Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress

Tiffanie Kovacevich
University of the Pacific; McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr
Part of the Law Commons

Recommended Citation

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.
Constitutionality of Term Limitations: Can States Limit The Terms of Members of Congress?

As a result of increasing voter dissatisfaction with incumbent politicians at all levels of government, voters in a rising number of states have limited, or are considering limiting, the number of terms their elected representatives may serve in office. This movement to limit terms has affected city, state, and federal elected officials. Consequently, constitutional amendments have been enacted in several states limiting the number of terms state legislators may serve. One state has also limited the terms of its representatives to the United States Congress. The current popularity of term limitation is demonstrated by movements in a number of states for term limitation, although the voters of at least


2. See Term-Limitation Measures Go Local; Anti-Incumbency Fever is Spreading, L.A. Times, Mar. 28, 1992, at B7 (discussing the constitutionality of charter cities and counties); Glasser, Term Limit Drive Makes Comeback, Roll Call, Mar. 12, 1992 (discussing term limitations in California, Oklahoma, and Colorado); Glasser, Term Limit Drive Scores Easily in Colorado; So Do 5 Incumbents, Roll Call, Nov. 8, 1990 (discussing Colorado's state imposed federal term limitations).

3. See COLO. CONST. art. V, § 3(2); OKLA. CONST. art. V, § 17A; CAL. CONST. art. IV, § 2(a) (limiting terms of state legislators).

4. See COLO. CONST. art. XVIII, § 9a(1) (limiting terms of Colorado senators to two consecutive six-year terms and Colorado representatives to six consecutive two-year terms).
one state rejected a term limitation amendment to their state constitution.\(^5\)

The constitutionality of term limitations on congressional and state legislators has yet to be argued before the United States Supreme Court.\(^6\) However, the California Supreme Court upheld the constitutionality of term limitations for state legislators in *Legislature v. Eu*,\(^7\) finding that such limitations do not conflict with either the California or the United States Constitution.\(^8\) This Comment will examine the constitutionality of state-enacted term limits on representatives to the United States Congress.

Part I of this Comment examines the history of term limitations and looks at the recent attempts by the United States Congress to limit the number of congressional terms of office.\(^9\) Part II surveys state-enacted term limitations and three state supreme court decisions pertaining to term limitations on both state and congressional legislators.\(^10\) Part III examines the federal constitutional arguments supporting and opposing state term


\(^6\) On March 9, 1992, the United States Supreme Court denied review of the California Supreme Court's decision in *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283, cert. denied, 112 S. Ct. 1292 (1992), which held that a state constitutional amendment limiting the terms of California state legislators was constitutional under the California and United States Constitutions. See *U.S. Supreme Court Lets Stand California's Term Limits*, Business Wire, Inc., March 9, 1991 (discussing the Supreme Court's denial of certiorari).

\(^7\) 54 Cal. 3d 492, 503, 816 P.2d 1309, 1322, 286 Cal. Rptr. 283, 310 (1991).

\(^8\) Id. at 535, 816 P.2d at 1336, 286 Cal. Rptr. at 310. Two other state supreme courts, Florida and Washington, have examined term limitations on congressional representatives, however, both courts examined the constitutionality of the proposals under state law only. See Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices, ___Fla.__, 592 So. 2d 225 (1991) [hereinafter *Advisory Opinion*]; League of Women Voters v. Munro, No. 58438-9 (Supreme Court of Wash. 1991) (order granting motion to dismiss). The Florida Supreme Court issued an advisory opinion to the Attorney General in which the Florida court held that the Florida term limitation initiative complied with the Florida Constitution. *Advisory Opinion* 392 So. 2d at 230. The Florida court did not decide the federal constitutional issue. *Id.* at 229. The Washington Supreme Court also issued an advisory opinion for that state's failed Proposition 553. League of Women Voters v. Munro, No. 58438-9 (Supreme Court of Wash. 1991) (order granting motion to dismiss). The court also refused to consider the federal constitutional issues, citing a lack of time to do so. *Id.* at 2.

\(^9\) See infra notes 13-56 and accompanying text.

\(^10\) See infra notes 57-146 and accompanying text.
limitations on congressional legislators. Part IV concludes by suggesting that a constitutional amendment is the best way to impose term limitations on members of Congress.

I. INTRODUCTION TO TERM LIMITATION

Term limitations are not a new concept. The delegates to the unicameral legislature created by the Articles of Confederation were appointed by the legislatures of their respective states and could be recalled by their state legislature at any time. Delegates under the Articles of Confederation, who were appointed annually, were limited to serving three years out of every six-year period.

In 1784, Congress conducted an investigation to ascertain whether any of the appointed delegates had stayed beyond their appointed term. This investigation revealed that one delegate from Massachusetts, Samuel Osgood, had overstayed his term. Under protest, Osgood resigned from office. The same investigation also revealed that the Rhode Island delegates had remained beyond their three year limit. When these holdover delegates were confronted, their protests led to a bitter debate about

---

11. See infra notes 147-289 and accompanying text.
12. See infra notes 290-302 and accompanying text.
13. AMERICAN ENTERPRISE INSTITUTE, LIMITING PRESIDENTIAL AND CONGRESSIONAL TERMS, 5 (1979) [hereinafter LIMITING TERMS]. See generally SULA P. RICHARDSON, CONGRESSIONAL TENURE: A REVIEW OF EFFORTS TO LIMIT HOUSE AND SENATE SERVICE 3 (1989) [hereinafter CONGRESSIONAL TENURE] (noting that the fourth and fifth resolutions of the Virginia Plan contemplated that members of the United States House of Representatives and Senate could not be reelected after completing their terms).
14. ART. OF CONFED. art. V, cl. 2. See CONGRESSIONAL TENURE, supra note 13, at 2 (stating that delegates under the Articles of Confederation had limited terms). See also Joint Resolutions Proposing an Amendment to the Constitution of the United States with Respect to the Number of Terms of Office Which Members of the Senate and the House of Representatives May Serve: Hearings on S.J. Res. 27 and S.J. Res. 28 Before the Subcomm. on the Constitution Comm. on the Judiciary, 95th Cong., 2nd Sess. 3 (1978) (stating that delegates under the Articles of Confederation were limited to serving three years out of every six-year period).
15. LIMITING TERMS, supra note 13, at 5.
16. Id.
17. Id. Osgood stated that he was "inexpressibly disgusted" with public life. Id.
18. Id.
whether these delegates should leave. The matter was eventually dropped when Congress realized that legislative business would practically stop if the Rhode Island delegates were ousted, and, therefore, the Rhode Island delegates were permitted to remain in Congress.

At the Constitutional Convention in 1787, most of the signers of the Constitution had served as state delegates under the Articles of Confederation. The delegates to the Constitutional Convention passionately debated the length of terms for members of the House of Representatives, but limitations on the number of terms were not discussed. After debating the merits of one, two, and three-year terms, the delegates finally compromised on two-year terms for members of the House of Representatives. Terms of office for United States Senators were also debated, but mostly regarding the length of the term, rather than any limitation on the number of

19. Id. at 6. This situation prompted James Madison to comment that it was the most “indecent conduct” he had seen in any assembly. Id. See CONGRESSIONAL TENURE, supra note 13, at 3 n.7, (stating that there is confusion among sources whether the members were asked to leave because of having served beyond their three year term, or for staying beyond the year for which they had been most recently elected).

20. LIMITING TERMS, supra note 13, at 6.

21. Id. Thirty-two of the thirty-nine signers of the constitution had served as delegates under the Continental Congress. Id. Several others who were present, but did not sign the constitution, had also served as delegates. Id.

22. Id. The convention also debated whether the members of Congress should be ineligible for office under the national government for a number of years after serving in Congress. Id. This provision was not adopted into the constitution. Id. See U.S. CONST. art. I, § 2, cl. 2 (setting out the qualifications for the House of Representatives); id. art. I, § 3, cl. 3. (setting out the qualifications for members of the Senate). Cf. U.S. CONST. art. I, § 6, cl. 3 (setting out the incompatibility clause which provides that during the time for which a member of congress is in office, that member cannot be appointed to any civil office of the United States, nor may any person who holds any United States office be a member of congress during the term of his United States office). See also 2 J. MADISON, DEBATES OF THE FEDERAL CONSTITUTION OF 1787, at 183-87 (J. Elliot ed., 1845) [hereinafter DEBATES] (discussing the different plans for congressional terms in office).

23. DEBATES, supra note 22, at 224. This compromise was introduced by the Virginia delegate, Edmond Randolph, on June 21, 1787. Id. Delegates against the three year plan thought that three years was too long in office. Id. at 225. Madison thought that three years would add stability to the new republic. LIMITING TERMS, supra note 13, at 6. See Four Year U.S. House of Representative Terms, 1979: Hearings on S.J. Res. 34 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 20 (1979) [hereinafter Hearings on Four Year Terms] (statement of Catharine Trauernicht, Director of Research, Foundation for the Study of Presidential and Congressional Terms) (noting that the two-year term was the result of compromise among the delegates to the Constitutional Convention).
terms. James Madison and Alexander Hamilton thought that senators should serve long terms of office, while other delegates regarded frequent elections as a method to ensure good behavior. The length of terms suggested for senators ranged from four years to life. A compromise was reached among the delegates when they agreed to six-year terms with elections every two years.

Until 1900, most members of the House of Representatives did not make a career of their service in the House, but instead retired after a few terms in office. At each election, new representatives were elected thirty to sixty percent of the time. Accordingly, limiting the number of terms of members of Congress was not an issue. Most proposals to limit congressional terms have come since congressional service has become a career. From 1787 to the present, a number of proposals altering congressional terms of

24. LIMITING TERMS, supra note 13, at 7. The delegates generally accepted longer terms for senators than for representatives. Id. But see supra note 22 and accompanying text (discussing the fact that the delegates did contemplate periods of ineligibility for other federal office).

25. LIMITING TERMS, supra note 13, at 6-7. Delegates who supported one-year terms thought that a one-year term would ensure against tyranny by elected officials. Id at 6. Supporters of a three-year term thought that a longer term would add stability to the new republic. Id.

26. Id. at 6.

27. Id. See U.S. CONST. art. I, § 3, cl. 2 (stating the duration of the term of United States Senators).

28. Petraea, Initiative 553—Yes:—Should Lawmaker's Terms be Limited?, Seattle Times, Oct. 6, 1991, at A15. See LIMITING TERMS, supra note 13, at 8 (discussing trends in House tenure, including the shift in the early 1900's to service in the House as a career); Hearings on Four Year Terms, supra note 23, at 43 (testimony of Congressman Elwood H. Hills) (stating that in the 1800's, members self-imposed a limit of four years of service in the House and six years in the Senate); Congressional Tenure: Hearings on S.J. Res. 27 and S.J. Res. 28 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2nd Sess. 4 (1978) (statement of Senator Dennis DeConcini) [hereinafter Hearings on Congressional Tenure] (stating that a significant trend of the 20th-century is the tendency of members of Congress to serve "longer and longer terms"); 137 CONG. REC. S6273 (daily ed. May 22, 1991) (statement of Senator Brown) (stating that typical members of Congress serve more than twice as long today as members of Congress a century ago).


30. LIMITING TERMS, supra note 13, at 9. See infra note 35 and accompanying text (detailing attempts to limit terms of members of Congress at the turn of the twentieth century).

31. LIMITING TERMS, supra note 13, at 9.
office have been suggested by Congress and various presidents. However, these proposals have not fared well.

Term limitations were suggested as early as 1789, in the First Congress. Congress' next attempt to limit terms of both houses did not come until 1947, the year in which the United States Senate considered the twenty-second amendment to the United States Constitution. The twenty-second amendment limited the president to two consecutive terms of office, so it is not surprising that Congress considered limiting its own terms at that time. During the debate on the twenty-second amendment, former Senator O'Daniel (D-Tx) secured only one vote when he proposed limiting all elected officials to one six-year term of office. From 1975 to the present, several term limitation proposals have been introduced during each session of Congress. Hearings were held

32. See infra notes 34-56 and accompanying text (discussing attempts by Congress to limit congressional terms of office).

33. Limiting Terms, supra note 13, at 8. Presidents Truman, Eisenhower, and Johnson proposed lengthening the term of membership in the House of Representatives to four years. Id. See also CONGRESSIONAL TENURE, supra note 13, at 8 (stating that Presidents Lincoln, Truman, Eisenhower, and Kennedy as well as Vice President Quayle supported term limitations for members of Congress); Hearings on Congressional Tenure, supra note 28, at 105 (statement of John C. Gartland, member of the Foundation for the Study of Presidential and Congressional Terms) (stating that Presidents Truman, Eisenhower, and Kennedy indicated support for term limits).

34. CONGRESSIONAL TENURE, supra note 13, at 4. Rep. Thomas Tucker of South Carolina introduced two proposals, one to limit the terms of the House and one to limit terms of the Senate. Id. These proposals were never voted on by the House. Id. See 137 CONG. REC. S6274 (daily ed. May 22, 1991) (statement of Senator Brown) (stating that a limit on congressional terms was proposed during the First Congress in 1789).

35. See CONGRESSIONAL TENURE, supra note 13, at 4 n.12 (concluding that term limitation proposals for the House were made in 1896, 1904, and 1906, but that none were made for the Senate).

36. See U.S. CONST. amend. XXII, § 1 (limiting the President to two four-year terms in office).

37. Id.

38. 93 CONG. REC. 1963 (1947). Senator O'Daniel's proposal would have limited the terms of the president, vice president, and both houses of Congress. Id. The vote was 83 to 1 against the proposal. Id. See CONGRESSIONAL TENURE, supra note 13, at 5 (discussing Senator O'Daniel's proposal).

39. See CONGRESSIONAL TENURE, supra note 13, at 7 (providing a table which states the number of proposals as follows: 94th Congress (1975-76), 8 proposals; 95th Congress (1977-78), 12 proposals; 96th Congress (1979-80), 10 proposals; 97th Congress (1981-82), 11 proposals; 98th Congress (1983-84), 10 proposals; 99th Congress (1985-86), 6 proposals; 100th Congress (1987-88), 5 proposals; 101st Congress (1989-90), 7 proposals). See infra notes 42-56 (providing information for the 102nd Congress).
before the Subcommittee on the Constitution of the Senate Committee on the Judiciary in March, 1978, specifically on the issue of limiting legislative terms of office. The next year, while hearings were being held on a bill to extend the term of office in the House of Representatives, two witnesses suggested term limitations in their testimony.

In the first session of the 102nd Congress, in 1991, Senator Brown (R-Co) proposed senatorial term limitations as an amendment to Senate Bill 3 concerning campaign finance reform. The proposed amendment applied only to those senators receiving public campaign financing, and limited those senators to two consecutive six-year terms. However, Senator Brown's amendment was soundly defeated by a vote of 68 to 30 to table the amendment. The amendment was tabled in part because the senators wished to focus on the issue of campaign finance reform, and not term limitation. Another reason for the failure of this amendment may have been that it imposed term limitations on only those candidates who accepted public funds.

Also during the 102nd Congress, several constitutional amendments focusing solely on term limitation were introduced in both the House and the Senate. Of these, the proposals with the

41. Hearings on Four-Year Term, supra note 23, at 39-40 (statements of Congressmen Elwood H. Hillis and J. Danforth Quayle).
42. See S.B. 3, 102nd Cong., 1st Sess., 137 Cong. Rec. S6272 (1991) (proposing term limitations on senators as part of an amendment to a campaign finance bill).
43. Id.
45. Id. at S6277. Senator Bumpers (D-Ark) stated that while term limits are a manifestation of discontent with the system, that discontent is aimed in the wrong direction and should instead be aimed at the way campaigns are conducted. Id.
46. Id.
47. Seven joint resolutions were proposed in the House and one in the Senate. See H.R.J. Res. 21, 102nd Cong., 1st Sess., 137 Cong. Rec. H61 (1991) (introducing staggered four-year terms for the House with a three term limit on the four-year term; a four term limit if the House term remains at two years and a senatorial term limit of two terms); H.R.J. Res. 22, 102nd Cong., 1st Sess., 137 Cong. Rec. H61 (1991) (introducing a limit of six terms on the House and two terms on the Senate); H.R.J. Res. 42, 102nd Cong., 1st Sess., 137 Cong. Rec. E199 (1991) (introducing a three term limit on the House and a one term limit on the Senate); H.R.J. Res. 54, 102nd Cong., 1st Sess., 137 Cong.
most sponsors are House Joint Resolutions (HJR) 21 and 22. HJR 21 advocates changing the length of the term of office in the House from two to four years. However, it does not affect the length of the term in the Senate. If the four-year term is adopted, HJR 21 proposes a three term limitation. If the term of office remains at two years, HJR 21 advocates a four term limitation. By comparison, HJR 22 does not propose to change the length of the terms of the members of the House or Senate. Instead, HJR 22 is solely a proposal to limit the number of terms a legislator may serve. HJR 22 limits senators to two terms of office and members of the House to six terms of office. Neither HJR 21 nor HJR 22 has been voted on.

II. CURRENT TERM LIMITATIONS ON STATE LEGISLATORS

Thus far, the voters of three states, Oklahoma, California and Colorado, have amended their state constitutions to provide for

---


50. Id.


52. Id.


54. Id.


1684
limitation on the number of terms of their state legislators. However, term limit proposals have not been universally accepted. Even so, the term limitation movement is growing in many states. For example, on November 3, 1992, voters in Florida will vote on whether to impose term limitations on their state and congressional legislators.

Although the term limitation concept is spreading, the terms of each proposal vary, which may indicate why some term limitation proposals have been successful, and others have not. Cases have been brought before the state supreme courts of California, Washington, and Florida to determine the constitutionality of term limitations under both the state and federal constitutions.

57. See OKLA. CONST. art. V, § 17A (limiting members of the state legislature to twelve years in the legislature); CAL. CONST. art. IV, § 2(a) (limiting state senators to two four-year terms and state assembly members to three two-year terms); COLO. CONST. art. V, § 3(2) (limiting state senators to two consecutive four-year terms and state representatives to four consecutive two-year terms). See also S. Glasser, Term-Limit Initiative Scores Easily in Colorado; So Do 5 Incumbents, Roll Call, Nov. 8, 1990 (discussing the passage and provisions of the Colorado amendment); Jacobs, California Elections Propositions 131, 140; Oklahoma Voters Send Signal on Limiting Terms, L.A. Times, Sept. 20, 1990, part A, at 41, col. 1 (discussing the Oklahoma and California amendments); Schreiner, Term-Limiting Prop. 140 Looks Like a Winner Prop. 131 Campaign Finance Plan Losing, San Francisco Chron., Nov. 7, 1990, at A1 (discussing the provisions of Proposition 140).

58. In November of 1991, the voters of Washington state rejected a term limitation proposal which would have restricted the terms of both state legislators and state representatives in Congress. Afraid of Losing Clout, Voters Reject Term Limits, Seattle Times, Nov. 6, 1991, at A1 (stating that initiative measure 553 was narrowly defeated on Nov. 5, 1991). See Ballot Measures at a Glance, Seattle Times, Oct. 4, 1991, at A3 (stating the terms of initiative 553 and the groups who supported and opposed initiative 553).

59. See supra note 1 (discussing states considering term limitation).

60. Glasser, Fla. Court Rejects Brief of House Counsel, OKs Term-Limit Initiative for Nov. 3 Ballot, Roll Call, Jan. 6, 1992. Florida's initiative proposes a lifetime ban from a particular office once an individual has served the maximum number of terms in office. CONSTITUTIONAL AMENDMENT PETITION FORM, Limited Political Terms in Certain Elective Offices, April 3, 1991.

61. Compare COLO. CONST. art. XVIII, § 9a(1) (limiting members of Congress prospectively to no more than six consecutive terms with a four-year break before that person can run for the House or Senate again) with 1991 Washington Initiative 553, SECRETARY OF STATE, VOTERS PAMPHLET, WASHINGTON STATE GENERAL ELECTION at 24 (Nov. 5, 1991) [hereinafter VOTERS PAMPHLET] (limiting members of the United States House of Representatives retrospectively to three consecutive terms, and members of the United States Senate to no more than two consecutive terms, with a six-year break before that member can run for the House or Senate again).

62. See Legislature v. Bus, 54 Cal. 3d 492, 535, 816 P.2d 1309, 1336, 286 Cal. Rptr. 283, 310 (1991) (holding that term limitations on state legislators did not violate the California or the federal constitution); League of Women Voters v. Munro, No. 58438-9 (Supreme Court of Wash. 1991) (order granting motion to dismiss) (dismissing complaint which alleged that Washington's term limitation initiative violated the Washington constitution as well as the federal constitution); Advisory
However, none of these courts considered the issue of whether a state constitutional amendment can limit the terms of members of Congress. The term limitations enacted in Oklahoma and Colorado have not been challenged in court.

Oklahoma was the first state to impose term limitations on its state legislators. Under the Oklahoma amendment, state legislators are limited to six two-year terms, or a total of twelve years in office. The twelve-year limitation includes service in either house of the state legislature, and imposes a limitation on total years in office, not just consecutive years. The Oklahoma amendment is prospective in application, in that legislators who were in office at the time the amendment passed may serve another twelve years in office.

On November 6, 1990, California became the second state to impose term limitations when California voters passed Proposition 140, also known as "The Political Reform Act of 1990." This Act imposed limitations on legislative terms, budgets, and pensions. Under Proposition 140, California's term limitations apply to state legislators and other specified state officeholders, but...
not to California’s representatives in the United States Congress. Proposition 140 limits state assembly members to three two-year terms, while state senators are limited to two four-year terms. As interpreted by the California Supreme Court, the limits under Proposition 140 constitute a lifetime ban from a particular office, once an officeholder has served the specified number of terms in that office. The limitations apply to all state legislators elected on or after November 6, 1990. Additionally, state senators not included on the November 1990 ballot may serve only one more term. Therefore, unlike Colorado’s term limitations which apply only prospectively, the California provisions have a retrospective aspect.

Shortly after the passage of Proposition 140 in November 1990, a challenge to its provisions, Legislature v. Eu, was filed with the California Supreme Court, which held that term limitations on state legislators satisfy both the California and the United States Constitution.

The petitioners in Eu consisted of the California

---

71. CAL. CONST. art. IV, § 2(a) (enacted by Proposition 140) (state senators and assembly members); id. art. V, § 11 (enacted by Proposition 140) (lieutenant governor, attorney general, controller, secretary of state, and treasurer); id. art. IX, § 2 (enacted by Proposition 140) (superintendent of public instruction); id. art. XIII, § 17 (enacted by Proposition 140) (members of board of equalization). On November 5, 1991, Pete Schabarum, the author of Proposition 140, announced a plan to similarly limit the terms of California’s members of Congress. Schabarum to Seek Term Limits for California Congressional Delegation, L.A. Times, Nov. 6, 1991, Part A, col. 4. at 3.
72. CAL. CONST. art. IV, § 2(a) (enacted by Proposition 140).
74. CAL. CONST. art. XX, § 7 (enacted by Proposition 140).
75. Id.
76. See infra notes 117-118 and accompanying text (discussing the prospective application of Colorado’s term limitation amendment).
77. See CAL. CONST. art. XX, § 7 (enacted by Proposition 140) (stating that term limitations apply to persons who are elected after Nov. 6, 1990, except that incumbent Senators who are not on the ballot may serve only one additional term).
79. Id. at 535, 816 P.2d at 1336, 286 Cal. Rptr. at 310. In granting the California Legislature’s petition for mandate, the California Supreme Court thought that this suit should be promptly resolved, because of the significant issues involved. Id. at 500, 816 P.2d at 1312, 286 Cal. Rptr. at 280. Usually, cases go to the supreme court only after review by lower courts. Id. A petition for mandate allows the litigants to take their case directly to the supreme court. Id.
Legislature, various individual legislators, taxpayers, voters, and citizens. Respondents were the state officials charged with implementation, enforcement, and application of the constitutional amendment. The sponsors of Proposition 140, Californians for a Citizen Government, intervened in the action on the side of the respondents. The petitioner advanced several arguments challenging the interpretation and constitutionality of Proposition 140. In its discussion, the California Supreme Court expressly stated that it would approach the constitutional analysis of Proposition 140 as the court understood the United States Supreme Court would approach it.

In the first step of its analysis, and as a preliminary matter, the California Supreme Court considered whether the term limitations enacted by Proposition 140 constituted a lifetime ban from a particular office, or a ban on consecutive terms in office. After reviewing the ballot pamphlet and the arguments of the proponents of Proposition 140, the California Supreme Court determined that the intent of Proposition 140 was to impose a lifetime ban from a particular office after the specified number of terms had been

80. Id. at 500, 841 P.2d at 1312, 286 Cal. Rptr. at 286.
81. Id.
82. Id. at 500, 816 P.2d at 1312, 286 Cal. Rptr. at 286. The court refers to both intervener and respondents as "respondents." Id.
83. Id. at 503-35, 816 P.2d at 1314-36, 286 Cal. Rptr. at 288-04. The first two arguments offered by the petitioners were based upon the California Constitution. Id. at 506-14, 816 P.2d at 1316-22, 286 Cal. Rptr. at 290-96. Petitioners first argued that Proposition 140 has such comprehensive consequences on the constitutional scheme that it represents a constitutional revision rather than a constitutional amendment. Id. at 506, 816 P.2d 1316, 286 Cal. Rptr. at 290. Next, petitioners argued that Proposition 140 embraced more than one subject and, therefore, violated California's single-subject rule. Id. at 512, 816 P.2d at 1320, 286 Cal. Rptr. at 294. Neither argument succeeded. Id. at 506, 816 P.2d at 1322, 286 Cal. Rptr. at 296. See generally Note, Proposition 140: The Constitutionality of Term Limitations, 22 PAC. L.J. 1041-48 (discussing the standards California courts use in evaluating single-subject and constitutional revision arguments).
85. Id. at 503, 816 P.2d at 1314, 286 Cal. Rptr. at 288.

1688
served. In reaching this conclusion, the Eu court noted that the initiative was designed to eliminate people who made a career out of service in the legislature. This intent was determined from the fact that the ballot pamphlet did not make any reference to consecutive limitation, but stated the fact that the measure was intended as a lifetime ban. The Eu court recognized that ballot pamphlets sometimes overstate arguments, but thought the fact that the proponents of the measure did not contradict the lifetime ban argument was significant in determining the intent of the measure.

After determining that Proposition 140 did not violate the California constitution, the California Supreme Court turned to the federal constitutional arguments. Specifically, the Eu court examined the petitioner's argument that the lifetime ban contemplated by the term limitations interfered with the voting rights of the populace, and the candidacy rights of present and future candidates, and, therefore, violated the first and fourteenth amendments of the United States Constitution. In particular, plaintiffs alleged because the lifetime ban imposed by term limitations forever barred office holders from running for the same office again, term limitations were a substantial burden on the right to vote and the right of candidacy. In considering this argument, the California Supreme Court first examined the question of what standard of review should be applied to test the constitutional validity of Proposition 140's term limitations. The petitioners argued that a "compelling interest" standard was mandated by the alleged burdens Proposition 140 placed upon voting and candidacy.

86. Id. at 500, 816 P.2d at 1316, 286 Cal. Rptr. at 290. Respondent Eu, arguing for the validity of Proposition 140, argued that the measure was intended as a limit on consecutive terms. Id. at 503, 816 P.2d at 1314, 286 Cal. Rptr. at 288. Petitioners contended that Proposition 140 imposed a lifetime ban. Id.
87. Id. at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 290.
88. Id. at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289.
89. Id. at 505, 816 P.2d at 1316, 286 Cal. Rptr. at 289.
90. Id. at 514, 816 P.2d at 1322, 286 Cal. Rptr. at 296. See supra note 83 and accompanying text (discussing the single-subject and constitutional revision arguments).
91. Id. at 514, 816 P.2d at 1322, 286 Cal. Rptr. at 296.
92. Id.
93. Id.

1689
rights, which petitioners termed to be "fundamental." In formulating their theory, the petitioners relied upon *Eu v. San Francisco Democratic Committee*, in which California's ban on primary endorsements by political parties was struck down. The *Eu* court rejected this standard, noting that Proposition 140 has no effect on speech interests, and has an equal impact on all political parties. The California Supreme Court noted that the ban in *San Francisco Democratic Committee* burdened free speech and association, and, therefore, had to satisfy a compelling interest standard of review. However, the *Eu* court concluded that *San Francisco Democratic Committee* did not apply in the term limitation context since Proposition 140 affected all parties equally and did not implicate speech interests.

After noting that the United States Supreme Court has given the states wide latitude in making election laws, as long as the laws are applied evenhandedly without discriminating against particular citizens, the California Supreme Court stated that the term limitations of Proposition 140 met that standard of review. Following the United States Supreme Court's determination that challenges to election laws cannot be resolved by a "litmus-paper test," the California Supreme Court applied a balancing test from *Anderson v. Celebreeze.* Essentially, the *Anderson* test requires a court to weigh the injury alleged by the plaintiff against

94. *Id.* Under petitioner's analysis, no compelling state interest could support a lifetime ban from office. *Id.* See infra notes 212-251 and accompanying text (discussing the standard of review under equal protection for elections cases).

95. *489 U.S. 214* (1989) (striking down California's statutory ban on political party endorsements of primary candidates, finding a violation of the first amendment). See generally, Karlan, *Undoing the Right Thing: Single Member Office and the Voting Rights Act*, 77 VA. L. REV. 1, 21 (1991) (discussing the California statute which required rotation of party chairman from Northern to Southern California which was struck down in *San Francisco Democratic Committee*).

96. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

97. *Id.* at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

98. *Id.*

99. *Id.*

100. See *id.* at 516, 816 P.2d at 1323, 286 Cal. Rptr. at 297 (citing Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)).

101. *Id.*


103. *Eu* at 516, 816 P.2d at 1323, 286 Cal. Rptr. at 297.
the protected interest asserted by the state. The argument that Proposition 140 infringed on the equal protection rights of voters or candidates was rejected, as the Eu court found that any injury to the voters and candidates was outweighed, under the Anderson test, by the state's interest in reforming the system of incumbency.

The petitioners also alleged that Proposition 140 was an unlawful bill of attainder enacted to punish longtime incumbent legislators. The Eu petitioners pointed to portions of the ballot pamphlet arguments which referred to certain legislators by name. The California court disagreed that these mentions qualified Proposition 140 as a bill of attainder, finding that none of the three tests set forth in Nixon v. Administrator of General Services was met by the term limitation provisions.

Since the equal protection issues apply to members of Congress as well as to state legislators, the California Supreme Court's

---

104. Id. at 516-17, 816 P.2d at 1323, 286 Cal. Rptr. at 297 (quoting Anderson 480 U.S. at 789-90). See infra note 259 and accompanying text (stating the Anderson test). The Anderson Court also required a reviewing court to consider any less drastic alternatives to a lifetime ban. Anderson, 480 U.S. at 806.

105. Eu, 54 Cal. 3d at 524, 816 P.2d at 1328, 286 Cal. Rptr. at 302. The Eu court weighed several facts in its Anderson analysis, including the fact that an incumbent is not barred from any other office, term limitations apply only after numerous years of service in office, and for most of those affected, the term limitations are prospective in effect. Id. at 518, 816 P.2d at 1324, 286 Cal. Rptr. at 298. As to the rights of voters, the court noted the fact that voters could still vote for qualified candidates. Id. at 519, 816 P.2d at 1325, 286 Cal. Rptr. at 299.

106. See U.S. CONST. art. I, § 10 (prohibiting state enactment of a bill of attainder). A bill of attainder is a legislative act that applies to named individuals, or to easily ascertainable members of a group, in such a way as to inflict punishment on them without a judicial trial. BLACK'S LAW DICTIONARY 150 (5th ed. 1979).

107. Eu, 54 Cal. 3d at 525, 816 P.2d at 1329, 286 Cal. Rptr. at 303.

108. Id. at 525-26, 816 P.2d at 1329, 286 Cal. Rptr. at 303. The pamphlet specifically referred to Assemblyman Willie Brown and Senator David Robert; each of whom has been in office more than fifteen years. Id.

109. 433 U.S. 425 (1977). In Nixon, former President Richard Nixon alleged that the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of President Nixon's papers and tapes, violated the constitution as a bill of attainder. Id. at 428.

110. Eu, 54 Cal. 3d at 527, 816 P.2d at 1330, 286 Cal. Rptr. at 303-304. The Nixon tests included a historical test, which looked at whether the challenged provision had been typically prohibited by the Constitution; a functional test of the actual existence of punishment, which looked at whether the challenged law could reasonably be said to further nonpunitive legislative purposes; and a motivational test which examined whether a congressional intent to punish was present in the legislative history of the law. Id. at 526-27, 816 P.2d at 1329-30, 286 Cal. Rptr. at 304.
analysis in *Eu* is helpful in determining whether term limitations on members of Congress, such as those enacted by Colorado, are valid. Unlike the California term limitations litigated in *Eu*, the Colorado provisions have not been challenged. Colorado’s term limitations became effective after those of California and Oklahoma. Colorado’s term limitation amendment is the most comprehensive to date, as it imposes term limitations on Colorado’s state legislators, as well as the state’s congressional representatives. The Colorado limitations on state legislators differ from those of Oklahoma and California in several respects. The Colorado provision limits state senators to two consecutive four-year terms, and state representatives to four consecutive two-year terms. As defined by the Colorado provisions, terms are consecutive unless they are separated by a hiatus of four or more years. Therefore, to escape the term limitation provision, a legislator could run every other four years indefinitely. Additionally, the Colorado amendment is purely prospective in nature. Since the amendment provides that the limitations apply only to those state legislators elected on or after January 1, 1991, all state legislators elected on that date, whether incumbent or newly-elected, face the same term limitations.

---

111. *See infra* notes 119-122 and accompanying text (discussing the limitations on members of Congress enacted in Colorado).


113. *See Colo. Const.* art. IV, § 1(2) (limiting the terms of governor, lieutenant governor, secretary of state, state treasurer and attorney general); *id.* art. V, § 3(2) (limiting the terms of state senators and representatives); *id.* art. XVIII, § 9a(1) (limiting the terms of congressional representatives).

114. *Compare Colo. Const.* art. V, § 3(2) (limiting the terms of state senators and representatives) *with* *Okla. Const.* art. V, § 17A (limiting terms of state legislators) *and* *Cal. Const.* art IV, § 2(a) (limiting terms of state senators and assembly members). *See infra* notes 115-118 and accompanying text (discussing limits on state congressional representatives).

115. *Colo. Const.* art. V, § 3(2). Colorado’s term limitation amendment also imposes limitations on other elected state offices. *See id.* art. IV, § 1(2) (stating that the governor, lieutenant governor, secretary of state, state treasurer, and attorney general are limited to two four-year terms).

116. *Id.* art. V, § 3(2).

117. *Id.*

118. *Id.*
Colorado is the only state to limit the terms of office of its representatives in the United States Congress.\(^{119}\) The Colorado congressional representatives, both Senators and members of the House of Representatives, are limited to twelve consecutive years of service in Congress.\(^{120}\) As these provisions are purely prospective in nature, even if an executive or state representative has served for many years, that individual may continue to serve as a congressional representative. Other than the inclusion of Colorado’s congressional representatives in the term limitation provisions, the significant difference between the Colorado term limitation provisions and those of California and Oklahoma is that Colorado’s scheme provides for limitations on consecutive terms, rather than lifetime term limitations on its officeholders and legislators.\(^{121}\) This allows a Colorado incumbent, who has previously served the prescribed number of consecutive terms, to run for the same office if there is a four year hiatus between terms.\(^{122}\)

The Colorado provisions have not yet been challenged in court. This may be because Colorado’s provisions were passed by an overwhelming majority of the voters.\(^{123}\) A further reason for the absence of a legal challenge is that no legislators will be affected.

---

119. See id. art. XVIII, § 9a(1) (limiting the terms of members of Congress).

120. Id. As with the terms of state legislators, terms are consecutive unless they are four years apart. Id.

121. See id. (limiting Colorado’s United States senators to two consecutive six-year terms and members of the House of Representatives to six consecutive two-year terms). California’s provisions constitute a lifetime ban on its legislators. Legislature v. Eu, 54 Cal. 3d 492, 506, 816 P.2d 1309, 1316, 286 Cal. Rptr. 283, 290 (1991). Oklahoma provides that anyone elected after the effective date of the amendment can serve no more than twelve years in the Oklahoma Legislature. OKLA. CONST. art. V, § 17A. The Oklahoma amendment further provides that years do not have to be consecutive to qualify for the twelve year limit. Id. See also Jacobs, California Elections Propositions 131, 140; Oklahoma Voters Send Signal on Limiting Terms, L.A. Times, Sept. 20, 1990, Part A, at 41, col. 1 (characterizing the Oklahoma amendment as a lifetime ban).

122. See COLO. CONST. art. XVIII §9a(1) (limiting Colorado’s United States senators to two consecutive six-year terms and members of the House of Representatives to six consecutive two-year terms).

until after the year 2000, since the term limitations apply prospectively only. 124

Following the successful passage of term limitation proposals in Oklahoma, California and Colorado, voters in other states will soon be considering their own term limit proposals. 125 In November 1992, Florida voters will vote on a proposal limiting the terms of their state and congressional legislators to eight consecutive years. 126 This proposed amendment, like the Colorado amendment, is purely prospective in nature. 127 However, the eight-year consecutive term limitation mandated by the Florida proposal is considerably shorter than the twelve-year consecutive term limitation imposed by the comparable Colorado provision. 128

The constitutionality of Florida’s proposed term limitation amendment was brought before the Florida Supreme Court in a petition by the Florida State Attorney General requesting an advisory opinion from the court. 129 In its limited decision, the Florida court held only that the term limitations complied with the Florida Constitution’s single-subject requirement and that the ballot

124. See COLO. CONST. art. IV, § 1(2) (stating that the limitation applies to executive offices beginning on or after Jan. 1, 1991); id. art. V, § 3(2) (stating that the limitation applies to state legislators beginning terms on or after Jan. 1, 1991); id. art. XVIII, § 9a(1) (stating that the limitation applies to congressional representatives beginning terms on or after Jan. 1, 1991).

125. See supra note 1 and accompanying text (listing states that are considering term limitation proposals).

126. CONSTITUTIONAL AMENDMENT PETITION FORM, Limited Political Terms in Certain Elective Offices, April 3, 1991 (hereinafter PETITION). The amendment proposes to limit not only state and congressional legislators, but also the lieutenant governor and Florida cabinet members. Id. See Advisory Opinion, supra note 8, at 226 (listing the offices which are affected by the eight consecutive year limit).

127. See PETITION, supra note 126 (stating that the amendment takes effect on the date on which it is approved by the electorate and that no prior service will count against the incumbent). See also Advisory Opinion, supra note 8 at 226 (setting out the proposed amendment).

128. Compare PETITION, supra note 126 (proposing an eight-year consecutive term limitation) with COLO. CONST. art. XVIII, § 9a(1) (imposing a 12 year consecutive term limitation).

129. Advisory Opinion, supra note 8, at 225. Under Florida law, the state Attorney General may ask the Florida Supreme Court for an advisory opinion as to the constitutionality of proposed legislation. FLA. CONST. art IV, § 10; FLA. STAT. § 16.061 (1989).
title and summary were valid.\textsuperscript{130} In reaching this conclusion, the court limited its inquiry to Florida law and found that the federal constitutional issues raised by the opponents of the proposal were not justiciable.\textsuperscript{131} Two dissenting justices thought that the court should have addressed whether state-enacted term limitations on congressional representatives violated the United States Constitution by adding a qualification for congressional office to those already specified in article I of the United States Constitution.\textsuperscript{132} However, the Florida Supreme Court is not the only state supreme court that has declined to address the federal constitutionality of term limitations on members of Congress.\textsuperscript{133}

In November 1991, voters in Washington state rejected a term limitation proposal which would have limited the terms of both state legislators and members of Congress.\textsuperscript{134} Under the Washington proposal, members of the state house of representatives would have been limited to three consecutive two-year terms and a member of the state senate would have been limited to two consecutive four-year terms.\textsuperscript{135} If a legislator met the term limit in one house, that person could still serve in the other house until that legislator reached a total of ten years of total service in both houses.\textsuperscript{136} Furthermore, the Washington initiative would have been retrospective in that a senator or representative who had

\begin{itemize}
  \item[\textsuperscript{130}] \textit{Advisory Opinion, supra} note 8 at 228. The purpose of the single-subject requirement is to prevent against multiple changes in the constitution with one initiative. \textit{See} FLA. CONST. art. XI, § 3 (providing that any initiatives to amend the Florida constitution address only one subject). The ballot title and summary are required to be in clear and unambiguous language. \textit{FLA. STAT.} § 101.161(1) (stating ballot title requirements).
  \item[\textsuperscript{131}] \textit{Advisory Opinion, supra} note 8 at 228. The Florida court did not address whether the proposed term limitations added a qualification to those already listed in the federal constitution. \textit{Id.}
  \item[\textsuperscript{132}] \textit{Id.} at 229. The dissenters thought that term limitations added a qualification to those listed in the federal constitution and were therefore invalid. \textit{Id.} at 230-31.
  \item[\textsuperscript{133}] \textit{See infra} notes 142-44 and accompanying text (discussing the dismissal of a case brought against a proposed term limitation amendment in Washington state).
  \item[\textsuperscript{134}] Broom & Gilmore, \textit{Afraid of Losing Clout, Voters Reject Term Limits}, Seattle Times, Nov. 6, 1991, at A1.
  \item[\textsuperscript{135}] 1991 Washington Initiative 553, \textit{SECRETARY OF STATE, VOTERS PAMPHLET, WASHINGTON STATE GENERAL ELECTION} at 24 (Nov. 5, 1991). According to the proposal, terms would be consecutive unless they were six years apart. \textit{Id.}
  \item[\textsuperscript{136}] \textit{Id.}
\end{itemize}
served the maximum number of terms would have been able to serve only one more term after enactment of the initiative. 137

The proposed term limitation provision applicable to Washington's members of Congress was nearly identical to that affecting state legislators. 138 Members of the House of Representatives would have been limited to three consecutive terms, and members of the Senate would have been limited to two consecutive terms. 139 However, instead of the ten-year limit on serving as both representative and senator, as imposed on state legislators, the state's members of Congress would have been limited to twelve consecutive years in any combination of service. 140 Finally, the Washington provision was also retrospective, since congressional representatives who had served the maximum number of terms at the time of the proposed enactment could have served only one more term. 141

Before the measure was placed on the ballot, the Washington Supreme Court dismissed a challenge to the proposal's constitutionality under the state constitution in *League of Women Voters v. Munro*. 142 The Washington court declined to rule on any state or federal constitutional issues, noting that the issues were complex, of public importance, and should not be decided in a cursory manner. 143 As a result, the court's opinion constituted a mere two page order dismissing the case. 144

Although state-enacted term limitations on state legislators have faced a number of constitutional challenges, as the above discussion of Washington, Florida, and California indicates, term limitations have been regularly upheld by the courts. The argument that term limitation provisions are constitutional was reinforced when, on March 9, 1992, the United States Supreme Court declined to review the California Supreme Court's decision in *Legislature*
v. Eu, which upheld the constitutionality of term limitations on both state and federal grounds. Since the status of state-enacted term limitations on members of Congress has yet to be decided, the remainder of this Comment will discuss the constitutionality of state-enacted term limitations on members of Congress.

III. Federal Constitutional Constraints on Term Limitation

Despite the recent acceptance of state-enacted term limitations on state elected legislators, state term limitations on congressional representatives may pose different problems. Several unique federal constitutional arguments can be raised against state-enacted congressional term limitations. The first, and most probable, argument is that state constitutional amendments imposing a term limitation requirement on congressional representatives expressly conflict with the federal constitutional qualifications for those offices. A second argument, which was rejected by the California Supreme Court in Eu in the context of term limitations on state legislators, is that term limitations may deprive both candidates and voters of their rights under the equal protection clause of the fourteenth amendment. A third argument, also

---

146. See Glasser, Term Limit Drive Makes Comeback, Roll Call, Mar. 12, 1992 (stating that the courts will have to decide the federal term limit question solely on the issue of whether states can control the qualifications for members of national legislature).
147. See U.S. Const. art. I, § 2, cl. 2 (stating "No person shall be a Representative who shall not have attained to the Age of Twenty Five Years, and been Seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen"); id. art. I, § 3, cl. 3 (stating "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.")
148. See U.S. Const. amend. XIV, § 1, cl. 2 (equal protection clause); Legislature v. Eu, 54 Cal. 3d 492, 514-25, 816 P.2d 1309, 1322-29, 286 Cal. Rptr. 283, 296-303 (1991) (discussing and rejecting the argument that term limitations which constitute a lifetime ban on holding office violate the first and fourteenth amendments).
rejected by the California Supreme Court in *Eu*,\textsuperscript{149} is that term limitations impermissibly burden the rights of freedom of speech of candidates and the freedom of association of voters under the first amendment.\textsuperscript{150} The next section will discuss each of these arguments in turn.

Before considering these arguments, however, a notable aspect of term limitation analysis must be recognized. In general, two types of term limitations on members of Congress have either been proposed or enacted. The first type, as enacted in Colorado, imposes a limit on the consecutive number of terms a member of Congress may serve.\textsuperscript{151} Consecutive limits allow a member of Congress to later run for the same office if that person waits a specified number of years between terms.\textsuperscript{152} The second type, as proposed in Florida,\textsuperscript{153} imposes a lifetime ban from a particular office after the specified number of terms has been served.\textsuperscript{154} The lifetime ban approach would forever bar a member of Congress

\textsuperscript{149} *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296. The court dismissed the argument that a "compelling interest" standard was required to test the validity of term limitations because of the impact on first amendment rights by stating that term limitations have no effect on speech interests and affect all political parties equally. *Id.* The court compared term limitations with a California law which was struck down by the United States Supreme Court in *Eu v. San Francisco Democratic Committee*, 489 U.S. 214, 222. (1991) That California law had prohibited primary endorsements by political parties. *Id.* In *Eu v. San Francisco Democratic Committee*, the "compelling interest" standard was employed because of the serious impact on first amendment rights in that case. *Id.*


\textsuperscript{151} *See* COLO. CONST. art. V, § 3(2) (imposing consecutive term limitations on state's congressional representatives).

\textsuperscript{152} *Id.* *See* supra note 115-122 and accompanying text (discussing Colorado's term limitation amendment which bans legislators from consecutive terms).

\textsuperscript{153} *See* supra notes 126-128 and accompanying text (discussing Florida's proposed amendment).

\textsuperscript{154} *Petition*, supra note 122. This is also the type of limitation which was defeated in the state of Washington. *See* supra notes 134-144 and accompanying text (discussing Washington's failed term limitation proposal).
from serving in the same congressional office if that member has served the maximum number of terms allowed.\textsuperscript{155}

The implications of these different approaches to term limitation are irrelevant to the analysis under the qualifications clauses, because, in either case, term limitations add a qualification to those already prescribed in article I of the United States Constitution.\textsuperscript{156} While some commentators have argued that term limitations which constitute a lifetime ban on holding office after serving the maximum number of terms are more likely to violate the equal protection clause,\textsuperscript{157} this prediction may be unlikely in light of the California Supreme Court's disposition of \textit{Legislature v. Eu}.\textsuperscript{158} Finally, different results may also occur under first amendment analysis. However, again because of the disposition in the \textit{Eu} case, these differences may not be significant in determining the validity of term limitations.\textsuperscript{159}

\textsuperscript{155} See \textit{Petition}, supra note 126 (stating that no person can run for the same office if that person has served for eight consecutive years).

\textsuperscript{156} See \textit{infra} notes 160-231 and accompanying text (discussing the qualifications clauses).

\textsuperscript{157} See, e.g., \textit{Note}, \textit{Recent Developments in the Law}, 28 HARV. J. ON LEGIS. 569, 589 (1990) [hereinafter \textit{Note}] (stating that term limit laws which constitute a permanent ban on service in the legislature raise more difficult constitutional questions than term limits which ban consecutive service in office, as in Colorado).

\textsuperscript{158} See \textit{Eu}, 54 Cal. 3d at 515, 816 P.2d at 1324, 286 Cal. Rptr. at 296 (1991) (holding that California's term limitations did not violate the equal protection clause). This is especially true since the California court stated it was following the same analysis for the equal protection and first amendment issues that the United States Supreme Court would use. \textit{Id}. at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296. While it has no precedential value, the Supreme Court's denial of certiorari may indicate that the California court's analysis is accurate in light of the federal constitution. \textit{Legislature v. Eu}, 54 Cal. 3d. 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), \textit{cert. denied}, 112 S. Ct. 1292 (1992).

\textsuperscript{159} See \textit{Eu} at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296 (holding term limitations valid under first amendment, equal protection, and bill of attainder challenges). A lifetime ban term limitation, which petitioners in \textit{Eu} argued that Proposition 140 imposed, is more stringent than a ban on consecutive terms since it forever bans the candidate from a particular office. \textit{Id} at 506, 816 P.2d at 1316, 286 Cal. Rptr. 283, 290. Intuitively, if the more stringent lifetime ban type has been upheld, the less stringent consecutive ban type would also be upheld.
A. Qualifications Clauses

The qualifications clauses of the United States Constitution set out specific eligibility requirements for members of Congress.\textsuperscript{160} Although the qualifications for representatives and senators vary slightly, the requirements for both offices include age, citizenship, and residency qualifications.\textsuperscript{161} Term limitations, either in the form of consecutive limits or lifetime bans, are not included among the qualifications prescribed in the Constitution. Therefore, it is argued that term limitations enacted by the states\textsuperscript{162} on federal legislators impose an additional qualification for office, since these limitations require that a candidate cannot be an incumbent who has served the maximum number of terms.

Writing in \textit{The Federalist}, Alexander Hamilton considered the requirements for congressional office listed in the constitution to be exclusive.\textsuperscript{163} Hamilton wrote that the qualifications of both electors and members of Congress, "as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."\textsuperscript{164} This position has been

\begin{itemize}
\item \textsuperscript{160} U.S. CONST. art. I, § 2, cl. 3 (setting out qualifications for representatives); id. art. I, § 3, cl. 3 (setting out qualifications for senators).
\item \textsuperscript{161} Id. art. I, § 2, cl. 2; id. art. I, § 2, cl. 3. Clause 2 pertains to representatives and states, "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been Seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Id. art. I, § 2, cl. 2. Clause 3 contains the requirements for senators and states, "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Id. art. I, § 2, cl. 3.
\item \textsuperscript{162} In general, states laws governing elections are given deference under the federal constitution. The United States Constitution, article I, section 4, clause 1 provides in part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."
\item \textsuperscript{163} The Federalist No. 60, at 394 (A. Hamilton) (E. M. Earle ed. 1937).
\item \textsuperscript{164} Id.
\end{itemize}
endorsed by the United States Supreme Court, and followed by federal and state courts.\footnote{165} In addition to the expressed intent of the Founding Fathers, the United States Supreme Court has also considered the extent of the exclusivity of the qualifications clauses. In \textit{Powell v. McCormack},\footnote{166} the Supreme Court examined the qualifications for service in Congress as set out in the Constitution.\footnote{167} The House of Representatives had refused to seat Powell, alleging that he had committed several unethical acts.\footnote{168} The Supreme Court held that the House could not exclude Powell, a duty elected member of Congress, for any reason other than the qualifications set forth in the Constitution.\footnote{169} The case centered on the authority of the House to exclude Powell under article I, section 5 of the Constitution which provides that the House shall be the judge of the qualifications of its members.\footnote{170}

Powell argued that it was the intention of the framers of the constitution that the qualifications in the constitution could not be

\footnote{165. \textit{See infra} notes 166-231 and accompanying text (discussing United States Supreme Court and lower federal court decisions which analyze the qualifications clauses). State courts have held that "resign to run," and other state-enacted requirements to run for congressional office violate the qualifications clause. \textit{See Lowe v. Fowler}, 240 Ga. 213, 240 S.E.2d 70 (1977) (resign to run provision); \textit{State ex rel. Chavez v. Evans}, 79 N.M. 578, 446 P.2d 445 (1968) (residency and qualified elector provision); \textit{Hellman v. Collier}, 217 Md. 93, 141 A.2d 908, 911 (1958) (residency requirement); \textit{Danielson v. Fitzsimmons}, 232 Minn. 149, 44 N.W.2d 484 (1950) (excluded convicted felons); Riley v. Cordell, 200 Okla. 390, 194 P.2d 857 (1948) (excluded judges during term of office); \textit{Buckingham v. State}, 42 Del. 405, 35 A.2d 903 (1944) (excluded judges during term of office); \textit{Stockton v. McFarland}, 56 Ariz. 138, 106 P.2d 328 (1940) (excluded judges during term of office); \textit{In re O'Connor}, 173 Misc. 419, 17 N.Y.S.2d 758 (1940) (rejected ballot position because he was an avowed communist); \textit{Ekwall v. Stadelman}, 146 Or. 439, 30 P.2d 1037 (1934) (excluded judges during term of office); \textit{State ex rel. Chandler v. Howell}, 104 Wash. 99, 175 P. 569 (1918) (excluded judges during term of office). \textit{See also State v. Crane}, 65 Wyo. 189, 197 P.2d 364 (1948) (holding, after an extensive historical discussion, that a state constitutional provision which did not allow the governor to seek another office during the governor's term was unconstitutional under the qualifications clause).}

\footnote{166. 395 U.S. 486 (1969).}

\footnote{167. \textit{Id.} at 549.}

\footnote{168. \textit{Id.} Powell allegedly deceived the House as to travel expenses and illegal payments to his wife. \textit{Id.}}

\footnote{169. \textit{Id.} at 550.}

\footnote{170. \textit{Id.} at 507. \textit{See U.S. CONST. art. I, § 5, cl. 1} (stating "[e]ach house shall be the judge of the elections, returns, and qualifications of its own members").}
changed by Congress. In resolving this issue, the Supreme Court in *Powell* surveyed the history of the constitutional requirements for office. The Court agreed with Powell that, as reflected in the constitutional debates and the events surrounding them, the qualifications in the constitution are exclusive. In so holding, the *Powell* Court referred to statements by Alexander Hamilton and James Madison during the constitutional debates. Hamilton had stated that a fundamental principle of our representative democracy is "that the people should choose whom they please to govern them," and Madison had stated that "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." These statements, according to the *Powell* Court, were the principal reasons that the Constitutional Convention had granted Congress only a limited power to expel members.

While the Court's holding in *Powell* referred to the ability of the House to exclude a member under the constitution, the exclusivity of the qualifications set out in the constitution was emphasized by the Court throughout the opinion. The *Powell* Court's endorsement of Hamilton's view of the exclusivity of the qualifications set out in the constitution seems to foreclose the argument that these qualifications can be supplemented by term limitations. This historical view, endorsed by the Supreme Court is especially useful where there are no direct precedents regarding the application of the qualifications clauses to term limitations on members of Congress. Therefore, state-enacted term limitations on members of Congress, under the historical reasoning of *Powell*, violate the qualifications clauses of the constitution by adding to

172. Id. at 522-47.
173. Id. at 532.
174. Id. at 547.
175. Id. (quoting 2 DEBATES ON THE ADOPTION OF THE CONSTITUTION 257) (J. Elliot ed. 1836) (statement of A. Hamilton).
177. Id.
the requirements for congressional office set out in the constitution, contrary to the “defined and fixed” qualifications contemplated by the framers. 179

One year after Powell, Justice Black, sitting in his role as a circuit justice, examined whether a state law provision, which required state officers to resign in order to run for the United States House of Representatives, violated the qualifications clause. 180 In Davis, Justice Black wrote an opinion supporting an order to stay the judgment of the Florida Supreme Court which had upheld the Florida Secretary of State’s denial of a ballot position to the plaintiffs. 181 The plaintiffs, a sheriff and a city mayor, wanted to run for the United States House of Representatives. 182 A Florida statute required incumbents of state elected office to resign in order to run for another office, including Congress. 183 This “resign to run” statute, upheld in Davis by the Florida Supreme Court, was later invalidated in a different case by a federal district court as conflicting with the qualifications clause. 184 While Justice Black’s decision was based on the prudential consideration that more harm would be done to the candidates if their names were excluded than would be done to the state of Florida, Justice Black did predict that the full Supreme Court, if presented with this issue, would find that this resign to run provision added a qualification for congressional office to those set out in the constitution and, therefore, that it was unconstitutional. 185

Like the resign to run provision in Davis, term limitations restrict a candidate’s right to run for office. In fact, it might be argued that term limitations restrict that right even further, because

179. See supra, note 163 and accompanying text (discussing Hamilton’s view of the qualifications in the Constitution as unalterable).


181. Id.

182. Id. at 1203. The other plaintiff was James J. Ward, Jr., the mayor of Plantation, Florida.

183. Id.

184. Id. at 1203. See State ex rel. Davis v. Adams, 238 So. 2d 415 (Fla. 1970), aff’d on rehearing, 238 So. 2d 418 (Fla. 1970); Stack v. Adams, 315 F. Supp. 1295 (N.D. Fla. 1970) (decision of federal district court).

185. Davis, 400 U.S. at 1204.
the criteria for exclusion, incumbency in that particular office, is an immutable characteristic of the candidate. The plaintiffs in *Davis* could have resigned their state offices in order to run for the House of Representatives, but an incumbent, subject to a lifetime ban term limitation, cannot change status with a resignation. Even if a term limitation imposes a consecutive ban, an incumbent cannot change status in order to run for office in the same year, as could the plaintiffs in *Davis*.

Another case where the Supreme Court examined the qualifications clauses, albeit in a cursory manner, was *Storer v. Brown*. In that case, a California statute prohibited an independent candidate from appearing on the ballot if that person had either voted in the immediately preceding primary, or had been registered with another political party in the year preceding the last primary election. The plaintiff, Storer, was registered as a Democrat until January of 1972, and was, therefore, disqualified from running as an independent candidate for United States Representative in 1972 under the California affiliation provision.

In a footnote, the Storer Court found that the provision requiring non-affiliation in the year preceding the last primary election did not add a qualification for membership in the House of Representatives under article I of the United States Constitution. In fact, the Court in *Storer* noted that there was no basis for the contention that the affiliation statute imposed an additional qualification since the affiliation requirement was similar to requiring a candidate to win a primary in order to secure...

---

187. *Storer*, 415 U.S. at 726-27. The statute at issue in *Storer* was CAL. ELEC. CODE § 683 0(c),(d) (West 1974). The same statute also required independent candidates to file nominating papers signed by no more than six, but no less than five percent of the entire votes cast in preceding general election in the area where the candidate sought to run. *Id.* These signatures had to be obtained in a 24-hour period. *Id.* Additionally, the voters who signed the petition could not have voted in the last primary. *Id.* These provisions were not attacked as adding a qualification to congressional office. *Id.*
188. *Id.* at 727-28. Another plaintiff, Fromhagen, was also registered as a Democrat until early in 1972, and was similarly disqualified from appearing as an independent candidate by California Elections Code section 6830(d). *Storer*, 415 U.S. at 727. Storer will refer to both plaintiffs.
189. *Id.* at 746 n.16.
Constitutionality of Term Limitations

placement on the ballot. Consequently, according to the Storer court, the affiliation requirement was a permissible candidacy requirement for demonstrating substantial support within the community. Instead, the Court found that the subject provision violated the equal protection clause, as it conditioned obtaining a ballot position on joining a new political party. The Storer Court determined that a person need not follow the route of belonging to a political party to appear on the ballot in a general election.

Term limitations are distinguishable from the California affiliation provision in Storer. The policies of term limitation and the policies of the affiliation provisions are quite different. The considerations of the Court which were determinative in Storer, such as preserving the integrity of avenues to the ballot, avoiding voter confusion, and assuring that the winner is the choice of the majority, are policies which do not apply to term limitation. Unlike the independent candidates in Storer, the incumbent candidate has demonstrated a level of public support, the very fact that California wanted to ascertain with its statute. Therefore, while the affiliation requirement does not add to the qualifications of the constitution since it is only related to public support, a term limitation requirement changes the requirements of office, an office for which the incumbent is otherwise qualified to become a candidate.

Federal district courts and courts of appeal have also considered the extent of the exclusivity of the qualifications clauses of the

190. Id. at 746, n.16. See Williams v. Tucker, 382 F.Supp. 381 (1974) (holding that a Pennsylvania statute, which prevented a candidate for Congress from filing nomination papers and running in a primary at the same time, did not add a qualification to those listed in the constitution, as but instead regulated the "times, places and manner of holding elections for senators" as expressly granted to the states by article I, section 4, clause 1 of the Constitution).

191. Storer, 415 U.S. at 746 n.16.

192. Id. at 746.

193. Id. at 774-75.

194. See generally Note, supra note 157, at 600-07 (outlining the policies behind term limitation amendments).


196. Storer, 415 U.S. at 733.
Many of these courts have held, as did the United States Supreme Court in *Powell*, that certain provisions which restrict a person's candidacy for Congress add to the qualifications prescribed in the constitution and are therefore invalid. For example, in *Dillon v. Fiorina*, a New Mexico statute imposing a residency requirement on candidates for the office of United States Senator was invalidated as conflicting with the qualifications clauses of the Constitution.

When confronted with resign to run provisions, lower federal courts, similar to Justice Black's analysis in *Davis*, have held that such provisions add to the qualifications for Congress set out in the Constitution. In *Stack v. Adams*, a Florida statute required a person who wished to be a candidate for the United States House of Representatives to resign from any state office currently held. The district court ruled that this requirement violated the constitution by adding a qualification to the office of United States Representative in violation of the qualifications clauses.

The *Stack* court, citing *Powell*, held that state laws cannot add to or

---

197. *See infra* notes 199-224 and accompanying text (discussing analysis under the qualifications clauses in federal courts).


200. *Id.* at 731. The court stated that it is well-settled that a state cannot add to or subtract from the qualifications set forth in the constitution. *Id.* *See* *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (striking down district residency requirements on the basis that states cannot add to the qualifications for representative set out in the constitution).

201. *See supra* note 198 and accompanying text (noting lower federal court opinions which found that resign to run provisions added a qualification to those set forth in the constitution).


203. *Id.* at 1295.

204. *Id.* at 1297. *See* State ex rel. *Davis v. Adams*, 238 So. 2d 415 (Fla. 1970) (opinion by the Florida Supreme Court agreeing with the analysis in *Stack v. Adams* that resign to run provisions add a qualification to those set out in the constitution).
subtract from the requirements for congressional office listed in the United States Constitution.205

In direct contrast to Davis and Stack is the holding in Signorelli v. Evans.206 In that case, the Second Circuit upheld a resign to run statute against a constitutional attack alleging that it added a qualification for congressional office.207 The New York statute provided that a judge had to resign from judicial office in order to run for Congress.208 In its discussion, the Signorelli court referred to the idea, announced in Powell, that the election of members of Congress is the choice of the people.209 With this principle in mind, the Signorelli court reasoned that a prohibition on candidacy during a term of office would prevent that candidate from appearing on the ballot and would, therefore, be invalid as adding a qualification.210 The Signorelli court stated that the New York statute imposed a lesser burden on candidates than state laws which absolutely prohibited judges from becoming a Congressional candidate during the judicial terms for which they had been elected.211 These absolute prohibition types of state statutes, the Signorelli court recognized, are invalid under the qualifications clauses.212 In contrast, the New York statute allowed the candidate to run for Congress, if the candidate was willing to resign the judgeship upon announcing his candidacy.213 The Signorelli court believed this was a more indirect form of regulation than the invalid absolute prohibition type of state laws.214

The Signorelli court noted that even New York's indirect regulation added a qualification to those set forth in the constitution, because, in addition to being over 25, an inhabitant of
New York and a citizen for seven years, the candidate could not be a state judge.\footnote{Id.} Finding that the resign to run provision added a qualification, the court nevertheless held that the provision was valid based upon an analogy to the incompatibility clause of the constitution.\footnote{Id. at 863. The incompatibility clause states that "[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.} The basic principle of incompatibility is that no person should hold any federal office concurrent with being a member of Congress.\footnote{Signorelli, 637 F.2d at 860. As the Signorelli court noted, this broad principle was refined to restrict members of congress only during their elected terms of office. Id. at 861.} The court noted that because New York’s statute was aimed at the judicial office, a subject for local government, and not at the candidate himself, New York could constitutionally enact this statute.\footnote{Id. at 859.} The court based its decision on the fact that because the New York statute was aimed at an area within state's traditional authority, it was not invalid because of its indirect effect on the qualifications for congressional office.\footnote{Id. at 861.}

Ultimately, the court held that New York could require state judges to resign before becoming candidates for congress, even though the statute added an "indirect" qualification to those in the constitution, since the predicate for doing so, the incompatibility clause, was found in the federal constitution.\footnote{Id. at 863.} In requiring a judge to first resign from judicial office before becoming a congressional candidate, the court recognized that the statute imposed an additional qualification on congressional candidacy, but said that New York, in essence, was adopting its own incompatibility clause.\footnote{Id. at 861.}

Term limitations are easily distinguishable from the New York resign to run provision upheld in Signorelli. First, the New York
statute applied to state officers, namely, state judges. Term limitations, like those enacted in Colorado, limit members of Congress, which are federal officers. Second, the Signorelli court found that New York was justified in enacting the provision because it had a parallel in the incompatibility clause of the United States Constitution and, therefore, even though it imposed an "indirect" qualification on congressional office, the statute was valid. By contrast, there is no constitutional parallel for term limitations. As a result, term limitations add an unprecedented qualification on candidacy for congressional office in violation of the qualifications clauses.

It has been argued that term limitations do not add to the qualifications in the United States Constitution. This argument is that term limitations are a very narrow type of restriction, since they affect only incumbent officeholders, and do not prevent the incumbent from running for another office. However, even if term limitations are so limited, the United States Supreme Court has recognized that the qualifications in the constitution are exclusive. Therefore, the exclusive nature of the qualifications clauses preclude any argument that these can be added to, even if the addition is in fact a limited one. Signorelli, because of its emphasis on the fact that judges are state officers, cannot serve as a precedent for state laws which add a qualification to federal officers.

From the time of the Founding Fathers, the qualifications clauses in the United States Constitution have been considered to be the exclusive statements of the qualifications for membership in the United States House of Representatives and Senate.
Although an "indirect" additional qualification for congressional office, predicated upon a parallel constitutional section, has survived judicial scrutiny,\textsuperscript{230} the qualifications clauses have been consistently interpreted as exclusive of any other requirements for office.\textsuperscript{231} As a result of this strict interpretation of the qualifications clauses, it appears that state-enacted term limitations on congressional representatives constitute an additional qualification on congressional membership, and violate the qualifications clauses.

B. Equal Protection

Another common argument against the validity of term limitations is that term limitations violate the equal protection clause of the United States Constitution.\textsuperscript{232} Found in the fourteenth amendment, the equal protection clause guarantees all persons equal protection under the laws of the states.\textsuperscript{233} Based on this clause, the argument is made that term limitations deprive incumbent candidates of a right to hold public office because term limitations affect the right of incumbents, as opposed to non-
incumbents, to run for office, and the right of voters to vote for an incumbent.234

When applying the equal protection clause, courts traditionally first examine the interests involved and then, based on the type of interest found, employ one of three levels of analysis: strict scrutiny, intermediate scrutiny, or rational basis review.235 In general, only if a fundamental right or a suspect class is involved, will the courts utilize strict scrutiny.236 The traditional inquiry is whether the state action infringes on a fundamental right or creates classifications which discriminate against similarly situated persons.237 However, in cases involving regulations restricting ballot access, the United States Supreme Court has developed a different analysis which includes a balancing test that does not follow traditional equal protection analysis.238

In Clements v. Fashing,239 a plurality of the Court, using the traditional equal protection analysis, relied on an earlier ballot

---


236. Loving, 388 U.S. at 11. See generally, Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (stating that strict scrutiny is usually fatal when applied to test the validity of state laws which are challenged under the equal protection clause); Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955) (discussing the school segregation cases); Rostow, The Japanese-American Cases: A Disaster, 54 YALE L.J. 489 (1945) (discussing the Japanese internment cases and the application of strict scrutiny).

237. Railway Express, 336 U.S. at 110; Loving, 388 U.S. at 10. See generally, Dworkin, Social Sciences and Constitutional Rights: The Consequences of Uncertainty, 6 J. LAW AND EDUC. 3-10 (1977) (discussing the differences between equality of treatment and treatment as an equal); Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1 (1977) (discussing the idea that laws which treat persons differently violate principles of equal citizenship).


access case, *Bullock v. Carter*, to hold that candidacy is not a fundamental right. *Clements* involved a challenge to two provisions of the Texas constitution. The first provision, section 19, required an officeholder to finish the current term of office before running for the state legislature. The second provision, section 65, provided that any officeholder who announced candidacy for the legislature automatically forfeited any office currently held. The *Clements* plurality noted that traditional equal protection analysis, in cases involving restrictions on appearing on the ballot, is a "matter of degree" which includes considering the facts and circumstances behind the law, the state’s interest in restricting candidacy, and the interests which may be burdened by the restrictions. Finding no fundamental right, the plurality next examined whether the candidate’s political opportunity was burdened by the state’s restriction to appearing on the ballot. The plurality upheld section 19 because it imposed only a waiting period on a candidate, which required only a rational basis to survive application of the equal protection clause. The plurality also upheld section 65 on the basis that it imposed less substantial burdens than section 19, and involved the same interests as section 19.

A different approach from the *Clements* plurality analysis was introduced the next year in *Anderson v. Celebrezze*. In *Anderson*, the Court defined a balancing test to analyze restrictions...
on appearing on the ballot where those restrictions impair constitutional rights.\textsuperscript{250} While the Supreme Court has not explicitly endorsed this analysis,\textsuperscript{251} it is the approach lower federal and state courts have used in evaluating ballot access restrictions.\textsuperscript{252}

In \textit{Anderson}, an Ohio statute required an independent candidate for the office of President to register in March for the November election.\textsuperscript{253} John Anderson, an independent candidate for President, filed his application in April, missing the March deadline.\textsuperscript{254} The Ohio Secretary of State refused to accept the late application, prompting Anderson and three voters to challenge the constitutionality of the Ohio filing statute.\textsuperscript{255} The Supreme Court analyzed this claim in light of whether the statute unconstitutionally burdened the voting and associational rights of Anderson’s supporters.\textsuperscript{256} The Court recognized that the statute directly affected candidates, not voters,\textsuperscript{257} but noted that the rights of voters and candidates cannot be neatly separated.\textsuperscript{258} To evaluate this statute under both the equal protection clause and the first amendment, the \textit{Anderson} Court employed the following test:

\begin{itemize}
  \item 250. \textit{Id.} at 789.
  \item 251. The Supreme Court has not applied the \textit{Anderson} analysis subsequent to the \textit{Anderson} decision. In \textit{Legislature v. Eu}, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991), the California Supreme Court, before applying the \textit{Anderson} test, noted that there was a lack of direction by the high court in cases which restricted ballot access. \textit{Id.} at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296. Federal courts have also applied the \textit{Anderson} test to examine restrictions on ballot access. \textit{See}, e.g., \textit{Matsumoto v. Pua}, 775 F.2d 1393, 1396 (9th Cir. 1985) (applying the \textit{Anderson} test in examining a provision of a city charter which disqualified recalled city officials from election for two years after their recall).
  \item 253. 460 U.S. 780, 782 (1983). Members of the major political parties had to register in March to compete in the June primary. \textit{Id.} at 799.
  \item 254. \textit{Id.} at 782.
  \item 255. \textit{Id.} at 783.
  \item 256. \textit{Id.} at 782.
  \item 257. \textit{Id.} at 786.
  \item 258. \textit{Id.} at 786 (quoting \textit{Bullock v. Carter}, 405 U.S. 134, 143 (1972)).
\end{itemize}
[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.\(^{259}\)

Based upon this test, the *Anderson* Court found that the state's asserted interests in voter education,\(^ {260}\) equal treatment of major and minor party candidates,\(^ {261}\) and political stability\(^ {262}\) were outweighed by the interests of voters who associated to support Anderson and his views.\(^ {263}\)

As the Court in *Anderson* noted, there are two groups whose interests may be impaired by term limitation.\(^ {264}\) One is the candidate, who has an interest in running for office.\(^ {265}\) The other is the voter, who has an interest both in voting for the candidate and in associating with other voters or with the candidate to

---

\(^{259}\) *Id.* This was the approach used by the California Supreme Court in evaluating that state's term limits on its state legislators and finding that a lifetime ban on service in the state legislature did not violate the equal protection clause. *Legislature v. Eu*, 54 Cal. 3d 492, 524, 816 P.2d 1309, 1328, 286 Cal. Rptr. 283, 296 (1991).

\(^{260}\) *Anderson*, 460 U.S. at 796. The state argued that it wished to have an informed and educated electorate in advance of the election. *Id.* The *Anderson* Court did not find that seven months was a necessary time period for voters to become informed of a Presidential candidate. *Id.* at 797-98.

\(^{261}\) *Id.* at 799. The state argued that because major party candidates had to file in March for the June primaries, independents must file in June for the November election. *Id.* The Court found that the effects on the candidates would be different, since even if the majority party candidate did not file, that candidate's party would still be on the November ballot. *Id.*

\(^{262}\) *Id.* at 801. The state asserted that it had an interest in preventing the splintering in the Republican party that Anderson's candidacy allegedly would cause. *Id.* The *Anderson* Court found that the statute was not drawn to protect the major parties from "intra-party feuding," because if it was, it would be both overbroad and underinclusive. *Id.* at 805.

\(^{263}\) *Id.* at 806.

\(^{264}\) *Id.* at 786. Specifically, the Court noted that the rights of voters and candidates were intertwined. *Id.*

\(^{265}\) *Id.*
advance their collective political beliefs.\textsuperscript{266} In \textit{Anderson}, the Court found that the Ohio filing date, because it excluded independents who had not filed early in the campaign, was a burden on the independent candidate’s right to run for president, since such inflexibility was not imposed on the major political party candidates.\textsuperscript{267} The Court also found that the Ohio filing deadline burdened independents’ signature-gathering efforts more than the major political parties, since the major parties had a longer time to comply with the requirements.\textsuperscript{268} Furthermore, the Court noted that these restrictions on the candidate also burdened voters who support independent candidates, since the independent candidates they support had to comply with shorter time requirements than the major party candidates.\textsuperscript{269} The \textit{Anderson} Court noted that laws which unequally burden new or small political parties, or independent candidates impinge on the voter’s associational rights guaranteed under the first amendment.\textsuperscript{270} The Court held that the extent and nature of Ohio’s filing deadline was a significant burden the rights of both independent voters and candidates and therefore, under the test it enunciated, was invalid.\textsuperscript{271}

The continuing vitality of this analysis, and its applicability to the constitutional analysis of term limitations was affirmed by the California Supreme Court in \textit{Legislature v. Eu}, where the California court applied the \textit{Anderson} analysis to evaluate the impact of term limitations on the rights of voters and candidates.\textsuperscript{272} As discussed earlier, the California court determined that the state’s interest in competitive, fair elections, encouraging qualified persons to seek office, and eliminating unfair

\textsuperscript{266} \textit{Id.} See \textit{Williams v. Rhodes}, 393 U.S. 23, 30 (1968) (stating that voter’s associational rights under the first amendment are implicated by laws which restrict a candidate’s ability to appear on the ballot).

\textsuperscript{267} \textit{Anderson}, 460 U.S. at 792.

\textsuperscript{268} \textit{Id.}

\textsuperscript{269} \textit{Id.} at 792-93.

\textsuperscript{270} \textit{Id.} at 793.

\textsuperscript{271} \textit{Id.} at 806.

\textsuperscript{272} 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991). See \textit{supra} notes 103-105 and accompanying text (discussing application of the \textit{Anderson} standard to term limitations). 

1715
incumbent advantages\textsuperscript{273} outweighed the voters' rights in reelecting an incumbent, and the incumbents' rights in running for the same office.\textsuperscript{274} Term limitations for federal members of congress have been predicated on the same or similar concerns as limitations enacted for state congressional representatives.\textsuperscript{275} Therefore, the \textit{Eu} equal protection analysis will likely apply to state-enacted federal term limitations. While a state-enacted term limitation amendment on members of Congress is probably valid under the analysis applied in \textit{Eu},\textsuperscript{276} such limitations ultimately fail under the qualifications clauses.

C. First Amendment

The first amendment protects the rights of freedom of religion, speech, press, and peaceful assembly.\textsuperscript{277} The Supreme Court has determined that political speech, voting, and assembly are protected by the language of the first amendment.\textsuperscript{278} Opponents of term limitation provisions commonly argue that term limitations violate these first amendment interests associated with the freedom of speech, such as the right to vote and the right of association.\textsuperscript{279}

The right to vote, although not explicit in the first amendment, has been interpreted to be a part of the protections of the first

\begin{itemize}
\item \textsuperscript{273} \textit{Eu}, 54 Cal. 3d at 519, 816 P.2d at 1325, 286 Cal. Rptr. at 299.
\item \textsuperscript{274} Id. at 518, 816 P.2d at 1324, 286 Cal. Rptr. at 298.
\item \textsuperscript{275} See CONSTITUTIONAL AMENDMENT PETITION FORM, Limited Political Terms in Certain Elective Offices, April 3, 1991 (stating the purposes of limitations as preventing long-term incumbents from becoming preoccupied with re-election, preventing incumbents from becoming beholden to special interests, increasing voter participation, increasing citizen involvement in government and increasing the number of persons who run for office).
\item \textsuperscript{276} 54 Cal. 3d 492, 518, 816 P.2d 1309, 1324, 286 Cal. Rptr. 283, 298 (1991).
\item \textsuperscript{277} See U.S. CONST. amend I (ratified Dec. 15, 1791 and guaranteeing the freedoms of religion, speech, press and assemblage).
\item \textsuperscript{278} See, e.g., Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (stating that political speech is at the core of first amendment freedoms); id. at 14-15 (stating that the choices by citizens of their representatives is essential); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (stating that when individuals associate together, they can use their resources more effectively to advocate their beliefs); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (stating that the right to associate to advance political beliefs is fundamental).
\item \textsuperscript{279} \textit{Eu}, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.
\end{itemize}
Similarly, while there is no explicit right of association found in the language of the first amendment, the Supreme Court has found that a right of association exists in the first amendment. Term limitation opponents have argued that limitations infringe on first amendment rights by limiting political speech and activity, by restricting the choice of persons who run for office. Term limitation opponents also argue that term limitations infringe on the right to vote, because term limitations prevent voters from choosing to vote for an incumbent candidate. Most recently, these issues were litigated by the California Supreme Court in *Legislature v. Eu*.

In prior cases examining the constitutionality of provisions which restrict a candidate's appearance on the ballot, the first amendment has been applied to cases which deny a candidate a ballot position based upon refraining from certain types of expression, or because the candidate represents a minority party. For example, in *Anderson*, the Court considered whether the law in that case burdened the availability of political

---


281. *Williams*, 393 U.S. at 30 (stating that the right to associate to advance political beliefs is fundamental); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (holding that Connecticut's primary, which was closed to nonparty voters, violated the independent party's associational rights).


283. *Brief*, supra note 282, at 11 (arguing that voters are forever barred from voting for a candidate of their choosing). *See Note*, supra note 157, at 590 (discussing first amendment rights).


285. *See Emerson*, THE SYSTEM OF FREEDOM OF EXPRESSION 201 (1970) (stating that the first amendment is implicated in cases where a political party is entirely excluded from the ballot or where individuals are required to meet qualifications or take oaths). *See also* CHAFFEE, FREE SPEECH IN THE UNITED STATES 490-93 (1967) (discussing state laws which excluded communists from the ballot). *See generally* Northrup, Local Nonpartisan Election, Political Parties and the First Amendment, 87 COLUM. L. REV. 1677, 1684-93 (1987) (discussing the first amendment issues in state election laws).
opportunity unfairly or unnecessarily. On that issue, the Supreme Court held that the Ohio filing deadline placed significant state-imposed burdens on a national election process and was therefore invalid. The California Supreme Court in Eu found that California's term limitation amendment affected political parties equally and did not invoke the right of freedom of speech or association. As with the equal protection arguments, the disposition of Legislature v. Eu renders a subsequent challenge by federal legislators likely to be unsuccessful. Although the first amendment encompasses the right to vote and the right of association, one court to this point has held that these rights are not unconstitutionally impaired by term limitations.

IV. CONSTITUTIONAL AMENDMENT

While term limitations are likely to be upheld against equal protection or first amendment challenges, term limits on members of Congress are probably invalid under the qualifications clauses. Therefore, to enact term limitations on members of Congress, a provision which conflicts expressly with the qualifications clause, the federal constitution should be amended. Article V of the federal constitution details the

---

286. 460 U.S. 780, 793 (1983). In particular, the Court referred to burdens on new or small political parties and independent candidates, as having an impact on first amendment freedoms. Id. In fact, the Court pointed out that debate should be "uninhibited, robust, and wide-open." Id. at 794 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

287. Anderson, 460 U.S. at 793.

288. Eu, 54 Cal. at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296. See supra notes 95-99 and accompanying text (discussing the California court's disposition of the first amendment claim).

289. Eu, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

290. See supra notes 160-231 (analyzing term limitations on members of Congress under the qualifications clauses).

291. See supra notes 230-231 and accompanying text (discussing the invalidity of state enacted term limitations on members of Congress under the qualifications clauses). See also, U.S. CONST. art. V (setting out the procedures for amending the constitution). See generally, Ervin, Proposed Legislation to Implement the Convention Method of Amending the Constitution, 66 MICH. L. REV. 875, 895 (1968) (stating that if part of Article V, a provision of the constitution, is not valid, it should be stricken by the amendment process).
procedure for amending the Constitution. There are two routes a constitutional amendment may take. First, if two-thirds of both houses of Congress approve, a constitutional amendment proposed by Congress is sent to the states for ratification. The state procedures generally follow those of the federal constitution, however, many states have developed their own procedures. The second method is where two-thirds of the state legislatures apply to Congress to convene a constitutional convention. After the convention has been convened, three-fourths of the state legislatures must approve the amendment for it to become part of the federal constitution. This process puts an onerous burden on proponents of term limitation, however, it is not an impossible idea, since the number of terms of the president was limited by an amendment to the constitution.

While Congress is attempting to limit its terms through a constitutional amendment, given the history of such proposals, such an amendment will have to come from the states. Although term limitation is popular, over thirty-three states will have to apply to convene a constitutional convention, and

---

292. U.S. Const. art. V. Article V provides:
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments which . . . shall be valid . . . when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof . . . .

296. U.S. Const. art. V.
298. See U.S. Const. amend XXII (limiting the President of the United States to two terms of office).
299. See supra notes 34-56 and accompanying text (discussing past and current congressional attempts to limit terms).
300. Id.
agree upon a constitutional amendment. After approval of those states, the agreed upon amendment will have to be passed by over 37 states.

V. CONCLUSION

Although term limitations were not mentioned in the history of the United States Constitution, they enjoy current popularity. The number of states considering constitutional amendments is growing. While state-enacted term limitations on state legislators are constitutional, the constitutionality of state-enacted limitations on members of Congress has not been addressed by any court. Such limitations are invalid under the qualifications clauses. A constitutional amendment, while a difficult method of enacting a law, is the only constitutional method by which states can impose term limitations on federal legislators.

Tiffanie Kovacevich

---


302. Id.