches to constitutional interpretation and application, even in the face of what otherwise might appear to be clear constitutional language dictating that result.

\[417\] The Court generally approaches such matters with the

\[415\] Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849)


\[417\] The classic example is the First Amendment, which, as Justice Black observed, "says in no equivocal language that Congress shall pass no law abridging the freedom of speech, press, assembly, or petition." Barenblatt v. United States, 360 U.S. 109, 140 (1959) (Black, J., dissenting). Of course, one could quibble—as did Justice Black when he either wrote or joined in the following—about whether the speech in question was the sort the framers had in mind, see, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."); was consistent with the environment within which it transpired, see, e.g., Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting) ("It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he
avowed intent of sustaining government action, if the interests are found to be compelling and the means selected to attain those objectives are narrowly tailored.

The normal strict scrutiny calculus is, however, designed to tell us only whether a given government action may stand or fall. It is expressly not an approach to be employed where the Constitution recognizes the authority to act and simply conditions that authority by making clear the consequences of the action. This is a vacuum Section 2 fills nicely when the subject is the right to vote, and the question is not whether it may be denied, but only at what cost. When Section 2 was inserted in the Constitution, the only provisions bearing on the exercise of the voting franchise were found in Article I and Section 1 of the Fourteenth Amendment. Since then, they have been expanded to include the Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. The fact that the contours of the field have altered does not, however, mean it is proper to ignore any particular provision of the text. Because Section 2 cannot be rightfully ignored, it is necessary to consider the extent to which it advances the case for state-imposed term limits and, inevitably, the impact it has if such limits are constitutional.

IV. Section 2 and Term Limits

Our belief that Section 2 must be taken into account in voting matters, obviously, is not determinative in itself. Does a revitalized Section 2 factor into the term limits debate? We maintain it does for two reasons. First, Section 2 expresses a commitment to a state role in electoral matters that complements, and is not supplanted by, any collateral concerns raised by the other substantive guarantees expressed in the Fourteenth or succeeding amendments. Second, the current Court interpretations of the parameters of the right to vote and, particularly, the relationship between voter and candidate indicate that state-imposed limits on the terms of United States Representatives do violate Section 2's mandate that the voting franchise is not to be "denied or in any way abridge[d]." We now consider each of these arguments in turn.

pleases."); or was actually "speech," see, e.g., Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) ("Cohen's absurd and immature antic, in my view, was mainly conduct and little speech.").

418. See U.S. Const. art. I, § 2, cl. 1 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").
A. Section 2 and the Reserved Powers of the States

Taken at face value and as a matter of the framers' intent, Section 2 expresses the fundamental, residual role of the states in electoral matters, and it provides a mechanism for enforcing compliance with those aspects of voting that do not violate major substantive guarantees articulated in other provisions of the text. As Senator Fessenden stressed, the Fourteenth Amendment "leaves the power where it is; but [Section 2] tells [the states] most distinctly, if you exercise that power wrongfully, such and such consequences will follow." This suggests that Jefferson may well have had the better of things in his debate with Story regarding the Tenth Amendment. By recognizing expressly that considerable authority to regulate the franchise remained with the states, Section 2 confirmed that the Constitution "has exercised the power [only] in part" and that, consistent with the Tenth Amendment, the states remain free to act in a variety of ways.

Moreover, Section 2 cannot be brushed aside as a necessary casualty in society's quest for an appropriately "modern" understanding of Section 1's equal protection guarantee. This does not mean we agree in all respects with Justice Harlan. His insistence that the Equal Protection Clause does not apply in cases involving state regulation of voting matters seems both incomplete and mistaken. Section 2, by its express terms, addresses only those circumstances in which the right to vote is "denied" or "in any way abridged" in certain specified election contests. As indicated, the positions listed in Section 2 conspicuously do not include United States Senators, an omission that reflects the express limitation on the amendment process to the effect that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." We doubt a state would normally consent to the loss of either of its senatorial seats. But it is interesting to speculate about...
whether the express embrace of senatorial term limits, in the face of the clear language of Section 2, constitutes such consent.

Section 2’s recognition that the state remains the principal actor in electoral matters says nothing about how the state should treat the franchise once conferred, absent the application of either Section 2’s penalty provisions or other express constitutional guarantees. Applications of Section 2, of course, simply involve questions about whether the state action denies or in any way abridges the right to vote, matters we will address shortly. Other constitutional provisions, in turn, pose different but arguably related issues. There is a distinction between the allocation of the power to grant or withhold the franchise and the imposition of conditions on the manner in which such authority is exercised. Section 1, for example, indicates that the states shall not deny the equal protection of the laws, which simply conditions the manner in which a state exercises its control over the franchise once conferred. This leaves ample room for a doctrine regarding this “individual and personal” right stating that “all who participate in [an] election are to have an equal vote.” Other constitutional provisions, such as the Nineteenth and Twenty-Sixth Amendments, mean simply that certain nineteenth-century assumptions about whether women or individuals under the age of twenty-one should vote, once expressed through restrictions in Section 2, are no longer valid.

Neither of these views of the constitutional landscape deprives Section 2 of its force, assuming the predicate conditions—a denial or abridgment—are met. For instance, there is no inconsistency between the Court’s recognition in Minor that Section 2 acknowledged that “[f]or nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage” and its subsequent declarations that the Nineteenth Amendment was properly enacted and women could vote, state prohibitions notwithstanding. Each amendment and each de-

424. See, e.g., McPherson v. Blacker, 146 U.S. 1, 39 (1892) (“the right to vote as established by the laws and constitution of the State”).
428. Leser v. Garnett, 258 U.S. 130 (1922). Among other things, the individuals challenging the Nineteenth Amendment argued “so great an addition to the electorate, if made without the State’s consent, destroys its autonomy as a political body.” Id. at 136. The Court rejected the contention, stressing the same could have been said of the Fifteenth Amendment, which “has been recognized and acted on for half a century.” Id. In a second
cision simply eliminated one set of circumstances in which Section 2 would apply; neither repudiated the continuing force of its core guarantee where the predicate conditions are met.

One can argue until the constitutional cows come home about whether the individuals who framed Section 2 contemplated its application to anything other than a denial or abridgment of the voting rights of the recently freed slaves. In *The Slaughter-House Cases* and *Strauder v. West Virginia*, for example, the Court declared that the Fourteenth Amendment's "aim was against discrimination because of race or color," and that it "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of" Section 5 of that Amendment. Those narrow readings have long since given way to a more sweeping recognition that "equal" means equal for all and that Section 5 conferred on Congress "the same broad powers expressed in the Necessary and Proper Clause," powers that amply supported a congressional determination that literacy tests were impermissible.

There is no sound reason to believe that the Court would hold differently regarding the reach of Section 2 or that Congress, assuming a need for legislative action, would not apply the prohibition in a similar, sweeping manner. In fact, Section 2 seems to compel this conclusion, "for its language plainly and unambiguously covers a wider field." And, as we have already noted, Section 2 does so in ways a
court, willing to face up to the section's clear commands, would presumably find compelling. Section 2 inescapably mandates that if, as part of the state's inherent power, it does "deny" or "in any way abridge" voting rights, certain consequences shall follow; "the word 'shall' is ordinarily '[t]he language of command.'" Indeed, the Court's treatment of similar constitutional provisions leads one to believe it would not hesitate to so parse Section 2, regardless of the consequences.

The transition from the original understanding that the franchise is a mere political privilege to its current status as a fundamental right does not alter the analysis. If anything, the constitutional history and cases following the ratification of the Fourteenth Amendment reinforce this impression. Constitutional amendments were required to force the states to extend the voting franchise in the states to blacks and women, lower the voting age from twenty-one to eighteen, and abolish the poll tax. And states still remain free, at least as a constitutional matter, to impose literacy requirements, consistent

437. Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 (1935)). As one of the standard treatises indicates, "[u]nless the context otherwise indicates the use of the word 'shall' (except in its future tense) indicates a mandatory intent. Even the permissive word 'may' is interpreted as mandatory when the duty is imposed upon a public official and his act is for the benefit of a private individual." 1A Norman J. Singer, Sutherland Statutory Construction § 25.04 (Sands 4th ed., rev. 1985) (footnotes omitted).


439. U.S. Const. amend. XV.

440. Compare U.S. Const. amend. XIX with Minor v. Happersett, 88 U.S. (22 Wall.) 162, 173 (1874) ("So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.").

441. Compare Oregon v. Mitchell, 400 U.S. 113, 124-31 (1970) (opinion of Black, J.) (Congress may not direct states to lower the voting age in state elections) with U.S. Const. amend. XXVI.

442. U.S. Const. amend. XXIV. The Twenty-Fourth Amendment was, however, arguably unnecessary given the Court's statement in Harper v. Virginia State Bd. Elections, 383 U.S. 663 (1966), that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor" regardless of "the degree of discrimination." Id. at 668.

443. Compare Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (literacy test "has some relation to standards designed to promote intelligent use of the ballot") with Mitchell, 400 U.S. at 131-34 (opinion of Black, J.) (literacy test ban in Voting
with their status as the primary actors in franchise matters, absent an express constitutional prohibition or intervening congressional action.

Professor Van Alstyne's insistence that Justice Harlan was wrong about the scope of Section 1 also misses the point. Simply because the equal protection guarantee governs voting matters says nothing about the inherent authority of the states over the voting franchise. One person, one vote is a matter of equal protection, not due process; as the Court stressed in McPherson, "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States."444 The now fundamental right to vote in federal elections, in turn, flows from certain assumptions made about the meaning of the language in other constitutional provisions that imply (without expressly mentioning) such a right,445 and not from any sense that states have lost all inherent authority in electoral matters.

All of this analysis is arguably tangential to term limit matters, since the question is not whether an individual will vote, but for whom the vote will be cast. As will be discussed shortly, we believe the interrelationship between the right to vote and the right to be a candidate is susceptible to a "deny" or "in any way abridge" treatment within the meaning of Section 2. As a practical matter, that is enough to invoke Section 2's penalties: To the extent that state-imposed limits are constitutional, Section 2 applies.

The more important question at this juncture is whether Section 2 addresses the authority of the states to impose additional qualifications. We think it does for two reasons. As an initial matter, the principle most courts and commentators derive from Powell—that the Qualifications Clauses exhaust the issue446—is suspect if one recognizes that Section 2 is a post-Article I recognition of, and expansion on, the inherent power of the states to control the interrelated questions of individual franchise and political candidacy. More fundamentally, if federal authority over the time, place, and manner of elections includes the ability to require election by district—as Ex parte Siebold suggests447—Section 2's edict applies when the states take actions that

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444. McPherson, 146 U.S. at 38.

445. See, e.g., Wesberry v. Sanders, 372 U.S. 1, 7-8 (1964) (noting "command" of Article I, Section 2 of the Constitution that Representatives be chosen "by the People").

446. See supra text accompanying notes 170-173.

447. See supra text accompanying notes 207-209.
differ in no material respect from that which the Congress accomplished when it carved the states into districts.

The commands of Section 2, accordingly, must be accounted for in any debate about whether state-imposed term limits are constitutionally permissible. The case for Section 2 is by no means conclusive. But it certainly adds force to the argument for a state power to add qualifications, a constitutional impetus that is especially important in light of the questions we have identified regarding other, more traditional approaches to the term limits question.

B. State-Imposed Term Limits: Abridgments of the Franchise?

Whether or not Section 2 is a bulwark in the case for the constitutionality of term limits, if term limits are by any means found constitutional, a second question must be addressed: what are the implications of such a “victory”? Obviously, a state’s term limits would have a substantial impact on the political fortunes of incumbents who reach the end of the time allowed them by the state. The nature and duration of that impact will vary with the jurisdiction. The question for our purposes is whether the effects of a given term limit, as a matter of constitutional law, “deny” or “in any way abridge” the right to vote, either as a matter of Section 2’s original purpose and intent, or as a valid construction in this age.

Regardless of how one characterizes its underlying purpose, the operative dimension of Section 2 was a “gentle and persuasive” attempt to “hold[ ] out to all the advantage of increased political power as an inducement to allow all to participate in its exercise.” The means by which that end would be attained in recalcitrant states was to enact a constitutional and, eventually, statutory mandate imposing a reduction in representation for those states that prevented the freedmen from voting. Viewed strictly in this manner, Section 2 seemingly does not apply to term limits: whatever else might be said about them, term limits do not bar voters from the polls. Rather, they merely restrict the voters’ choices by disqualifying certain individuals as a result of prior service of a particular length.

The language of Section 2, however, does not limit either its force or effect to simple denials. Rather, it is triggered by either a denial or an abridgment in any way, a sweep that seems to include within its

448. That is, as discussed supra at text accompanying notes 311-314, did the framers care about whether the freedmen voted, or were their purposes fundamentally political?
449. Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. 8 (June 8, 1866), in Alvins, supra note 287, at 94.
ambit any measure that restricts the ability to vote for a particular candidate for federal representative. This is entirely consistent with Madison's sentiment that “[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect.” More importantly, it is also within the contemplation of any number of decisions of the Court that treat the right to vote, and the implications of any “abridgment” of that right, in an expansive manner.

One obvious question is how the framers of the Fourteenth Amendment viewed denials or abridgments. Senator Howard, responding to a question, explained “abridged” this way:

I suppose it would admit of the following application: a State in the exercise of its sovereign power over the question of suffrage might permit one person to vote for a member of the State Legislature, but prohibit the same person from voting for a Representative in Congress. That would be an abridgment of the right of suffrage; and that person would be included in the exclusion, so that the representation from the State would be reduced in proportion to the exclusion of persons whose rights were thus abridged.

Further, Howard maintained:

It is not an abridgment to a caste or class of persons, but the abridgment or the denial applies to the persons individually. . . . It applies individually to each and every person who is denied or abridged, and not to the class to which he may belong. It makes no distinction between black and white, or between red and white, except that if an Indian is counted in he must be subject to taxation.

Howard, quoting from Madison, stressed that “‘those who are to be bound by laws ought to have a voice in making them.’” Then, in response to an inquiry by Senator Sumner as to whether Section 2 would be “applicable to all without distinction or color,” Howard replied, “Certainly it is, and whether they can read and write or not.”

This suggests that as a simple, historical matter, Section 2 would apply when the terms of Representatives are limited. An individual voter would, for example, be subject to a clear prohibition: she could not vote for candidate X. Actually, she could not vote at all, for when Senator Johnson asked, “[f]emales as well as males,” Howard drew the line:

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450. 2 Farrand, supra note 63, at 250.
452. Id.
453. Id. (quoting Notes on Suffrage, written at different periods after his retirement from public life, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 21, 25 (1865)).
454. Id.
I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children were not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women’s voting or of an infant’s voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.\textsuperscript{455}

More importantly, the impact of the restriction would be uneven. Voters in a district where the incumbent has not served the magic number of years would, inevitably, have a greater degree of choice than those in a district where the representative has reached the end of the eligibility line. In a similar vein, voters in a state where the bar is absolute would be burdened in ways distinct from those in states where the prohibition is more flexible, either as a matter of renewed eligibility after a period of non-service or where the opportunity to be elected as a write-in candidate is available. In each instance, states “in the exercise of their sovereign power” abridge the right of “individuals” to vote for the candidates of their choice.

There are, in addition, at least three distinct bases in the decisions of the Court for considering any one of the fifteen state term-limit provisions currently in force to be a denial or abridgement of the right to vote. The first, and most straightforward, is the Court’s recognition that “[r]estrictions on access to the ballot burden . . . ‘the right of qualified voters . . . to cast their votes effectively.”\textsuperscript{456} Time and again, the Court has characterized any limit of the voters’ choice of the candidates available as an impairment of the voters’ ability to express their political preferences.\textsuperscript{457} For example, the Court assures us that “[t]he 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.”\textsuperscript{458} It is therefore unsurprising that any method by which candidacy is regulated must

\textsuperscript{455} Id.


\textsuperscript{457} Id. See also Buckley v. Valeo, 424 U.S. 1, 94 (1976) (“[State ballot access laws] were, of course, direct burdens not only on the candidate’s ability to run for office but also on the voter’s ability to voice preferences . . . .”); Lubin v. Panish, 415 U.S. 709, 716 (1974) (“The right of . . . an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.”); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (“[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.”).

"pass muster against the charge of . . . abridgment of the right to vote." 459

We doubt Judge Dwyer had Section 2 in mind when he wrote his opinion in *Thorsted*, and it may well be that he would reassess the language employed in the light of what we are about to say. We find it significant, nevertheless, that he characterized the effect of the Washington measure in precisely this manner.

The operative section of the opinion begins with the declaration that "The cases holding that neither the states nor Congress may add to the Article I qualifications for service in Congress all rest on the same foundation: the constitutional rights of voters in the United States to elect legislators of their choice."

Judge Dwyer then quotes substantial passages from *Powell* and concludes by stating, in no uncertain terms, "As *Powell* . . . and the other authorities cited above make clear, the voters' freedom to choose federal electors must not be *abridged* by laws that make qualified persons ineligible to serve." 461 It is of no particular significance, at least for our purposes, that Judge Dwyer found the Washington measure unconstitutional. Our concern in this Article is, after all, only partially a question of whether state-imposed limits can withstand constitutional scrutiny. What is striking is that Judge Dwyer sensed, as we have suggested, that the Washington measure *abridged* the right to vote. Indeed, that finding is arguably all the more significant because it was reached reading much the same evidence we have marshalled on the nature of the rights to vote and be a candidate, and without what might otherwise have been the disquieting spectre of Section 2 sanctions.

Second, states that do not enact limits may be left with a preferred class of voters whose options are not restricted by the reduction in choices of voting. Within those states that do enact limits, some voters are more and some are less restricted, as the citizens of some states may more often vote for incumbents than the citizens of other term-limiting states. To the extent that a state's term limit law creates a preference for the voters of other states, that state has denied or abridged the right of its citizens to vote. Such a preference is constitutionally suspect. The Court has stated, in suggestive terms, that

[the concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every

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461. *Id.* at 1078 (emphasis added).
other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.\textsuperscript{462}

This principle, disfavoring preferences between voters of different classes in elections for national office, may also be restated as a form of the question posed in \textit{Baker v. Carr}, by shifting the focus slightly from “counties” to “states”: “[t]he injury . . . [wa]s that this classification disfavors the voters in the [states] in which they reside, placing them in a position of constitutionally unjustifiable inequality \textit{vis-a-vis} voters in irrationally favored [states].”\textsuperscript{463}

Preferences creating divisions of states into those with and without term limits and among states with various forms of limits need not violate the Equal Protection Clause. The principles of equal protection would not be violated if, for instance, the courts were to find a preference was not subject to strict scrutiny or promoted a vital state interest by the least offensive means.\textsuperscript{464} Even so, a preference would amount to some diminution of the right to vote among those whose choice of candidate is in any way reduced. Such abridgment may be properly described as a right denied a voter who sought to cast a ballot for an individual and was thwarted by the regulation. The prohibition is made the more obvious because voters in other states will be allowed to vote for candidates who have served the same number of terms. The diminution may also properly be said to abridge the right to vote of all voters, whether or not they truly intended to cast such a vote. From this denial or abridgment, we believe a case can be made that invoking the penalty provisions of Section 2 is, if not necessary, certainly appropriate.

Third, the meetness of such a punishment is suggested by most observers’ recognition that Section 2 had a quite narrow, and arguably sinister, purpose, “Protecting the Republican hegemony in Congress, quite aside from any long-term effort to secure the right to vote against arbitrary discrimination by the states.”\textsuperscript{465} Indeed, resort to Section 2 seems especially appropriate if one assumes it offers entrenched office holders arms with which to combat pernicious at-

\textsuperscript{463.} \textit{Baker}, 369 U.S. at 209.
\textsuperscript{464.} Thus, a deprivation resulting from a term limit might be similar to the Court’s view of the equal protection claim in \textit{Clements v. Fashing}, 457 U.S. 957, 964-70 (1982), where it held that a state constitutional provision prohibiting a judge from running for state office during his term did not violate the Equal Protection Clause, even though it required the resignation of elected officials who ran for another office, \textit{id.} at 970-72. \textit{Cf. Illinois Bd. of Elections}, 440 U.S. at 173 (signature requirement for ballot petition violated equal protection).
\textsuperscript{465.} Van Alstyne, \textit{supra} note 4, at 44.
tempts to deny them their sinecures. As we have noted more than once, the assumption that Congress would be unwilling to undertake this fight is by no means as sound as term limit proponents might wish; indeed, the incentives might run in the other direction if the assumptions term limit supporters make about “career politicians” are true.

The application of Section 2 to term limits is then outside its intended parameters only if one embraces an extraordinarily limited view of its objectives. Any argument that Section 2 must be limited to matters involving the voting rights of African-Americans must, of course, give way in the face of the Court’s abandonment of similar limitations on Section 1. Indeed, this understanding of Section 2’s potential scope is consistent with the approach espoused by Professor Bickel when he stressed, in his discussion regarding Brown v. Board of Education,\textsuperscript{466} that “we are dealing with a constitutional amendment, not a statute”\textsuperscript{467} and found nothing inconsistent between an acknowledgment that Congress did not contemplate immediate cessation of discrimination in the schools in 1866 and the recognition that the Fourteenth Amendment’s “general terms” could in fact eventually embrace that result.

More tellingly, this view of Section 2 explains why Professor Flack would characterize his discussion of “the second, third, and fourth sections of the Amendment” as an attempt “to discover, if possible, any cause or causes which might have had weight in inducing the people to accept the Amendment, and not so much for their intrinsic

\textsuperscript{466} 347 U.S. 483 (1954).

\textsuperscript{467} Bickel, supra note 374, at 59. Thus, while Professor Wechsler’s critique of Brown still stings, see Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 HARRV. L. REV. 1, 33-35 (1959), most “originalists” tend to back away from a strict application of their principles when Brown rears its head. \textit{Compare} Robert H. Bork, \textit{The Tempting of America: The Political Seduction of the Law} 143 (1990) (“a judge is to apply the Constitution according to the principles intended by those who ratified the document”) \textit{with} id. at 324 (“I have always supported the proposition that racial segregation by government is unconstitutional”) \textit{and} Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 14 (1971) (framers of Fourteenth Amendment intended for the Court to “secure against government action some large measure of racial equality”). Mr. Bork’s alternate “rationale” for Brown is, and must remain, at odds with the actual practices, see Bickel, supra note 374, at 56-65 (summarizing his findings about practices tolerated by the Amendment’s framers), and avowed intent, see supra text accompanying notes 292-293 (concessions by Senator Howard), of the individuals who framed the Fourteenth Amendment. Interestingly, some of the most eloquent statements recognizing the need for appropriate flexibility pop up in the oddest places. \textit{See}, e.g., William H. Rehnquist, \textit{The Notion of a Living Constitution}, 54 TEX. L. REV. 693, 694 (1976) (“The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live.”).
value.” As Justice Harlan stressed, Section 2 made the Fourteenth Amendment “palatable” for two reasons. It did not, as a fundamental matter, purport to interfere with the states’ intrinsic right to control the franchise. And it gave those states that decided to defy the supposed national “consensus” that freedmen should vote a clear warning of the consequences flowing from such a determination.

These rationales find their counterparts in state-imposed term limits, assuming such limits are otherwise deemed constitutionally permissible. Term limit laws articulate a fundamental belief that the states themselves control an important aspect of the franchise, the eligibility of an individual to seek office. And they are available to and exercised by the states with full recognition that they have a collateral price.

C. Section 2 in Action: Some Initial Thoughts

We have not discussed Section 2’s implications for limits on the terms of “the Executive and Judicial officers of a State, or the members of the Legislature thereof” for three reasons. As a threshold matter, the people of each state are free to amend their constitutions and statutes as they wish, provided they employ the proper means. The propriety of state-initiated limits on state office terms therefore presents no federal constitutional questions, provided the focus is the office itself. They raise, rather, concerns that depend on the nuances and mechanics of each individual state’s constitution and laws—inquiries we do not care to undertake.

Second, our conclusion that Section 2 may recognize greater state authority over the franchise than is traditionally assumed does call into question traditional assumptions about the extent to which the Qualifications Clauses and Powell are the sole points of reference in the term limits debate. One does not need Section 2 to validate state attempts to limit the terms of state officials. A revitalized Section 2, however, may have a direct impact on the permissibility of state attempts to bar incumbents from federal offices.

Finally, if Section 2 applies when states limit the terms of federal representatives, it applies in the same manner when they limit terms

468. Flack, supra note 4, at 97.
469. That this will occur is far from clear. In Nebraska, for example, the term limit measure was invalidated in its entirety by the state supreme court because “the submission of at least 30,000 too few signatures” did not constitute “substantial compliance with the provisions of the Nebraska constitution for an initiative by the people.” Duggan v. Beer- man, 515 N.W.2d 788, 794 (Neb. 1994).
of the enumerated state officers. In each instance, the answers to two questions are dispositive. Does Section 2 have continuing force, and does a term limit "deny or in any way abridge" the right to vote? If both answers are "yes," the penalty is also the same: proportionate reduction of the "Representatives . . . apportioned among the several States." The applicability and impact of Section 2 therefore depend on factors that have nothing to do with the locus of the office.470

The individuals who crafted Section 2 understood its implications. Senator Howard addressed the issue during the debate on the Amendment. He stated that the "basis of representation is numbers, whether the numbers be white or black; that is, the whole population except untaxed Indians and persons excluded by State laws for rebellion or other crime."471 He observed that the abolition of the "three-fifths" principle472 and "enfranchisement of the colored race . . . will increase the number of Representatives from the once slaveholding States by nine or ten."473 Then, after a detailed recitation of data from the 1860 Census, he indicated that his "best calculation" was that "if the late slave States shall continue hereafter to exclude the colored population from voting, they will do it at the loss at least of twenty-four Representatives in the other House of Congress, according to the rule established by the act of 1850."474

470. We do not underestimate the extraordinary implications of a Section 2 role in the definition and control of state offices. It is important, however, to recognize that Section 2 was designed to protect the individual right to vote, not the offices themselves.

471. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Senator Howard).

472. That is, the original textual limitation that apportioned Representatives "according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2.

473. CONGR. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Senator Howard).

Howard also captured the spirit and rationale of Section 2 in ways that emphasized the core state power over voting matters:

Shall the recently slaveholding States, while they exclude from the ballot the whole of their black population, be entitled to include the whole of that population in the basis of their representation, and thus to obtain an advantage which they did not possess before the rebellion and emancipation? In short, shall we permit it to take place that one of the results of emancipation and of the war is to increase the Representatives of the late slaveholding States? I object to this. I think they cannot very consistently call upon us to grant them an additional number of Representatives simply because in consequence of their own misconduct they have lost the property which they once possessed, and which served as a basis in great part of their representation.

Id.

474. Id. at 2767.
Howard recognized that "[t]he penalty of refusing will be severe"; the offending states "will undoubtedly lose, and lose so long as they shall refuse to admit the black population to the right of suffrage, that balance of power in Congress which has been so long their pride and boast."\[^{475}\] He also stressed that "this Amendment does not apply exclusively to the insurgent States, nor to the slaveholding States, but to all States without distinction... It holds out the same penalty to Massachusetts as to South Carolina, the same to Michigan as to Texas."\[^{476}\] This prompted an inquiry from Senator Clark, who wanted to know "whether the committee's attention was called to the fact that if any States excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State."\[^{477}\] Howard responded, "[C]ertainly it does, no matter what may be the occasion of the restriction."\[^{478}\]

The actual mechanics of applying Section 2 sanctions to achieve these results pose interesting questions. Both Section 2 and its statutory counterpart dictate the reduction "shall" take place, a mandatory action that would occur in either of two ways: as the inevitable consequence of routine application of the statutory provisions for allocating the 435 seats currently authorized; or in response to litigation claiming that the commands of Section 2 have been violated and asking for the reduction as a matter of legal entitlement.

The first of these approaches involves simple application of existing procedures. Under the current statutory scheme, the allocation of seats in the House takes place once every ten years when the President transmits to Congress "a statement showing the whole number of persons in each State... as ascertained under the... decennial census... and the number of Representatives to which each state would be entitled."\[^{479}\] Under normal circumstances, the Clerk of the House then provides each State with a certificate indicating the number of Representatives it would receive per the census numbers.\[^{480}\] That process is, however, subject to the concomitant command of Section 2 and its statutory counterpart:

\[^{475}\] Id.
\[^{476}\] Id.
\[^{477}\] Id.
\[^{478}\] Id.

Should any State deny or abridge the right of any of the inhabitants thereof . . . to vote at any election . . . the number of Representatives apportioned to such State shall be reduced in the proportion which the number of such . . . citizens shall have to the whole number of . . . citizens . . . of age in such State.481

This means, for example, that if a state otherwise "entitled" to ten seats bars two members from reelection to the House of Representatives it would "deny or abridge" the rights of approximately twenty percent of eligible voters, reducing its delegation from ten members to eight. Within the offending state, the ensuing elections for the remaining seats would be by district, assuming the districts are redrawn in a timely fashion and collateral litigation does not preclude putting the revised districts in place. Given the complex and contentious nature of the redistricting process, however, and the virtual certainty that a challenge to the Section 2 reduction would be lodged, it seems more likely that the elections would be at large.482 If, in turn, the term limit measure barred all incumbents or an "Executive officer[ ] . . . of a State"—say the governor—it presumably denies or abridges the right to vote of all eligible voters, and the state would lose all but one seat, given the requirement that "each State shall have at Least one Representative."483

Whether or not the seats lost by one state would be reallocated to the others is less clear. The one serious attempt to invoke Section 2, which was contemporaneous with its adoption, would have made the reduction after the apportionment.485 That approach suggests no redistribution would occur. That episode may not, however, dictate what transpires today. There was no proportionate reduction in 1872, and the statutory framework then in force did not stipulate a set number of Representatives from which each state received a formula-driven share. Thus, application of Section 2 today may well benefit other states, a possibility that makes its invocation more tempting to states not burdened by practices that "deny" or "abridge" the right to vote.

The second approach to enforcement would be for opponents of term limits—or states seeking to increase their own delegations—to file a legal challenge demanding the reduction take place immediately.

482. See 2 U.S.C. § 2a(e) (1988) ("if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large")
484. U.S. Const. art. I, § 2, cl. 3.
485. See supra text accompanying notes 317-320.
As the Court made clear in a recent, unanimous decision, questions of the sort posed by a Section 2 claim are clearly justiciable. The only operative issue would be the extent to which immediate relief might be barred under the theory that the code provisions require one to wait for the decennial readjustment. We suspect they would not. Assuming agreement with the threshold proposition that term limits do "deny" or otherwise "abridge" the right to vote, these code provisions pose squarely "whether Congress exercised its apportionment authority within the limits dictated by the Constitution." We find no reason to believe the Supreme Court would now treat Section 2 less seriously than it has the Fifteenth Amendment or Section 1 of the Fourteenth, and we believe it would order appropriate relief. It could, for example, simply find a Section 2 violation and defer to further congressional and state actions, "so long as they are consistent with constitutional norms." Or it could direct the lower court to "tak[e] appropriate action to insure that no further elections are conducted under the invalid plan," consistent with a federal court's broad, albeit not unlimited, equitable powers.

It is always possible that a court will refuse to act, clinging to those parts of the record indicating that the individuals who framed the language contemplated a role for Congress in that process. We suspect, however, that the federal courts will not display the same reluctance to enter the Section 2 fray they exhibited in a pre-Baker world. This will especially be the case when litigation before them poses issues far less inflammatory than, for example, the poll tax or a challenge to Virginia's miscegenation statute just one year after Brown was decided. The term limits debate is intense and visceral, but, as Justice Frankfurter observed, "The responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding . . . ."

487. Id. at 1426.
491. As indicated, Saunders was at its heart a challenge to Virginia's poll tax, although the justiciability concerns expressed were arguably appropriate at that time. See supra text accompanying notes 327-334.
493. Cooper v. Aaron, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring).
There is also substantial room to believe that most members of Congress—who, after all, saw problems with the nomination of Zoe Baird as Attorney General only after the people revolted—will accede to the wishes of the voters and refuse to invoke Section 2 against enacting states. But this is the same Congress that resorted to all manner of artifice to secure annual pay raises, in spite of popular opposition to what many characterized as "midnight raids" on the Treasury. More to the point, if the devotees of term limits are correct in their surmises about the character of Congress, it is entirely reasonable to assume that a "dynastic ruling class" dedicated to "a self-perpetuating monopoly of elective office" would initiate the Section 2 process. That, as we have indicated, would resonate the spirit in which Section 2 was enacted, a state of affairs within which the Radical Republicans of 1867 become the Imperial Congress of 1995 or beyond, its members dedicated to the preservation of their own political lives.

Conclusion

We have tried to remain neutral in the debate about the advisability and, to a lesser extent, the constitutionality of term limit measures. We believe the parties to the term limit debate must account for the existence and force of Section 2, both as a matter of the initial constitutionality of term limits and as a factor in assessing their ultimate effect. Obviously, given our views about the nature and force of Section 2, we believe state-imposed term limits are more viable, at least as a constitutional matter, than is normally assumed. At the same time, we suspect the implications of such enhanced constitutional vitality will prove disquieting for those states in which such limits are in force. For if state-imposed limits are constitutional, the argument that the remedies incorporated in Section 2 are available becomes compelling.

Section 2 also focuses our attention on the rights and interests of a group whose voice is at some risk of disappearing in the term limits debate: the individual voters who do not believe a preemptive strike is the only means by which congressional reform may be secured. Term limit measures have proven overwhelmingly popular. Our constitutional system recognizes, nevertheless, that there are limits to majority rule. Indeed, the message that emerges from the Court's

franchise decisions is that we will tolerate even draconian burdens on parties and candidates, but will under virtually no circumstances allow a state to deny the individual voter the right to participate in the political process.495

Section 2 is the most compelling expression of that principle in the Constitution. Neither equal protection nor due process provide, expressly or as parsed, absolute protection. Each is phrased and has been interpreted by the Court as a relative guarantee. Section 2, on the other hand, speaks much more directly and in terms that leave little room for maneuver. It is triggered when any citizen’s right to vote is “denied or in any way abridged,” a sensitivity to individual rights within both the letter and spirit of a constitutional system that believes voting to be “a fundamental political right, because preservative of all rights.”496

Regardless of the means invoked or specific avenues of compliance ordered, successful invocation of Section 2 threatens to transform a term limits initiative into the sort of poison pill the people might be loathe to swallow. Some individuals opposed to an entrenched Congress may well maintain no representative is better than the same old, career politician and accept the loss of one or more seats. That is certainly their prerogative, although we suspect it will not occur. But whether it does remains a matter for the people to decide, consistent with the letter and spirit of Section 2.

Section 2 was inserted in the Fourteenth Amendment as a means of informing a majority who opposed granting the freedmen the vote of the price of opposition. Under our analysis, Section 2 serves the same purpose today, apprising a majority fed up within “entrenched” politicians of the costs associated with barring incumbents from office. It is paradoxical that Section 2 may finally become a substantial presence on the constitutional landscape as a matter of accident, rather than design. However, we sense that the individuals who crafted Section 2 would find quiet satisfaction in its reemergence, particularly if it becomes a means by which Congress challenges popular determinations that conflict with the members’ own vested interests. That same self-interest, after all, motivated the creation of much of what we now know as the Fourteenth and Fifteenth Amendments. And while we

495. The most obvious exception to this is, interestingly enough, the power to deny convicted felons the franchise, which withstanded constitutional challenge in large measure because Section 2 recognized that authority. See supra text accompanying notes 377-388.

may find it distasteful, it is nevertheless a political determination that found its way into the constitutional text.