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CONSENT OF THE GOVERNED: TERM LIMITS
AND AMERICAN DEMOCRACY

by

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of the requirements for the degree of

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ABSTRACT

*Consent of the Governed: Term Limits and American Democracy* reviews the arguments and methods of proponents of term limits for members of Congress and other legislative representatives. These are contrasted to past theories and to the actual application of “rotation in office” in the constitutions adopted by the American states during the Revolutionary era. These early constitutions were discriminating in their use of rotation, generally reserving it for executive or administrative offices. The lessons drawn are: first, that term limits will not solve our modern political problems and may make them worse; and second, that safeguarding the process of elections and insuring that legislative bodies were truly representative of the public interest were among the major concerns of Revolutionary America. These concerns also apply to our modern politics. Campaign and other purposeful political spending has spawned a “political industry” and has enveloped our democratic processes. The conclusion is that we must remove the problems of money from our elective and representative politics and search for new ways and new structures that allow genuine democratic self-governing in our local communities.
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CHAPTER 1

INTRODUCTION

In 456 BCE Cincinnatus was called from his fields to lead the Roman Republic through a difficult crisis. He served nobly, exercising extraordinary authority as Dictator. Yet, when his appointed term was expired, he dutifully relinquished all pretense of power and returned again to his farm, his plow and his private life.¹ The reality and legend of Cincinnatus form the very picture of idealized republican service; affirming the equal dignity of ruler and citizen, and the potency of belief in government of laws over men. It embodies the concept of citizens "ruling and being ruled in turn" in the process of self-governing.² Viewed from our modern notions of representative democracy, the story is also incomplete. Cincinnatus was no mere commoner and the republic he served was vastly different from government "by the people." He was an aristocrat, chosen by others like himself for a turn at the wheel. The ropes and levers of governmental power were closely held and full citizenship was itself a privilege accorded to few. However distant in time and social-political evolution as this reality is from our own, the power of the essential idea remains. It is re-played at each periodic scene on the steps of the U. S. Capitol when one president is left retired and powerless, as another assumes the office. It is re-affirmed by countless ceremonies, in city and township halls, county seats, state

capitols and in the Congress. The prolonged, and often bloody, convulsions that have characterized political change throughout history appear to have been, at least institutionally, contained. People can indeed govern themselves—can retain or replace their most immediate representatives and their most powerful governors—and redirect the decisions and policies that will affect their lives and those of their children. They can indeed rule, and be ruled, in turns.

Despite the evidence of more than two-hundred years of experience, and a potential that is constantly renewed with each election, many present-day Americans seem to have forgotten this overarching aspect of what is so right about our political system. That it works so well, as compared to nearly every previous human attempt at government and as compared to most other contemporary governments around the world, is so taken for granted as to be ignored. That the people can change their rulers, bring some home and replace them with others from amongst themselves; and have done so through war, economic turmoil and civil conflagration—and have brought about an expansive democratization of the originally conservative republic created by the Framers at Philadelphia—should engender in all Americans an abiding faith in their political system and faith in themselves as citizen-sovereigns. Yet, many Americans no longer like their politics and mistrust their system. For a variety of reasons many Americans have simply withdrawn from the political life of their communities, their states and their nation. For many the notion of popular sovereignty has become strange, or even absurd. Political leaders and the system itself are more frequently the subjects of public derision, rather than respect. Many Americans now find the greatness of their history in the past and view the political present with distrust and the political future with uncertainty.

The American political system stands in an interesting paradox. In terms of voting rights, it is at once among the most egalitarian in the world and yet demonstrates one of
the lowest rates of voter participation among the so-called western democracies. During the last hundred years, an important trend of American political evolution has been towards increasing voter opportunity and participation. The 17th Amendment to the U.S. Constitution (1913) changed the original method of selecting U.S. Senators so that they are now elected directly by the people of their respective states. Women gained the vote through the 19th Amendment (1920) and the 26th Amendment (1971) extended the franchise to 18 year olds. Together with other civil rights laws, the 24th Amendment (1964) eliminated de facto barriers to voting for racial minorities and the economically disadvantaged. Presidential nominees are no longer selected by party leaders at nominating conventions; they are now largely selected by direct popular ballot in primary elections and presidential elections are now largely funded by public funds. Added to these fundamental measures, many state constitutions allow voters to directly legislate through ballot initiatives—some believe too much so. More recent movements have aimed at giving the people more information about elected officials, candidates for office and those who influence them. These "disclosure" laws have opened personal finances, campaign contributions and lobbyist client lists to public scrutiny. "Motor voter" laws, mail-in ballots and early voting have made it far easier than at anytime in the past for citizens to register and to vote. It is now easier for more people to vote for more candidates, for more offices and even directly for laws, and to know more about who they are voting for and who will be influencing them, than at any time in our history. Despite all this, this century has also seen a steady decline in voter participation. On a percentage

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3 Edward Walter, "Presidential Campaigns, Television News, and Voter Turnout," Public Affairs Quarterly 5 (July 1991), 280. Walter reports that voter turnout for national or general elections is routinely in the range of 90% for West Germany, Italy and Sweden; and, while lower, turnout in Great Britain has never fallen below 70%. In contrast, only one-half of eligible American voters turned out for the 1988 presidential election.
basis, fewer Americans vote and thus voluntarily negate much of this extraordinary political evolution.

This failure is not merely the result of Americans being too busy in the pursuit of happiness to concern themselves with a government they generally believe to be beneficial. For many Americans, it rises from a sincere belief that their votes no longer matter. Despite the increased opportunities for participation and decision, the new requirements for disclosure and the new avenues of communication and information—or perhaps because of these changes—many now suspect that what really decides governing is conducted outside of their sight and ability to control. It is not that Americans are apathetic about their politics—it is that many have fundamentally lost faith in their politics.

Many Americans do not believe they are living in a democracy now! They don't believe that "We, the people" actually rule. They don't believe that the average citizen even influences, much less rules. . . . What is more, people do not believe this system is able to solve the pressing problems they face.4

A number of causes have been proposed to explain this paradox. Everything from moral wickedness among our leaders and ourselves, to more immediate factors such as special interest influence in elections and governing. Each explanation is offered with a proposed solution; and these include everything from campaign finance reform to fundamental changes in the Constitutional structures. One recent current in this stream of proposed reform has settled on a single cause-effect explanation and has drawn from it a single, straightforward solution—term limits. Advocates of this "reform" tell us that the problem now is, quite simply, that Cincinnatus will not go home. Elections take place, each more boring—or vicious, or intellectually sterile—than the last; votes are cast,

\footnote{Kettering Foundation, \textit{Citizens and Politics: A View From Main Street} (Dayton: The Kettering Foundation, 1991), iv.}
selections are made, but nothing really changes. Incumbents retain their office, less because the people truly desire to retain them, than because no challenger can mount a successful campaign to convince people that a change of rulers or representatives is in their power, let alone in their interest. The inordinate powers of incumbency—to pry campaign contributions from those seeking influence, to perform constituent services and "bring home the bacon," to use the franking privilege for self-promotion, to have more opportunities for media exposure and to skew the political rules and governing itself to his or her advantage are widely believed to be insurmountable. Thus, incumbents win more by default than popular choice. So much so that, for many Americans, the act of political choice has become irrelevant.

The advocates of term limits believe the problem of incumbency goes even further than its effect on voter-turnout. They believe that the very concept of "career" politicians, especially among members of the U.S. Congress, has contorted the American republic into something vastly different than was intended—or than is desirable—even if it is assumed that voters deliberately choose to return incumbents. Advocates maintain that the quest for life-long Congressional careers has altered government itself. It has become broader in scope and more burdensome in expense, largely to enhance the power, prerogative and re-electability of incumbents. Modern Cincinnati, it would seem, have come, have seen, have conquered—have perverted government to their desire for life-long tenure—and have stayed.

The proposed solution is to force the removal of incumbents and eliminate the future possibility of political "careerism" by legally fixing specific limits to the tenure of individual office-holders. The contemporary term limits movement claims to draw this remedy from an ancient republican reservoir. The practice of limiting the time that an individual can serve in a given political office was known as "rotation" during the
American Colonial and Revolutionary periods. Precedents are found in the earliest days of the Athenian city-state and the Roman Republic. Such limits were described by Aristotle in *The Athenian Constitution* and in *The Politics*. Machiavelli attributed the downfall of the Roman Republic, in part, to the lack of application and enforcement of term limits for certain positions. Rotation was an article of political faith for its most enthusiastic proponent, the 17th century radical English Whig, James Harrington. Though less well known today, Harrington had a discernible influence on several prominent American Revolutionaries of the following century. Term limitation was applied to members of Congress under the Articles of Confederation. It was proposed by Jefferson for the Virginia Constitution and was incorporated into several other state constitutions of that era. Madison included term limits in the “Virginia Plan” proposed at the Constitutional Convention and rotation finally made its way into the U.S. Constitution with the ratification of the 22nd Amendment (1951), which limits the president to two terms.

Beyond these legally imposed, proposed and theorized term limits, contemporary advocates point to the actual practice and traditions of public service during the 18th and 19th centuries. Until this century, in fact until the New Deal era, average congressional tenure was shorter than today. Congressional and statehouse and city hall “careerism,” we are told, is a distinctly modern phenomenon. But more than that, it is also a political problem. The solution, they say, is to apply to Congress (and the state house and city hall) the same antidote that has been prescribed for the presidency.

Thus far, the argument has been extremely successful. Term limits are now fundamental law in many states and localities. The political action that has brought about these changes, even the attempts to limit federal legislators, have largely been carried out at the state level. The primary vehicle has been the ballot initiative, allowing the people to directly enact amendments to state constitutions or local government charters. For state
and local offices, the prescribed term limits have been straightforward prohibitions against service beyond a fixed length of time. Attempts at limiting federal offices from the state level, however, have been more problematic. Here state imposed limits have run afoul of Constitutional jurisdiction and have been struck down by the U.S. Supreme Court. Nonetheless, in nearly every case where term limits have appeared on the ballot, they have been overwhelmingly approved by the voters.

Perhaps because of this success, term limits proponents have never had to fully justify their argument or their proposed remedy. Whether careerism is the political problem of our time is not irrefutably established against the myriad of other more apparent problems of our politics. In fact, they have not completely established that careerism, in itself, is a problem at all--only that certain features of incumbent re-election demonstrate one aspect of a larger problem. The lack of rotation in the U.S. Constitution has proved a stubborn obstacle to arguments attempting to establish a republican precedent. Modern proponents try to explain this away as a reluctance on the part of the Founders to clutter our fundamental charter with mere "details." But that does not explain why the Framers at Philadelphia--so keen on perfecting the republican form, so familiar with rotation in theory and experience, so immersed in their consideration of possible consequences for every detail of political office--would have so cavalierly relegated rotation as an unnecessary detail. In their counter-arguments, proponents mistakenly interpret past precedents and demand a severity of application that goes beyond even Harrington's proposals. Term limits, it will be shown, were not widely applied, and where they were, almost exclusively to executive or administrative offices--and even here, rarely to officers elected directly by the people. Extending term limits to popularly elected representatives is a novel and fundamental change, which goes against the entire political current of the 20th century. The Constitutional Framers did not ignore term limits, they
considered and rejected them. To be sure, a nation born of revolution should not discourage new, even radical, ideas. But the scarcity of precedent should give us pause.

There are other problems with the arguments advanced by proponents of term limits. Beneath the obvious call to "throw the bums out," prominent advocates have a policy agenda, which may or may not be shared by many of the voters who have thus far supported these measures. It is found in the premise that incumbents have increased government for their own ends and by the evidence offered in the "before and after" comparative arguments delivered against Congress. The policies of, and what has followed from the New Deal are framed as the political watershed. Before this, government was small, inexpensive and unobtrusive. After this, government became, by their description, grotesque. The coincidence of this governmental expansion and the increased average length of congressional tenure since the New Deal, is linked as a direct causal relationship. The expanded role of government serves the career politician, not the people. It is an evil consequence of careerism—not a response to political will. Even where it clearly is a political response to popular desires, term limit proponents believe those desires are wrong—and that career-motivated pandering to them is worse. Term-limited officers and representatives, we are told, would not be so motivated to respond to popular will or to accept an expanded view of government. Implicit in this argument is the politically conservative notion that government should be vastly smaller, more limited and less democratically responsive. This is a perfectly legitimate political position with a genuine tradition in our political history. It deserves consideration, but it should stand and be debated on its own. It should not be hidden behind a "movement" which panders in the same way and cynically steers widespread public distrust of politics to permanently self-limiting measures.
Associated with this is an even more deeply imbedded argument, which at its core repudiates the very political evolution that has produced our modern representative democracy. The tensions between our republican birth and democratic evolution, the complex notions of meritocracy—that all are equal but some are better—has many variations and forms the basis for much of our internal political conflict. The seeming contradiction between the words of the Declaration of Independence and the reality of slavery, indentured servitude and prescribed limits on political participation—allowing franchise to only white, male property owners—reveals a tension in our political beliefs about "the people" and who should represent them. The political leaders of Colonial and Revolutionary America, whether self-made or fortunate, were not unlike those of prior republics. Public service was not only a sacred duty for our illustrious forefathers. For most, it was a luxury they could well afford. All men were not equal in this. And while early American requirements for participation were the most liberal of their time, many Revolutionary Era state constitutions imposed a hierarchy of wealth for political participation and for holding public office. In that age when politicking, as we understand it today, was considered undignified—and was in some cases illegal—those chosen to represent the rest tended to be the most prominent men of their district. Arguments for term limits reveal a subtle prejudice for return to an elitist concept of public service. In an effort to disprove this contention, some proponents have offered examples that seem to demonstrate that term limits can widen the opportunity for public office for those hitherto excluded. However, their argument reveals a more definite tendency toward the idea that public service should be a sabbatical from an otherwise successful private, usually business, career. If public service is no longer possible as an occupation, then it is likely that those who can serve will come from those who can afford the diversion. Like Cincinnatus, term limit proponents believe future leaders will—and should—come from
among those who have achieved or inherited beyond the norm—in measurable terms. It is true that Jefferson, Madison and others assumed a republican meritocracy of government "by the best," but wealth and business acumen were not the only standards of measurement. The possible—and for some, desired—outcome of the widespread application of term limits contradicts this ambition. True merit should be the only measure of worthiness for public service, but term limits would have it arbitrarily retired. Our history and contemporary experience demonstrate that, for some officers and legislators, one term may be too many; for others, a lifetime may not be long enough.

Finally, the "organized" term limits effort reveal a political bias and employs methods that are the antithesis of its avowed reform. The current movement was sparked by suggestions from professional Republican political operatives, in response to the frustration of continued minority status in Congress. While the tactic has been to place limits directly before the voters, the major institutional proponents have generally remained hidden from view. The electoral success cannot be described as a popular "movement" in the traditional sense. Few instances of genuine grass-roots initiation or participation can be found in any state where limits have been approved by voters. Instead, the work has been carried by a few well financed operatives, who have employed political "businesses" to place the issue before the voters. The national institutions behind this have been reluctant to reveal their financial contributors and have generally lingered in the same purposeful obscurity as other PACs and political "educational" foundations. This despite the fact that an important point of their argument decries the effects of these very institutions and methods. It is doubtful that the average voter is aware of the people or money behind the "movement."

The 1994 Congressional election may have lessened the impetus towards imposing further limits, at least for the U.S. House and Senate. As was amply
demonstrated, the people are perfectly capable of removing and replacing incumbents, even to the extent of switching majority status between the parties. It is very telling that, since then, official Republican support for term limits has waned considerably. The promise to bring a term limits amendment to a vote was cynically fulfilled, but the result was preordained.

Nonetheless, the work of proponents has borne results. Term limits do apply to state and local officials across the country and advocates continue to pressure for an amendment to the Constitution applying limits to members of Congress. In Nevada, tenure limits are now in effect for members of the state legislature, state officers and all local officials.5

The ultimate effects of these changes will not be known until well into the future, and the need to re-examine the issue continues. Whether widely applied term limits really fit into our political tradition and evolution merits continued examination. More central to the larger debate is determining whether arguments for term limits sufficiently describe our modern political problem and whether they offer an effective solution for that problem. We must also attempt to project what effects term limits will have generally and determine whether they will cure or harm.

This thesis will attempt to answer these questions. It is based on the assessment that the arguments in support of term limits do not adequately describe our modern political problem, and that they discourage a more fruitful dialogue by misdirecting us to the wrong side of the causal relationship between money and politics. It therefore follows,

5 A Nevada Supreme Court decision separated the language of the original petition into two separate ballot questions; one applying to state legislators, state officers and other local officials, and the other strictly to Supreme Court Justices and district judges and justices. Nevada voters approved the question for lawmakers and other officials, but rejected term limits for judges.
they will not provide an effective solution. This is not to say they will not have effects, or that some of those will not demonstrate some discernible benefits. But term limits simply will not accomplish the range of specific reforms advertised by proponents. This thesis will also bring support to the conclusion that, on balance, term limits will be more harmful than not, to our politics. To explore these questions, term limits and their effects will be viewed \textit{in and of themselves} and in the absence of any other measure of reform. To proceed in this way is fair treatment and consistent with arguments made by proponents themselves that term limits \textit{alone} will bring positive change to America's political health. Such a perspective is also required by the fact that the limits recently imposed in various places have yet to be operative long enough to demonstrate their ultimate effects. Assessment therefore, from proponents and opponents alike, is necessarily the result of a high degree of speculation—which is hopefully informed. This paper will address the question of term limits primarily as they are proposed for \textit{legislative} representatives. The primary focus will be on its application for members of the U.S. Congress, but it will necessarily discuss the precedent and effects of more widespread application.

In order to explore this question it is also necessary to identify some important aspects of the modern American political problem itself. As one of my primary contentions is that the term limits argument misidentifies the cause of that problem as being political careerism, I am obligated to at least suggest what the problem is and where more effective solutions may be found. I will do this, but emphasize at the outset that this paper is \textit{not} intended as an all-encompassing political statement.

Chapter One will briefly review the modern American history of the debate and provide a more detailed account of the recent movement and its methods. Chapter Two will critically examine the central arguments for term limits as espoused by its most prominent proponents. The political ideas of James Harrington, will be reviewed in
Chapter Three. The purpose here will be twofold. First, to establish a theory for application of term limits, as established by its most ardent proponent, so that it can be weighed against recent proposals; and second, to place term limits within the wider context of Harrington's proposals and show where his concerns really fell. Likewise, Chapter Four will explore rotation as it was applied during the American Revolutionary experience. Particular attention will be on the various state constitutions adopted in the immediate period of separation from Great Britain. There are three reasons for this exploration. One is to refute the assertions by term limit proponents that rotation was widely enacted during that period of American history. Another is to further identify a theory and precedent for how and where term limits should and should not be used in democratic republics. The final reason is to offer an interpretation of what the founding generation did intend as the ultimate cause-effect of self-government. The argument will continue in Chapter Five with an admittedly speculative assessment of the possible effects of term limits as they are proposed to be applied today. That analysis will concentrate on certain individual and institutional actors of the political system, but do so from the lens of our democratic evolution. Chapter Six will attempt to bring all this together in a conclusion that presents a more inclusive explanation of the myriad of political problems before us and will suggest some further areas of reform that would prove more effective.

The intent is not merely to refute an argument, but to extend the debate. Even the most virulent opponents of term limits must credit advocates for having placed so fundamental a notion upon the contemporary political stage. The state of our politics requires a re-examination of basic principles, but that examination should be in light of the long view and not merely a response to immediate contingencies. The republic we have inherited was drafted by men who sincerely sought to create "enduring" institutions of self-governance. For the most part they succeeded. But intrinsic problems--which some
of the Founders identified and predicted—have persisted and now face us with naked force. The debate of any proposed solution to these problems serves to bring us closer to those answers which will guide us through the next two hundred years.
CHAPTER 2

THE RECENT MOVEMENT AND ITS METHODS

The idea of establishing term limits for members of Congress is not entirely new and has had episodes of national attention for several decades. It first came to the forefront during the mid-twentieth century debate on limiting presidential tenure. The two-term precedent established by George Washington had remained the unspoken rule of presidential service until the four successive elections of Franklin D. Roosevelt. Prior to FDR, most presidents had served only a single term, and several died before completing even that. During his lifetime, Roosevelt’s personal popularity, coupled with the contingencies of depression and World War II, stifled critics of his twelve-plus years in office. In 1947, however, a respectful period after his death—and after the Republican party attained majority control of the U.S. House and Senate—Congress passed the 22nd Amendment, which limited future presidents to only two terms.\(^1\) It was ratified by the states in 1951. Despite the widely perceived need for imposing these limits, the effects have been largely theoretical. Since 1945, only two individuals have been elected, reelected—and have served—two complete terms.\(^2\) During this time, average presidential tenure has been just over five years.

\(^1\) The 22nd Amendment also limits the total number of years an individual who inherits the office can serve as President. An individual who serves "for more than two years of a term to which some other person was elected President" can not themselves be elected to more than one four-year term.

\(^2\) Dwight D. Eisenhower and Ronald Reagan are the only two of the nine presidents since FDR, who were elected, re-elected and completed their terms. Harry S. Truman was narrowly elected in 1948 and served from 1945 to 1953, but he first assumed the
Even though the 22nd Amendment and the concerns which prompted it applied only to the chief executive, the debate for its adoption and ratification spawned a discussion of limits for members of Congress. During consideration of the amendment in the U.S. Senate, one member offered a substitute proposal, limiting all federal elected officials to a single six-year term. In what was generally considered as a partisan reaction to the whole notion, Democratic President Harry S. Truman proposed a twelve-year limit to service in the U.S. House and Senate. That suggestion was ignored and for a number of years the idea of term limits for Congress never went beyond the talking stage. Lyndon Johnson actually proposed extending terms of office for members of the U.S. House, from two to four years. He believed that frequent elections diverted legislators attention and forced a more political cast to their deliberation. The sixties brought attention to Congressional tenure because the power of many long-term, Southern committee chairman was seen as an impediment to progress on civil rights and other Kennedy-Johnson programs. Calls for term limits and changes in the congressional seniority system intensified. Gallup polls taken in 1964 indicated that 49 percent of the public supported limits on congressional tenure.

By 1977 public approval had risen to 59 percent. Congress responded with an array of unsuccessful measures. Between 1975 and 1980 seventy proposals affecting legislative terms were introduced in the House or Senate. Forty of these called for longer

terms, twenty-three of which coupled these extensions with term limits. Thirty proposals addressed only limits. In 1978, the Senate Judiciary Subcommittee on the Constitution held hearings on these issues:

The Senate sponsors of these proposals—Democrat Dennis DeConcini of Arizona and Republican John Danforth of Missouri—both argued that Congress would become more representative if its members were citizen legislators rather than professional politicians. But Rep. Berkeley Bedell of Iowa, a second-term House Democrat who was sponsoring a proposal combining a four-year House term with tenure restrictions for House and Senate members, emphasized the goals of sparing House members from frequent electioneering and reforming the seniority system as well as encouraging greater turnover in Congress. Testimony from a panel of political scientists, however, voiced near universal opposition to term limits for members of Congress and despite numerous proposals during the seventies and eighties, no Constitutional amendment made its way to the floor of either house for a vote.

By 1988, Democrats had maintained the control of Congress for an unprecedented duration. Republicans did gain a majority of seats in the U.S. Senate for a brief interval during the Reagan Presidency, but House Democrats had held the Speakership and all major committee chairmanships for more than thirty-four years. This placement gave them enormous influence over the legislative agenda and institutional process. Frustrated by their seemingly permanent minority status in the House, Republicans had an obvious motivation for renewing the term limit debate. The Party Platform of 1988 made a non-specific call for Congressional term limits and professional party activists began forming organizations aimed at propelling a national movement.

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4 Ibid., 13.
5 Ibid., 13.
The organized term-limit movement can be traced to Republican political consultants Eddie Mahe Jr. and LeDonna Lee. They began to look at the issue in early 1989 and established Americans to Limit Congressional Terms (ALCT) that summer. As described by political newsletter editor Stuart Rothenberg, Mahe and Lee brought some Democrats into the organization's hierarchy to establish it as a bipartisan organization and then concentrated on serving as a national information clearinghouse . . . rather than creating local chapters.6

Other politically conservative advocates soon emerged as well. In Oklahoma, the first state of the modern era to adopt term limits for state legislators, the movement was advanced by two prominent business leaders. In 1990 Edward L. Gaylord, publisher of the Daily Oklahoman and considered the wealthiest person in the state, and Lloyd Noble II, a Tulsa oilman, combined their substantial financial and editorial resources to promote the successful ballot initiative.7 In that same year, Colorado's Republican State Senator, Terry Consodine, led the fight in the first state-based attempt to limit the tenure of its Congressional delegation.

Efforts in California later that same year were aimed at state and local office-holders; but here prominent members of each political party were chief sponsors. Democratic Attorney General John van de Kamp's proposal was widely seen as part of his unsuccessful bid for governor. His proposal coupled term limits with campaign finance reform and was supported by Common Cause of California. Republican Los Angeles County Supervisor Pete Schabarum's initiative offered more severe restriction on tenure, a reduction in state legislative staffs and the elimination of legislator pensions. Both proposals achieved placement on the 1990 ballot, but Schabarum's was ultimately approved.

6 Ibid., 14.
The success in Oklahoma, California and Colorado unleashed a virtual firestorm of petition efforts across the country. Some initiatives focused on state legislative offices, others on federal. But whether pulled along in the rising tide against incumbents or used as the epitomized example, Congress was badly scathed. California voters approved a 1992 ballot question aimed at federal legislators and by the end of that year a total of fifteen states had adopted Congressional term limits. In the general elections of 1994, six more states approved such measures.

There were acknowledged Constitutional problems with these state-based limits on federal offices. The question hinged on whether term limits were regarded as a "qualification" for office. Qualifications for members of the U.S. House and Senate are delineated in Article I, Sections Two and Three, respectively, of the U.S. Constitution. The requirements listed are merely age, years of citizenship and state residency. Section Five states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." However, Section Four grants jurisdiction over "The Times, Places and Manner of holding Elections for Senators and Representatives," to the states. This section also gives Congress the right to alter state election laws, at least as they apply to Congress, but this was generally considered a fail-safe provision to insure that states did in fact hold elections for members of Congress.8

Opponents to state-imposed term limits on federal offices argue that since the Constitution imposes no limits to tenure among the qualifications, none can be imposed save by Constitutional amendment. Term limit proponents have countered with two

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8 Hamilton argued that a state might fail to send federal representatives in order to cause the union's failure. In such an eventuality the federal government "ought to contain within itself the means of its own preservation." See Alexander Hamilton, James Madison and John Jay, The Federalist Papers, No. 59, ed. and intro. by Gary Wills, (New York: Bantam Books, 1982), 299.
arguments. One is that the qualifications listed in the Constitution are minimal and may be extended by the states. The theory here is that rights granted under the First, Ninth and Tenth Amendments reserve to the states and the people all rights which are not otherwise prohibited. Some proponents believe this power includes the authority, by the people of a state, to add qualifications for Congressional office for members and candidates from that state.9 The other argument claims that, since states do have the authority under Section Four to effect the "manner" of congressional elections, they may exercise that authority in restricting who may have their name placed on the ballot. Following these arguments, some states have simply enacted "direct" limits for members of their Congressional delegations; stating that no one shall serve, or shall have served, more than a certain number of terms or years in either the U.S. House or Senate--or both. Others have seized on the manner argument, adopting language which precludes individuals who have attained a certain length of tenure from having their name placed on the election ballot.

Nevada's ballot initiative of 1994 is of this latter type and states:

No person is eligible to have his name placed on a ballot for election as a Representative in Congress if at the end of the current term in that office he will have served, or would have served but for his resignation from that office, as a Representative in Congress from any district of this state, after December 31, 1996, for three full terms or a total of 6 years, whichever is completed first.10

This petition goes on to propose similar language limiting ballot access for candidates for the U.S. Senate to previous service of two terms or twelve years. It also contains a provision which has been incorporated in term limit initiatives in several other states. This requires the state legislature to provide election laws allowing individuals, who are

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10 Filed October 7, 1993 with the Nevada Secretary of State.
otherwise excluded, to be eligible for re-election as "write-in" candidates. Proponents claim this device will help state-imposed limits pass Constitutional muster, because they do not actually exclude long-term incumbents. Opponents generally consider all such "ballot access" proposals as being legally flimsy devices aimed at concealing an essentially unconstitutional act.

The matter was finally settled by the U. S. Supreme Court in its review of a term limit initiative enacted in Arkansas. These state-imposed limits for federal legislators employed the "ballot access" language. The Court's decision on its constitutionality was considered critical, since if that theory did not stand, "direct" language amendments would automatically fall as well. In a five to four decision the Supreme Court struck down Arkansas' law and thereby all other state-based attempts to set tenure limits for members of Congress. "The Court ruled that the qualifications for congressional service were already enumerated in the Constitution, and term limits were an attempt to add to or alter those qualifications."11 It is now generally conceded that future efforts will have to focus on securing an amendment to the U.S. Constitution. Thus far, actions by the Republican-controlled Congress have proven unsuccessful.

If state-based limits had stood, they would have created several problems. Among the states imposing congressional term limits, there have been nearly as many variations on how limits should be applied as there have been ballot questions. Arkansas attempted to place strict lifetime limits of six years for members of the House and twelve years for members of the Senate. Florida, South Dakota, Colorado and Nebraska limited the number of consecutive terms of service, but did not preclude an individual from returning after an interval.12 Similarly, California limited members of the U. S. House to three

11 Kamber, 149.
12 In 1990 and again in 1994, Colorado passed two separate initiatives. The first set
terms (6 years) within an eleven-year period and Senators to two terms (or 12 years) within a seventeen-year period, thus also allowing an individual to return to a given office. Michigan, Montana, Washington, Wyoming, Alaska, Maine and Idaho also applied limits of service within a given number of years. The most stringent application of Congressional limits was passed in North Dakota, where an individual would have been allowed a total of twelve years' service in either, or both, houses. In all of these examples, regardless of the method of applying limits, the number of terms or years also varied. And along with all of the diversity of these limits, most states had not restricted tenure. If allowed to stand, the multitude of limits—and no limits—would have created may difficult questions of unequal political rights among the citizens of the various states.13

The campaign for establishing these term limits for members of Congress and others was accomplished through state ballot initiatives, but in most cases the political work was not carried out as a true grass-roots effort. Typical scenarios can be observed in the cases of Washington, Oklahoma and Nevada. The campaign in Washington state did have local citizen involvement, but also demonstrates how some of the national organizers appropriate the issue from local sponsors. Oklahoma and Nevada are particularly illustrative of the new political fact that, given financial resources, a small group—or even a single individual—can place an issue of considerable political importance before the voters for direct decision. It also provides evidence that the ballot initiative process is ripe for exploitation and political entrepreneurism.

 limits of 6 consecutive terms for members of the House. The second, reduced these limits to only 3 consecutive terms.

Nevadans for Term Limits and Responsible Campaign Funding, which brought these questions before Nevada voters, is largely an organization of one man—Sig Rogich. A former advertising executive, political consultant and White House Communications Director under President Bush, Mr. Rogich also served as Ambassador to Iceland. He formerly owned R & R Advertising and worked on Ronald Reagan's 1984 campaign and George Bush's 1988 and 1992 presidential campaigns. His Nevada group sponsored three separate initiatives. The first sought to establish maximum limits on campaigns contributions for state and local offices. The second, as shown earlier, attempted to impose limits for members of Congress. The last sought term limits for state and local office-holders. Members of the State Assembly and State Senators are limited to twelve years of service. The Secretary of State, State Controller, State Treasurer and Attorney General are eligible for no more than two elections. Similarly, Justices of the Supreme Court, Judges of District Courts and Justices of the Peace may only be elected twice. A blanket provision of this initiative also limits elected members of all governing bodies (i.e., city councils, county commissions, state and local school boards and the like) to service of no more than twelve years. In all cases the term limits were to be applied retroactively to current tenure. These initiatives were filed on October 7, 1993 and appeared on state-

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15 Members of the Nevada State Assembly serve 2-year terms. State Senators serve 4-year term.
16 These state officers serve 4-year terms. The proposed change would not only limit an individual to two terms, it would limit an individual who is appointed to fill a vacancy to be elected and serve only one additional term in his or her own right. The Governor is already subject to term limits of no more than two 4-year terms, though an individual who inherits the office may serve less than one-half of a predecessor's term and still be eligible for two full terms in his own right.
17 Judges serve 6-year terms, but here again if an individual is appointed to a vacant bench, he or she may only seek one election to that same office.
wide ballots in the general election of 1994, where they were successful. Under the Nevada Constitution, voters must approve amendments twice before they are adopted. Several things intervened between the 1994 and 1996 general elections. The ballot question on congressional term limits was removed from the 1996 ballot because of the U.S. Supreme Court decision. The Nevada Supreme Court ruled that the issue of term limits for Supreme Court justices and other judges had to stand alone, as a separate ballot question. And an opinion by the Nevada Attorney General removed the retroactively feature. Voters in the general election of November 5, 1996, approved the campaign contribution limits and term limits for state and local officers and representatives. However, they rejected term limits for Nevada judges.

When he revealed details of his proposals, Mr. Rogich vowed "to spend $250,000 to collect the signatures, spending his own money if he [could not] secure it through contributions." Reports filed with the Nevada Secretary of State indicate he had little trouble raising needed funds. Nevada law requires periodic reporting of campaign contributions and expenditures in support of or in opposition to ballot questions. However, because Nevadans for Term Limits and Responsible Campaign Funding supported three ballot issues, they are required to report only total amounts raised and spent as an organization. Specific contributions and expenses in support of each ballot question are therefore unknown. What is known is that, by October 19, 1994, Mr. Rogich had raised $153,200. Most of this came from two large non-Nevada contributors. U.S. Term Limits, based in Washington, DC, contributed $41,000 and Cecil Heftel, a member of U.S. Term Limits board, gave $50,000. Mr. Heftel also is a former Hawaiian Congressman, though the disclosure statement shows him as now residing in Hollywood,
California. The Nevada based Mirage and Prima Donna resorts each contributed $10,000 and the balance was raised in smaller amounts of $5,000 or less. It is somewhat more than ironic that Mr. Rogich's effort also sponsored an initiative, seeking to limit individual contributions to $5,000 per campaign, yet secured most of the funding used to enact these changes in much larger increments.

Reported expenses are far more revealing. Rather than having to build a volunteer organization of citizen activists, Mr. Rogich simply hired professionals. A total of $124,120 was paid to National Voter Outreach, a company specializing in petition signature drives. Little was spent advertising. Confident of overwhelming popular and editorial support, Mr. Rogich's entire strategy seems to have been to simply get the issues on the ballot. To accomplish this, political activity was simply purchased from suppliers. In a sense, his actions were not unlike those of a business entrepreneur, finding a ready market for a product, raising needed capital and subcontracting the labor necessary to produce it. The only thing lacking in this enterprise was the expense of any time or money to promote it. If it had been, Mr. Rogich's experience in political advertising would certainly have proven useful.

The earlier term limit effort in Oklahoma's is only slightly different. Lloyd Nobles II, a "self-described 'arch-conservative," was certain that legislators would not impose limits on themselves. An opinion poll he commissioned confirmed his belief that a ballot initiative would be successful. He then had a petition drafted, which called for the imposition of twelve-year limits on state representatives and senators, but which did not impose limits on Oklahoma's federal delegation.20

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19 Kamber, 179. Kamber reveals Mr. Heftel as being a former Democratic Congressman from Hawaii.
20 Ibid., 4-5
The next step was for Noble to get the signatures he needed to put the petition on the ballot. He hired paid collectors to gather more than 175,000 signatures within ninety days. . . . Noble supplied most of the $220,000 budget for his organization, Oklahomans for Legislative Reform.21

Though a considerable opposition group formed and was aided by former U.S. House Speaker Carl Albert, the measure was approved by a huge margin. Because the question was advanced to the September primary ballot, rather than the November general election ballot, Oklahoma edged out California to become the first state adopt limits for its legislature.22

In Washington state a genuine grass roots movement initially developed in 1991, but the national organizations that had recently been formed around the issue soon enveloped the local advocates. It began "in Sherry Bockwinkel's living room." She had been "a liberal Democratic activist and campaign operative."23 Bockwinkel and other local organizers from around the country had attended a conference in San Jose, that was sponsored by Citizens for Congressional Reform (CCR), which later became U. S. Term Limits, and Americans to Limit Congressional Terms (ALCT), the organization founded by Eddie Mahe Jr. The Washingtonians named their group Legislative Initiative Mandating Incumbent Terms (LIMIT) and drafted a bill which not only sought to impose restrictions on state and federal offices, but did so retroactively. Left to themselves, backers of the local state movement soon ran out of money. By mid-April, 1991, LIMIT had accumulated $10,000 in debts. Washington, DC-based CCR stepped in with a

21 Ibid., 5.
22 Ibid., 6.
23 Ibid., 165.
contribution of $176,970. Additionally, it commissioned a poll showing that the issue had a 68 percent public approval rating.24

[CCR then] contracted with National Voter Outreach (NVO), a California company, to organize professional signature agents, both from in and out of state. The company paid agents 60 cents for each signature they obtained, plus bonuses, and "provided training, supplies, and supervision for the agents, arranged for their rental housing at different locales, and reimbursed their expenses."25

Conflicts between the local advocates and national organizations soon developed. Washington law prohibits the use of professional solicitors to gather petition signatures and, even though CCR had paid NVO more than $80,000 for their work in the state, they refused to allow LIMIT to see their contract. Later, "CCR demanded that the Washington state group open a new bank account so that CCR could wire funds directly into it, but the LIMIT treasurer was denied access to this account [emphasis added]."26 Field workers from the national organization ran an essentially separate, parallel campaign, with little coordination to the local movement. In Victor Kamber's assessment, "The national organization clearly wanted to control the campaign and keep LIMIT financially and logistically dependent upon it."27 Of the more than $350,000 spent in support of the initiative, CCR contributed more than 90 percent. Sherry Bockwinkel rebelled against this treatment and went to the media. Subsequent news stories revealed that much of the impetus and nearly all of the money behind the effort had come from outside the state.28

The 1991 effort in Washington failed largely because its retroactive feature would have ended the career of then House Speaker Tom Foley, Washington' s influential voice

24 Ibid., 166-167.
25 Ibid., 168.
26 Ibid., 168.
27 Ibid., 169.
28 Ibid., 169-170.
in Congress. Foley was able to both build opposition and raise substantial enough funds to overcome the national effort and spending. A second petition effort in 1992 led to different results and to Mr. Foley's ultimate re-election defeat. Sherry Bockwinkel again organized a state-based effort, but the new initiative language did not contain a retroactive provision. By this time CCR had been taken over by "Howard Rich, another wealthy libertarian," and renamed U. S. Term Limits. The organization played a quieter, but no less effective role during this second effort. "All told, LIMIT raised $419,112, twice as much as the term limit opposition group. . . . [M]ore than 80 percent of that was given by large donors, including U. S. Term Limits and members of its National Finance Committee." The measure passed, but Speaker Foley joined a lawsuit challenging its Constitutionality in federal court. The 1994 court decision striking down that law, and Foley's involvement in bringing the challenge, so angered voters that he was narrowly defeated in his attempt for re-election later that year.

These three examples demonstrate how a few well financed national organizations have steered this supposed state-based movement, and how similar their methods have been in each case. These groups are not widely known to the public, nor are the people and money behind them. Like other so called non-partisan, "research" foundations these decidedly political organizations are able to hide in the political nether-world. This obscurity might have been changed if President Bush had not vetoed a campaign finance reform bill which, among other things, would have added more stringent requirements for reporting donations to state ballot initiatives.31

29 Ibid., 171.
30 Ibid., 172.
31 Ibid., 184.
Two prominent, and early, backers of the national term limits effort are billionaire brothers Charles and David Koch, who control the second largest privately owned company in America. Their political enterprises include the Cato Institute, Citizens for a Sound Economy (CSE), Citizens for the Environment—which opposed the 1990 Clean Air Act—the CSE Education Foundation and Citizens for Congressional Reform (CCR).

CCR, as has been mentioned, was prominent in the Washington state effort and was involved in other states as well. Its activities in a Michigan term limits effort were curtailed by a challenge to its donor list. It was dissolved and quickly reconstituted as U.S. Term Limits, this time under the sponsorship of Howard Rich, a New York Businessman and publisher of Laissez Faire Books. Rich bought Americans to Limit Congressional Terms (ALCT), merged it with CCR and retained the former director of CCR, Paul Jacob, as head of the new entity. It has been asserted that Rich purchased ALCT because its list of smaller donors would serve a public relations cover for CCR/U.S. Term Limits' list of almost exclusively large contributors. In Alaska, Idaho, Maine, Nebraska, Utah, in the second campaign in Colorado (which imposed lower term limits than were enacted by the previous effort) and here in Nevada, U.S. Term Limits provided, or channeled, more than 70 percent of the funds raised by pro-limit advocates.

None of this is to suggest that backers of term limits have been alone in their fund raising efforts. Then Assembly Speaker Willie Brown raised $5 million to campaign against California's initiatives and Tom Foley was able to gather considerable funding to counter Washington's ballot question. However, these experiences point out that the manner in which term limits is advanced, and the people behind organizations like U.S. Term Limits, are not grass-roots by any stretch of the definition. The concept of grass-

32 Ibid., 176-178.
33 Ibid., 179-182.
roots political action suggests ordinary citizens volunteering their time to do the necessary busy-work of politics. Whether organized around a party, a candidate or an issue, they bring their cause to the public or to decision-makers through a host of fairly common, labor intensive activities—walking door-to-door or manning tables at shopping locations to gather petition signatures are commonly among these. However, in the American politics of today, citizen involvement on this level is being almost completely eliminated by a vast array of specialty political service businesses, such as National Voter Outreach. Political action, it would seem, can be phone-ordered for delivery, and the money behind the term limits movement has employed this method of citizen participation in nearly every instance.

These methods and the money which pays for them raise troubling dilemmas when combined with the use of ballot initiatives. Initiatives have been seen as a way to restore citizen control over government and were designed to serve as a political "safety valve," allowing the citizenry to by-pass unresponsive elected representatives and engage in direct lawmaking. They have become an increasingly important reality of American politics. In California's famous Proposition 13 Howard Jarvis demonstrated, to no one's great surprise, the ease of encouraging voters to reduce their property tax burdens. Every general election cycle has seen an ever-greater number of simple and complex issues brought directly before the voter for decision.

On the surface, the increased use of initiatives may be regarded as an extension of America's democratic evolution. And certainly if term limits are assumed to be a good policy and legislators refuse to consider them, initiatives would seem the appropriate remedy. But there is a supposition here, that such democratic self-governance has a broad base and actually engages ordinary citizens in the effort. The process of raising awareness of an issue, convincing others of a proposed solution, crafting the language, recruiting and
organizing volunteers, circulating petitions, gathering sufficient signatures to place the issue before the people and then convincing a majority to approve it, is tedious and difficult. That difficulty, and its effect in slowing the decision, adds some measure of deliberation to the direct lawmaking process. It requires—and was meant to require—leadership and activism, but also public conversation and debate. We are after all, a representative democracy; we elect others to accomplish the work of lawmaking for us. We do not do this only because it is generally difficult for all of us to become fully informed of every detail of a particular issue and because it would be prohibitively expensive to convene an election whenever we need a change in law. We do this in order to have better laws—and to protect our liberties. By selecting a group of citizens from among ourselves to do this, we "refine and enlarge the public views" This filtering allows deliberation; tends to form momentary passions into sensible policy and generally helps to protect us from ourselves—and from those who would lead us into folly or worse.

The Basic weakness of voter initiatives . . . is that enacting laws by referendum skips over the hard part of representative democracy. Lawmaking is supposed to be a deliberative process of conflict and resolution—debate, negotiations and compromise—that requires all sides to face the contradictions in their own positions. . . . Packaging laws by popular vote evades this obligation—the accountability embedded in the legislative process itself.

Circumventing this fundamental feature of governing should be accomplished with great care. Ballot initiatives were not meant to be easy and are not even permitted in twenty-nine states.

34 The Federalist, No.10, 46.
36 Mark P. Petracca and Darcy Jump, "From Coast to Coast: The Term-Limitation
The advent of professional organizers, consultants and business firms specializing in such projects, bringing to bear all of the resources of a veritable political industry, erases much of the naive supposition of citizen-sponsored petition drives and makes direct voter-lawmaking even more dangerous. What appears before the people for decision can now be too easily manipulated by narrow political views and purposeful financial interests. The quality and manner of the debate is likewise determined by the kind and amount of resources brought to bear. Money tends to force political information through the limiting, but highly effective, funnel of media consultants and other professional campaign experts. Political deliberation is sacrificed to expressions of the moment and all of the problems of our elective politics--indeed some of the same problems used to justify the need for term limits--increase dramatically. The difference is that here voting decides not who will later decide law, but law itself. It is one thing to elect a fool, it is quite another to be made foolish.

Despite this, the people are being convinced--and are demonstrating a willingness--to restrict their own future political choices! The manner of establishing term limits has had problems of constitutionality and raises troubling issues of elitism and proper deliberation, and yet these efforts have been very successful. The people have responded in large measure because they are frustrated by the current state of politics. In this climate almost any measure aimed at politicians stands an excellent chance of gaining rapid public support. The people are entirely right in their perception that something is terribly wrong, but they have been led to a supposed solution by the same means and methods that characterize much of what is wrong.

Express, "National Civic Review" (Summer-Fall 1992): 356.
Many people now believe that last year's Supreme Court decision, the Republican takeover of Congress and the subsequent defeat of a proposed Constitutional amendment ended the debate over term limits for federal legislators. Others believe that the closeness of the Supreme Court's majority opinion on this matter does not preclude a resurrection of the question, especially in light of the appetite of some current justices to revisit prior decisions. Term limits, however, do now exist for state and local officials around the country and it is unlikely the movement is fully spent. Earlier precedents demonstrate that state-based efforts can result in Constitutional change. By 1912, twenty-nine states had established direct party primaries for nominating U.S. Senate candidates. That movement had begun through state ballot initiatives a decade earlier and grew until Congress could no longer resist it. The 17th Amendment was submitted and ratified by the next year. Similarly, the 19th Amendment came about after women had already achieved the right to vote in several states. In both of these cases the movements were genuine democratic, citizen-based efforts. And in both, voter opportunity and choice was extended, not restricted.

37 Jost, 10.
CHAPTER 3

GEORGE F. WILL AND THE ARGUMENT FOR TERM LIMITS

Before he became a proponent for term limits, conservative columnist and political commentator, George F. Will, wrote in opposition to them. Even in his opposition, however, the themes he would later turn to argument for support were apparent. "What has changed since 1945 is the number of incumbents seeking reelection," he said, but then pointed out that the mean years of service for members of the House was actually slightly lower in 1990 then it had been in 1971. To explain the ability of incumbents to secure reelection he proposed that "Americans like to think they favor a small government comprehensible by amateurs . . . ; practically, however, Americans are remorseless Hamiltonians, demanding an immense government . . . and career legislators looking after their constituency interests." Despite the issue he takes with the result of these desires, he concludes that "Americans have a constitutional right to democracy, not good government."\(^1\) Given this unflattering view, it is not surprising that within a year he had developed a very different explanation for incumbency and changed his position on term limits.

In *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy*, Will offers a Dorian Gray-like picture of the modern Congress. The U.S. Capitol is among the most magnificent of public buildings, but within its walls are disease

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and decay. Its very centrality in the capitol city is testament to the primacy of the legislature in republican government, yet the practices of its inhabitants have corrupted the Founders' intent. He no longer believes that political longevity is a creature of public desire, or at least not public desire alone. Now he is convinced that congressional careerism is not only a problem, but the problem and term limits are the remedy. In order to support this theme he is forced to make a direct causal connection between this careerism and every real and perceived problem of the American political system. In many areas of his analysis he is in the right vicinity; identifies the players, the process and many aspects of what is wrong. But the need to work everything to a single solution often forces his cause-effect argument into contortions of logic. And he largely misses the thrust of his evidence by mistaking the effect for the cause.

Restoration makes the case that congressional careerism became a reality in the aftermath of the New Deal expansion of the federal government and quickly accelerated in the following decades. While statistics demonstrate that incumbents have always had a remarkable re-election success rate, they also point to more recent trends in long-term incumbency and reduced turnover of total membership. Will offers evidence for this by charting the number of House incumbents with twelve or more years of service at the end of each legislative session. During the first one hundred years of the republic, 1789 - 1889, the number of members with that tenure was never above twenty; indeed through most of that period only a handful of members served twelve years or longer. An average of sixty to seventy members accumulated this length of tenure in sessions after 1907, but the average remained in this range until the depression and World War II. During the 1930s

2 Using 12 years as the yardstick is probably no accident. Most proposals seek to limit members of Congress to 12 years of service.
and early 1940s the average number climbed into the nineties and low one-hundreds. After this, beginning with the election of 1946, the propensity for more incumbents to serve longer periods rose steadily. The 102nd Congress, elected in 1990, listed 198 members—45.5 percent of the total body—who would end the session with twelve or more years service. A similar trend is observed in the Senate. Between 1789 and 1889 an average of only 2.3 Senators began any session with twelve or more years of tenure. But this average jumps dramatically during the four decades from 1889 through 1929, when the average number of members who achieved twelve years of tenure reached 17.5. Turnover rates in the Senate remained relatively stable for more than thirty years until 1961. After that, the average number of senators with twelve or more years of service leaped to 34.8. Nearly one-half of the members who began the 1993 session did so with twelve or more years of senatorial tenure. Will believes the percentage turnover of total membership from one session to the next also tends to confirm increasing longevity. Since the federal election of 1790, the highest turnover among Representatives occurred in 1842, when 76 percent of House seats changed. The lowest, in 1988, resulted in only a 7.6 percent change in membership—exactly one-tenth of the prior figure. Based on this, Will asserts that congressional longevity is a phenomenon of this century and has been markedly higher since the depression.

His central argument is that this evidence of increased longevity represent something different from the people's desire to return worthy legislators. It represents something incumbent legislators are able to do for themselves, and in the course of so

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4 Ibid., 81-83.  
5 Ibid., 73.
doing they have perverted the role of Congress and of government. Congress "is and ought to be the epicenter of the political expression of the nation's collective life." But it can no longer be trusted in that role because of "the nexus between legislative careerists and the capacity of the modern state to be bent to the service of their careerism." This "nexus," Will explains, is "degrading to Congress and demoralizing to the country, [and] is one reason why government performs so poorly and is therefore so disdained."6 His justification for this assessment is illustrated through numerous examples of action, inaction, foibles, mistakes, zealousness, partisanship, and outright greed. Whether accomplished as an institution or by individual members, these are presented as the effects of congressional careerism itself.

One important area of his focus is federal spending and the extension of federal authority. Here he contends that much of the size, scope and expense of the federal government results directly from careerist intentions. He discusses two categories of spending behavior. The first consists of numerous measures that are enacted for the specific benefit of a member's individual district, state or region. These examples of federal facilities, grants, projects, programs and other such favors are generally referred to as "pork barrel" legislation. This can also consist of federal subsidies and beneficial tariffs for various industries and agricultural products that happen to be important segments the economy of a legislator's region or state. The subsidies not only increase the cost of government, they increase prices for all consumers.7 Senior members are particularly adept at providing these benefits because of the power of their committee chairmanships.

6 Ibid., 9.
7 Ibid., 22-23.
He cites the example of Robert Byrd's efforts to bring all manner of costly facilities and programs to his small home-state of West Virginia.\(^8\)

According to Will, "pork" and other strictly localized benefits are caused by careerism because legislators use them specifically to promote re-election. They are provided in the spirit of "vote for me and I'll give you something," or "vote for me \textit{because} I \textit{gave} you something." Not only does this tend to increase spending, it is also engenders naked parochialism. In the name of re-election the greater national good is sacrificed to local, sometimes peculiarly local, interests. But would term-limitation, \textit{in and of itself}, prevent this? Would term-limited incumbents be any less concerned with re-election during their period of allowed tenure? Would term-limited legislators from tobacco, mohair, or peanut regions be less concerned with obtaining and preserving benefits for their constituents? Would term-limited legislators from states or districts with military bases, even ones widely believed to no longer be necessary, be any less vigilant in preserving the jobs and business incomes that depend on these facilities? George Will neither asks nor answers these questions. Using Robert Byrd as an example is very problematic for this argument. Byrd deliberately stepped down from his former position as Majority Leader of the Senate to become Chairman of the Senate Finance Committee. He did so in order to concentrate his last term in the Senate in efforts for West Virginia. He is even quoted as wanting to be a billion dollar industry for his region.\(^9\) His are the very actions of one who knows his congressional time is growing short and wants to leave a legacy to his home state. Term limits will increase the number of Senators and Representatives in this very stage of service.

\(^8\) Ibid., 31.
\(^9\) Ibid.
Restoration looks at a second category of spending-related activity which Will believes is linked to careerism. This is the tendency of federal legislators to take small, usually local, projects and enlarge them to expensive national programs. One example is a local night baseball program for youth. Representative Pat Schroeder takes an interest in it because it seems to keep restless kids from getting into trouble and she promotes increased federal spending to expand it to other areas. Will reminds us that this small instance is only one of thousands, including many larger, more expensive programs that have fattened our "leviathan-like" federal government. This type of spending, he insists, is caused by careerism.

The mentality of Washington's entrenched incumbents is one of the reasons they are entrenched. They believe—really believe—that every good idea out there in America should become a federal program. His argument is that the longer a legislator remains in Washington, the more convinced they become that Washington, and only Washington, can solve all problems. In effect, because they are career federal legislators they must provide federal solutions. Regardless of how well meaning they may be, this propensity of members to "do something" at the federal level destroys any sense of limited government. Term limits, he suggests, will retire such individuals and replace them with legislators of a more narrow scope.

Here again, his conclusion is that term limitation alone will shift the focus away from Washington. Is this not a political argument rather than a structural one? Term limits aim at the relationship between the governed and their representatives. They establish rules for how long individuals serve in a public office, not for what they may do.

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10 Ibid., 33-34.
11 Ibid., 34.
12 Ibid.
while they serve. Is it any less likely that new members or perhaps an entire Congress may be elected that believes most problems should be handled by the federal government? There is no direct link between the proposed solution and Will's desired result. There is a legitimate—and needed—debate over the extent and purpose of the federal government and its relationship with the states and localities. There is certainly a needed debate on federal spending, especially in light of the budget deficit. These debates should be carried out and they should be carried out in the course of every individual campaign for federal office. Term limitation, however, is an entirely separate issue and merits an entirely separate debate. His argument actually builds a better case for a balanced budget amendment, or for rules that prohibit amendments that are not germane to the subject of the original bill—which is one way many pork and special program laws are accomplished. These would force the setting of budgetary priorities regardless of who is elected and how long they stay. Or he should argue the political solution and encourage the election of people who share a belief in smaller government.

In claiming that the New Deal era represents the watersheds for both congressional careerism and the expansion of the federal government, Will brands each phenomenon as the cause of the other. As the federal government became larger and more important people desired to remain in Congress longer. And as people remained in Congress longer they had a natural incentive to extend the role of the federal government in American life. The coincidental occurrence of the two may be related, but in a different way than explained by Will's interpretation. The role of the national government was certainly expanded by the various New Deal programs. However, the trend towards an increased federal mandate began at the turn of the century.

The nationalizing of American political life occurred largely in response to industrial capitalism. The consolidation of economic power called forth the
consolidation of political power. Present-day conservatives who rail against big government often ignore this fact.\(^3\)

Will's explanation also ignores the enormous changes brought about by the Great Depression and World War II. Widespread economic dislocation overwhelmed the abilities of state and local governments. The huge national effort required to prosecute a global war necessarily led to a wider mandate for the federal government. Moreover, the immediate aftermath of the war and the Cold War that followed, propelled the United States into an unparalleled position. As the only major combatant relatively unscathed by the war's destructive effects, America accepted new responsibilities for the reconstruction of Europe and Japan. The stark polarization that characterized the Cold War and the threat of nuclear annihilation forced the United States to take on a new mantle, as leader of the free world. The eventful history of this period left America remarkably different than it was prior to 1932. The contingencies that presented themselves in rapid succession, both domestic and international, required a national response and the federal government was the only capable respondent. There should be little surprise in the increased trends for congressional longevity and reduced turnover during this period--from the standpoints of both the politicians and the people. It was natural that the politically talented would be drawn to federal service in order to work on these challenges. It was also natural that the people might respond to a succession of crises by keeping steady hands on the tiller. These circumstances, along with the coincidental changes brought about by an internationalized economy, offer a more complete explanation of government expansion and congressional longevity.

In gerrymandering, Will finds another illustration of how the desire for life-long tenure contorts the legislative function. He takes the example of a Pennsylvania state

legislative redistricting scheme known as "incumbent protection" and concludes it represents an "inside the Beltway" mentality.\textsuperscript{14} This first instance is a relatively straightforward case of drawing district lines in such a way as to remove a prominent, potential opponent. Such efforts explain some of the absurdly irregular shapes of several congressional districts around the country. In general, many oddly formed boundaries are the result of deliberately politicizing congressional redistricting.\textsuperscript{15} But there is another reason as well. Here, Will departs from his arguments about careerism. The seeming illogic of some districts is because the lines were drawn to insure representation by a member of a specific racial or ethnic group. It is no longer careerism he argues against, it is the 1982 amendments to the Voting Rights Act of 1965.\textsuperscript{16} This another area where he argues a political difference, not a structural one. If the problem is a given federal law he should argue for repeal or amendment of that law. Even if we give charitable treatment to his argument and look broadly at the issue of congressional redistricting, is there any specific remedy for this problem to be found by term limitation? Might term limits cause state legislatures to become even more partisan in their redistricting plans to insure party advantage in the face of greater individual turnover? And would those incumbents serving in sessions charged with redistricting be any less concerned with insuring their reelection through the period of their allotted tenure?

The well known scandals peculiar to congressional service are a third aspect of how careerism putatively corrupts people and institutions. In Will's estimation, the House-bank scandal, midnight pay increases, franking privilege excess and other like abuses will end only if term limits are adopted. He quotes an assessment by \textit{Roll Call} that members of

\textsuperscript{14} Will, \textit{Restoration}, 41.
\textsuperscript{15} Ibid., 43-46.
\textsuperscript{16} Ibid., 42-47.
Congress "cannot be trusted with the frank under current terms" and advances the conclusion that "a different kind of member—members serving under term limits—might be more trustworthy." Whether this would be so, however, depends on term limits eliminating incumbents, which they would not do. Whatever tenure is permitted under term-limitation, there are likely to be individuals who wish to enjoy it. If any advantage of incumbency can be exploited to help insure that length of service, it is likely to be exploited. There is really little to justify his conclusion other than wishful thinking or the belief that term-limitation will somehow encourage saints to run for office. While there is no question that such abuses should be curtailed, more specific and targeted reforms would be more effective.

Will next examines the intertwined relationship between campaign funding and special interest influence in legislation. He correctly identifies the seriousness and subtlety of these issues and their central position among the causes of the erosion of public confidence. But in insisting they serve as only one more example of the need for term limits he misses the much of the point. His argument forces him to reverse the cause and the effect.

The problem created by the enormous funds required by and contributed to political campaigns is obvious in the extreme. There are numerous examples where campaign contributions by special interest groups, usually through Political Action Committees (PACs), appear to result in favorable legislative treatment for that interest and vice versa. The overwhelming propensity for these groups to contribute to incumbents over challengers indicate an important aspect of the "nexus" in Will's argument. In Still The Best Congress Money Can Buy, Philip M. Stern provides ample evidence of how

17 Ibid., 95.
extensive this problem really is. On the campaign spending side, the average cost of
winning a seat in the House of Representatives went from $126,900 in 1978 to $407,556
in 1990. Successful Senate campaigns have likewise increased from an average of
$1,208,600 to an average of $3,870,621 during that period. In contributions, an
increasing number of successful candidates derive an increasing share of their total receipts
directly from PACs. In 1990 more than one-half of the members of the House received at
least one-half of their contributions from these PACs. One-hundred and thirty-seven
members received over 60 percent of their funds from these purposeful contributors.\(^1\) In
addition to PACs, many individual contributors seem to have questionable motives and
methods. Stern shows that some business leaders seeking legislative attention contribute
amounts up to their personal limits, under federal election law, and then "encourage"
family members— even minor children—to follow their example.\(^2\)

Whether by individuals or PACs, these contributions are not provided broadly to
candidates. They are not even provided to candidates likely to share political philosophies
with the donors. They are targeted to incumbent members of committees having direct
jurisdiction over legislation that can affect those contributors' interests. They even
contribute to well placed incumbents who have no effective campaign opposition.\(^3\)
These incumbents are rendered impossible to defeat in the immediate election, and are able
to amass huge carry-over surpluses, which serve to ward off would-be challengers in the
future.

But there must be a quid pro quo; the contributor must realize a benefit from this
generosity or play the fool. Stern provides numerous examples where legislators have

\(^{1}\) Philip M. Stern, Still the Best Congress Money Can Buy, (Washington, DC: Regnery
Gateway, 1992), 53.
\(^{2}\) Ibid., 18.
\(^{3}\) Ibid., 37.
introduced, blocked, modified, supported or withheld support of legislation to the benefit of a given interest—and did all these things very coincidentally to the receipt of contributions from that interest. And it isn't in lawmaking alone that these relationships prove mutually beneficial. The subtleties of legislative influence are seen in the "Keating Five" story, where contributions and intercessions with regulators have an apparent and embarrassing connection. Even if these contributions and legislative activities are truly unrelated, they create a terrible impression. The probability that they are related confirms the public's worst fears.

But as Will acknowledges, these circumstances are not necessarily a case of corrupt individuals, so much as a case of a corrupt system. His solution, once again, is to apply term limits. By making congressional careerism impossible, he believes, one key element of the nexus between incumbency and the myriad of political problems will be broken. His argument uses a kind of "supply side" logic; fewer long-term incumbents will result in fewer benefits for special interests to purchase. The problem here is that Will's argument focuses solely on an incumbent's desire for reelection. Term limits will not end that desire. Nor will term limits change the role of Congress, which places its members in a unique vortex of power. The ability to grant or withhold enormous benefits and to mediate conflicts among powerful interests is inherent to congressional authority. And opportunities to exploit these congressional powers for personal benefit will exist regardless of how long individual members serve. Will's argument also ignores the other side of the equation, that so much money is needed for campaigns and too many purposeful interests see benefit in providing it. If the assertion is that powerful interests are buying influence, then what guarantees it cannot be purchased from term-limited sellers? Indeed, the reality of shortened tenure may cause added temptation for those
inclined to "get it while they can." George Will labels the effects of money in politics as the cause. Interested political money is itself the problem.

In his final argument for term limits, George Will tells us there is a higher purpose to be achieved—a return to deliberation. Careerism—the sum total of all the great and small abuses, the link between special interest money and legislative acts, the purpose of selfish parochialism, the basis for "Washington knows best" and forestalling tough decisions that might risk continuance in office—has, in addition to all this, destroyed the original republican ideal of a deliberative legislature. Legislators should emulate the British Parliamentarian Edmund Burke, Will tells us. They should not merely echo the voice and advance the local interests of their constituents. In a republic, representatives are to exercise their judgment and not follow the people's instructions as articulate puppets. Legislators are to deliberate upon the great matters before them. They should serve the higher public interest, and help the people understand what they should want.21

Madison says that representation—the delegation of decision-making "to a small number of citizens elected by the rest"—is supposed "to refine and enlarge the public views." As Harvey Mansfield, professor of government at Harvard, says, the Founders believed that the function of representation is to add reason to the popular will.22

"The Framers of the Constitution strove to constitute deliberative democracy." To achieve this, members of Congress must "have both opportunity and incentive to transcend the maelstrom of private interests and to engage in deliberation about the public good."23 The combined effects of careerism, however, distort the very purpose of representative government. Rather than serving as a "filtering" of the public's desires, it forces representatives to relinquish their judgment to the maelstrom of polls, special interests and

22 Ibid., 104.
23 Ibid., 104-105.
local wants. In running from one committee hearing to another, scrambling for funds, dashing back to their districts, staving off pressure from lobbyists and subjecting themselves to harangue by every faction that can register a blip on opinion-polling-radar, legislators find little room left for deliberation of the issues. These dilemmas can be resolved, and deliberation can be restored, George Will concludes, only by term limits.

The picture he paints is real. But not all of these circumstances and pressures are internal to a legislator's desire for re-election or even to the legislative process itself. The modern Congress is not a product of its members alone. It is a product of its time and of the circumstances, pressures, technology and forces that shape the modern age. Congress is the beneficiary as well as the victim, as is every other institution and individual in modern society. Today, fifty-five prominent American statesmen simply could not lock themselves in a room in the middle of a major city and secretly design a Constitutional system of government for the rest of us. Every aspect of modern communications, transportation and political marketing would force itself upon them and would distort their deliberation. The dilemma of the need for deliberation and the confluence of forces that work against it is painfully real and will not solved easily.

This critique of Restoration examines the major arguments advanced by the most prominent advocate of term limitation. They are echoed, in one way or another, by many others. Most of these combine into what can be labeled the "obvious" argument. Obvious because it reiterates the list of widely observed abuses which inspire understandable public outrage and then uses them to fuel support for term limits. These proponents do little more than remind the people of the obvious, link this solely to incumbency and tap a deep reservoir of anger and frustration. This argument chants the refrain "and term limits will fix that" as a chorus to each litany of scandal, abuse and policy failures. By promoting the issue in this way, expectations are raised beyond what any reform could possibly deliver.
and create the risk of even greater frustration and disillusionment among an already skittish, and shrinking, electorate. Moreover, these unrealistic objectives render future evaluation nearly impossible. Without a clear understanding of what is intended, it will be difficult to know if it has been achieved.

The hidden argument in all of this is declaring the failure of the public. It urges the people to admit this failure and limit themselves. It says they cannot resist the power of political marketing and are therefore controlled by the money that buys it and the careerist motives that beg it; that the people are easy prey for ambitious political pandering because they are selfish in their political desires. Because they are no longer capable of making choices among candidates, they should adopt a law to do it for them. These are not truly limits on political choice, proponents argue, but are in keeping with the Founders' intent—indeed are among the oldest of republican concepts. It should not be surprising that in confusing times we seek simple answers. But, as the following chapters will show, the solution proposed today is very different from what was proposed and applied in the past.
CHAPTER 4

HISTORICAL DEVELOPMENT OF THE
THEORY OF TERM LIMITS

Western thought has paid a great deal of attention to the practice and theory of republican government. Term limits have been among the many tenets prescribed and described in the writings of many well known political theorists and historians. From the earliest Greek and Roman governments to the Twenty-second Amendment of the U.S. Constitution, there have been numerous examples of legally imposed tenure limitation. From this, modern proponents and opponents of term limits have drawn equal measures of support for their competing arguments. Americans of the Founding generation also drew heavily from the reservoir of republican history and thought. They adapted many ancient precedents into the features of government we now take for granted. But Revolutionary Americans were also very selective in their borrowing, accepting some ideas and rejecting others. They were also experimental, trying and discarding many concepts before settling on those which best served their principles. Term limits were among the features of republican government that Americans borrowed, adapted, tried and ultimately rejected. A review of the history and theory of term limits will assist in understanding of why this was so.

Aristotle and Machiavelli

Aristotle, history's most notable political observer, devoted several works to the questions of governing. He related histories, identified general principles and described
structures and procedures. He also prescribed certain societal and personal characteristics that he believed were necessary to achieve justice and stability. His view encompassed the forms of government, which he defined and classified in textbook fashion. But his interest was in the more immediate, in how individuals connected to the larger whole. Citizenship, community and government were interconnected and inseparable. The Greeks had no word for *society* as we understand the term. Instead they spoke of *polity*, which implied more than an organized group of individuals living in a particular place. It implied a union of self-governing *citizens*.

In his effort to define the *citizen*, Aristotle assumed limited tenure for certain public offices:

What effectively distinguishes the citizen proper from all others is his participation in giving judgment and in holding office. Some offices are distinguished in respect of length of tenure, some not being tenable by the same person twice under any circumstances, or only after an interval of time. Others, such as membership of a jury or of an assembly, have no such limitation.¹

Continuing this theme he denied the possible objection that citizenship itself was not an *office* with the assertion that citizens "have the fullest sovereign power, and it would be ridiculous to deny their participation in office," and suggested that citizenship be distinguished as an "unlimited office." He arrived at his definition in concluding that ".. as soon as a man becomes entitled to participate in office, deliberative or judicial, we deem him to be a citizen of that state."²

He offered a further hint of the possible benefits of limiting tenure in a later chapter of *The Politics*. Here he was primarily engaged in determining the education required to

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² Ibid., 1275a, 29-1275b, 20.
produce citizens capable of maintaining a polis. If nature provided inherently superior persons, there would be no problem in resolving who should rule and who should be ruled. But because "rulers are not so greatly superior to their subjects . . . it is clear, for a variety of reasons, all must share alike in the business of ruling and being ruled by turns. For equality means giving the same to those who are alike, and the established constitution can hardly be long maintained if it is contrary to justice." His meaning here must be carefully considered. His notion of ruling and being ruled is both overt and subtle. On the one hand it implied the division of a population into those who participated in governing as citizens from those who were mere subjects or residents without political standing. On the other, it admits the question of authority among a group of equal citizens. He answered this last dilemma by suggesting the equals be divided by age. The older ruled the younger and from the virtues gained by being ruled—and knowing they would someday rule, the young learned to rule well when their turn arrived. This implied a benefit that was later echoed by American revolutionaries, and even by modern critics of the Congress—that rulers should be required to live under the laws they create. His intent, however, was aimed at educating a good citizen. Ruling, in this context, implied the collective rule of the citizens and was more an argument on the issue of political participation than restrictions on an individual in a specific office.

While important observations, these did not provide a theoretical basis for term limitation. This is somewhat surprising because, by his day, Athens had applied term limits to various offices for centuries. Aristotle tells us much of this himself in The Athenian Constitution. One legend maintains that in the earliest days of the city-state the heirs of

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3 Ibid., 1332b, 24-26.
4 Ibid., 1332b, 12-1333a, 16.
the monarch were perceived to be unworthy of succeeding him. Another embellishes this somewhat in saying that Codrus was so beloved that after his death no one was deemed worthy of bearing the title "king." In either case, the title "Archon" was bestowed on his successors who initially served for life. Sometime after this, the Archon's tenure was limited to ten years, and in 683 BCE the term of office was reduced to only one year. Coincident to that change the role of the position was divided among nine separate Archons. Aristotle does not specify the term of membership for the council of four-hundred-and-one, established under Draco's reforms, but he does tell us they were chosen by lots "among men over thirty years old, the same man was not to hold office a second time until all had held office once."

Though annual terms were fairly common among the various Athenian offices, they were not universally enforced. Solon was nominally elected Archon, but accorded the powers of dictator and allowed that authority several years. Damasias became Archon and served for "two years and two months, until he was removed from his office by force." Neither did these limits prevent the occurrence of political usurpers. After three attempts at seizing power, the temperate and generally well regarded Pisistratus, ruled Athens for thirty-six years. Athenians were also willing to yield to capable leadership by circumventing institutional authority. Pericles effectively governed as one of the ten strategoi, or commanders, a position without fixed limits to which he was elected

5 Aristotle, *The Athenian Constitution*, trans. P.J. Rhodes (London: Penguin Books, 1984), 40. This account is provided by the translator as the first four pages of the original manuscript have been lost.
8 Durant, *Greece*, 113.
and re-elected for nearly thirty years. The rules limiting tenure applied to offices, not necessarily to rule or governance. Aristotle was not critical of these variances, indeed was inclined to complimentary treatment of some of the actors involved—though he suggests Pericles left little in the way of a political legacy.

Machiavelli was more explicit of his criticism of such lapses in the Roman republic. Here he observed the abuses of the Decemvirs and drew a lesson for maintaining liberty and political stability:

And therefore, when we said that an authority conferred by the free suffrages of the people never harmed a republic, we presupposed that the people, in giving that power, would limit it, as well as the time during which it was to be exercised.

Later in The Discourses he amplified this concern, arguing that the creation of the Censorship was beneficial because its members acted as "the supreme arbiters of the manners and customs of the Romans, . . . [and thus] helped to preserve the liberties of Rome . . . [as] the most potent instrument in retarding the progress of corruption"

However good and necessary these offices were, Machiavelli believed "it was a serious mistake to create these Censors for a term of five years." The Dictator Mamercus corrected this with a law that reduced their term to only eighteen months.

Machiavelli believed the prolongation of military commands had grave consequences. In part caused by the extension of the empire and the perceived necessity of allowing a high degree of autonomy for commanders in remote regions, long military commands also resulted from emulation of bad examples. Terms of the Magistracies,

\[10\] Durant, Greece, 249.
\[11\] "While Pericles was champion of the people the constitution was not in too bad a state, but after his death it became much worse." Aristotle, Constitution, 71.
\[12\] Niccolo Machiavelli, The Prince and The Discourses (Garden City: International Collectors Library, no date given), 167.
\[13\] Machiavelli, 194.
Tribunes and Consuls had been extended in the push-pull struggles of the people and the Senate for political control. Bad practices led to bad precedents, "which custom led to the prolongation of the military commands, which in time proved the ruin of this republic."

Long tenure in command of a single army had two ill effects. First, it reduced the number of capable military leaders that might otherwise have developed, because "a less number of men became experienced. . . . [Second,] by the general remaining a long while in command of an army, the soldiers became so attached to him personally that they made themselves his partisans, and, forgetful of the Senate, recognized no chief or authority but him."¹⁴

These observations and criticisms formed Machiavelli's basis for applying term limits to certain kinds of offices. In a republic, whenever inordinate political, governmental or military power was delegated to an individual or small group for an extended period, liberty and stability were jeopardized. This was true because republics required a balancing of interests. The intersecting conflicts among the one, the few and the many—in Machiavelli's understanding of political forces—required constant vigilance and constraint. Under the right conditions, republics may be established with relative ease.¹⁵ But maintaining a republic was fraught with difficulties because of the tendencies

¹⁴ Machiavelli, 391-392.
¹⁵ Machiavelli, 392-394. Machiavelli held that relative equality among citizens was a natural foundation for a republic. Where it existed, princes were less likely to establish themselves. Where it did not, forming a republic was nearly impossible. He went on to say "that it is of great advantage in a republic to have laws that keep her citizens poor." His use of the term poor here did not imply poverty as we understand the term today. As shown in his example of L. Quintius Cincinnatus, it implied a farmer who, by Machiavelli's interpretation, was self-sufficient on a small piece of land. He also refers here to the Agrarian law, which aimed at restricting the amount of land that any one person or family could own. As shall be seen, this was taken up by Harrington, though Machiavelli indicates it was quite problematic for Rome.
of human nature and the clash of economic interests. For this reason, Machiavelli believed republics and other "mixed bodies" must provide for "the intrinsic means of frequently renewing themselves." These means had to "bring them back to their original principles." His intent in this admonition, it must be said, was beyond mere forms. It demanded attention to the virtues of the citizens, as well as the specific features and procedures of their institutions. Machiavelli did not see official corruption as the only means of usurpation. Foretelling Gibbon's later account of the Roman decline, he declared:

To usurp supreme and absolute authority, then, in a free state, and subject it to tyranny, the people must have already become corrupt by gradual steps from generation to generation. And all states necessarily come to this, unless . . . they are frequently reinvigorated by good examples, and brought back by good laws to their first principles.

Where Machiavelli concentrated on the use of tenure limitation to protect society from the potential of abuse and tyranny, Aristotle suggested that among political equals, justice requires that citizens take turns in governing. In these, a negative and positive basis for applying limits in a republic can be discerned. By combining these and other lessons, James Harrington presented a utopian model for republican society; a form of society he believed required pervasive and intrusive limitations of every kind.

**James Harrington's Oceana**

In *The Commonwealth of Oceana*, Harrington portrayed a thinly disguised 17th century England as the idealized republican commonwealth he believed it should and could become. Just as his hero Machiavelli, he wrote to the political leader of his time and

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16 Machiavelli, 321
17 Machiavelli, 355.
place. Like his most prominent American reader, John Adams, he actually tried to bring his vision of government to practice. *Oceana* must therefore be seen as not just a theoretical work, but as an actual proposal for a system of government made with at least some hope of adoption.

Harrington was "a country gentleman of an old family." His ideas bore the unmistakable imprint of Machiavelli, whom he both credited and lightly criticized in his own work. He differed from his contemporaries in that "[his] text is devoid of the vocabulary of natural law, and (no less surprisingly) of common law as well. He reverts almost unequivocally to an earlier vocabulary, one in which the concepts of property and nature functioned as means of pronouncing that man the political animal was by nature a citizen and not a subject, a creature who used intelligence to define himself rather than to acknowledge binding law." "He accepted the . . . thesis that the aim of government was to maintain the balance between the one, few and many, and he accepted the dictum of 1649 that the historic monarchy had never been very good, and had gotten worse, at maintaining it."20

But Harrington was not merely presenting an ideal or a political theory, he was interpreting events in the context of a broader history.

"The central significance of *The Commonwealth of Oceana*, and the central reason for regarding its author as a creative genius, is not that it is utopian or republican, but that it confronts the problem of *de facto*

19 Ibid., viii.
authority by offering, for the first time in intellectual history, an explanation of the English Civil Wars as a revolution, produced by the erosion of one political structure and the substitution of another through processes of long-term social change.\textsuperscript{21}

After some initial difficulty, the work was published in 1656 with a dedication to Oliver Cromwell. Harrington actually hoped to convince Cromwell to become the \textit{lawgiver} portrayed in \textit{Oceana}, and to adopt his principles for creating a new British Commonwealth.\textsuperscript{22} Whether Cromwell considered it is doubtful, but the notoriety gained from publication brought Harrington a degree of political prominence and a small but loyal following.

After Cromwell's death in 1658, his son Richard attained the Protectorate. "In desperate need of money, Richard summoned a Parliament to meet on January 27, 1659. Although the elections were held with the usual Cromwellian machinations, fifty republicans managed to win seats. And of these fifty, at least ten were followers of Harrington."\textsuperscript{23} These "Commonwealthmen" showed friendship to Richard and declared that the existence of a single Chief Magistrate fit neatly into their view of the one, few and many. As the \textit{one} existed in the Lord Protector, they focused their political efforts on the manner of electing the Commons and to the composition of the upper house. Through the rapid developments of 1659 Harrington continued to write, amplifying his original theme in an effort to provide solutions for the succession of contingencies that developed. The

\textsuperscript{21} Harrington, xix.
\textsuperscript{22} In this appeal for Cromwell to become the new British \textit{lawgiver}, Harrington attempted to emulate an ancient concept, also taken up by Machiavelli, of a great individual who either imposes on his own, or is given the power to impose, a complete political system upon a society. This notion looked to the idealized examples of Draco, Solon, Cleisthenes and other \textit{lawgivers}. To further the comparison, Harrington gave the Athenian title of "Archon" to the principle character of his narrative.
dissolution of Parliament on April 22d convinced him that time was ripe "for a
fundamental change in the government of England."24

The Harringtonians redoubled their efforts after the Rump of the Long Parliament
persuaded Richard Cromwell to resign. Their plans "for the establishment of an equal
commonwealth," were finally given Parliamentary consideration when a committee was
appointed to review their proposals. Whether these considerations were taken as serious
may be debated, since one appointed committeeeman suggested that Harrington himself be
made a member and be required to attend meetings "with a rope around his neck."25 The
committee issued a report to Parliament on July 6, 1659. In all probability written by
Harrington himself, it proposed that Parliament adopt a commonwealth based on his
principles. Parliament's response was a polite "no!"26

Undaunted, Harrington and a small group of followers continued to discuss these
beliefs in what came to be called the Rota Club. Members became the subject of
pamphlets, poems and songs ridiculing the club's ideas and its use of intricate voting
procedures taken from Oceana's text. Soon after the Restoration of Charles II, the Rota
Club disbanded. Harrington continued expanding on his System of Politics, working
quietly from his London residence. This tranquillity did not last. Suspicious of his work,
loyal Royalists conspired to bring his theories to the attention of the new king. Harrington
was arrested in December, 1661 and committed to the Tower of London. Though
eventually released, he never regained prominence and lived another sixteen years,
victimized by a strange form of insanity.

24 Ibid., 47-49.
25 Ibid., 50-52.
26 Ibid., 55-56.
Harrington’s political theories were in some ways extreme by even modern egalitarian standards, and in other ways very conservative. His aim was to establish a lasting republican commonwealth. In his view, this required balance of societal orders. Stability would be achieved by forcing and maintaining relative equality. This followed from his belief in an economic basis for political power. The attainment of a degree of wealth created a natural aristocracy. He observed that Britain's economic distribution, particularly in land ownership, had changed, but that its social and political system had not. Land ownership had become more equal across society, as had relative wealth, yet the titled nobility continued to exercise a disproportionate degree of political power.

More incongruent, in his view, this titled aristocracy attained station through inheritance rather than personal ability. Thus the House of Lords represented an artificial order of political power contrary to social and economic reality.

Harrington advocated the abandonment of this ordering of society. In its stead, he proposed the imposition—by unalterable constitutional law—of new social orders based on natural aristocracy. Unlike the old system, however, he would have the dividing line between social orders relatively low and constrain the total amount of land-based wealth an individual could accumulate. Called the Agrarian, this law did away with primogeniture and limited land ownership to that which would provide a fixed maximum annual income.

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27 Harrington, 218.
28 Blitzer, 127-135.
29 Harrington, 138.
30 Blitzer, 233.
31 Harrington, 234; Blitzer, 227. Harrington borrowed heavily from the Romans and Greeks. The Agrarian law has precedents in the Roman republic, the first instance being the measures of the brothers Gracchi. See Will Durant, Caesar and Christ, 113-117.
Oceana's government consisted of succeeding levels of elected representatives and officers. All self-supporting males above thirty years of age could vote and hold office. New societal orders were formed by dividing the citizenry into a natural commons and aristocracy. These were termed "Order of the Foot" and "Order of the Horse." The Horse were those with wealth above one-hundred pounds. These distinctions also had military implications, as they established the basis for ranks in the militia. Members of the Horse were so named for their ability to provide their own steeds and serve as a cavalry. Each order also had slightly different roles in the various institutions of government.\(^{32}\)

Election of officers and representatives to succeeding levels of the government and militia took place in great, formal public assemblies. Harrington's intricate election system required separating the functions of nominating from voting. Nominators were selected by lots. They proposed candidates for the various offices who were elected in an elaborate and somewhat ceremonial procession, in which each voter secretly deposited a different colored ball into the ballot box to indicate his choice. The system was also proportional, rather than "winner-take-all" in that various offices were filled by a ranking of the votes received. The procedural devices he imposed were intended to insure free and equal choice; which he held to be among the pillars of republican society.\(^{33}\) He was especially concerned with the need for the secret ballot, which was not the common manner of voting in his day.\(^{34}\)

Oceana's government rose like a pyramid from the local parish to the national commonwealth. Harrington arbitrarily divided England into 10,000 parishes of roughly equal population. These were combined into larger districts called the "hundreds" and

\(^{32}\) Harrington, 76.
\(^{33}\) Ibid., 79.
\(^{34}\) Blitzer, 158. Votes were commonly given in person, by voice. This viva voce method of voting will be discussed more fully in the next chapter.
these in turn were organized into fifty "tribes." Each level had certain jurisdictions and selected officer-electors for succeeding levels. Tribes contributed members to the national legislature. The purely citizen militia was similarly organized. Participation was mandatory, but it was governed by republican norms, each level electing its own officers. For younger citizens, the militia provided training in both public service and the republican processes of the commonwealth.

The national legislature was bicameral. The lower house, or "Prerogative," was made up of both orders, but only members of the Horse could serve in the upper house, called the Senate. Harrington diffused power between these houses through a unique and highly improbable system which separated proposing new laws from deliberating and voting. The Magistrates served as a collective executive and were selected from, and sat before, the Senate. Only magistrates could propose new law. The Senate alone could debate the merits of the proposed bill, but the Senate could not vote to enact law. This power was held exclusively by the Prerogative. Conversely, the Prerogative could not propose laws or amendments to bills, and could not even debate these measures. Members of the Prerogative were, in fact, strictly forbidden from discussing these issues with one another. They could simply vote yes or no; first, on whether or not to consider the issue; and if so, then yes or no on every clause of the proposed law. To inform their decision, the lower house had to rely on the language of the text itself or on the published debates of the Senate. The Senate also selected and sent "proposers" to orate on the measures before the Prerogative. Harrington described this peculiar set of restrictions as "dividing and choosing." He derived this method of enacting legislation from a story of two

35 Harrington, 83-86.
36 Blitzer, 247.
37 Ibid., 238-243.
typically selfish children deciding how to divide a piece of cake. If one cut and the other
chose, they concluded, a fair distribution will inevitably be achieved.38

Harrington was concerned with the effects of personal and class interest in the
processes of governing. He believed that history proved that interests, particularly of
wealth, would work against a fair distribution of political power and ultimately against
political stability. Thus, he imposed this difficult-to-imagine system as a means of insuring
that the wisdom of the natural aristocracy would determine what issues required remedy
and the proposed remedy itself, and the public interest—as represented by the Prerogative-
would decide the matter.39

It is within this context of various devices and constraints that Harrington's
complete application of term limits must be observed. Oceana imposed fixed term limits
for all elected and appointed officers and representatives. It also provided that one-third
of the Senate be replaced annually. He termed this system of forced change "equal
rotation."40 At the lowest level, parish officers served one-year terms and could not serve
two years in succession. Deputies (members of the Prerogative) and Knights (members of
the Senate) served three year terms, but were likewise ineligible for reelection until three
years after leaving office. These periods of ineligibility were termed "vacations."41 The
Magistrates and presiding legislative officers were also subject to rotation. Harrington
defended this system in saying:

38 Harrington, 22.
39 Blitzer, 76.
40 Harrington, 33.
41 Ibid., 239.
Equal rotation is equal vicissitude in government, or succession unto magistry conferred for such convenient terms, enjoying equal vacations, as take in the whole body by parts, succeeding others through the free election of suffrage of the people. . . . The contrary whereunto is prolongation of magistry which, trashing the wheel of rotation, destr[o]ys the life or natural motion of a commonwealth.42

Rotation was, for Harrington, not a mere mechanical device that could be lifted out of the totality of his system. It was, together with the Agrarian Law, his elaborate, secret voting system and "dividing and choosing," a restriction necessary to republican society. It satisfied his belief that stability required balance, which required stringent limitations to the potential of accumulated political power. Term limits were designed to reduce the possibility that elected officials would form a class interest as rulers—in the manner that the House of Lords actually represented a ruling class. Rotation also implied taking turns, in a system of true political equality, by insuring that more citizens had an opportunity to serve as officers and representatives. Thus, just as the agrarian law balanced and equalized society and the political power that flowed from its natural orders, equal rotation balanced the government that ruled it. "As the agrarian answereth to the foundation, so doth rotation unto the superstructures."43 Harrington believed that rotation and each of these other deliberate features of government achieved a specific republican purpose, but only together did they establish a free, balanced and lasting commonwealth.44

As pervasively as rotation was applied in Oceana, the manner of application should be emphasized. Rotation, as Harrington proposed it, did not impose strict, lifetime limits to service in any office.45 Oceana's limitations were imposed through required periods of

42 Ibid., 33.
43 Ibid., 33.
44 Blitzer, 208.
45 Ambassadors were an exception. They were chosen by the Senate and could not be a
vacation, after which an individual was re-eligible to serve in a given office. The objective was to limit the potential effects of continuous rule, not a limitation of service itself and certainly not of experience. This is a sharp contrast to the lifetime limits currently proposed, and enacted, for service in a given office or combined tenure in either house of a legislature. In Oceana, merit was expected to rule and would likely be returned to the councils of government.

John Adams listed Harrington among the important political theorists of the past. The influence of some of his ideas on Adams is unmistakable. Adams clung stubbornly to the notion of social orders being individually represented in the very structures of government. Compared to Locke, Hume and Montesquieu, Harrington was rarely cited by other writers of the American Revolutionary era. Perhaps, as Montesquieu suggested, the tedium of Harrington's ornate detail or the improbable nature of some of his specifics

current member of either house. After an 8-year term, no individual could again serve in one of these diplomatic offices. Ambassadors were rotated by an interesting system which stationed an individual for two year periods in each of four different nations. After serving a full eight years, the ambassador returned to Oceana with great experience which would prove invaluable to the commonwealth. To be eligible for appointment as Ambassador an individual had to be under 35-years old. This policy was designed to insure that the benefit of diplomatic experience would not be wasted on someone who was too old to offer further contribution. Here we see specific evidence of the point raised. Namely, that Harrington expected that experienced political actors would be returned to government after their required vacation, and that experience and meritorious service would likely be rewarded by future election. See Harrington, 124.

46 Ibid., 96.
47 Gordon S. Wood, The Creation of the American Republic 1776-1787, (Chapel Hill: University of North Carolina Press, 1969; New York: W.W. Norton & Company, 1972; reissued 1993), 577. While this passage is the most illustrative of Adams' belief that each legislative house should represent a different social class, Wood devotes the entire chapter to exploring Adams' views on this issue.
rendered him incomprehensible or even laughable. 48 Perhaps there was simply far more
genius from which to draw during America's political awakening.

More likely, a fundamental difference between Harrington and those who followed
rendered him a political anachronism. The concept of political authority changed through
the course of the Enlightenment, particularly among the Americans who were not saddled
with notions of institutional aristocracy or societal orders. Harrington was still bound to
older ideas of the one, the few and the many—in societal orders and not merely as
institutional devices. Because of this, and no matter how couched in the language of
republicanism, his system vested authority in the people only as they were comprised into
orders of society and represented in the institutions of government. This placement of
political authority is crucial to an understanding of Harrington's arguments for term
limitation, as indeed for an understanding of his entire system. John Adams' similar
insistence that social classes should be represented in different houses of the legislative
branch, with the executive as balance, sprang from the same issue. 49 In both cases, the
intent was not simply to recognize and reward the ambitious and well born.

Only by arranging this natural aristocracy, or the most conspicuous of
them, together in a separate house, isolating them from the rest of the
nation, would the state "have the benefit of their wisdom, without fear of
their passions." 50

The intent was to recognize, use and control aristocratic tendencies. Unless these forces
had an institutionalized role in governing, Adams believed, the natural aristocracy would
find means to pervert any political system to their advantage. Any other mere devices

48 "[Harrington] sought . . . liberty only after misunderstanding it, and . . . he built
Chalcedon with the coast of Byzantium before his eyes." See Montesquieu, The Spirit of
the Laws, ed. Anne Cohler, Basia Miller and Harold Stone (Cambridge: Cambridge
University Press, 1989; reprint, 1992), 166.
49 Wood, 578.
50 Ibid., 577.
used to combat natural human tendencies—found in the lessons of all of human political history—would, as they had in the past, simply fail. What both Harrington and Adams failed to realize is that such plans guaranteed social warfare because they deliberately pitted the social orders against each other. Institutionalizing the division served to reinforce it. Rotation changed the faces, or at least moved them from office to office, or in and out of office. By doing so, tenure limits were intended to deny the formation of a governing class. But the very structures of government established and maintained a governing class. Harrington's Senate of Knights and Adam's Senate of individuals with greater wealth were the effective governing class. The people, actually the larger public interest, of Harrington's Prerogative may have had the last word on policy, but the choices presented to them and even the debate itself were controlled by others. Aristocrats, whether natural or economically fortunate, effectively ruled—and term limits merely enhanced that rule by removing the possibility of retaining leadership that rose above class.

There is a renewed interest in Harrington today owing, perhaps, to growing concern over naked, interest-based governing. For some, his and Adams' fears are realized and their prescriptions for granting economic interests a fixed place in the government seem to have come about de facto—and their presence indicates not the balance Adams and Harrington sought, but a dominance. The American experience teaches that they were both right and wrong. They identified the political problem that had perplexed the ages, but could not see beyond a concept of society that reinforced it. The revolutionary experimentation that produced the Constitution was carried out by men who may have been aristocratic in their tendencies, but who placed political authority in the people as the people rather than as members of a particular class. That placement, coupled with the marvelous political flexibility of the Constitution, allowed America's version of the age old struggle to be played out through the medium of elections. The

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clash of interests has generally been mediated to a balance by the sheer size and diversity of the growing republic—and the active involvement of the electorate. Thousands, and later millions, of individual decisions forced America to grow from a limited republic to a democratic republic to a representative democracy. This has occurred because the people have demanded it, and because America's political structures have allowed it.

The application of term limits today creates similar problems as did Harrington's theoretical model. Limits are applied to elected office holders, but not to other political and "institutional" actors. These powerful "others"—the lobbyists, the special interests, the purposeful political money, the political industry, the policy experts, the news media, the bureaucracy—effectively act to define political choices and frame the political debate. And they all survive presidents and members of Congress. Their dominance of our politics leaves the voter with little more than the same simple yes or no of Harrington's Prerogative—a decision of increasingly less importance. If by term limits we mean to truly eliminate the governing class, then perhaps we should turn them on the real centers of political permanence.

But we should also look further into the means by which a sovereign people exercise their rule. Adams and Harrington shared a faith in, and concern for, elections. They placed these political sacraments in the very center of republican society. Both insisted on returning government to a yearly accountability. Harrington devised intricate measures to insure the integrity of elections and he insisted on the secret ballot. Farfetched though some of his devices may seem, they each aimed at removing specific flaws inherent in most election processes. His elections required the participation of the entire political body in yearly assemblies—meetings where the public and their leaders (old and new) knew and faced each other. It was an exercise of duty, but it was also an act of community. His system was based on decisions reached in the smallest subdivisions and it
integrated thousands of such districts into a national whole. Like the Greeks, from whom he borrowed heavily, the idea of society and republic were intertwined. Government was in many ways an expression of society, of citizens coming together and governing through elections. His specifics would be inconsistent with some of our beliefs, but his intent and general concepts may offer some useful advice. And his placement of each individual into a small, comprehensible political unit may offer a possible remedy for the Byzantine multitude of overlapping and redundant American governments we struggle to comprehend today.

To the American Revolutionary generation elections were also the central feature of self-governing. They were the prime vehicle for accountability and that accountability occurred yearly in every newly independent state but one. That generation also placed great faith in republican society and in the sense of attachment of an individual to a community. While we live in a very different society than our political forebears, one of our most startling differences is their near absolute faith in elections, and our general lack of faith them. Perhaps we need to re-examine the care and attention we give to these unique societal events. And perhaps we need to look at the framework and structures in which they occur. If our elections no longer seem to work, perhaps it is because we have been so casual in letting the rules-of-the-game develop on their own. And because we can no longer see the connection between ourselves as citizens and the political community we inhabit.

Harrington's proposals in Oceana addressed the daunting, age-old question: how large can a self-governing society become? He believed that a national republic consisting of millions of citizens and covering a considerable expanse of territory was possible, but only if it rose up from the local communities which comprised it. While much of the detail of his narrative provided over-arching principles and described national structures and
procedures, he devoted equal attention to the business of self-governing at the lowest level. He attended to the details of citizen assemblies, free elections and the authority of local entities. The national commonwealth did not float above these smaller jurisdictions, separate and apart. They were integral to its formation and it could not exist without them. Harrington may have misplaced political authority in the interests of society, but he still took great pains to fashion the communities which would form that society. It is perhaps from this that we can draw the most applicable lessons for solutions to our modern problems. We have paid far more attention to the problems of national governance than to the governing of our neighborhoods and communities. The politics of both are in need of repair, but we must begin our work where the people are.
Proponents claim to find precedents in the American Revolutionary period to support limiting the tenure of modern elected legislative representatives. George F. Will relates several examples. In one, he tells of a delegate to the Continental Congress who was sent home after attempting to serve beyond the limits imposed by the Articles of Confederation. In another, he quotes an eloquent passage from the Declaration of Rights of the Massachusetts Constitution of 1780, a statement which seemingly presents a strong republican basis for applying rotation to elected officers and representatives. He also reminds us that the Virginia Plan, presented to the Constitutional Convention, contained term limit provisions. With these, Will not only attempts to justify term-limitation through American republican precedents, but also by establishing a normative basis for term limits. The examples drawn from the Articles of Confederation and the Massachusetts Constitution of 1780 are meant to convince his readers that, regardless of the lack of term limitation in the Constitution, the Founding generation believed in, and widely practiced rotation—establishing a principle of republican government that should be re-applied today.

1 Will, Restoration, 103.
2 Ibid., 110.
3 Ibid., 4.
Will is not alone in claiming rotation, as it was applied during the Revolutionary period, to further his argument. John Armor, a chief writer for U.S. Term Limits, devotes an entire chapter of his book, Why Term Limits?, to this discussion. He likewise references the limits imposed by the Articles of Confederation and, in discussing the Constitutional Convention, tells us:

Most of the Framers of the Constitution . . . wrote in favor of "Rotation in Office," which is the original phrase for what term limits seek today [emphasis added].

Armor quotes Jefferson's criticism of the lack of term limits in the Constitution and, in a strange oversight, quotes one of John Adams' arguments for annual terms of office, identifying him as a "Massachusetts Delegate." Adams was, of course, in London when the Convention met in Philadelphia. While Armor's work lacks the research and readability of George Will's and serves as more of a polemic, as do many of the recent treatments on the issue (both pro and con), Armor follows Will's lead in linking the modern term limit movement to our republican heritage. He concludes Chapter Five of his book by saying:

Term limits are the way to restore what the Framers both expected and practiced—rotation of office of new representatives, bringing to the nation's capitol, state capitols, and major cities, fresh commitment and a closer attachment to the views of the people back home.

These and other writers are correct in presenting the fact of a history of the subject of rotation in American political thought and practice. However, they either fail to fully

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4 Armor, 60-70.
5 Ibid., 62-63.
6 Ibid., 67.
7 It is an irony of history that two of the finest minds, and most ardent republicans of that era, John Adams and Thomas Jefferson, were not present at the Constitutional Convention. They were serving as ambassadors in London and Paris, respectively.
8 Ibid., 70.
understand that history or deliberately select only those aspects that further their cause, and thereby leave the impression that applying term limitation to elected legislative representatives is merely some unfinished business of the original republic. In truth, rotation, as it was imposed during the American Colonial and Revolutionary period—and as it has been practiced until the most recent changes—does not serve as precedent for what is now proposed. A careful examination of the history of rotation in American Colonial and Revolutionary governments reveals that it was a rare constitutional device, reserved for specific purpose, and was never applied in a rigid manner.

The United States Constitution was the culmination of a long American tradition of structuring government through written, fundamental law. Distance from the mother country allowed colonial Americans to adapt their British heritage and beliefs to their own unique circumstances. In many ways, the early settlers brought a British notion of "constitution" with them. They also brought written charters, which did more than create colonies and plantations, by defining boundaries and conferring ownership. These were documents of extraordinary breadth, which established the rules of colonial society through governing institutions and procedures. Final approval of certain actions was often held by British lord-proprietors, corporate boards or the Crown itself, but much of the day-to-day governing was, of necessity, left to the settlers themselves. These governing institutions were broadly republican in form. Elected representatives and executive officers appeared very early in the colonial experience and political institutions were relatively similar throughout British North America. By the time of the Revolution, Americans were themselves among the most practiced republicans on earth.

Between 1776 and 1787, Revolutionary America exploded in republican experimentation. Eleven states adopted new constitutions—some more than one. Only Connecticut and Rhode Island did not. Instead, they simply removed all references to the
Crown from their colonial charters and declared these as constitutions. As early as May, 1775, Massachusetts had asked Congress for advice on forming a government. John Adams was the driving force behind these efforts and—before independence was actually declared—convinced Congress to adopt a resolution encouraging the states to adopt new governments. His short treatise, *Thoughts On Government*, became a blueprint for many state efforts. And he was the primary author of the Massachusetts Constitution of 1780.

For the most part, these new governments were remarkably similar. All had three branches; executive, legislative and judicial—though these authorities were not always distinctly separated. All had at least one house selected by a *qualified* popular electorate. Every state, except one, adopted a bicameral legislature. There were also

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9 Wood, 133.
10 New Hampshire and South Carolina also expressed the desire to form governments in the fall of that year. See Wood, 130.
11 In many ways this resolution and the actions by states prior to July 1776, was an effective declaration of independence. See Wood, 131-132.
12 John Adams, *The Works of John Adams*, ed. Charles Francis Adams, vol. IV (Freeport: Books For Libraries Press, 1969), 191. "Thoughts" is, in fact, a letter written by Adams to George Wythe. The Virginian asked Adams to provide his recommendations on the subject in January, 1776, while both were delegates to the Continental Congress. Wythe provided the letter to Richard Henry Lee, who asked permission to publish it. Adams agreed provided he was not identified as the author. In that same month, he wrote a similar letter to John Penn of North Carolina. See Adams, 203.
14 It was a universal practice during this period to limit the right to vote to males who owned a minimum acreage of real property outright, attained a certain level of net worth, or who paid taxes. This followed the British Whig belief that self-governing should be carried out by those who had a stake in the community. Precedents can be found in both the classical Roman and Greek governments as well. Through the course of this paper, whenever various terms such as popular, people, public, electorate, voter, or the like are used in the context of voting by the citizens at large, it is understood that during early
significant variations on the republican theme. The radical Pennsylvania Constitution of 1776 vested executive authority in a committee, which elected an extremely limited President. In some states both legislative houses were elected by voters. Others provided for a popularly elected lower house, which met and selected members of the upper house from amongst its own membership, or from the qualified citizens at large. The Governors of Massachusetts, New Hampshire and New York were chosen directly by the people, while in the other states the executive was elected by the legislature. Generally, government was kept on a very short leash; with mere annual terms for most, if not all, officers and representatives.

"Rotation in office" was a common feature of nearly all of these Revolutionary Era constitutions and it was applied to the appointed delegates to Congress under the Articles of Confederation. Rotation, however, was not pervasive and tended to follow limited and predictable criteria. The first instance of term limits in an American government came far earlier than the Revolutionary period and even before the work of Harrington. The Fundamental Orders of Connecticut, written in 1639, limited the governor to service of no more than a single one-year term in any two-year period. This officer was selected by the legislature and, in keeping with norms that continued well after the Constitution, had American history this implied a qualified electorate.

15The Fundamental Orders actually comprised the first constitution written in America and created the first federal system. Through the Orders, Hartford, Windsor and Wethersfield, the three towns of the Colony of Connecticut, united to form a single colonial government, but also maintained their separate town governments. Later, the towns of the Colony of New Haven established a similar system. In 1662 both colonies were combined into the unified Colony of Connecticut. The government provided in the charter signed by Charles II was nearly identical to the original Fundamental Orders. See Donald S. Lutz's commentary in Stephen L. Schechter, ed. Roots of the Republic: American Founding Documents Interpreted (Madison: Madison House, 1990), 24-28.
to be a member of an approved congregation. The governor also had to have prior experience as one of six magistrates—officers who acted as a privy council. These officers were likewise appointed by the lower house. The elected legislative representatives, called Deputies, sent by the various towns to the General Court, were not subject to any limits, nor were any other officers. Even the original limits placed on the governor were later removed under a revised colonial charter.

With the exception of New Hampshire, every state constitution written during the Revolutionary Era imposed term limits to some state office, and generally followed the precedent of the Fundamental Orders in applying it to executive or administrative officers who were not elected by the voters. The New Jersey and Connecticut constitutions

16 The Fundamental Orders of Connecticut (1639), no. 4, in Schechter, 32.
17 The title is taken from the Privy Council of the English King. In the American Colonial experience these bodies acted as the upper legislative house, but in some cases also had judicial authority as an appeals court and exercised some executive responsibilities. The predominant American Revolutionary political theory rejected such blending of functions. Most constitutions of the time, as well as the U.S. Constitution, enforced a high degree of separation of executive, legislative and judicial functions. Privy councils, in their legislative roles, were replaced by upper houses in all but one state, though some states did continue the use of separate councils as advisors to the chief executive. See Wood, 138-139 & 160.
20 New Hampshire adopted two constitutions during this period; the first, in 1779 and another in 1783. The earlier document contained no limitations. The Constitution of 1783 had limits for Delegates to the Confederation Congress, but these were merely a restatement of the limits imposed by the Articles. Other than this, both of New Hampshire's Revolutionary Era Constitutions are unique in applying no limits to any state office. The Maryland and Pennsylvania Constitutions also had limits for Congressional Delegates, but provided different terms than required by the Articles. Maryland delegates could serve.
were unique in that they did not limit the tenure of the non-popularly elected governor.\textsuperscript{21} In every other state where the chief executive was selected \textit{indirectly}, by the legislature—
or by the legislature and executive council—that office was subject to rotation.\textsuperscript{22} Conversely, in Massachusetts, New York and New Hampshire, where governors \textit{were} elected by popular vote, they were \textit{not} subject to term limitation.\textsuperscript{23}

Only Pennsylvania imposed limits on members of the \textit{legislature}, despite their being subject to annual, popular elections.\textsuperscript{24} Representatives could serve no more than four one-year terms in a seven-year period.\textsuperscript{25} Considered radical in its time, the Pennsylvania constitution's pervasive application of term limits was only one of many features in which it differed from the general norms of the period.\textsuperscript{26} It established a unicameral legislature and a collective executive.\textsuperscript{27} While several states limited their chief executive by requiring consultation with an executive or privy council, Pennsylvania's system was decidedly executive-by-committee in nature. This constitution also established three years in a six year period, as proscribed in the Articles. However, at least two members of the delegation had to be changed every year. Pennsylvania was more restrictive than the Articles, allowing no more than two years of successive service and then imposing a three year vacation.

\textsuperscript{21} For election by Assembly & Council, see New Jersey Constitution (1776), art. VII. The constitution is silent on rotation for the office of governor.
\textsuperscript{22} The executives of Delaware, Georgia, Maryland, No. Carolina, Pennsylvania, So. Carolina and Virginia were elected by their respective legislatures and were subject to rotation. See Delaware Const. (1776), art. 7; Georgia Const. (1777), art. XXIII; Maryland Const. (1776), art. 31; No. Carolina Const. (1777), art. XV; Penn. Const. (1776), art. 19; So. Carolina Const. (1777), art. VI; Virginia Const. (1776), art. 9.
\textsuperscript{23} For election see New York Const. (1777), art. XVII; New Hampshire Const. (1783), section titled "Executive Power. President." Here and forward referring to the New Hampshire Constitution of 1783.
\textsuperscript{24} Penn. Const. (1776), art. 9.
\textsuperscript{25} Ibid., art. 8.
\textsuperscript{26} Wood, 232-236.
\textsuperscript{27} For legislature see Penn. Const. (1776), art. 2; for exec. see Ibid., art. 19.
a Council of Censors, which came into existence every seventh year, and had the power to question the constitutionality and propriety of laws and actions made during the intervening period. The Censors could also pass public censures of individuals, order impeachments and call a constitutional convention to consider amendments. Members of the Council were elected by the people and served for one year. This was the only Pennsylvania office with no stated term limitation, owing perhaps to the infrequency of service.  

No other state imposed limits on members of the legislature. This was true in states where the upper house was selected by the lower house, as well as in states where members of both bodies were elected by the people. Delaware and Virginia did provide tenure limits for members of their privy councils and, in both cases, these bodies were elected by the legislature. Members of Delaware's privy council could serve only a single two-year term, after which a three-year vacation was required before an individual was re-eligible for appointment. Virginia's constitution provided the possibility of an unusually long, twelve-year term for the eight members of its Council of State. Every three years, two members were removed by legislative ballot and these individuals were subject to a three-year vacation before re-eligibility. New York added a body called the Appointments Council, which was selected from members of the Senate by the Assembly and had the responsibility of appointing various officials. Members served for one year and could not succeed themselves, but they maintained their Senate seats, and were not subject to tenure limits as legislators.

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28 Ibid., art. 47.
29 Delaware Const. (1776), art. 8.
30 Virginia Const. (1776), art. 11.
31 New York Const. (1777), art. XXIII.
After chief executives, sheriffs and coroners were the officers most often subjected to rotation by state constitutions of the Revolutionary era. But here, as further evidence of just how infrequently tenure limitation was applied, these second most often limited offices were limited in only three states. This was true regardless of whether they were elected by the people, as in Pennsylvania, or appointed, as in New York. In Pennsylvania they were required to take a four-year vacation after serving three one-year terms. The New Jersey constitution required a three-year vacation after the same length of service. While the purpose for limiting coroners is less clear, sheriffs exercised somewhat different authorities than commonly understood today. They were essentially the chief officers of a county, or locality, administering whatever extent of government existed in that local jurisdiction. Among their duties, they served in the role of tax collectors and were empowered to confiscate and sell property for the satisfaction of obligations. This authority conferred great potential for abusive treatment of citizens and of enrichment for themselves or others. In some states, sheriffs presided over local elections, a role which offered other opportunities for abuse.

This actual constitutional application of rotation seems to have been in conflict with many of the statements of that era. John Adams seemed to evidence this dichotomy

33 Jefferson described sheriffs as "the most important of all the executive officers of the county." See Thomas Jefferson, Monticello, to Samuel Kercheval, 12 July 1816, reprinted in Peterson, 554.
34 In Maryland, for example, the sheriff of each county acted as the judge of elections. See Maryland Const. (1776), art. 3.
in his somewhat tentative support for rotation. In *Thoughts On Government* he told his reader:

A rotation of all offices, as well as of representatives and counsellors, has many advocates, and is contended for with many plausible arguments. It would be attended, no doubt, with many advantages; and if the society has a sufficient number of suitable characters to supply the great number of vacancies which would be made by such a rotation, I can see no objection to it. These persons may be allowed to serve for three years, and then be excluded three years, or for any longer or shorter term.\(^\text{35}\)

Yet, very few state constitution-makers followed this advice. It is somewhat ironic that *Adams* did not follow it either. It is even more ironic in light of the eloquent statement found in Article VIII of the Bill of Rights section of the Massachusetts Constitution of 1780—the one governmental charter in which he was directly involved in writing.

In order to prevent those who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.\(^\text{36}\)

On first reading this rings as a clarion call for term limits, which is no doubt, why George Will makes use of it for his argument.\(^\text{37}\) Yet, the actual frame of government established by this Massachusetts constitution imposed term limits on only two state officers, the Treasurer and Receiver General.\(^\text{38}\) Apparently Adams and his fellow constitution-makers were more concerned with possible malfesance in the administration of public funds than with other avenues of "oppressive" behavior.

\textsuperscript{35} Adams, 197-198.  
\textsuperscript{36} Mass. Const. (1780), Declaration of Rights, art. 8.  
\textsuperscript{37} Will, *Restoration*, 110.  
\textsuperscript{38} Mass. Const. (1780), chap. II, sec. IV, art. I.
Jefferson was easily the most passionate and persistent member of the Founding generation in support for rotation. In his suggested constitution for Virginia, written in 1776, he proposed that senators be appointed by the lower house to extraordinary nine-year terms, after which they would "be for ever incapable of being re-appointed to that house."\(^39\) As were the Knights of Harrington's upper house, and as was later adopted for U.S. Senators, their terms were to be staggered so that one-third would be replaced every three years. His chief executive, called the Administrator, was also selected by the House of Representatives to serve a one-year term and was ineligible for re-appointment until after a three-year vacation. Jefferson proposed that Virginia Delegates to the Confederation Congress be subject to stricter limits than provided by the Articles themselves. He proposed more stringent limits for sheriffs and coroners than any constitution adopted in that period, allowing them service of only one year, and then requiring a five-year vacation.\(^40\)

Jefferson maintained his devotion to term limits through the Revolution. In a famous letter to James Madison, he provided a lengthy critique of the newly proposed Constitution. His first objection was the absence of a bill of rights:

The second feature I dislike, and greatly dislike, is the abandonment in every instance of the necessity of rotation in office, and most particularly in the case of the President. Experience concurs with reason in concluding the first magistrate will always be re-elected if the constitution permits it. He is then an officer for life.\(^41\)

Comparing the proposed Presidency to the aristocratically elected Polish monarch, he warned of the possibility that foreign powers would conspire in the selection of presidents.

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\(^{39}\) Jefferson, "Draft," in Peterson., 244.
\(^{40}\) Ibid., 245-246.
\(^{41}\) Thomas Jefferson, Paris, to James Madison, 20 December 1787, reprinted in Peterson, 430.
He concluded that "an incapacity to be elected a second time would have been the only effective preventative."\textsuperscript{42}

For Madison's part, it can be said—he tried. As the principle author of the Virginia Plan, which became the agenda followed through much of the deliberation of the Constitutional Convention, he proposed an unprecedented system of rotation. The Virginia Plan was an outline containing blank spaces where the Convention was to decide specifics. Thus, the actual terms of office and length of vacations that Madison and his Virginia colleagues assumed is uncertain. What is known is that the plan called for term limits for members of the \textit{popularly} elected lower house; \textit{no} limits for the \textit{non-popularly} appointed upper house, and permitted the chief executive only one term in his lifetime.\textsuperscript{43} None of these recommendations was included in the Constitution as it was submitted to the states for ratification.

This overview of rotation as it appeared in the proposals and state constitutions reveals several norms of actual application during the Revolutionary Era. First, offices with the most potential for oppression or abuse were often subject to limits. Governors and state presidents generally exercised great individual authority. This was particularly true in an era when legislatures met for short duration, leaving most of the day-to-day governmental responsibilities to executive officers during the interim between legislative sessions. By and large, these executives also served as commanders-in-chief of the state military. Long tenure in such roles allowed an undue concentration of power and has

\textsuperscript{42} Ibid., 431.

\textsuperscript{43} Ralph Ketchum., ed. \textit{The Anti-Federalist Papers and the Constitutional Convention Debates} (New York: Mentor, 1986), 37-38. Again, the plan did not list the actual lengths of terms or the number of years of vacations. The upper house in this proposal was to be elected by the lower house from nominations made by the state legislatures. The chief executive was to be elected by the national legislature.
long been recognized as potentially dangerous to republican societies. Limitations applied to these executive officers fell into an ancient trend—as indeed does the modern limit imposed on Presidents by the 22nd Amendment. The sentiments supporting such limits were expressed in the Maryland Declaration of Rights:

That a long continuance in the first executive department of power or trust is dangerous to liberty, a rotation therefore in those departments is one of the best securities of permanent freedom.\textsuperscript{44}

There are similar examples in the limits imposed on sheriffs—again because individual authority was wide and potential for abuse was high. Framers of the Massachusetts constitution, however, found a high potential for abuse in, and therefore applied limits to the two state offices which dealt directly with the public treasury.

A second norm that can be observed is that offices subject to \textit{popular election} were \textit{rarely} limited. This applied even to \textit{executive} officers who were so chosen. Frequent elections—often held annually—provided accountability to the people and allowed them to quickly check mistaken policies or abuse. However, the people also rewarded able leadership with continuance in office and did so for chief executives. In 1777, George Clinton, who later served as Vice President of the United States, became the first popularly elected governor of New York. Through subsequent re-elections, New York voters retained his services for six consecutive three-year terms.\textsuperscript{45}

Third, and of particular significance to the modern debate, term limits were \textit{almost never} imposed on legislative representatives regardless of whether they were directly elected by the people or indirectly appointed. The only instances where rotation was

\textsuperscript{44} Maryland Const. (1776), Dec. of Rights, art. 31.
applied to legislative offices are found in the Pennsylvania constitution and in the Articles of Confederation. The Pennsylvania limits have been described earlier. Delegates sent to the Confederation Congress were appointed by the various state legislatures. They served one-year terms, but were subject to recall and often to specific instructions from their respective state legislatures as well. The Articles limited these Delegates to service of only three years within a given six-year period.\textsuperscript{46} The Confederation Congress, however, was an unusual institution. Contrary to the well-accepted division of governmental authority among separate branches—as was established in some measure by every state constitution of that time—this Congress exercised all of the legislative \textit{and} executive functions of the Confederation. Limited though their powers may have been, these indirectly chosen delegates served beyond the widely understood role of legislative representatives. They comprised, in effect, the entire "continental" government. Various administrative functions were delegated to committees and their chairmen acted much as department heads or cabinet secretaries. The Confederation Congress and the Pennsylvania General Assembly were also unicameral bodies. Legislative decision-making was not subject to the deliberative checks of a second house. It is true that, under the Articles of Confederation, many "internal" actions of Congress were largely ineffective without concurrence by the individual states.\textsuperscript{47} Pennsylvania required public notice and a delay of time before legislative acts became law; however, Madison revealed that a review by the Council of Censors found that this requirement was often abandoned on the pretext of emergency and expediency.\textsuperscript{48} All these things considered, and particularly in the case

\textsuperscript{46} Art. of Confed., art. V.

\textsuperscript{47} Ibid., art. VIII. Under the Articles, Congress had no direct taxing authority of its own. It could only \textit{requisition} needed revenues from the individual states "in proportion to the value of all land within each state."

\textsuperscript{48} Madison relates that the Council met in 1783 and 1784 and found numerous violations
of the Congress under the Articles of Confederation, these were not conventional legislative institutions and they provide weak precedent for modern application.

Finally, in every case where rotation was applied, it was through the device of imposed *vacations*. Even in Pennsylvania and under the Articles, no individual was restricted for life, and—as in every other case—limits only applied to service in a given office. Just as with the proposals of James Harrington, the manner of enforcing rotation was very different during the Colonial and Revolutionary Era than the stringent, sometimes lifetime, restrictions proposed and actually enacted today.

Against this infrequent application of legally imposed term limits, how do we explain the beliefs expressed in Article XIII of the Declaration of Rights of the Massachusetts Constitution of 1780? Were Adams and the other authors of these Revolutionary state constitutions saying one thing and doing another? In fact they were saying and doing exactly what they believed and the lesson for us is their absolute faith in the powers of elections. Every state constitution, but one, required annual elections for the lower house of its legislature. As was later adopted for the U.S. House of Representatives, members of the South Carolina General Assembly served two-year terms, as did all other South Carolinian officers. Most states imposed annual elections and one-year terms of office for their upper house as well. And annual elections also applied of the Pennsylvania constitution by the legislature. For specifics on notice and delay requirement see Penn. Const. (1776), art. 15. See *The Federalist*, No. 48, 253.

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49 So. Carolina Const. (1777), art. 8.
50 Members of the Delaware Legislative Counsel were elected and served three years. New York voters chose their senators every four years. The Legislative Counsel of South Carolina were elected and served the same 2-year term as their lower house. The Virginia and Maryland senates had longer 4 and 5-year terms, respectively. Virginia's upper house were elected by the people, while in Maryland the voters chose "Electors" who in turn elected the Senate. See Maryland Const. (1776), art. 14; So. Carolina Const. (1777), art. VII; Virginia Const. (1776), art. 6.
to, or affected, chief executives and privy councils. Whether elected directly by the people or by the legislature, most faced annual decisions on their continuance in office. These republican governments followed the precepts of the Massachusetts Declaration of Rights faithfully. They allowed full exercise of the people's right "to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and [resulting] appointments." They did not do so through legal devices, they did so through elections.

This faith in the ballot was shared and sustained by the voters. Turnover among members of state legislatures was high; sufficiently high as to raise concern among delegates to the Constitutional Convention. In Federalist No. 62, Madison told his New York readers, "Every new election in the states, is found to change one half of the representatives." This was not necessarily a benefit. The frequent annual elections that earlier in the Revolutionary experience were assumed as a necessary republican feature—and the resulting turnover among lawmakers—had, by the time of the Convention, become a serious problem of mutability of public policy. The longer, two-year terms of U.S. Representatives, six-year terms for Senators and four-year term for the President, resulted from a desire to insure greater stability in the new republic. The Convention did consider the question of rotation, but the discussions were almost exclusively about application for

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51 Delaware's President was elected by the legislature to a 3-year term. New York's governor was elected by the people for the same period. South Carolina was consistent in providing the governor with the same 2-year term as both houses of the legislature. In fact, sheriffs and members of the privy council also served 2-year terms. Owing to its unusual collective executive the Presidency of Pennsylvania was rotated for one-year intervals among members of the executive council who were elected by the people every three years. See Delaware Const. (1776), art. 7; New York Const (1777), art. XVIII; Penn. Const. (1776), art. 19; So. Carolina (1777), art. III.
the chief executive. In the end, the Framers had ample faith that the people would, through elections, choose to impose or not impose tenure limitation as they saw fit.

This did not sit well with older Whig notions accepted by many opponents of the proposed Constitution. Madison responded directly to anti-federalist criticism that the two-year term for members of the House was a violation of the traditional principle "where annual election end, tyranny begins," and was therefore dangerously long. Against comparisons made to the annual terms of the Confederation Congress, he reminded his audience that:

They are elected annually it is true; but their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.

He might have said, "the people will not be self-governed by the same principle." The experience and expectations were for an active and involved electorate. The Founding generation may have doubted the public's ability to grapple with the complex issues the new nation would encounter, but they had little doubt of the people's desire to closely control those who were elected to act in their stead.

Elections were the critical element of true representative government and several state constitutions took special pains to insure elections would accomplish exactly what was intended. Maryland required election judges and clerks to swear they would carry out

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52 Madison's notes relate many debates and commentaries on the issue of re-election or re-eligibility for the chief executive and for members of the Senate during the course of the Convention. The only specific mention of the subject as it relates to representatives, other than the unspecified limits listed in the original Virginia Plan itself, occurred on June 12, 1787 when a member moved to strike the plan's provision that representatives be "incapable of re-election." Madison simply indicates it was agreed to. See James Madison, Notes of Debates in the Federal Convention of 1787, with an introduction by Adrienne Kock (New York: W.W. Norton and Co., 1966; ppb edition, 1987), 109.
53 The Federalist, No. 53, 274.
their duties "without favor or partiality." The New York constitution called for an experimental use of the secret ballot, as replacement for the traditional method of voting *viva voce.* It allowed the legislature to provide for ballot elections and monitor the results. If such manner of elections proved "less conducive to the safety or interest of the State, than the method of voting *viva voce,* . . ." then the legislature was to abolish them and return to the former method. In Delaware there were fears that militia involvement could inhibit free elections:

To prevent any Violence or Force. . . . [during] elections, no Persons shall come armed to any of them; and no Muster of the Militia shall be made on that day, nor shall any Battalion or Company give in their Votes immediately succeeding each other. . . . [N]or shall any Battalion or Company in the Pay of the Continent, or of this or any other state be suffered to remain at the Time and Place of holding the said Elections, nor within one Mile of the said Places respectively for twenty-four Hours before the opening of said elections, nor within twenty-four Hours after the same are closed, so as in any Manner to impede the freely and conveniently carrying on the said Election.

To address similar concerns, Georgia's constitution of 1777 forbade military men from attending election in uniform. It also offered privileges to voters that were very like those accorded to sitting legislators. Officers were instructed not to "serve any process, or give any hinderance" to voters traveling to, in attendance at, and returning home from an

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54 Maryland Const. (1776), art. 61.
55 A common, but not universal, method of conducting elections during this and earlier periods was for voters of a given district or town to gather in one place and indicate their votes by voice or show of hands. Votes might be expressed one at a time, individually or as a group. A variation was for election officials to travel from voter to voter and record the choices they expressed. These were then reported as the various laws required.
56 New York Const. (1777), art. VI.
57 Delaware Const. (1776), art. 28.
election. Georgia's unique provision is a slight echo of Aristotle's concept of citizenship as a public office, which was amplified by Georgia's imposition of fines for failure to vote.

Every person alienating himself from an election, and shall neglect to give in his, or their, ballot, at such election, shall be subject to a penalty not exceeding five pounds; the mode of recovery, and also the appropriation thereof, to be pointed out, and directed by act of the legislature, provided nevertheless, that a reasonable excuse shall be admitted.

Georgia was the only state to fine non-voters, but was one of several who, well in advance of modern elections in Cook County, Illinois, reminded its citizens that "No person shall be entitled to more than one vote." Pennsylvania seemed to anticipate some of the antics accompanying modern election campaigns in prohibiting electors from receiving "any gift or reward for his vote, in meat, drink, monies or otherwise." As the prohibition referred both to the people as electors and to members of the General Assembly, in their capacity as electors of other state officers, it may also be seen as an early attempt at lobby reform. A few years later in the American experience, Georgia went a bit further in this vein. Under a new constitution established in 1798, legislators of both houses were required to swear "that I have not obtained my election by bribery, treats, canvassing, or other undue or unlawful means, used by myself, or others." In this context the term canvass may have been used in its more pejorative sense, as in a scrutiny or a survey to ascertain probable votes before an election, which could imply a form of intimidation—particularly if we assume these potential canvassers were the prominent men of their districts. Candidates of that era,

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58 Georgia Const. (1777), art. X.
59 Ibid., art. XII.
60 Ibid., art. XI.
61 Penn. Const. (1776), art. 32.
62 Georgia Const. (1798), art I, sec. 19.
however, were expected to *stand*, as opposed to *stump*, for election, so we may also conclude that this article means exactly what it says to a modern reader.

These examples and many others of state constitutions from that era demonstrate a care and concern for the manner of conducting elections. As mundane as some of these examples may seem, it is important to consider that these were not merely statutory rules for election—these were fundamental, *constitutional* provisions adopted in the very moment of state creation. In representative government, elections are the pivotal act of self-government—indeed the *defining* act of citizenship for republican societies throughout the ages—as it certainly was in an era that imposed qualifications for voting and holding office.

Our modern democratic understanding no longer realizes the citizen as an office-holder with duties and responsibilities, as well as privileges and powers. Like our forefathers we crave accountability from our politicians, but demand little of it from ourselves. There are, to be sure, many obstacles to the average American voter's ability to fulfill his and her full political potential, but that potential is no less real. It is certainly far more so than it was for the unqualified *non-electorate* that comprised the majority of Americans until this century. Yet today we despair the sorry state of our politics and merely accept that our last two presidents were respectively chosen by twenty-seven and twenty-four percent of the eligible electorate. Perhaps we are no longer "governed by the same principle" or, more likely, we have let the circumstances of our politics develop to the advantage of a purposeful few. We can re-establish a faith in elections, but first we must give them the care and attention needed to make them work.
CHAPTER 6

WINNERS AND LOSERS

The conclusions drawn from the previous chapter, contrary to the assertions of modern day supporters, are that the limits imposed during the Revolutionary era were neither widespread nor severe—and, in any event, were almost never applied to elected legislators. This goes against the claims that term limits were what the Founders intended and expected. As to what they expected, the comments of Madison and others do support the fact that legislative tenure tended to be shorter during that period. However, they found this turnover problematic, and there are examples of noteworthy leaders who were elected and re-elected beyond what even modern norms would permit. As to the Founder's intent, it is hard to construe their support for term limits from the given facts. They were not bashful in declaring their republican principles and were very specific, sometimes tediously so, in establishing governing institutions and processes. If term limitation were their intent, why did they fail to apply it to any office in the federal Constitution?

The answer that it was a detail of too little importance is not at all supported by Madison's Notes on the proceedings of the Convention. His remark that further debate be postponed because members believed they were "entering too much detail for general propositions," was in reference to the general subject of "qualifications" for service in the
lower house and comes very early, on only the fifth meeting day, of the Convention. At this point delegates had begun their first attempt at working through the various provisions of the Virginia Plan. On previous days they had reviewed the larger question of the very notion of a federal system. When this notation appears in Madison's journal, they had just finished an *initial* discussion of whether the lower house should be elected directly by the people or indirectly by the state legislatures. Madison's next entry indicates that the convention then took up the manner of selecting members of the upper house. In this early phase of the Convention delegates were not looking at *any* details, they were only looking broadly at the general principles and essential features of a possible federal system. They did return to the question of specific qualifications for members of the House and did so repeatedly through the course of the Convention--and agreed on very specific criteria. Aside from the initial presentation of the Virginia Plan itself, Madison reports no further discussions on the issue of tenure-limitation for *representatives*. The use of Madison's comment are taken completely out of context by modern-day proponents.

The greatest evidence of the Framer's intent is the fact that, contrary to republican principles of that day, limits were not applied to the Presidency by the original Constitution. The chief executive was to be *indirectly* chosen by popularly elected electors. But in addition to this "filter" of public will, many delegates assumed that the electoral college would simply *nominate* presidential candidates who would then be presented to the House of Representatives. It was fully expected that presidents would ultimately be elected by the House, not the people, through this indirect process. As we

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1 James Madison, *Notes*, 41.
2 Ibid., 23-41.
have seen, both the nature of the office and the manner of election were consistent with existing norms for applying rotation. Madison’s journal of the convention reveals that there was a great deal of debate on the subject of presidential rotation. Here we can be far more certain that the Framers expressed their intent. They specifically considered and specifically rejected term limits for this, as well as every other office.

One problem here is that during the ensuing constitutional ratification debates, it became immediately apparent that the original Constitution had several major omissions, which were later remedied by the Bill of Rights. Term limit proponents may therefore be granted the argument that the Framers were not perfect in their intentions, as is demonstrated by all of the revisions subsequently adopted, including the 22nd Amendment. The powers of the modern Presidency have been significantly increased by America’s predominant role in world events. This is particularly true of the President’s powers as Commander-in-Chief of a vastly expanded, standing military; an authority which greatly exceeds the powers that have been of concern to republican commentators throughout the ages. The presidential limits imposed by the 22nd Amendment fall in line with an old tradition of answering these and more recent concerns. Not allowing an individual to hold these powers beyond eight years, even if the people wish it so, is a wise and prudent policy. This is true even though it has been shown that actual events—assassination, resignation, vice-presidential succession, as well as decisions by the voters

reveals that this view was held by many delegates from the first agreement on this manner of presidential election. During the early Convention debates on the subject, the final selection of presidents was proposed to be delegated to the Senate rather than the House. Including the second detailed reading of the Virginia Plan, Madison records discussion on the specific subject of executive re-eligibility on June 1st, 2nd and 13th; July 17th, 19th, 24th, 25th, 26th and Sept. 4th and 5th. This is by no means an exhaustive list of days on which the issue was mentioned during the course of the Convention. See Madison, Notes.
themselves—have limited recent presidents to an average tenure of just over five years. On one hand, the two presidents who have been elected, re-elected and have served the allotted terms have been among the most personally popular leaders of their time. Presidents Eisenhower and Reagan may well have been capable of extending their tenure were it not for the limit. On the other, they were also successively the oldest occupants of the White House, which may have influenced both their own and the public's desire for third administrations. The ultimate verdict on the amendment's effect must therefore wait for an equally popular, and younger, president. All this considered, the question then becomes whether or not the presidential term limit serves as precedent for applying rotation to members of Congress.

The question is important because there is really little by way of evidence to support a prediction of any, but the most obvious, effects of term limits. In looking for a more substantial basis from which to make predictions, as well as to extend arguments, both proponents and opponents alike are faced with a difficult challenge. Analysis of effects drawn from where term limits are currently in existence has the problems of either too little evidence or invalid comparisons. The President and most state executives have limited tenure. But executive limits offer a less than adequate comparison to widespread legislative restrictions. This is all the more so, because even the Presidency existed without limits for most of our history with no ill results. State executives offer greater numbers from which to draw a comparison, but also present the problem of different roles and authorities. Where term limits do currently apply to legislators, most notably in the California state-house, the results are too new to offer valid trends. The California electorate imposed limits on their legislature in 1990, but those limits did not apply retroactively and have just recently affected those incumbents who are barred from
election in November, 1996. Others are just entering their final two years of service. As difficult as these problems are, they are merely technical. The greater challenge here is determining a widely shared definition of "benefit." Regardless of whether they can be accurately predicted or not, term limits will have effects. But determining whether these effects are beneficial requires value judgment, which is necessarily laden with the views of the analyst. Nonetheless, two writers connected with the U.S. Term Limits organization have attempted to draw predictions from gubernatorial elections, California legislative limits and other local examples.

In *Term Limits Do Work: Fifty Years in the Election of State Governors*, John Armor compares gubernatorial elections in states where the chief executive is subject to term limits, to those where the executive is not. He further compares the results of these elections to the results of the simultaneous legislative elections in these states. Correlating these results according to the narrow criterion of whether the party of the governor coincides with the majority party of the legislature, he determines that term limits do "work."

The public policy benefit of term limits, then, is that the people are better able to express their current political will about the parties which should run their state government if the Governors are limited, and in states with very large Senate and House districts, if the legislature is also limited.  

Armor justifies the comparison of governors to Congress because, "Governors run in the same 'districts' as Senators (the whole state). And one-fifth of the gubernatorial

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5 Members of the lower house, or Assembly, are limited to three 2-year terms. Members of the Senate are limited to two 4-year terms. However, because the limits imposed were not applied retroactively to prior tenure, incumbents who were in office at the time were able to be re-elected and serve the full, limited tenure.

elections in this study . . . took place in states with populations that were . . . less than 110 percent of the current size of House districts. . . ." Moreover:

A study of the history of term limits as applied in American elections must focus on gubernatorial ones. Prior to 1990, the only offices at the state and federal level which were limited were Governors, and Presidents. There are too few Presidential elections since the 22nd Amendment was adopted to draw valid conclusions. That leaves only the gubernatorial elections to provide a factual analysis of the results of term limits.8

Essentially, Armor bases his measure of the benefit of term limits on two criteria. Did the party of the governor change relative to the majority party of the houses of the legislature and "how often did the election produce divided government." He looks at those elections where an incumbent governor was barred from seeking reelection and compares these to elections where the incumbent governor was not. Between 1940 and 1990, twenty-eight states applied term limits to their chief executives. "[In] the 802 elections reviewed, 164 (20.4 percent) were term limited. . . . In those 164 elections the party of the governor changed 61 times or 37.2% of the time." He contrasts this to the fact that in the remaining non-limited elections the governors' party "changed only 182 or 28.5% of the time. In laymen's terms the party of the governor was one-third more likely to change in a term-limited election than a non-limited one."9

His premise is that legislative elections reflect the current popular will and that the smaller the legislative district, the more closely the election demonstrates that will. He measures the expression of the people's will by which party wins a majority of seats in a given election. While he praises smaller, "shoe leather size" districts as being "more likely to reflect the voters political will . . . than larger, media districts," and is particularly

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7 Armor, "Term Limits," 3.
8 Ibid., 3.
9 Ibid., 4-8.
struck by the minuscule New Hampshire House districts, "with an average of 2,772 [constituents] in 1990," he nonetheless dismisses any factor but party affiliation in measuring outcomes. This despite the credit he allows for the merit and effectiveness of individual candidates in smaller districts.

Nor does Armor allow for voter's ability to differentiate between electing state executives and legislative representatives. His analysis assumes that if the voters elect a majority of one party to the legislature and the candidate of another as governor—and that governor is a non-limited incumbent—he or she is merely benefiting from the power of incumbency to thwart the public will. He tells us, "In short, unless they are term limited, incumbent Governors are more likely to hang on even if the tide of public will is running against them and in favor of an opposing party." Incumbents are able to resist these changes and public desires because they are able to eliminate any meaningful competition. The power of unlimited incumbency allows them to raise sufficient campaign funds to discourage significant challengers. The similar advantage of incumbent legislators is reduced, however, by the effects of smaller districts which render finances alone a more limited factor.

It is unfortunate that Armor misses the point of some of his own evidence. The fact that smaller political districts tend to allow more direct, non-media campaigning, thereby offering the public better opportunity to judge candidates on their individual merits—is not expanded upon. From this observation he might have drawn conclusions on the ability of political structures to improve or hinder the quality of election campaigns and ultimately of governing itself. Another weakness of his analysis is that he fails to review of all those elections where an individual wins his or her first term as governor; the many

10 Ibid., 6-7.
11 Ibid., 5.
cases where the public deliberately chooses a governor of one party and a legislative
majority of another. These instances, just as with the modern history of the U.S.
Presidency and Congress, demonstrate that voters do differentiate when electing an
executive and a legislator.

A more complete analysis by Armor would have revealed that something quite
different has been going on—widespread ticket splitting by the American electorate.

Ticket splitting is the electoral expression of the antiparty, or at least
nonparty, ideology that has attracted a growing proportion of the voting
public since the beginning of this century.¹²

Before the progressive era it was difficult for voters to split their votes. Ballots were
printed by the political parties, not the government, and voters could simply check a box
or circle at the top of the party ballot to select the entire slate. Reforms of the Progressive
era replaced these with single, publicly printed ballots. While these still offered "straight
ticket" voting, they also allowed voters greater freedom to select from among candidates
of both parties. Throughout this twentieth century, the public's inclination has been to do
exactly that, and with increasing frequency. So much so that by 1980 only nineteen states
allowed "straight ticket" or "one lever" party voting and "at least one state, Virginia, even
went so far as to eliminate party identification from the ballot altogether."¹³ These
changes helped to enable the decline in party affiliation and loyalty. And their result has
made it difficult to discern the intent of electoral mandates. Armor's analysis completely
ignores these trends.

In a second paper, Armor develops the theory of predicting the effects of term
limits from observations of recent changes in the California legislature. As the reality of

¹² Sundquist, 79.
¹³ Ibid.

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impending term limits is realized, there is a tendency among long-term incumbents to leave legislative office in advance of being forced out.

What has happened, and how, and why, is the "foreshadowing" effect of term limits. Not only have many legislators decided not to run, some have resigned in mid-term—to take stable, long-term jobs elsewhere in government, or in the private sector in roles related to legislation. The 'voluntary quits,' by legislators who could have run and probably would have won, have radically increased, from 13 in the Assembly and Senate in 1990 to 30 in 1992.*^* He concludes that some of this voluntary turnover may be due to redistricting, but asserts "most of the increase is due to impending term limits." Armor attributes this effect to the fact that members considered themselves professional, career legislators. Term limits meant the end of this lifetime occupation, so many opted to leave prior to their final election in order to avoid the "rush" of having numerous other former incumbents competing for the same political jobs in or out of government.15

In addition to this induced-exodus, Armor observes another foreshadowed effect. "The new legislators who have replaced the departing long-timers are radically different from those they have replaced."16 Because the California legislature is so similar to the federal Congress, in both the size of districts and in the full-time nature of service, Armor predicts similar results for a term limited Congress:

The California experience suggests very strongly that term limits will change the Congress of the United States in three ways: 1) more women and minorities, 2) more people experienced in running private sector businesses and organizations, 3) more pragmatic members, regardless of party, and 4) a general attitude of acting more promptly on the public's

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15 Ibid., 3-4.
16 Ibid., 4.
business, because they don't have time to waste in accomplishing what they were elected to do.17

He offers scant evidence to support his first contention, however. Only women showed a significant increase in membership, rising from twenty-two of 120 Assemblymen and Senators in 1990, to twenty-eight in 1992. Of other minorities he admits that "although whites were 43 percent of all Californians in the 1990 census, whites still held onto 80 percent of the legislative seats."18 This hardly suggests sufficient change in California to support predictions for Congress. But, this is not the most critical problem of his arguments.

In justifying his comparison of the California legislature to Congress, Armor again glosses over the problem of special interest funding of campaigns. The similarity in the size of California legislative districts and Congressional districts, rendering both "media" campaign districts, is also matched by the relatively equal amount of spending required by winning campaigns for membership in both bodies.

The influence of special interests and their money does not occur equally in all elections at all levels. Instead, it is concentrated in those elections for which a third of a million dollars is the current cost of a minimal, winning campaign. This is the case with Congress. It is also true of the California legislature.19

Yet, he denies that campaign financing is an issue, other than the fact that incumbents can, in most cases, raise more money than challengers. This lack of concern is generated, in part, by the secondary purpose of his article. While ostensibly attempting to provide predictions of how term limits will affect Congress, Armor is also involved in debating a campaign finance report released by Common Cause:

17 Ibid.
18 Ibid., 10.
19 Ibid., 7.
The unspoken agenda of the Common Cause report is to foster the idea that all money donated to politicians is bad, leading to the conclusion that public funding is the only effective reform. . . . The true problem is largely restricted to campaigns by challengers against incumbents, rather than open-seat races.\(^{20}\)

He does suggest that disclosure requirements allow the public to see where campaign finances are derived. "So long as the race itself is competitive, the voters are able to vote against and defeat any candidate whose finances are intolerable or unsavory."\(^{21}\) This is, of course, true, but only if the public is able to determine the ultimate sources of campaign money from behind the masks of innocuous and public-spirited sounding names adopted by many PACs. Because he is so concerned with discrediting proposals for public campaign financing (or any reform except term limits) he forces himself into the position of defending unbridled—and often obscured—political spending.

Armor concludes by specifying numerous changes that will occur in Congress, based on the California experience. In addition to long-term incumbents leaving before limits take effect and more women and minorities winning election, he predicts that the balance between Republicans and Democrats will not change; fewer people who consider themselves congressmen for life, will hold office; more people who have had successful careers in the private world will be elected to public office; new legislators will work with one another and with the President, regardless of party membership; public business will be conducted more in the open, and more promptly; and, the seniority system will end.\(^{22}\) All of this is derived from the relatively recent, and incomplete evidence of California.

U.S. Term Limits offers another article in its Term Limit Outlook Series to advance the possible changes that will result from limiting Congressional tenure.

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\(^{20}\) Ibid., 9.
\(^{21}\) Ibid., 10.
\(^{22}\) Ibid., 14.
Authored by Jonathan Ferry, this paper essentially argues that, because women and minorities tend to do better in open-seat elections and term limits will increase the number of open-seat elections, more women and minorities will be elected to Congress. The ultimate benefit of term limits, therefore, will be a legislative institution more broadly representative of the American population. He further argues that term limits will force changes in how Congressional leadership is selected, which will provide more opportunities for elected women and minorities to achieve important roles.

Ferry's argument is based on a series of interesting facts. "All but two of the 24 women newly elected to the U.S. House in 1992 won open seat races. And in the last ten years, only seven seats have been won from incumbents by women. Statistics show that 70 percent of blacks now in Congress were elected to open seats as well as 73 percent of women and 80 percent of Hispanics." However, the elections of 1992 "saw greater turnover, due to retirement and redistricting. . . . Women and minorities are still not making progress in defeating the long-time incumbents." Ferry finds evidence that some of this is caused by the fact that qualified women and minority candidates are less likely to challenge an incumbent—as will few others—because the chances for success are remote. Evidence suggests that in local elections, where term limits eliminate the power of incumbency, women and minority candidates will run and can win. In New Orleans, for example, there were few challengers for the seven Council seats prior to the imposition of limits. Once limits took effect, forty-nine candidates mounted campaigns and thirty-four of them were black. Of the seven current members, five are black and three are women.

24 Ibid., 6-7.
25 Ibid., 8.
What Ferry does not tell us in all of this is how many of the open seats reviewed had prior occupants who were also women or racial minorities. In other words did these elections plow any new ground?

But, in addition to these election results, Ferry continues Armor's attack on meaningful campaign finance reform. Interestingly though, he adjusts his argument to suit the contention that it will harm minorities. He quotes Rep. John Lewis of the former Congressional Black Caucus as being against reform of PAC contributions because without them, minority candidates could not raise sufficient funds to mount competitive races. Ferry concludes:

PAC contribution reform, while perhaps decreasing the influence of PACs, would unduly harm minorities because the individual contributor base of wealthy incumbents would be unaffected. PAC reform alone would cut out a large group of less affluent individuals from the political process.²⁶

Both of these U.S. Term Limits authors find increased campaign competitiveness as being the primary benefit of term limits. While Ferry offers some evidence that increased competition will result in greater opportunities for individuals from segments of society that have historically been excluded, neither assigns any value to the nature of the campaigns that will result. The standard they set for our politics is low; competition in itself with no measure for the quality of political debate, nor for the governing that results. Their argument is for increasing the shear quantity of open-seat, and therefore more competitive, races. But absent campaign finance reform, the current rules-of-the-game force the conclusion that competitive races will only become more expensive and more media oriented as well. This increased demand will be met by an increased supply of funds from interested contributors. The effects will be seen not only in the lack of improvement in campaign dialogue, but in the kind of governing carried out by beholding recipients.

²⁶ Ibid., 3.
Increased political competition is a true benefit only if it also produces meaningful political debate; if it offers not merely choice, but efficacious political choice that results in the kind of governing the people believe they elected. This end would be an unlikely result if we continue to allow huge amounts of interested money in our politics.

The predictions of possible effects by advocates of congressional term limits tend to ignore many intended and unintended collateral consequences. A more complete review of possible effects will demonstrate that they will not achieve what proponents have suggested. The outcome of this should lead to an identification of more promising areas of solution. There is a major caveat here. This review will concentrate on the possible effects of term limits in and of themselves. Modern proponents have been adamant in their opposition to other reform measures. It is therefore correct to take them at their word and view term limits in the absence of any other proposed solutions. This also helps to isolate the speculated cause and effects by reducing the number of variables to be considered. This is necessary because the manner of applying term limits has several variables itself.

**Congressional Stakeholders**

Whatever else term limits would accomplish, they would achieve the obvious—they would change the membership of the Congress. On a larger scale than has been seen recently—even considering the 1994 Congressional elections and numerous retirements—they would achieve greater turnover. The extent to which they would do this depends largely on what number of terms or years is applied—and whether they are applied retroactively to tenure attained prior to adoption. This will also depend somewhat on whether former members are allowed to return to service after a Harringtonian vacation. One of the stated objectives of proponents is to reduce the possibility of a political class
and install in its place a more truly "citizen" government. This implies service of fairly short duration and return to private pursuits. This would only be achieved if limits are applied severely by allowing only short tenure and imposing a lifetime ban thereafter. North Dakota's limit of twelve years in either or both houses would be an example. But as political actors could still move between jurisdictional levels and branches, even this may not fully achieve the stated end. This begs the question of whether the people truly desire to end political careers. Senators Humphrey and Goldwater left the Congress only to return years later. Both contributed enormously to the nation and to the political debate and make it difficult to imagine the public would deny itself the continued service of individuals it considers capable and worthy. It will therefore be assumed that however applied, term limits will allow political--if not congressional--careers.

With these assumptions then, the effects of term limits can be supposed on the various actors and institutions that comprise our political system. The brunt of these effects may not fall directly on the Congress itself. As with taxes, the incidence of limits may fall directly on members and the institution, but the burden of these changes will likely fall on others as well. Congress is not an island. As George Will says, it "is and ought to be the epicenter of the political expression of the nation's collective life."^27 The effects of changes there will inevitably spill over into the larger national political environment. Even in the seemingly mundane aspects of managing itself, the federal legislature does not operate in a vacuum. Its members are not the only "stakeholders" of its immediate institutional realm and these other actors will experience effects.

Term limitation will affect the Congress, its stakeholders and our politics by what it changes and by what it will not change. This review will attempt to look at both. While

^27 Will, Restoration, 9.
some evidence of the effects of recently imposed limits will be considered, this will primarily be a speculative assessment. Even determining a complete list of which actors and institutions would be affected is difficult, let alone predicting exactly how. Those which have been selected represent areas where the effects will be greatest, or the most problematic.

Prospective Candidates

Who will run for Congress if term limits are adopted? Congressional candidates will likely come from where they have come in the past—members of state legislatures, city councils and commissions—in other words, experienced politicians. Looking to the future, James Madison, assumed the same. The incentive to run for Congress among occupants of these "lower" offices will be even greater as term limits are applied there as well. Many will attempt to move up, to avoid the certainty of having to move out. There will of course be numerous exceptions to the rule, but by and large political newcomers will begin their careers in state and local government—exactly as they do now. But while this may imply little change, there are other considerations.

One question that has been raised is whether the newcomers, at whatever level, will be different than those who currently offer themselves for public office. Will term limits and the reality of short political careers inhibit some citizens or act as an incentive for others? Who would they most likely be? In attempting to answer this, an overriding observation must first be made. Political office-seekers are, and are likely to remain, a somewhat unique sub-group of general society. The vagaries of political contests cull out all but the most willing risk-takers. Among those left, not every individual has an

28 The Federalist, No. 56, 286. Madison even assumed that some members might serve simultaneously in Congress and as members of their state legislature.
inclination for things political. Even assuming a group of publicly spirited citizens, who vote and think about the issues of their community, not everyone is inclined to a vocation (even for a limited period or on a part-time basis) immersed in this work. The requirements of financial disclosure and willingness to undergo intrusive scrutiny and negative personal attacks reduce the potential pool of individuals still further. Many ardent political activists are content to work for the election of others or in the support of important issues, but would never think of entering the fray as candidates. Finally, and perhaps the most troubling of factors, personal financial circumstances will inhibit many who might otherwise be capable and willing. This is especially true for part-time service in places like the Nevada Legislature, which requires substantial periods away from a job or business and does not offer commensurate compensation. These various factors serve to shrink the universe of prospective candidates and office holders and it is within this smaller group that we must first look.

Consideration of these issues is extremely important. The effect of term limits and other qualifying aspects of public service will determine the nature of the polity we become, regardless of what we wish. If we truly intend citizen government then we must insure that anyone with the ability and interest can seek and hold office. In our representative bodies, this is more critical. During the Constitutional Convention James Wilson rose to the issue of whether the lower house should be elected by the people.

The Gov[ernment] ought to possess not only the force, but the mind or sense of the people at large. The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively.\(^{29}\)

Pennsylvania's Wilson is less well known today, but was perhaps equally as important as Madison to the deliberations of the Convention. The sentiment he expressed was far from

\(^{29}\) Madison, Notes, 74. The abbreviations and emphasis are Madison's.
new by 1787; it echoes a prescription for the legislative branch made by John Adams eleven years earlier. "It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." But these sentiments were complicated by the expectation that representatives would likely come from among the more economically advantaged. Hamilton discussed this dilemma in Federalist No. 36. Though he was considered among the most aristocratic-natured of the Founders, he nonetheless expressed a belief that room should be made for the meritorious, regardless of their economic circumstances.

Whether the representation of the people be more or less numerous, it will consist almost entirely of proprietors of land, of merchants and members of the learned professions, who will truly represent all those different interests and views... There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all; and I trust, for the credit of human nature, that we shall see examples of such vigorous plants flourishing in the soil of Federal, as well as of State Legislation.

The final product of the Convention testifies to an agreement with these hopes for wider, more inclusive representation. The minimal qualifications required by the Constitution for service in either house of Congress—indeed for any office—stand in remarkable contrast to the various property qualifications for service required in the state constitutions of that era. The Constitution also took pains to insure that voters for federal representatives be the same as each state allowed for the "most numerous," or lower, house of their own

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31 The Federalist, No. 36, 169.
32 Massachusetts, for example, required members of the lower house to have a freehold of 100 or estate of 200 pounds, Senators to own a freehold of 300 or estate of 600 pounds and the governor to own a freehold of 1000 pounds. See Mass. Const. (1780), chap. I, sec. III, art. III; Ibid., chap I, sec. II, art. V; Ibid., chap. II, sec. I, art. II.
legislature. These requirements were the least restrictive and, in the case of Pennsylvania, included nearly every free male. Additionally, and though the subject of debate, the Convention settled on providing legislators with a fixed "Compensation ... paid out of the Treasury of the United States." The sum of these seemingly mundane features came about after much debate and had a profound effect in determining who could serve in the future. We can be no less circumspect in determining the effects of modern proposals.

The specifics of how term limits would be imposed will themselves have a result. Shorter tenures for full-time positions will tend to attract those who can more easily move from career to career, or who are more able to afford a public service "sabbatical." Longer tenure, twelve years for example, may well exceed the current expectations of private sector jobs and allow candidacies by individuals from a greater variety of circumstances. The effect of limits on candidates for part-time offices is not likely to be as great as the specific duties, compensation and time requirements of the position itself. As these are already at work, they are of equal concern, but for our purposes here we can only suggest they be reviewed.

Term limit proponents, particularly Armor, have stated that term limits will result in attracting more people from a successful business career to public office. This is suggested as a specific benefit. There is no question that individuals with business backgrounds, as with those from many others, would help to achieve a more representative institution. But there is also no guarantee that such experience will

33 U.S. Constitution, art. I, sec. 2.  
34 Penn. had the lowest requirements among the states. See Penn. Const. (1776), art. 6.  

\subsection*{Incumbent Members}

Congressional incumbents form a separate class of stakeholders. If term limits are imposed there will be two groups to consider; current and future incumbents. As the initial wave of new, term-limited members arrive they will be met by a core group of long-term incumbents. While this has always been the case with "freshmen" versus more seasoned members, it will happen with greater frequency, and in greater numbers in the immediate future. Veterans will, from the onset of adoption be faced with the same future limits as the newcomers. They will also have the advantage of longer experience in the legislative process and friendship with and knowledge of the players and protocol of Washington. How they will use this advantage will vary by the circumstances presented. It should not be expected that they will simply yield it up to less experienced hands. Until newer members predominate, or at least achieve an effective influence, it is unlikely the present system of allocating committee assignments and chairmanships will be changed. More to the point, term limits should not be expected to bring an immediate end to business as usual.

After the initial phase, all of the current longer-term incumbents will have exhausted their possible tenure and an all members will face the same possible length of service. When this has occurs, which could be six to twelve years from the time of adoption for the U.S. House and probably twelve for the Senate, there will still be
incumbents. One of the results seldom mentioned by proponents—because their argument depends so heavily on the zeal of their attacks on incumbency—is that *term limits will not end it*. From their first election and through the duration of their tenure, term-limited incumbents will enjoy all of the advantages as do current incumbents. They will be no less able to thwart challengers, have easier access to the news media, achieve greater name recognition, provide benefits to their home districts, raise more money and do all the rest. People willing to endure what is required to be elected to begin with are not likely to simply give up what they have achieved. It would be contrary to human nature to suppose that these new incumbents will be any less interested in re-election than present incumbents, nor that they will deprive themselves of the advantages incumbency offers them.

The only difference will be that all members will know they will have to leave at a fixed point in the future and they will have to think about what to do next. Depending on age, some incumbents will simply retire from working life altogether. Others will return to their law practices, businesses, schools or other employment. Many will seek different political office. If permitted, House members are likely to seek Senate seats and, occasionally, Senators may seek House membership. Still others will try to continue their political careers in state or local offices. Some, hopefully most, will follow in the expectations of George Will and see in their last term an opportunity to overcome the various forces at work on the modern Congress and simply do what they think is right. Others however, seeing what will likely be the end of a career, will be susceptible to many temptations. Even if they are not otherwise bent on selfishness or outright corruption, a large number will be seeking jobs. And, unlike others in that same predicament, while

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37 President John Quincy Adams returned to Congress as a Representative and served there for over seventeen years.
these congressional applicants are looking for work they will have the power to decide law and to arbitrate the great clash of interests that exist in our complex society. It is inevitable that the quantity and variety of ethical conflicts will be increased. In the New York ratification Convention, in June, 1788, a debate on this very issue ensued between Alexander Hamilton and Melancton Smith. To Smith's criticism that the proposed Constitution contained no provisions for rotation of U.S. Senators, Hamilton replied:

When a man knows he must quit his station, let his merit be what it may; he will turn his attention chiefly to his own emolument: Nay, he will feel temptations, which few other situations furnish. 38

It must be granted that personal and political corruption has always and will always exist in some degree. As it has existed prior to term limits, they certainly cannot be supposed as a future cause. What can be predicted however is that more individual legislators will be placed in the position of needing a career change than at present. They will be placed there not by experiencing an unexpected loss at the polls, but by laws which tell them the exact date of their departure. As Hamilton wrote against presidential limits:

One ill effect of the exclusion [or limit] would be a diminution of the inducements to good behaviour. There are few men who would not feel much less zeal in the discharge of a duty, when they were conscious that the advantages of the station . . . . must be relinquished at a determinate period, than when they were permitted to entertain hope of obtaining by meriting a continuance of them. 39

Whether term limits will affect the parochialism of incumbent members is less likely. As has been shown in George Will's example of Robert Byrd, its effects on retiring members is problematic. Under Will's careerism premise, catering to local interests is primarily based on the desire for re-election. If this is true, and incumbents continue to

39 The Federalist, No. 72, 367.
seek re-election during their allotted time, it can be assumed they will remain parochial. Members will be products of their locales and can be expected to represent their peculiar interests. For those who see post-congressional opportunities in state or local government the incentive to demonstrate their largess to home districts will be particularly strong. George Will's own argument suggests that congressional incumbency can be just as effective as a tool for election to other offices as for re-election to Congress.

The Legislative Institution

Congress, like any organization, must manage itself and its work. Legislative bodies accomplish this through institutional arrangements that have a long tradition. They select presiding officers and floor leaders, establish rules of procedure and divide their labor among separate, special purpose committees. In all of this, of necessity, a certain amount of authority is delegated from the many to a few. All may be equal in their status as legislators, but some will inevitably be more equal in their individual ability to prioritize which issues and bills will be considered. From this authority flows power over not just the legislative process itself, but over the larger national debate.

Speakers, majority and minority floor leaders and committee chairs control the flow of work. The two-party system places effective control with the majority party, which selects the Speaker of the House and the Majority Leader of the Senate. The majority also determines committee chairs, to whom control over the examination of issues and proposed bills is delegated. This places enormous power in the hands of the chairmen because the fate of most bills is decided there. The committees hold hearings to receive testimony and engage staff to research the issues. But the majority staff essentially works for the committee chairman and he or she has great latitude in determining what
issues and bills are heard and which are passed on to the full house. Many a bill, good or bad, has died in the drawer of a committee chairman.

Under the current system chairs are determined largely by seniority rank within the majority party. It was not always so. Prior to the progressive era the leadership of each house chose committee chairs and other important posts. The seniority based system was originally implemented as a "reform" to diffuse that power and distribute it within the institution. More recent changes have allowed the rank-and-file members of each party's "caucus" a greater role in selecting from among candidates for committee chairmanships. Seniority still plays an important role in the decision.

As touched on above, a term limited Congress will likely go through two stages. The first will occur during the period until long-term members are removed. During this period, or at least until its later stages there is likely to be little change. The present system already allows participation by caucus members and this will increase as the balance shifts. But even with this, incumbents who stay through the length of their allotted tenure will always have a distinct advantage. They will have made their reputations, will have a status within their party and will likely have helped some new members achieve their office. This can be observed in the current Congress. The results of the 1994 elections did bring more new members, particularly to the House, than any recent election. Yet the leadership and committee chairmanships remained among experienced and generally long-tenured hands. The very real changes that did take place are attributable to the change in the majority status of the parties, not to an influx of new membership itself. Leadership simply shifted from one set of old hands to another, with a different ideology to be sure, but from an institutional standpoint, old hands just the same.

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The process of determining leadership, committee chairmanships and assignments will also be exposed to many outside, interested forces; just as it is today. Special interests have a stake in how committees are organized. They exert influence in the selection of membership and chairs now, and term limits offer nothing to remedy this influence. In the House of Representatives, large-state delegations may also become more involved than at present. The combination of a few large states could concentrate power to their advantage. More turnover will only create more necessity to revisit organizational issues more often—and therefore more opportunity for organizational intrigue. Against the presumption that shorter terms would achieve better governing, Madison warned that:

The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them.41

In this he only considered the snares of fellow legislators. As we are well aware, legislators are not the only seasoned, knowledgeable or important actors in the Capitol, or in any other seat of representative government.

Lobbyists

Just as incumbents and for similar reasons, lobbyists are treated separately because they are institutional actors. Many operate in concert with special interest contributors (PACs and individual companies and persons), but lobbyists also represent a distinct group unto themselves that will be affected by term limits. At all levels of government, professionals represent the interests or views of others. Some are paid very well for this, others work on particular issues because of their personal beliefs and are paid little, and in some cases, nothing. While the work of lobbying has always been controversial, the right

41 The Federalist, No. 53, 274.
of individuals or groups to have direct access to governmental processes is very well established. The American colonies themselves employed agents to represent their interests to the British government in London. Edmund Burke, the great Parliamentarian, was employed by the New York Assembly on the very eve of the Revolution. It is doubtful, however, that he raised New York PAC money for any members of Parliament.

Lobbyists and legislators work together and have similar, even complimentary roles. In function, many observers would confuse the work of lobbying with legislating. Lobbyists draft bills and amendments to bills. They seek the support of elected members for their side of an issue. They testify before legislative committee hearings, contribute to research and provide information on issues. Many also entertain members in the manner of a salesman of any product, through business lunches and dinners or other, sometimes more elaborate, outings. The extent of these latter offerings has been somewhat curtailed by recent changes. What has been barely changed is that most professional lobbyists also arrange, convey, direct or are otherwise involved in providing campaign and other contributions. The issue of the effects of term limits and money will be explored further in later discussions.

The effects of term limits on the institutional role of individual lobbyists is largely the same as those for long-term incumbents; the more so because, under a limited Congress, a time will come when lobbyists and legislative staff will be the most experienced actors directly involved in the process. The more constant influx of new members, on the one hand, will require that lobbyists will have to learn new names, faces, likes, dislikes and the other factors needed to build personal and professional relationships. But, on the other, they will already have a greater command of the Capitol world and will

42 Draper, 489.
have had the time to cultivate relationships with the other more permanent institutional actors in the legislative and executive branch. They will have gained reputations for expertise in the areas of their interests and will serve, just as they do now, as a cadre of near-colleagues to legislative members—except that they will be able to stay after the elected members must leave. And, through contributions from their sponsors, they will have helped some new members win elections.

Finally, as was seen among California legislators faced with impending limits, some incumbent members of Congress, desiring to continue their presence in Washington, may themselves opt to become lobbyists. This has happened in the past and, with term limits, is likely to happen again with greater frequency. These individuals will be able to employ both their experience in the Congress and the campaign funds of their clients. They will have party status, national reputations and certain institutional privileges as former members. The prospect of many former members becoming lobbyists and continuing their influence over legislation for the specific purposes of their clients is unsettling. What is even more unsettling, though, is the possibility that incumbents could build a future lobbyist career as sitting legislators. Term limits in themselves offer nothing to resolve any of these dilemmas, but instead create incentives for possible abuse. While it is entirely possible for these kinds of activities to occur in a non-term limited environment, there is at least the possible motivation of continuance in office that will encourage many individuals to pursue public rather than self-serving ends.

Political Parties

The major parties face two possible scenarios. Term limits may strengthen them, stem their decline into oblivion and provide motivation for renewal, or term limits may hasten their demise. The reality that more open seats will result from term limits,
particularly at state and local levels, will create the need for organizing agencies to recruit, train and support new candidates. While many newcomers may simply step forward on their own, others will have to be coaxed and cultivated. In the past, parties served in this role.

More recently, caucus groups of elected officials, hoping to gain or maintain majority control of legislative bodies, have established their own recruiting, training and support operations. In many cases they have run away from parties, either because there was little structure left to help or support them or because candidates didn't want to be burdened with some of the positions of the party platform. This disconnection of party-labeled candidates from the parties themselves came about largely because the parties had lost their ability to provide the resources needed for electoral success—activist volunteers, contributions, technical campaign support and the like. Caucus organizations supplied these resources and remained under the control of the candidates themselves, or at least of the leadership of elected officials in given legislative arenas. They have had the unifying purpose of institutional control and the benefits that flowed from that and they have been able to marshal the organized, financially contributing constituencies and special interests to their respective causes. This has proven successful for the Republican and Democratic caucuses of Congress and many state legislatures, but it may not be as viable against the widespread changes that will be brought about by applying term limits across the board to every state, local and federal office. Term limits may force a re-connection between these caucus organizations and the larger party structures, if for no other reason that every resource will be needed for the effort.

Term limits may also help to make party identification a more important factor in campaigns than it has been in the recent past. As discussed earlier, party affiliation has steadily declined during the Twentieth-century. Voters who do register as members of a
given party have also proven that they can be persuaded to vote for candidates of another party. The so called Reagan-Democrats are one example. Turnover will put legislative majorities in a more constant state of flux. This in turn could motivate candidates and dormant party organizations to come together to establish platforms which encourage voters that the policies of their slate of candidates truly are better than those of the another political party. Control of Congress and state-houses will become a more critical element of the political debate and this may bring new life to the role of the parties.

The effects of term limits will intensify the process of political boundary redistricting. Contrary to George Will's suggestion that term limited state legislators would employ less political artistry in drawing political maps, the increased emphasis on majority control will inevitably spill over into this activity. Drawing district lines so as to encompass partisan voting majorities, and to include or lock out potential candidates will become more important as caucuses react to the reality of constant membership turnover. The fact that term limits are applied across the board to federal, state and local districts will also inspire more widespread involvement and attention to these efforts, which may serve as added impetus to party rejuvenation.

On the other hand, parties have not been able to re-establish their role as conduits of political information. They no longer serve as connecting tissue between the citizen and a governing philosophy. Various single-issue and religious groups have stepped into this void by encouraging political involvement and developing candidates. These groups have by-and-large used the existing party structures, but that has not helped to re-connect the parties to widespread partisan sentiment. The core participants in party primary efforts and the convention delegates of both parties tend to be less representative of the broader partisan-oriented public. As effective as these groups have been in attracting a loyal
following and inspiring political activism for their individual causes, they may not be capable of providing the resources needed for a national recruitment.

In addition—and perhaps more critically—the major problem for parties continues to be the media nature of modern campaigns and the ability of individual candidates and caucuses to obtain electoral resources without them. Primary elections have largely eliminated the role of the parties as "nominating" institutions. Well funded candidates can simply buy media and other assistance and reach over any grass roots structure to inform—or confuse—voters. Beyond the obvious problem of the sources of campaign funding, there is an added danger. The political industry which has provided the technical means to accomplish this may also be capable of recruiting and training candidates as well. Some of this already occurs on a small scale, and an organized, though probably obscured, effort is not impossible. The possibility that major special interests, through political marketing organizations, could appropriate the political process completely is not an impossibility. In its stubborn refusal to consider the issue of money in politics, the term limits movement offers no solutions to this and the many dilemmas created by campaign financing.

The Presidency and the Executive Bureaucracy

Whether Presidents will become more or less powerful relative to the Congress is an open question. The removal of long-time Congressional incumbents will prove a benefit in some issues, but will also eliminate some of the switches and levers Presidents—regardless of party—have relied on to govern. A constant streams of newly elected Congressmen may react in awe to the power and trappings of the Presidency. On the other hand, as the recent Congress demonstrates, new members may come to Congress with disdain for the occupant of the White House and be unwilling to compromise. While examples of either have occurred in the past, the difference in the future will be in the 

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numbers and in the possibility of constantly shifting majorities. Contrary to Armor's assertions, divided government is more likely to occur more often under term limits, particularly in the House which was designed to be a current bell-weather of the public mood. Historically, the party of the President suffers losses in mid-term elections. 1994 was an amplified example of this trend. The very effect that term limits promises will increase this likelihood in the future. But where in recent divided governments Presidents have at least found stable leadership in Congress with which to deal, future Presidents are more likely to be denied this luxury. Reduced stability in the legislative branch will force Presidents to reestablish their role as titular heads of their parties. Winning and holding Congressional majorities will become both more difficult and more crucial for Presidential success and future Presidents may have to focus more time and energy on the legislative process and in legislative campaigns. Term limits may require Presidents to become far more partisan.

Bureaucracies, it is widely believed, tend to run of their own accord. Agency officials within the Executive branch, below the political appointive level, have enormous power. They implement the laws passed by Congress and their efforts are important to the effectiveness of those laws. The federal personnel system, as most public employee systems, makes replacement below the political level difficult. In the course of working to retirement, most of these individuals will enjoy careers outlasting several presidents and thousands of members of Congress. Under term limits the institutional memory of Washington will reside among lobbyists and career bureaucrats. In and of itself, this can be—and to some extent is—counteracted by rules enforcing the non-partisan professionalism of government service. This occurs in the military services, which have adjusted to routine change in civilian command. The difference, again, will be the more rapid turnover and the ability for bureaucracies to "wait-out" some policy changes until
legislative resolve is more clearly established. Term limited Congressmen may find
themselves unable to quickly impose the changes they believe they were elected to
accomplish.

Special Interests and Political Contributors

Another effect of public instability is the unreasonable advantage it gives to
the sagacious, the enterprising and the moneyed few, over the industrious
and uninformed mass of the people. Every new regulation concerning
commerce or revenue, or in any manner affecting the different species of
property, presents a new harvest to those who watch the change. . . . This
is a state of things in which it may be said with some truth that laws are
made for the few not for the many.43

Other than the greater formality of his language Madison's words could be lifted
from numerous commentaries on our present political life. Both real and perceived, the
many effects of special interest influence—and money—in our elections and governing
come closer to identifying what is truly the political problem today. Interested
involvement in pursuit of governmental deference is not new and no measures will
completely eliminate it. Nor should they. We hold dear the concept that the minority
should be protected from oppressive majorities. This must also include those
economically interested individuals and organizations who are at risk from the majority's
will. The question is not whether these interests should have a voice in political decisions;
the question is whether they should predominate the process. It is a question of balance.
For many Americans the answer is too obvious.

In our current political environment, funding from purposeful interests has created
a political industry, which has an inordinate role in campaigns and in providing political
information. Few campaigns consist of a candidate simply stating his heartfelt views and

43 The Federalist, No. 62, 317.
attracting voters to support those beliefs. Most involve a cadre of campaign experts, media consultants and fund-raisers. Door-to-door canvassing is often carried out by paid "volunteers." The businesses that supply these services operate political campaigns with techniques borrowed from product marketing. The voting public is segmented, just as consumers, for their "buying" preferences. Political messages are tailored to the particular audience and produced to utilize all of the evocative power inherent to the medium used. Political information is packaged to suit the limits and potency of the medium employed. Campaign themes, speeches and even candidate responses to questions are developed and coordinated, honed and refined so that little spontaneity is required. The result are campaigns that dwell on as much of the negative of the opponent as can be discovered, and as little on the specifics—other than safe "feel-good" themes—as can be exploited and artfully presented. The only real difference between this political marketing and product marketing is that statements about products are at least subject to "truth in advertising" laws and regulations. This method of framing the political debate tends to play on the emotions of the electorate without really responding to the public's desire for meaningful information and without really considering the priority of issues among citizens themselves. Treated as mere political consumers, the political business either panders or over-promises without ever connecting candidates to specific policies.

Political businesses are also at work in actual governing. In the legislative process special interests exert influence through both individual lobbyists and political interest-manufacturing firms. This latter category of lobbying is fairly recent. In Who Will Tell the People, William Greider chronicles how one of these firms, Bonner and Associates, is able to raise public interest in an issue and direct public pressure on Congressional deliberations. Using phone banks and direct mail, Bonner "informs" targeted groups of voters about the impact of pending legislation—at least as that impact is interpreted by
particular interests. Those who respond to the message are then directed to contact members of Congress to urge their support or opposition to the measure. By providing pre-addressed response cards, fax and telephone numbers, even the method of direct communication is packaged. The flood of cards, letters and telegrams that bombard members is often orchestrated in this way. But Bonner’s efforts are not motivated by public spirit nor even by his own personal position on given issues—his company performs these service for special interest clients.

Bonner & Associates packages democratic expression and sells it to corporate clients—drug manufacturers and the cosmetic industry, insurance companies and cigarette makers and the major banks.44

Thus, even what passes for direct communication between the public and their elected representatives may, in fact, be heavily influenced by purposeful interests.

The common glue binding the political business to the work of campaigning and governing is special interest money. Campaign contributions on one side and purposeful political investments on the other provide the resources that either carefully, channel or outright jam, political communication between the people and their representatives.

Absent any other changes, term limits will aggravate this problem. The increased competition that would inevitably occur from the imposition of term limits, as has been shown, will increase the need for campaign funds. Under the current rules-of-the-game, these funds will inevitably come from the various purposeful special interests that presently contribute to congressional and other campaigns—only in increasingly larger amounts. Whether this funding goes to re-election for long-term incumbents or first-time elections of freshmen, the result will be the same; elected policy-makers who have mortgaged their political independence.

44 Greider, 36.
and less secure members would be more susceptible to the influence of orchestrated public sentiment.

As long as there are willing buyers and sellers in the political marketplace, uninhibited by other laws, this problem will continue. Term limits are only likely to make this worse by forcing an even greater need for campaign funding and increased efforts by political professionals to influence an ever-changing Congress. By steadfastly refusing to consider any means of reducing the effects of money in our politics, term limit advocates are willing to propel American democracy into a state of unbridled campaign-finance competition. A competition that will inevitably bid the price of political participation beyond the reach of most citizens.

The People

The forgotten political actors in all this are the American people. The term limits movement has flattered them into believing that voting for ballot questions is an act of empowerment. In reality, term limits are an acknowledgment of the voter's diminished role in political decision making. Term limits have been packaged as a cure-all for our political problems. The many critical problems that term limits do not address, and the ones that will be made much worse, are largely ignored. Many voters have supported term limits because of the promise of real reform. The realization that term limits simply will not do what they promise is likely to have a profound impact. Many voters will become disillusioned of their inability to bring about meaningful change. We cannot afford further political alienation.

Given the low percentage of eligible voters who choose to participate in elections, especially in mid-term congressional elections, one possible effect is that the term limits imposed will become the de facto tenure for members of Congress. Voters may simply
conclude that if a member is allowed six or twelve years, voting is unnecessary until the incumbent is no longer able to seek reelection. This could further reduce the average turnout in non-presidential elections.

In and of themselves, term limits offer nothing to improve the nature of the political debate or to re-connect the people to candidates, representatives and governing. The voter will continue to be bombarded with negative media campaign advertising—and probably much more of it as competition increases at all levels—but will not gain better information on which to base his or her decision. Competition will increase the need for money and that will empower special interests and the political industry which serves them. The voter's diminished role as political consumer will only be enhanced.

In the end, it is the voters who are most directly affected by term limits. Political careers will not end—and should not. The people, however, will loose the choice of voting for representatives who have served them well. Citizen government requires an active and engaged citizenry, but it also acknowledges that some citizens will lead and will find a vocation in public service. Many citizens will come and go through Congress, state legislatures and local councils. Some will find a liking and a talent for the work. If they are good enough and their fellow citizens desire their continuance, they will seek and be permitted to retain their positions or be elected to new ones. That has always been the case. The difference is who places some in these positions governing all. Where does the real power lie? Who decides who stays and for how long and who goes? Who ultimately rules? Term limits tell the shrinking electorate that they do not; that they have proven themselves incompetent for such decisions.
Summary

As demonstrated by their likely effects, term limits fail as meaningful reform. The supporting arguments identify an effect as the cause, and misapply the solution. Their imposition will tend to aggravate a predominant problem of our politics and relegate the voter to reduced status. Rather than pushing away the cacophony of deliberately created confusion that surrounds our political choices and governing, they tell the voters to accept their diminished capacity and to limit themselves still further. Term limits do not uplift or inspire self-governance. They pander to worst-fears and increase alienation. They do not seek greater involvement, but urge a fundamental alteration, disguised as a harmless quick-fix. They are sold through methods that do not encourage greater participation or deliberation, but employ the same means—and some of the same money—which have otherwise been employed against the broader public good.

These actors, institutions and effects are by no means a definitive list. They are offered merely as points to be considered in the deliberation of the policy. The Constitutional Framers looked at term limits and opted against them. Where Revolutionary America did apply them, we apply them today. It may be argued that they have no ill effect on presidents or governors and are unlikely to have any detrimental effect on Congress or the political system. But to say they will not hurt, as is true in some of the examples above, is not to say they will positively help. The greatest defect in the argument for term limits may lie in this alone—that they will absorb a great deal of political hope, but achieve no benefit for our troubled politics.

Through the course of this analysis, we constantly encounter the problems created by special interest money in elections and governing. Elections and governing were meant to be the great cause-effect of our democratic republic, with protection of individual and minority rights as the great caveat. The ability of some to assert their rights has
superseded the ability of most to effectively self-govern. The result is a political
environment of Technicolor sound and fury, signifying very little to the average citizen. If
we are to solve this overwhelming problem, we must re-establish our elections as what
they were intended to be. Reform policies should be aimed at insuring that election
campaigns and the governing that results from voter decisions are connected; that the
debate is about what the people care about and carried out in language they can
understand and respond to. The kind of changes that are needed are those which help to
reinforce a faith that governing decisions are based on the broader public good. Reforms
must do more than "tweak" the outer edges of the political process. They should re-build
forums and channels of direct political action and communication. Above all, they must
re-establish the central role of citizenship. Democracy demands a great deal—no less from
the many, as from the few who are elected.
CHAPTER 7

DEMOCRACY BY ANY OTHER NAME

Americans do not want their system to fail and want to assert their ultimate sovereignty, but are confused by the number and complexity of the problems. At every turn there are so many jurisdictions, so many considerations, so many choices, so many conflicting values, so many dilemmas and so many paradoxes. But there are so few places for public participation, public discussion, public education, public deliberation and compromise—so few places for democracy. And floating above all this is the perception and reality that things are exactly as they seem, that too much money and too much political professionalism has crowded out the people--has turned them into spectators of governing. America has neglected the care and feeding of its own democratic society. We have nurtured a consumer-based political society instead of a democratic one. We would look strange to our Revolutionary predecessors in this more than anything--that we have become content to watch our politics like a soap opera and buy what we are sold.

Our political problems stem, in part, from a confusion of definitions. We call ourselves a democracy, but in fact we are not. The Framers were precise about such things. They established indirect, republican governments; governments based on elected representatives acting in place of the people. But in their local affairs, the Americans of that era also knew more direct self-governing, and while some of the Founders were afraid of its possibilities, their political ideas were grounded on the fundamental belief that governmental authority was ultimately vested in the people--and not as an abstraction. This tension of both trusting and fearing the people rose from three concerns. One was
the essential need to contain political power wherever it may reside; a sovereign majority of people having no less potential for abuse than a tyrannical monarch. Another was a belief that the people were largely ill-informed on the issues and so busily engaged in their livelihoods that they could not properly deliberate the great matters of governments. And finally, the people were too self-interested, too prone to the factions of their localities, employment or circumstances to be able to form a larger public voice.

To address these concerns the Revolutionary science of politics restricted the people to only one channel of expression--elections. And even here there was an assumption of "disinterested" decision-making. As originally envisioned, the people were not to choose policies by electing particular partisan candidates. They were expected to elect the prominent and meritorious, who would go to Congress and disinterestedly debate, deliberate and fashion policies reflecting the larger public good. The people were limited because they were expected to be active. Officers and representatives were accorded longer terms than the norm of that day not only as a means of gaining and using practical experience, but also to prevent the people from discarding them too frequently, thereby creating a havoc of instability. Even within the government and among the representatives, officers and judges, the counter-positioning of separated powers further thwarted and diffused dangerous tendencies. The force of the main-spring of public will was reduced by the gears of representation, executive veto, constitutional guarantees and judicial review. But Madison's clockwork system of limited, divided and balanced authority did not render the individual citizen a free-floating political atom. It assumed polity. The issues that rose up to decision would come from the people's lives, their families, their livelihoods, their neighbors and their communities. Common problems would be recognized, shared and discussed. Full citizen participation was expected at the
local level. The people were not merely voters, they were members of republican societies.

The American system was set in motion as a hybrid and with obvious tensions that have been magnified by changing circumstances. The idea of a national republic was a tenuous proposition at best, but necessary for our early survival as a people. Yet our human nature was, and is, bound by the immediate and familiar and could only grasp so far. It was, and remains, an old dilemma; how large can a self-governing society become? The representative system allowed America's expansion into a continental nation, but required that national citizenship be contained to a limited role. The real stuff of self-governing and the real places for direct citizen involvement could only exist in the smaller towns, counties and city wards. Here the people could find fuller expression of their democratic selves and participate directly in political debate and decisions. We could be only republican citizens of the nation, but we could be democratic citizens of our communities.

Thus Americans embrace a difficult political paradox: the deeply held conviction that we are a democratic society, with all the expectations of self-governing that follow from that, and the reality that our cherished structures are deliberately designed to frustrate those expectations. We believe in one-man one-vote, yet the U.S. Senate is decidedly unrepresentative. We believe in majority rule, yet the majority is limited by constitutional barriers and judicial review. A majority of our representatives and senators may pass laws, yet a single president may veto them. We accept these things because we have generally seen the wisdom of the design; that individual and minority rights must be protected from majority capriciousness; that an independent judiciary is more likely to follow law than political whim; that representatives reflect the parochial views of their states and districts but the president reflects the nation—that the people must be protected.
from themselves. On one level, we appreciate these structural features for the justice, general moderation and stability they achieve, but we also recognize that in certain circumstances, these same features can delay and confuse obvious, and needed, change; can continue obvious inequalities and prolong the search for solutions to difficult problems. Our ideas of democratic self-governing inspire the belief that all are equal in the political sphere and that the people as the people are sovereign. Their will is to be carried out, made more coherent perhaps—enlarged and refined by representatives—but carried out nonetheless. Whatever the design, and within whatever limits, popular sovereignty is to be achieved. The people rule.

The conundrum of our politics is that democracy must operate at two levels simultaneously—we must be a representative democracy on one level and a direct democracy on the other. We must have a functioning representative system for governing larger national, state and metropolitan entities, and we must have direct citizen involvement at the most local levels. We need both because beyond a certain level, democracy simply is not practicable, but popular government is the only just alternative. And we need both because as associating beings we need meaningful participation with others—and we need places to learn the craft of citizenship—to meet, to discuss, to share, to find common ground and to work together to solve public problems.

We have allowed both levels of democracy to break down. We have allowed our representative politics to devolve into a mad scramble for interested political money; and through that, have also allowed the debate to become a one-way conversation promoted largely by experts and the political industry. At the local level we have simply abandoned the notion of democracy. We have yielded to an errant conventional wisdom and have erected representative forms where they are unnecessary and even undesirable. We have misapplied the lessons of Madison and have delegated our local, democratic citizenship to
appointed and elected agents, and we have divided ourselves into a confusing array of disconnected and overlapping jurisdictions. To re-establish meaningful political life we need to reform and restructure both American democracies.

If we search for a national democracy we will never find it. That level of direct participation can only occur close to home. It is here that we must find new ways of restoring both the sense and reality of community—and of polity—and of re-learning self-government by actually practicing it. The stakes of not doing so are high. "If liberty requires citizens whose identity is defined in part by civic responsibilities, the public life of the neutral state may erode rather than secure our agency as free persons."¹ The neutral state here is part of Sandel's argument against the ascendancy of rights over responsibilities and the tendency of the modern state to cater to these and remain neutral on the question of the political-moral character of its citizens. This is distinguished from earlier American concepts of citizenship and government as observed by Alexis de Tocqueville:

Municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty.²

To truly achieve a democratic society we must learn to be democratic citizens and we can only do that where it is most natural. Unless we are willing to actually re-create and trust local self-governing institutions, we will be condemned to watch our politics erode around us. This will happen because political liberty is only an idea whose practical fulfillment is dependent on the extent to which it is—not merely advertised and enforced from without--

¹ Sandel, 27.
but intrinsically understood and valued. Like muscles, political ideas will atrophy without exercise and we see the evidence of this all around us—when we let negative commercials discourage us from voting, when we select candidates because of name recognition or media skills, or when we support (or oppose) policy choices because of clever ad campaigns—we have in effect yielded a portion of our political liberty to those whose business is to purposefully manipulate us. It is not merely that use of these subtle devices can have the same coercive force as the authoritarian means of prior ages, it is also that we have become politically immature in our abilities to resist them. We do not practice, and have not learned, self-government and democratic citizenship.

In our local communities we have made two serious mistakes. First we have delegated too much; and second, we have divided ourselves haphazardly. Conservative critics often charge that government is too big. They are only partially right. It is not the size or scope of government that is the real problem. That has come about largely because of the nationalizing and internationalizing political and economic trends that have overwhelmed the ability of local communities, states and even the nation to confront.\(^3\) The real problem is that there are too many governments in America; too many jurisdictions that either overlap or arbitrarily divide communities of interest, too many divisions of authority and too many specialized taxing entities. "At last count, the United States had some eighty-three thousand governmental units—the federal government, the fifty state governments, plus a bewildering variety of fauna and flora below."\(^4\) We have school districts, state school boards, university boards, library districts, sanitation districts, water districts, flood control districts, counties, townships, cities—each with its own

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\(^3\) See Sandel, 215; 339-340 and 344-345.

governing boards, councils, legislatures, and executive agencies. They all have the power to enact laws, ordinances or administrative codes; to issue licenses or mandates and collect taxes and fees.

In some areas, government units overlap like layers in a wedding cake. In Los Angeles, for instance, it was not unusual for a homeowner in the 1970s to receive an annual property-tax bill with as many as twenty itemized charges—a city tax, a county tax, one or two school taxes, plus a dozen or more taxes from special districts. 

"Since no citizen could possibly keep tabs on twenty governmental units, the system added up to a modern version of taxation without representation." And to make matters even worse, many of these American governments compete against each other, each acting as "a self-contained feudal duchy, quick to raid its neighbors for businesses and tax assets." The problem is not merely that this haphazardly-created maze is unintelligible and inefficient, it is also that this confused arrangement of governments unnaturally diffuses authority and reduces accountability—and retards our ability, and willingness, to achieve community.

In this environment, nearly every election brings a cacophony of claims and counter-claims about issues and candidates from every jurisdiction. Local issues get mingled with national. Candidates for state offices get confused with candidates for offices of other levels. Ballot issues are increasingly about complex questions of policy rather than straightforward bond issues, and bond issues come from every level. Citizens on one side of a street elect a mayor, voters on the other side of the street elect a county supervisor. For even the most knowledgeable citizen, the average election ballot is as complicated and indecipherable as assembly instructions for a child's toy. It would be a

5 Ibid., 255.
6 Ibid., 255.
7 Ibid., 255.
great surprise to find that any significant portion of the citizenry has an understanding of where to fix responsibility for a given area of public policy, a knowledge of which jurisdiction does what, under what authority and constrained by what limits.

The problems of jurisdiction are in part attributable to the nation's incredible growth in population and economic complexity. With industrialization and the influx of new immigrants America became increasingly urbanized. As city populations continued to grow, those who could spread outward and America became suburbanized. In most places the division of cities into neighborhoods was transformed into a division of metropolitan areas into central cities and separately incorporated suburbs. We now speak of the greater Chicago, Cleveland or Los Angeles, recognizing that the name implies many separate political entities. This regionalization has had the additional result of requiring still more regional jurisdictions to address common problems that overlap many political subdivisions. Water and sewage districts are one example. There has also been a tendency for increased governmental specialization. Even within single governmental units, departmentalization has proliferated. And special governing boards, commissions and authorities have been created to handle specific functions, such as education, libraries and police. Separate entities have even come about for purely business reasons. In 1906, meat packing companies of East Saint Louis formed their own city by building houses around their plants and moving employees into them until there was a large enough census for incorporation. This enabled Swift, Armour and Morris to effectively control a city government and their own tax assessment.®

On the surface it might appear simple to re-arrange all this into something more elegant and understandable and into a system that would enable and require greater citizen

®  Ibid., 245.

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involvement. However, there are several stumbling blocks to doing so. For one, many of these entities have legal and even constitutional status and it would require an overwhelming mandate to consolidate them. For another, many of these jurisdictions, particularly suburbs, are widely supported by their residents. Many have moved to these outer places specifically to avoid the problems of the central cities and they are unwilling to re-associate themselves with those problems or the expense of solutions—even where they clearly understand a connection between themselves and the larger metropolitan area. While difficult, change is not impossible and we may draw lessons from Britain. Faced with similar urban growth at the turn of the century, the British government took a different tack.

Where the American politicians fell over themselves catering to these new suburbanites, British authorities said no. In 1904-5, a British government agency known as the Local Government Board issued a ruling forbidding middle-class communities from breaking away from larger cities in order to form their own districts.\(^9\)

In dividing ourselves we have sought the comfort and security of outer enclaves and convinced ourselves that we have escaped the problems, but our windows are barred and our security alarms beep in the night. We have tried to run, but we can no longer hide from our shared, local problems and we cannot delegate all of their solutions.

If as individuals we cannot find a role in direct self-governing, we will lose our connection to our communities and ultimately weaken our grasp of democratic liberty. If the people cannot clearly connect responsibility and authority to the outcomes of their votes, cannot fix jurisdictional roles to problems, then they cannot make informed decisions. Without these, the public cannot find itself amidst the confusion and there can be no polity—no sense of an American, nor district, nor township, nor city, nor county.

\(^9\) Ibid., 243.
nor state, nor regional—we. These issues are not new. Sandel relates John Dewey's concern of the 1920s:

For Dewey, the loss of community was not simply the loss of communal sentiments, such as fraternity and fellow feeling. It was also the loss of the common identity and shared public life necessary to self-government. American democracy had traditionally "developed out of genuine community life" based in local centers and small towns. With the advent of the Great Society* came the "eclipse of the public," the loss of a public realm within which men and women could deliberate about their common destiny. According to Dewey, democracy awaited the recovery of the public, which depended in turn on forging a common life to match the scale of the modern economy. 11

Jefferson pondered these things as well. In the town meetings of New England he found examples he hoped his fellow Virginians could emulate. He "proposed to divide every county into wards of five or six miles square," about the area that could accommodate a local elementary school. 12 The best students from these schools would be given public scholarships to attend "a district school . . . and from these district schools to select a certain number of the most promising subjects" who would be provided with a university education. 13 But the democratic intent of these wards was not just the education of the young.

My proposition had, for a further object, to impart to these wards those portions of self-government for which they are best qualified, by confiding to them the care of their poor, their roads, police, elections, the nominations of jurors, administration of justice in small cases . . . . in short,

11 Sandel, 208.
12 T. Jefferson, Monticello, to John Adams, 28-October-1813, reprinted in Peterson, 537.
13 Ibid.
to have made them little republics, with a warden at the head of each, for all those concerns which being under their eye, they would better manage than the larger republics of the county or State.\textsuperscript{14}

In similar fashion, Harrington's \textit{Oceana} rested its national commonwealth on the base of ten thousand parishes.\textsuperscript{15} Each had certain jurisdictional authority and delegated others to levels above it. While David Hume was critical of \textit{Oceana}—for its application of rotation among other things—he likewise based his \textit{Perfect Commonwealth} on the same division into local parishes.\textsuperscript{16} In both cases these parishes functioned as election units that selected local officers and sent representatives to higher jurisdictions. But this wide base was at the heart of Hume's and Harrington's shared belief that—contrary to ancient warnings—large republics \textit{were} possible, so long as they involved the people at the most local level and swallowed, in Hume's reasoning, or re-arranged, in the case of Harrington, the tendencies of faction. We owe these political thinkers a great deal. It was this framework that inspired Madison to conclude that a larger American republic was possible.\textsuperscript{17}

Most attention and thought has been paid and directed to the top of the governmental pyramid and we have neglected the base. Jefferson was among the few who, though having reached the summit, never lost his fondness or concern for the local. Perhaps because he was the most ardent of his generation in his ultimate faith in popular government, he saw the need to insure true self-governing structures where the people actually were. In our modern era, many local governmental functions may obviously

\begin{footnotes}
\item[14] Ibid.
\item[15] 10 Parishes formed a unit called a \textit{Hundred}, 20 Hundreds formed a \textit{Tribe} and 50 Tribes formed the Commonwealth. See Harrington, 83-86.
\end{footnotes}
require delegation to higher levels, but it is inconceivable that some others could also be performed by smaller entities that are tied together through representation to a larger metropolitan or county whole—and through that representation, to also coordinate common solutions and combined resources where needed? Can we not establish self-governing units, with real authority in certain basic aspects of community life? Can we not build on the community programs that have recently emerged—"Neighborhood Watch" and community policing, homeowner associations, "traveling" meetings of local legislative bodies (tailored, however, to the specific issues affecting a given area), elected representative's "town hall" meetings—and other such efforts geared to bringing people together for public purposes.

We have the places to do this, though we often ignore them. We have school buildings and community centers, libraries and museums; public buildings of all kinds, dispersed throughout our cities and counties, yet we do not use these to bring people together for democratic discussion and decision. Instead we let jurisdictional jealousies restrict the use of one place for another common purpose. If we break through this attitude, we will find we have numerous places to accommodate local democracy with very little added expense; and if done sensibly, perhaps with an overall savings. We have public places, what we have lacked is a meaningful public purpose for going there.

We have followed a false notion of economy in believing that big is better politically. We have representative districts at all levels which are so large that no candidate can conceivably win without the substantial expense of a media-oriented campaign. We have been convinced that smaller districts mean more districts, and more districts mean more elected politicians and therefore more expense. But large districts create an abstract sense of representation at even the lowest level. Citizens can be no more than political consumers when combined into such large numbers. However, if we
break down these districts into much smaller units, and if we give some authority to these units and allow the people within them to actually decide certain issues directly--then we may not need so many additional officers and representatives as such a concept might otherwise suggest. In this fashion we could also re-combine certain divided metropolitan entities.

Such smaller, ward-like units, run from schools, libraries or other public places would do more than distribute authority among a self-governing people. They would also serve as places for more meaningful interaction between representatives and the citizens they represent. They could serve as places for decisions of certain issues, which combined with those of other wards would contribute towards a clearer identification of public will. "A general call of the ward meetings by their wardens on the same day through the state, would at any time produce the genuine sense of the people on any required point, and would enable the state to act in mass."\(^{18}\) And this would not have to be akin to the pseudo-public hearings that are presently called for a variety of issues, which are in fact largely ceremonial. These could be real discussions where actual decisions could be rendered. Wards would be places for democratic education, where the complexities of government could be discovered and reviewed and where issues could be discussed and debated. And, finally, such units could also serve as the structures around which more meaningful election campaigns could be developed; places where candidates would be expected to attend to promote and defend their ideas before audiences that are better able to understand the problems and the wisdom of proposed solutions--because they have had some practice grappling with, and solving public problems themselves.

\(^{18}\) Jefferson to Adams, in Peterson, 537.
There are, of course some dangers and a need for precautions in all this. In smaller political units, minority and majority factions can more easily seize and hold sway over deliberations and decisions. Some people will simply attempt to monopolize discussions and others will simply dominate by their stature or manner. Some will be disrupting. There will be anger and shouting and even occasional fights. There will also be attempts in some places to overstep, to encroach too far into personal freedoms. But all of these things occur now. Even legislative bodies of supposedly distinguished members contain the long-winded, the bullies and the uncouth. On that score, we may well have to learn civility by first seeing its opposite. We will also have to insure that constitutional freedoms are protected at this, as at every other level. Establishing certain structure and procedure will be necessary, just as with any other legislative assembly. And, because each ward would be connected to a larger whole, there would be authorities above to which minorities below could appeal. Such a structure would have all of the bumbling and seemingly incoherent characteristics to which democracy is prone, but they would be that-democracy.

But, given our modern propensity to separate rather than re-associate, how do we get back to anything like what Harrington, Hume, Jefferson, Dewey and Sandel describe? Here is where leadership will be required. And that will not be easy because many political office-holders and special interests have incentives to keep things exactly as they are. On the other hand, the public is ripe for change and may be far more willing to consider new ideas than is assumed. A range of arguments could be effective. There is the appeal to the current trends of empowerment. Localized self-government would achieve what no current theory of business management could hope to accomplish and genuine citizen-governing could have great sway over those who are on the verge of political alienation. Another argument would be for greater efficiency and the probability
that reorganization would allow a better distribution of resources. There is even an appeal to the sublime, that such activity could be entertaining and socially rewarding. In the course of deciding issues important to their neighborhoods, boys could meet girls, friends could make golf dates and birthdays could be celebrated. On a much deeper level, though, such change is more than reform or "tweaking." It is a change of public philosophy and will require a real and sustained commitment for success. Fortunately there are modern precedents, some of long-standing--political party caucuses and community development boards among them.\(^{19}\)

But what of the criticism that if people are now unwilling to vote, which is comparatively easy, why would they attend meetings that actually do the work of governing? Are not Americans, at least in part, just too busy—or too tired and in need of relaxation when they are not working—to be bothered with government. The difference here is that, where voting is seen as futile, this would be meaningful involvement. And what would be the general risks of trying? If quorums do not attend, procedures could permit decisions to pass to higher levels—and we would be no worse off than we are now. The object is to challenge the notion that we are political consumers and to create an environment where a democratic ethic and culture can develop.

We could begin more tentatively, by requiring local elected commissions and councils to consider and vote on issues affecting a given area in meetings actually held in that area—so the people most directly affected can attend and participate. The agendas of such meetings should not merely provide an opportunity for "public comment," but should require public discussion and debate. In the same way, issues of concern to a much wider area could require discussion in separate meetings held throughout the larger jurisdiction.

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\(^{19}\) For community development boards see Sandel, 303.
Some public officials will scoff at such proposals, believing they will only draw the critics and the cynics who will disrupt proceeding and attract unfavorable attention from the news media. Others will view this as an added burden that will only prolong decision-making. Democracy can be very inconvenient and fraught with many diverse dangers, but the greatest danger is not trying something on this order. We should begin with pilot programs in the first communities that are willing.

But if local democracy can be established, or at least envisioned, what of the problems in those functions and levels of governing that do require representative democracy? We will still need others who act for us, and we will have to select and monitor them. While new communities may greatly change some aspects of the political debate, they may not be enough to cure all that ails our elective politics and both levels of democracy must be repaired.

There are many causes attributed to the decline of faith in our representative governing, but none come as close to explaining the divorce of representatives from their constituents as the problem of money. There is simply too much interested money, and because of it, too much professionalism in our representative politics. This is not a professionalism of the politicians, but of the professional political industry. From campaign funding to the governing processes, too many vested--usually economic--interests have infected our political discourse and decision-making. It is not merely that campaign contributions on one side, and lobbying on the other, create the appearance and reality of powerful interests wrestling political power away from the people. It is also that this interested money has spawned a myriad of political campaign and political advocacy businesses--campaign consultants, media experts, advertising specialists, pollsters, professional canvassers, opposition researchers, industry-sponsored think tanks—all of whom serve those interests that pay them. The combined effect is a debate that is defined
and controlled by political specialists and squeezed through the confines of media-based presentations, by those hired to define and control it; and legislative institutions, which are very nearly held hostage by a cadre of professional legislative operatives who drown the public voice for the sake of their interested clients. How do the people, their concerns, their hopes, their values break through this? How do the people even participate in this? We pride freedom of political speech above all others, but we must come to a realization that in our current political reality, meaningful political speech—that which decides issues and elections and has a direct impact on governing—is far from free. Meaningful political speech has become very expensive.

The 1996 election cycle will prove to be the most expensive in this nation's history. "[As of mid-October, 1996,] candidates and their party committees have raised more than $600 million, with much of the fund-raising still to come." According to estimates, the presidential race will "cost as much as $800 million, three times as much as the 1992 campaign." Each political party has cried foul over some contributions received by the candidates or organizations of the other, but both are equally guilty. While the labor movement has been conspicuous in its contributions for Democratic congressional candidates, "the largest source for all candidates is business."

"Money is not coming from ordinary Americans, " said Ellen Miller, [of the Center for Responsive Politics.] "American elections are paid for overwhelmingly by economically interested industries and a small handful of individuals."

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22 Ibid.
23 Ibid.
It is estimated that business interests have contributed $242 million.\(^{24}\) The significance of these contributions is the decided political agenda of the groups behind them. "Health industry—doctors, hospitals and insurers—contributed $8.8 million through July. . . . [and the] amount has increased significantly since."\(^{25}\) Tobacco giants Philip Morris and RJR Nabisco contributed $2,741,659 and $1,765,396 respectively.\(^{26}\) The National Rifle Association which is largely funded by gun manufacturers is likely to contribute at least $3.3 million. "The biggest business donor . . . is Wall Street, which has given nearly $60 million, mostly to Republicans."\(^{27}\) On the other side, Democrats have benefited from most of the $2.1 million contributed by the Association of Trial Lawyers and from tens of millions of dollars donated and spent by various affiliates of the AFL-CIO.\(^{28}\) In the money war, however, "Republican candidates now get $3 in PAC money for every $1 received by Democrats."\(^{29}\) The industries and interests represented in these and most other large donations have obvious political motivations. They are either proponents or opponents on some issue that will almost certainly come before the next president and Congress—depending on who wins and who holds majority control. It would be the height of absurdity to represent these campaign contributions, on both sides, as publicly spirited donations made purely to advance good government. Candidates soon come to realize that their special interest "friends" are not contributors after all, but investors, who will be looking for dividends in governing.

\(^{24}\) Ibid.


\(^{27}\) Ibid., A1.

\(^{28}\) Ibid., A-26

\(^{29}\) Ibid., A-1.
The competition between the parties has escalated to ridiculous proportions and has stretched the limits of the campaign finance laws that do exist. The so-called "soft money" loophole has been ripped wide open and now serves as the primary vehicle for raising and spending funds. "More money for Congressional races is coming from special Senate and House campaign committees run by the parties, rather than from the candidates' own fund-raising efforts." This is one form of so called soft-money, or indirect contributions or expenditures made either to party or caucus organizations, or spent on behalf of candidates.

The soft-money game is another way interest groups skirt the law. The concept is basic. Organizations can't give more than $10,000 to a candidate in an election, but they can give all they want to the limitless soft-money accounts of political parties.

Soft money was originally intended to be used for party activities such as voter registration or get-out-the-vote drives. Such activities were believed to contribute to party-building efforts and fell within the law, because they were not specifically coordinated with individual campaigns. However, the specific limits imposed on contributions to individual candidates are routinely circumvented by a technique called "tallying," through which contributors specify the candidates for whom the party organization must use the money. Campaign-finance laws "were meant to restrict the influence wealthy individuals and powerful groups could exert in an election." But these laws have become meaningless, except as a source of additional negative campaign fodder. These abuses are not merely the result of clever law-making. The Supreme Court has held that such independent expenditures are permissible by the parties and other interest

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31 Auster, 25.
33 Birnbaum, 33.
groups. The fundamental right of free speech takes precedence over efforts to wring interested money out of our politics. Re-animation of the parties could have some important long-term benefits for representative politics. But this will not happen if parties are transformed into mere money-laundering fronts.

Each party has attacked contributions received by the other. Some criticism has come remarkably close to claiming that certain contributions represent crimes. While this has helped to bring the issue to sharper focus, it has also helped to increase the overall cynicism of the electorate. Admittedly, though, there has at least been some entertainment value in watching party spokesmen dance in curious logical circles trying to explain why some political money is good, but other political money is bad. The entertainment may prove a black comedy, however, if the result is a wounded presidency and a Congress which owes its allegiance to financial sponsors—and if political success because of higher levels of funding reduces the impetus towards reform. 1996 has epitomized the degree to which the problem of interested money is systemic, affecting both parties and all candidates alike. Because everyone’s money is interested, no one’s is any cleaner or dirtier than anyone else’s. Money is itself the problem.

This influx of political capital has not benefited the debate. The funds have largely been used for television and radio advertisements which have largely been negative, and that have themselves become the subject of dispute. Freshmen Republican members of Congress have experienced a barrage of negative ads sponsored by the AFL-CIO. Likewise Democrats face attacks financed by the larger amounts raised and spent by their Republican opponents. The only beneficiaries of this have been the political professionals who have earned huge fees for crafting these messages and the advertising media which

34 Auster, 26.
have printed, displayed and broadcast the sometimes clever, but increasingly nasty, insults. The public has not gained more useful information on which to base its decisions. Even the dialogue of the two presidential, and one vice-presidential, debates did little more than parrot the same slogans and themes—often verbatim—of the respective campaigns. Money and increased media have not elevated the debate, but have proven contentions made in the previous chapter, that under current rules political competitiveness will increase the money, the special interest involvement and the professionalization of our politics.

Protecting free political speech while ridding our politics of interested money poses daunting problems. Even if campaign finance laws are crafted to avoid constitutional issues and restrict what is spent by—or on behalf of—a given candidate, the question of special interest lobbying remains. Recent changes, which limit the gifts or entertainment that lobbyists or interested parties may give to legislators, do not really have an appreciable effect because of the simple fact that lobbyists and their clients are in the halls of government day-in and day-out. They are there on an institutional basis, and their concerns are constantly before legislators and administrators. "In 1970 only a handful of Fortune 500 companies had public-affairs offices in Washington. Ten years later more than 80 percent did."33 Much legislative work, in fact, is directly involved in resolving the conflicts brought by opposing special interests. Even when laws do address a larger public concern, they are often riddled with exceptions and benefits specific to given industries, interests or even individuals. The disorganized public can rarely match the influence brought about by constant proximity and purpose.

The recent health care debate demonstrated another aspect of the problem. In response to President Clinton's proposals, the interests that would be most directly, and

33 Greider, 48.
adversely, affected took their cause directly to the people. Armed with considerable sums of pooled money, they enlisted the formidable talents of the political industry to discredit the plan. The "Harry and Louise" television ads became classics of political advertising and achieved their desired end. The public became confused and eventually opposed to the changes. What is troubling is that this did not occur in the course of an election, but in the course of a political decision before the Congress. It was one of the most extensive programs of political action undertaken by any industry group. Regardless of the merits of the arguments for or against what was proposed, this unprecedented form of direct political advocacy by business interests raises troubling prospects for the future. This is all the more so because there are no laws to address purposeful spending on political issues outside of elections. In an age of powerful media, free speech rights will make it very difficult to impact the ability of wealthy individuals or organizations to artfully influence public, as well as Congressional, deliberation. The only remedy is the hope that interests from both sides of an issue will be able to evenly match the funds poured into such "debates." But even that will only guarantee that the public hears each side's version of the truth; it will not guarantee the actual truth or the overall quality of what is said. And the public interest would be determined, not by the people, but by those who can afford to carry a debate.

In addition to financial resources, businesses and individuals who own businesses, have a very important advantage over ordinary citizens in their political involvement. The costs of lobbying and advocacy are treated as business expenses and as such are tax-deductible. Ironically, changes in the tax code eliminated the credit of up to $100 that ordinary citizens could deduct for political contributions. Companies reduce their taxes by contributing to think tanks and "foundations" that "perform the research and advocacy functions that in many other industrialized nations would be undertaken by the organized
political parties. . . . An auto company deducts the cost of flying its executives into Washington to lobby senators on the clean-air bill. An ordinary citizen has to pay his own way." Likewise, the fees of lobbyists and public relations experts, "well connected" law firms, and the salaries of "public affairs" executives and other politically purposeful agents are write-offs to business. Direct contributions to candidates are not deductible, but contributions to foundations set up by politicians are.\textsuperscript{36} Campaign finance reform is one important step in bringing the people's voice back to the election debate, but more broad reform of interested political activity in the process of governing itself will be necessary to re-establish true political equality.

In the past, political theorists have attempted to address the problem of how wealth influences governing by controlling wealth itself. Harrington's Agrarian law, just as similar laws in Rome and Greece, aimed at dismantling or restraining the social orders. In more recent history the communists attempted draconian means of re-arranging economic and political society--with disastrous results. Aristotle believed that a stable society could only be achieved if most of the people were "of the middling sorts" so as to balance the interests of the fewer rich and poor.\textsuperscript{37} His observations, however, were of a system where nearly every citizen was able to gather in one place to directly consider and decide issues. Our representative democracy consists of several hundred million people interconnected through a complex economic system. That so much of our political discourse makes appeals to the middle class and emphasizes programs aimed at preserving and increasing its number demonstrates the wisdom of Aristotle's observation. We believe in the great middle. But we also believe in rags-to-riches and that true freedom requires that some will earn or inherit more than others. The modern dilemma, no different from those of past

\textsuperscript{36} Ibid., 52.
\textsuperscript{37} Aristotle, \textit{The Politics}, ed. Lord, 1296a1, l.
eras, is how to mitigate economic inequality without abolishing it—how to preserve freedom and reward work and merit, while insuring that all are equal in meaningful political participation.

Madison and others assumed that larger representative districts would achieve two things. First they would tend to mingle so many specific interests that no one could easily predominate. "Extend the sphere, and you take in a greater variety of parties and interests." On the other hand, there was an upper limit. "By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests." Madison's views were rendered within the context of proposed congressional districts consisting of 30,000 inhabitants. As large and controversial as that proposal was during the Constitutional ratification debates, the populations of modern districts are nearly twenty times that number. Secondly, Madison also assumed that a natural aristocracy would be elected to represent these larger districts, to a greater extent than what occurred in smaller state-legislative districts of his day. "The suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit, and the most diffusive and established characters [emphasis added]." Prominent men would serve the people under the new government. His vision assumed that larger districts would make campaigning, such as it was, less likely and he did not desire the rise of self-selected candidates, as we primarily see today. He did not foresee the level and scope of political campaigns as we know them, but he did believe that property, or economic, rights and interests would be well represented by the very status of the representatives themselves.

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38 The Federalist, No. 10, 48.
39 Ibid., 47.
40 Ibid.
Our system has evolved very differently. The large modern districts do not swallow the effects of interests, they exacerbate them. The sheer size in population and distance make it all but impossible for a candidate to personally canvas and there currently are not sufficient numbers of forums where a candidate can meet enough voters to make a difference. For the most part, political success requires the use of media, and that requires money. The days when a successful candidate can simply walk door to door, speak directly with voters, hand them printed brochures, put up some yard signs and win an election— one vote at a time— are not completely dead, but they are the notable exception. Where they do occur, it is generally in smaller, state or local districts. But even here it is becoming a rarity, and these districts—and campaign expense— are growing as well. Under current rules-of-the-game, to be elected to the modern Congress requires large sums of money, media skills and professional handlers.

But if the size of current Congressional districts is one part of the problem, would reducing the size of these districts be part of the solution? Smaller districts would allow for more personalized—and less expensive— campaigns, but they would also create a larger Congress. There is nothing magic about having 435 members of the House of Representatives. The British Parliament has 650 members and the population of the United Kingdom is only twenty-two percent of our own. The lower house of the New Hampshire legislature consists of 435 members, approximately one for every 2587 residents. Smaller districts and more intimate representation can be achieved if we are willing to concede larger legislative bodies and more office holders.

There is, however, an undefined upper limit. Madison believed that, above a certain size, legislatures were prone to "the cabals of a few [members]." In all

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41 Based on July, 1993 population estimates by the Bureau of the Census.
42 The Federalist, No. 10, 47.
legislative assemblies, the greater the number composing them may be, the fewer will be
the men who will in fact direct their proceedings.\textsuperscript{43} Moreover, even if the modern
Congress were doubled in the number of members, we would still have election districts of
nearly three-hundred thousand residents. Unless we are willing to elect a Congress with
several thousand members, we will not be able to achieve anything resembling the election
districts of the early days of the republic. It may well be beyond the capacity of the
Congressional institution to provide a degree of personalized representation necessary to
achieve a national polity. However, we can consider reducing the size of state and local
representative districts and increasing the size of those elected bodies. There would of
course be the criticism that such changes will bring corresponding increases in the expense
of government. This cannot be denied. But the real cost of democracy is its failure and
we should ask the citizens of New Hampshire whether it is a price worth paying. Smaller
representative districts would be an improvement in themselves. If coupled to a ward
system America would be much closer to restoring public voice and public participation in
a more credible self-governing.

We can also look to establishing political and representational boundaries that
encompass communities of interest. Some state boundaries separate large metropolitan
communities and others bind distant population centers that have very little in common.
And there is the grossly unequal representation in the U.S. Senate. "A Senate majority
can be gotten from twenty-six states representing less than one American in five."\textsuperscript{44} For
these reasons, we may need to consider entirely new federal arrangements that recognize
natural communities—regional entities that could replace or re-combine states and have a
share in internal national governance. In short, we may have to review our federal

\begin{footnotesize}
\textsuperscript{43} The Federalist, No. 58, 297-98.
\textsuperscript{44} Lazare, 297.
\end{footnotesize}
arrangements in light of where the people are today. These are, however, major constitutional issues and beyond the immediate scope of this paper.

Closing Thoughts

What can and must be done now is to insure that the representative democracy we do have is truly reflective of the public voice. That will require reform of how money and politics are combined. Here we can no longer be kind or patient. We must adopt no-nonsense campaign finance and lobby reform that is unambiguous and which carries severe penalties for violations. Thus far laws have aimed at how much campaign funding is raised. We must instead look for ways to limit how much is spent. And while we cannot limit what individuals may spend independently, we may be able to count those amounts against the benefiting candidate's limits. Another alternative would be to channel all political contributions through the parties and eliminate contributions to individual candidates. This would help re-establish the role of parties as mediating institutions and would force greater cohesion among elected partisans. The goal should be as nearly level a financial playing field as possible and at a much lower monetary threshold than at present. We need to bring the people back into politics. Money has reduced the need for volunteerism and "shoe-leather." And that has been a greater loss than is realized.

Democracy, it has been said, is government by conversation. The electronic media have been obstacles to that conversation. They have allowed more people to see and hear more candidates and messages than at any time in the past, but they have also reduced our tendency to simply talk to one another, to debate and discuss. The ability of the art of electronic presentation to persuade, would make the sophists of old blush with jealousy. New technologies and the proliferation of networks may increase the variety of offerings, but we are still left mainly as observers rather than as a participants. "Couch potato"
democracy does not work and will be the end of our liberty if we do not establish new avenues for genuine participation. What has been suggested here may strike some as far-fetched or antique. That they spring from old ideas is granted. It is also granted that association was more natural in the small towns and agrarian life of the early republic. Our technologies may yet offer us new avenues of natural association and we should pursue them. But we cannot replace the basic human need to mingle with others, to share, to discuss, to argue and to learn. We have tried passive democracy and it has failed. And we are the worse off for it—collectively as well as individually. Our moral standing has been reduced to economic beings, whose primary roles are to listen, watch and consume. Democracy demands much more of us, and by so doing, allows us to become much more than we are. It is more than a textbook category of government or a few cherished slogans, it is a way of living and a kind of person—a kind each of us must become.
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