How Term Limits Enhance the Expression of Democratic Preferences

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In the U.S. Term Limits *case, the Supreme Court concluded that any legal restriction on the ability of incumbents to run for Congress is unconstitutional. This conclusion was based largely on the theoretical claim that term limits violate the fundamental principle of our representative democracy: "that the people should choose whom they please to govern them." This article shows that the Court's stated principle should have led it to the opposite conclusion, for the likely effect of term limits is actually to assist electorates in registering their democratic preferences. Term limits promote this goal in two principal ways: by reducing barriers to entry in political markets, and by solving a collective action problem facing voters who want to remove representatives whose seniority enables them to deliver government benefits to their districts. Although there are plausible objections to terms limits, none of them provides substantial grounds for believing that term limits are on balance undemocratic.*

I. INTRODUCTION

The condemnation of term limits in *U.S. Term Limits, Inc. v Thornton* is sweeping.[1] Any restriction on the ability of long term

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[1] 115 S Ct 1842 (1995).

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incumbents to run for Congress is unconstitutional. It does not matter whether the restriction is imposed by Congress, state legislatures, or the voters themselves in state initiatives. Nor does it matter whether the restriction absolutely bars such incumbents from being elected or merely requires them to get write-in votes by depriving them of a place on the ballot.

To reach this conclusion, the Court relied repeatedly on the premise that term limits are "contrary to the fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them."[2] This premise was crucial because, as Part II of this Article shows, the legal materials were highly ambiguous. The Court itself conceded the Constitutional debates were "inconclusive," but reasoned that the ambiguous historical and textual evidence had to be "read in light of the basic principles of democracy."[3] In this, the Court echoed a common refrain in the public debate: if voters do not like long-term incumbents, they can vote the bums out, but it is undemocratic to keep other and future voters from keeping the bums in if they wish.

The dissent left this premise effectively unchallenged. To be sure, the dissent argued that true respect for democratic principles requires respecting the wishes of the voters who voted for term limits. But this amounted to arguing that the democratic wishes of the current electorate should constrain the possibly contrary democratic wishes of future electorates. Indeed, because the dissent conceded that it would be unconstitutional and undemocratic for Congress to absolutely limit terms, it was poorly placed to argue that, in actual operation, absolute term limits would be prodemocratic for future electorates. Instead, the dissent focused on federalism principles unrelated to democratic policy to argue that states could impose term limits even though Congress could not, and on the more limited claim that ballot restrictions were valid even if absolute term limits were not.

Neither opinion recognizes that public choice theory more directly rebuts the Court's premise by providing powerful grounds for believing term limits would help future electorates more accurately register their democratic preferences. As Part III of this Article explains, entry barriers in political markets are generally worse than in product markets and can prevent electorates from seeing challengers on the ballot who would better represent them. Term limits can overcome such barriers. This argument applies to both

[2] Id at 1845, 1850-51, 1862 (internal quotation marks omitted). See also id at 1848-51, 1857-58, 1860, 1862-64, 1866 (expressing same principle in other ways).

[3] Id at 1848, 1866.

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legislative and executive offices, and indeed explains why the term limits imposed on Presidents and many state governors are prodemocratic.

The argument for term limits is even stronger in the legislative arena. As Part IV shows, even when all districts would benefit from replacing their political representatives with challengers, any individual district will find it costly to remove an incumbent whose tenure has made him more able to deliver governmental benefits to the district than his challenger would be. This creates coercive pressure to retain incumbents even when challengers would more closely match their district's political preferences. Placing a limit on the tenure of all representatives solves this collective action problem by ensuring that no one district will benefit at the expense of other districts when a representative is removed from office.

There are objections to term limits, which Part V addresses. None in our view provides substantial grounds for believing that term limits are on balance undemocratic. But in any event, the matter is sufficiently contestable that democratic principles require respecting the resolution offered by the democratic process, which has approved just about every term limits proposal offered. Instead, the Court's constitutional interpretation leaves us with a Constitution that mandates term limits for the President and prohibits them for Congress—an irony since the democratic argument for the latter is far stronger.

II. THE LEGAL AMBIGUITY

A. The Ambiguous Text

The Constitution's Qualifications Clause states that "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and had been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[4] The text nowhere indicates whether states can impose additional qualifications. The Court concluded they could not, using the canon of construction that the listing of some things (here qualifications) excludes all others.[5] But this canon could validly imply only that the listing exhausted the qualifications imposed by the Constitution itself, not those imposable by states.

[4] US Const, Art I, § 2, cl 2. The Clause on Senators is identical except that it sets a minimum age of thirty and period of citizenship of nine years. See US Const Art I, § 3, cl 3.

[5] 115 S Ct at 1850 n 9.

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Moreover, the canon cuts both ways because the Constitution elsewhere prohibits religious qualifications for federal office and polices various state interferences with federal elections,[6] implying that the Constitution prohibits no other qualifications and offers no other restrictions on state interference with federal elections. Most fundamentally, this canon—like many canons—has counter-canons. Courts often say that the failure to explicitly exclude something implies an intent to allow inclusion, or that the purpose manifest in included language should be extended to unincluded situations. Indeed, the *U.S. Term Limits* Court relied on the latter counter-canon to conclude that the purpose manifest in the various provisions policing state interferences with federal elections should be extended to police states' ability to add qualifications for federal candidates.[7] The irony was apparently missed.

B. The Ambiguity of the Textual Editing Decisions

The Constitutional Convention rejected proposals to allow Congress to add qualifications and to impose rotation, a form of term limits requiring incumbents to forgo their offices for a term before running again.[8] But one cannot infer from nonadoption of a proposal an intent to prohibit it. It might indicate a mere lack of consensus on the issue. Further, a refusal to give Congress an unfettered power to impose any qualifications it chose might reflect a fear of legislative self-perpetuation inapplicable to qualifications that are imposed by states or that take the form of term limits. And a refusal to mandate rotation might reflect not opposition to the concept of term limits but rather a belief that the imposition and precise form of rotation should be up to the states and future electorates. It seems not at all unwise to allow such flexibility on term limits rather than impose them since various intervening changes in government have made term limits far more attractive than they would have been at the time of the constitutional framing.[9] Moreover, another textual editing decision cuts the other way. The Convention deleted language in the Qualifications Clause providing that "any person possessing these qualifications may be elected."[10] This suggests an intent to make the Qualifications Clause a floor rather than a ceiling.

[6] US Const., Art VI, cl 3; 115 S Ct at 1857-59.
[7] 115 S Ct at 1857-59.
[8] Id at 1849, 1859-60, 1865-66.
[9] See Parts III.B, IV.A., and V.A below.
[10] 115 S Ct at 1895 (Thomas, dissenting).

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C. The Ambiguity of the Framer's Statements

Various framers, including James Madison and Alexander Hamilton, stated that the Constitution neither gave nor should give Congress the unfettered power to add qualifications because they might abuse such a power to produce a permanent aristocracy and legislative self-perpetuation.,[11] But this did not mean the *states* could not impose additional qualifications, a concession implicit in Madison and Hamilton's statements since they equated the power to qualify federal candidates with the power to qualify voters that the Constitution explicitly left to the states.[12] And term limits proponents could cite their own founder, Thomas Jefferson, who declared that states could impose additional qualifications (while conceding the matter was debatable).[13] Nor did the concern that an *unfettered* power to adopt qualifications might produce legislative self-perpetuation mean the framers would have opposed term limits, which (whatever their other drawbacks) clearly do not aid self-perpetuation.

The Court also relied on the *absence* of any statements during the rotation debate that constitutional rotation was unnecessary because states could always impose rotation on their own.[14] Relying on nonstatements is normally a disfavored practice since it may indicate an incomplete record or that everyone harbored the opposite unspoken assumption. After all, the record also contained no statement from a rotation proponent arguing that the constitutional provision was necessary because otherwise states could *not* impose rotation on their own. In any event, it was hardly surprising that all debaters ignored the possibility of state-adopted rotation. A state that unilaterally imposed term limits would lose influence in Congress if other states did not follow suit. This creates a potent collective action problem to individual state action that, as we show in Part IV, states have only recently found ways to overcome.

D. The Ambiguous Early Practice

Did contemporaries understand the Qualifications Clause to prohibit states from adding other qualifications? The majority argued that they must have since, though rotation was widely popular at the time, no state limited the terms of its congressmen.[15] But the collective action problem just discussed, and detailed in Part IV

[11] See id at 1849-51, 1856-57, 1862-63.
[12] See US Const, Art I, § 2, cl 1.
[13] 115 S Ct at 1860 n 24; id at 1888-89 (Thomas, dissenting).
[14] Id at 1860.
[15] Id at 1865-66.

below, provides a far more likely explanation. Among other things, it explains why Pennsylvania (the one state whose term limits on federal legislators continued in effect in 1788) rescinded them in 1790 (before any seniority advantage could be lost) when no other states followed suit with their own term limits.[16] It also explains why many states *did* impose additional qualifications that did not raise such collective action problems. One state, for example, imposed a property qualification; five imposed a district residency requirement; and three imposed a one-year residency duration requirement.[17] But the Court preferred to stress that many states (including many that required state legislators to be property owners) did not impose such additional qualifications, and that states would be biased in favor of an expansive reading of state power.[18]

The Court also stressed that the House of Representatives decided in 1807 to seat a certain William McCreery despite allegations that he did not meet his state's additional requirement that he reside in his district.[19] But the House left it unclear whether this decision reflected a constitutional determination that no additional qualification could be imposed or a factual determination that McCreery satisfied the state's additional qualification. Indeed, the House excised all constitutional interpretation from the relevant committee report and rejected both a resolution that McCreery had the qualifications his state required and a resolution that he had and needed only the qualifications imposed by the Constitution.

E. The Ambiguity of Precedent

In *Powell v. McCormack*,[20] the Court clearly stated that Congress had no power to add to the qualifications listed in the Qualifications Clause. But as the majority in *U.S. Term Limits* itself acknowledged, this did not mean the states lacked such a power.[21] Moreover, this sweeping statement was dicta. The actual holding in *Powell* was just that the House could not refuse to seat an elected congressmen because of his alleged misconduct. Such refusals to seat might be abused to further legislative self-perpetuation, a concern

[16] Compare Pa Const of 1776, § 11, reprinted in 5 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* 3085 (Francis N. Thorpe ed. 1993), with Pa Const of 1790, reprinted in id at 3092-3103.

[17] 115 S Ct at 1864-66, 1903-08 (Thomas, dissenting).

[18] Id at 1864-66.

[19] Id at 1861, 1908-09 (Thomas, dissenting).

[20] 395 US 486 (1969).

[21] 115 S Ct at 1847, 1852.

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that Part II.B above shows the framers clearly did have. But this concern is not raised by term limits.

F. Conclusion

These ambiguities in the relevant legal materials meant that the Court could not have justified its conclusion without relying on what it itself identified as the "most important" factor in its decision—the premise that term limits interfered with the electorate's ability to express its democratic wishes.[22] True, the Court was partially drawn into arguments about federalism, arguing that the power to set the qualifications for federal candidates was not "reserved" to the states under the Tenth Amendment because the offices were "new" and that the matter was inherently federal.[23] But the Court's focus was not on federal/state distinctions but rather on the conclusion that *neither* the federal nor state governments could impose term limits because *both* equally offended the democratic principle of allowing future electorates to elect whomever they preferred. It is this premise—that term limits on balance restrict rather than enhance the ability of future electorates to elect their preferred representatives—that we challenge.

III. REDUCING POLITICAL ENTRY BARRIERS

One way term limits might help electorates further their democratic preferences is by lowering political entry barriers. High barriers might prevent the political entry of candidates the voters would prefer to incumbents and current challengers. Moreover, even if the electorate would not ultimately prefer the precluded candidates to incumbents, the entry of additional candidates might help define issues better and move the incumbent closer to the ideological positions held by the electorate. Achieving either goal would result in representation that more accurately represented the electorate's views. And neither goal can be achieved by simply voting against incumbents under the current system.

We begin our analysis by comparing entry barriers in product and political markets, concluding in Section *A* that they are likely to be higher in political markets. We then describe in Section *B* how term limits might reduce such entry barriers, and in Section *C* how ballot access restrictions might have a similar effect.

[22] Id at 1856. See also note 2 above (collecting additional citations to the Supreme Court's references to this democratic premise).

[23] Id at 1854-55, 1863-64, 1871. See also id at 1872 (Kennedy, concurring).

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A. Entry Barriers and Political Markets

Entry barriers play a large role in the industrial organization literature as well as in the analysis of antitrust and regulatory policy. There is some disagreement about exactly what constitutes a barrier to entry in ordinary markets, but the underlying notion is that some condition exists for potential entrants that does not exist for incumbent firms, giving the incumbent firm an advantage over potential entrants. George J. Stigler, for example, defines entry barriers as "a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[24]

Harold Demsetz has questioned the value of the entry barrier concept, in part by arguing that in most markets, when costs of production fully account for opportunity costs, the incumbent and the potential entrant face the same costs.[25] He cites, for example, supposed barriers in a regulated taxi cab market. Requiring taxi cab owners to buy from the government a medallion or license to operate might be thought of as an entry barrier because a potential entrant must buy a license, whereas the incumbent already owns one. However, if the licenses are transferable, the incumbent owner can always sell his medallion to a potential entrant for some amount up to the cost of buying a new one from the government. The opportunity cost of this sale constitutes a real cost to the incumbent which exactly equals the cost facing an entrant. Even if the medallions were originally given to the incumbent taxi drivers for free, their current market price is the relevant cost facing both incumbents and potential entrants.

More generally, as long as the assets of any firm have market value, the opportunity cost of incumbents' retaining an asset is the same as the opportunity cost of potential entrants' acquiring it. Whether these assets were acquired at a historically low cost does not matter. Such costs are not barriers that can keep out more efficient firms if they are faced both by potential entrants and by incumbents.[26]

[24] See George J. Stigler, *The Organization of Industry* 67 (U Chicago, 1968).

[25] Harold Demsetz, *Barriers to Entry*, 72 Am Econ Rev 47 (1982).

[26] Of course, society cares not only about whether the most efficient firm(s) are in the market but whether the firms in the market sell at prices equal to marginal cost. If, for example, the government gives out only one (transferrable) taxicab medallion, the medallion requirement would not prevent a relatively inefficient taxicab monopolist from being replaced with a more efficient one. But the medallion requirement would remain a barrier to entry (though apparently uncovered by Stigler's definition) because it harms consumer welfare by establishing a single firm with a price exceeding marginal cost. Both sorts of injury, the failure to replace exiting market actors with more desirable ones and an undesirable limitation on the number of market actors, can be caused by political entry barriers.

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Another example is the use of brand names. A respected brand name, which has been acquired by a long history of advertising and consistent provision of high quality goods, does not present a barrier to a potential competitor because the brand name can always be purchased. If the potential competitor could produce the same quality good at lower cost, the existing owner of the brand name could profit by selling the brand name to the potential entrant.[27]

In political markets, the "firms" are equivalent to individual politicians, but the process of transferring brand name does not function as well.[28] Politicians provide government services or wealth transfers to various groups. Success in the "political market" is associated with the efficient provision of such services to affected groups. Politicians who can provide such services at the lowest cost generate more support, and tend to win elections.[29] The most important asset incumbent politician "firms" hold is the stock of name recognition, or "brand name," they develop over time through advertising and experience. While this asset is valuable to the politician who owns it, it has only limited value to others since a politician's promises are guaranteed through features unique to his personality and not the size of his sunk investments. Hence the difference from product markets. While a politician can endorse a fellow candidate, he cannot sell him his name and reputation: there is a huge difference between being endorsed by Ronald Reagan for the Presidency and running *as* Ronald Reagan. Because the political brand name is essentially nontransferable, the entry barrier problems in political markets are potentially much greater than those in ordinary markets.

Nontransferable political assets make it less likely that the most efficient or desirable candidates are elected to office. Because incumbents cannot sell their assets to challengers, they will find it in their interest to remain in office even when lesser known challengers would be better at running the government. Unlike the less efficient incumbent firm that sells its brand name to a more efficient rival, the incumbent does not want to "sell out" because his brand name has less value to the rival.

[27] Even if a particular asset is not transferable, firms themselves ultimately are, and their valuation is based upon the rents produced by these assets. Thus, Demsetz's argument still applies even in this case. See John R. Lott, Jr., Licensing and Nontransferable Rents, 77 Am Econ Rev 453 n 1 (1987) ("Lott, Licensing").

[28] See John R. Lott, Jr., *The Effect of Nontransferable Property Rights on the Efficiency of Political Markets: Some Evidence*, 32 J Pub Econ 231 (1987) ("Lott, *Effect of Nontransferable Property Rights*"); John R. Lott, *Explaining Challengers' Campaign Expenditures: The Importance of Sunk Nontransferable Brand Name*, 17 Pub Finance Q 108 (1989).

[29] See Sam Peltzman, *Towards a More General Theory of Regulation*, 19 J L & Econ 211 (1976).

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Though an incumbent might be willing to retire from office in exchange for a payment from a challenger, no challenger would be willing to offer enough.

Finally, the entry barrier problem is exacerbated by a free-rider problem among potential challengers.[30] Suppose a challenger somehow succeeds at buying the retirement of an incumbent in order to run for the vacant spot. This may remove the incumbent, but it also benefits other potential rivals who have not had to bear the cost of bribing the incumbent to leave office. Thus, the prospective paying challenger would not be able to capture the full value of the payment to the incumbent. The only way the incumbent can reap the returns of the investments he has made in his reputation is to remain in office.

In order to unseat an incumbent, a challenger must generate support of his own. If he has no political capital, he starts at a disadvantage that must be overcome either by investing to acquire a brand name of his own or by demonstrating in some way that he is a vastly superior supplier of government services. Both of these are costly. While a challenger faces some opportunity cost of his resources, the incumbent faces none for his brand name capital. Therefore, the incumbent seeks re-election as long as the return to his existing political capital is at least zero, but the challenger invests resources in political capital only when the return on that investment is greater than the return he could earn by making other, non-political investments. The existence of nonsalvagable political capital dissuades potentially higher quality challengers from seeking office and allows lower quality incumbents to persist.

B. Term Limits as a Remedy

The establishment of a term limit for politicians is a potential solution to the problem caused by nontransferable political assets. When an incumbent has reached the limiting tenure, the election to replace him will be between two challengers, neither of whom possesses large amounts of nontransferable capital. Newcomers are no longer discouraged from running for office by the size of past investments that incumbents have made in producing political support.

In addition to this most obvious case, there are other ways in which limits to tenure reduce political entry barriers. To the extent

[30] See Andrew R. Dick and John R. Lott, Jr., *Reconciling Voter's Behavior with Legislative Term Limits,* 50 J Pub Econ 1, 2 (1993) ("Dick & Lott, *Reconciling Voter's Behavior*").

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that term limits reduce the average tenure of incumbents, the average amount of name recognition held by incumbents will be smaller and the disadvantage that must be overcome in a race against an incumbent is reduced. Further, to the extent that the benefits from nontransferable capital are reduced by term limits, fewer such investments will be made, and again, the disadvantage to be overcome by challengers will be smaller. Both effects help not only to decrease average entry barriers but to set an upper bound on their potential height.

Risk averse voters may also prefer limited terms for elected officials as a means of smoothing the stream of transfers generated by their elected officials.[31] Any voter would obviously like to have someone in office who favors his causes all the time. However, if offered the choice between one election in which the winner remained in office forever and a series of repeated elections between different candidates, a risk averse voter would under many circumstances prefer the latter. To the extent that term limits offer voters more frequent turnover, or more frequent opportunities to take draws from the uncertain electoral urn, risk averse voters are likely to be made better off.

The strength of this rationale for limits turns on the height of entry barriers. Because incumbency advantages are far higher than they used to be,[32] term limits should be more attractive now than they were at the time of the constitutional framing. Moreover, because brandname advantages are proportional to length of tenure, they will be higher the average length of tenure. This again makes the case for term limits stronger now than in the past. It also means that this rationale for term limits will be stronger in states and districts with more senior representatives. But we cannot predict that term limits will generally be more attractive in such jurisdictions because they suffer more from the free-riding problem we discuss in Section IV.B.

C. Term Limits as Ballot Access Restrictions

The *U.S. Term Limits* Court conceded that if the Arkansas law could have been interpreted as a ballot access restriction, rather than an outright ban on service, it may well have been a valid exercise of the state's constitutional power to regulate the "Times, Places and Manner" of elections.[33] The Court rejected this possibility, saying,

[31] See Lott, *Licensing*, at 453 n 2 (cited in note 27).

[32] Andrew Gelman and Gary King, *Estimating Incumbency Advantage Without Bias*, 34 Am J Pol Sci 1142, 1157- 58 (1990) (noting scholarly consensus to this effect).

[33] 115 S Ct at 1867-68.

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"allowing States to evade the Qualifications Clauses by dressing eligibility to stand for Congress in ballot access clothing trivializes the basic principles of our democracy that underlie those Clauses."[34] On this same point, the dissent relies on the argument that write-in candidacies still allow a term limited legislator to run for office, so that the Arkansas law does not constitute an absolute ban to service, and may reasonably be thought of as a ballot access restriction.[35] While the argument so far treats the law as a *de facto* ban, it can also be shown that holding open the option of a write-in campaign still moves the electoral process in the direction of closer voter representation, and may offer an improvement over a strict ban.

Imposing an absolutely fixed limit on tenure opens the possibility that an incumbent who is a superior representative to any challenger may be forced from office. The availability of a write-in campaign serves as a partial remedy to this problem without undoing the benefits of term limits. The higher costs of informing people about a write-in candidacy, and assuring that voters correctly write-in a name ensures that not all incumbents who reach the tenure limit will mount write-in campaigns. In order to win a write-in campaign, the incumbent will have to make substantial incremental investments to his political brand name. In other words, a write-in campaign diminishes the private value of the incumbent's existing stock of brand name, and his decision to make further investments must be balanced against the alternative uses of his resources. He is thus in a situation much more similar to his challengers. If the disadvantage of not being on the ballot equals the incumbent's brandname advantage, then the playing field can be leveled without imposing an absolute ban that might prevent a highly desirable incumbent from running.

IV. FREE-RIDING AND UNILATERAL DISARMAMENT IN LEGISLATIVE SENIORITY

A. The Pursuit of Relative Seniority as a Collective Action Problem

In addition to entry barrier problems, legislative elections raise collective action problems because an incumbent's relative seniority offers a district greater influence in the legislature.[36] Experience in

[34] Id (internal quotation marks omitted)

[35] Id at 1909 (Thomas, dissenting).

[36] See Einer Elhauge, *Term Limits: Voters Aren't Schizophrenic,* Wall Street Journal A16 (March 14, 1995) ("Elhauge, *Term Limits*"); Dick & Lott, *Reconciling Voter's Behavior* (cited in note 30).

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office increases a legislator's understanding of the rules of the legislature and the process by which political transfers are made to favored groups. Moreover, the ability of a legislator to provide transfers to groups within his constituency depends not only on his own experience and position within the legislature, but on the experience of other legislators as well. A legislator with lengthy tenure in office has an advantage over relatively inexperienced colleagues. Incumbents' skills in supplying transfers more efficiently can take many forms, including increased familiarity with legislative rules and procedures, acquisition of seniority, increased legislative staffs and research budgets, and cultivation of the contacts and political favors necessary for logrolling. Therefore, voters care not only how long their own representative has been in office, but how long those representing "competing" constituencies have been in office as well.

Because of the advantage of relative tenure in providing government services to a constituency, a representative with long tenure relative to others is likely to be returned to office even when other candidates exist whose ideological positions are more closely aligned with those of the represented voters. Hence, in legislative bodies, not only does absolute tenure confer an electoral advantage to incumbents by raising entry barriers, but longer tenure relative to other legislators confers an additional electoral advantage.

Over time, as the composition of a legislative district changes or as the political preferences of the voters or the representative change, the "philosophical distance" between an elected representative and the voting population changes. With increased experience, the incumbent's incentive to consistently serve the interests of his constituents diminishes, and his freedom to serve other interests (which may not coincide with those of his constituents) increases. In exchange for an incumbent's superior ability to provide direct benefits, voters accept greater philosophical distance between themselves and the incumbent, or less representative voting behavior overall. An incumbent is voted out of office only when the distance between him and his constituents becomes large enough to offset the value of his experience at procuring transfers to his district. The increasing ability of a long term incumbent to deliver transfers insulates him from voter disfavor. In this way, the electoral process may lead to an outcome in which the ideological views of the elected representatives do not match those of the electorate very closely.

If incumbents were all turned out of office at high and steady rates, the relative disadvantage of electing a new representative would be small. Thus, if voters in different districts could reach implicit agreements to get rid of incumbents regularly, they could gain the benefits of being represented by the person most

closely aligned with the views in a district, without suffering from having a novice in office. However, such agreements would be impossible to reach, much less enforce. Voters in one state or district cannot observe the actions of voters in another district before making their choice; hence they could not know whether any such implicit agreement was being kept by the other districts until after the election. Moreover, in such diffuse groups, there would be no reputational effects or institutional arrangements to ensure cooperation. Voters who may want to replace their incumbent representative fear that voters in another district may gain at their expense by returning an incumbent—even one that the latter group would otherwise wish to replace. If the first group replaces their incumbent, the latter group stands to gain greater political transfers made possible by their representative's increased relative stock of political capital. The result is that districts that want to replace their incumbent may hesitate for fear that voters in other districts would free-ride by returning their incumbent legislator to office. The absence of a mechanism by which voters could agree to replace incumbents thus leads to a situation where all districts may be represented by people they would like to replace.

As a substitute for agreements not to continue returning incumbents, voters in different states or districts can overcome the free-riding problem by imposing term limits. In addition to solving the problem of divergent returns to political brand name investments, a term limit places a limit on the relative disadvantage any district will suffer from unseating an incumbent. Voters would thus more likely vote for candidates who match their political preferences, and hence the legislature should better reflect the democratic ideal.

This rationale for term limits is stronger the greater the collective action pressure to vote for senior incumbents. That pressure increases as the size of government and government transfers increases, because it makes it more costly to reduce the relative tenure of one's own representative and thus forfeit the skills that he has acquired in creating transfers. The pressure also increases with increases in the average tenure because that too increases the average penalty for replacing an incumbent with a newcomer.

We thus predict that term limits will be more attractive at times and in political jurisdictions where governmental transfers and average legislative tenure are high.[37] For example, since both gov-

[37] Whether they are high in parts of political jurisdictions (such as states and districts) that have above-average tenure is a different question. See Part IV.B below.

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ernmental transfers and average tenure were low when the Constitution was originally written,[38] term limits should have been far less attractive then. A judgment not to impose rotation under those circumstances thus does not at all mean the framers would have meant to preclude term limits under present circumstances.

B. Why Don't Collective Action Problems Preclude State-Imposed Term Limits?

Free-rider problems between different states imply that it may not be individually rational for a state to impose limits on its own representatives while neighboring states have no limits. Furthermore, limits imposed at the state level may be unstable, because once a large number of states have established such limits, it would be in the interest of an individual state to abolish those limits to gain legislative advantage over the other states. Given these potential difficulties, why would any individual state impose term limits in the first place?

A partial answer is that entry barrier problems might suffice to justify term limits. But the fuller explanation is that the term limits initiatives could be seen as an offer by one state to cooperate in removing long term incumbents if other states did the same.[39] If other states did not respond by passing similar limits, the original "offer" could always be withdrawn by repealing the term limits in those states that first enacted them. This has historical precedent: Pennsylvania did precisely that in 1790 when no other states followed its lead in imposing term limits on its federal representatives.[40] This explains why more recent state-imposed congressional term limits were always prospective, refusing to count incumbent terms that occurred before the passage of the term limits law. Prospectivity coupled with six- to twelve-year term limits gave each state ample time to rescind its term limits before they actually deprived the state of senior representation if other states did not follow suit with their own term limits.

Term limits proponents and voters seem to have understood the collective action problem they faced. In Washington, voters rejected retroactive term limits and later adopted a prospective

[38] Tenure may be longer now in part because the costs imposed on representatives in terms of travel have decreased over time. See W. Robert Reed & D. Eric Schansberg, *The Behavior of Congressional Tenure over Time: 1953-1991*, 73 Pub Choice 183 (1992). This also makes it much easier for a representative to remain in contact with his district.

[39] See Elhauge, *Term Limits* (cited in note 36).

[40] See Part II.D above.

limit.[41] Colorado pushed back the date from which terms would prospectively be counted from 1991 to 1995 when the intervening period failed to produce a situation where more than half the other states had passed term limits.[42] And several state term limits included a trigger clause explicitly making the limits ineffective until half the states imposed term limits on their federal legislators.[43] In the only term limits proposal put to voters that already enjoyed prospective term limits with a trigger clause, the voters of Utah had no difficulty rejecting a proposal to make those limits retroactive and untriggered.[44] Indeed, it is striking that no state's voters have ever either adopted retroactive federal term limits or rejected prospective federal term limits.[45]

Unanimity was probably unnecessary to this strategy for overcoming the collective action problem. If a majority of states had successfully imposed term limits on their representatives, and the remaining states failed to follow suit, the majority of representatives would have had strong incentives to enact rules of the legislature which lessened the value of seniority or even to vote for a constitutional amendment at the national level. Thus, while term limits imposed by individual states might not have been a perfect means to a nationwide limit, they may have been an attractive alternative to the route of a direct constitutional amendment. Imposing limits at the state level may have even been the best way to achieve an amendment at the time.

According to our argument, the most strident opponents of term limits would be the most senior members of Congress. In order to force the representatives to begin the amendment process, voters in individual states that did not impose term limits would have had to oust their most experienced representatives in the hope that the amendment process would proceed. In some cases they may be

[41] Brief for State Petitioners in *U.S. Term Limits,* 1994 WL 444683, *3.

[42] See Colo Const, Art 5, § 3a.

[43] See Alaska Stat § 15.30.180 (1995); Missouri Const Art III, § 45(a), cl 1 (1995); NH Legis Ch 108 (1995); Utah Code Ann § 20A-10-301 (1995). See also Wash Rev Code Ann §§ 29.68.015-.016 (1993) (triggered when a total of ten states enacted term limits for their federal legislators).

[44] See Tony Semerad, *Term Limits Aren't Dead,* Salt Lake Tribune A1 (Nov 10, 1994).

[45] In Mississippi, state voters did reject prospective term limits, but the *U.S. Term Limits* decision had already stripped the federal term limits from the proposal. The rejection of term limits for state legislators seemed mainly traceable to the fact that they were linked to term limits for local officials who had little brandname advantage and no collective action advantage. See Reed Branson, *Term Limits Backers Vow Narrower Effort,* The Commercial Appeal B2 (Nov 9, 1995); Editorial, *Scaring Mississippi Voters,* Wall St J A18 (Oct 30, 1995).

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willing to do so (witness the defeat of Tom Foley), but again the free-riding problem makes it unlikely. The voters of any state would not be able to know whether the voters of other states would also defeat their long term incumbents, and further would not know whether the defeat of their incumbent would lead to the final enactment of a constitutional amendment favoring term limits. It is unlikely that the voters represented by many senior representatives would be willing to oust their incumbents under these circumstances. However, if a large number of representatives have limits imposed on their service under state law, this would increase the likelihood that a proposed amendment could muster the two-thirds support needed submit an amendment to the state legislatures. Even a highly senior legislator has no personal incentive to oppose a constitutional amendment extending to other legislators the term limits that his state has already imposed on him. Thus, while allowing the voters of each state to limit terms may not lead immediately to the universal imposition of term limits, it was probably the most likely path to obtaining a constitutional amendment before the Court's decision in *U.S. Term Limits* put an end to this strategy.

An alternative tack, taken by some states and increasingly pushed by term limits proponents, is to pass initiatives instructing federal legislators to vote for a constitutional amendment imposing term limits. This approach, which was used successfully to procure the Seventeenth Amendment, may be the best remaining strategy after *U.S. Term Limits.* But such instructions are not binding, and federal legislators will still have a direct personal incentive to oppose term limits. If they violate their instructions, voters would still feel substantive coercion to reelect them to avoid the penalty of a loss in seniority and relative influence. In contrast, legislators had no direct incentive to oppose the Seventeenth Amendment, and the substantive coercion was lower at that time given the lower levels of government transfers and average tenure.[46]

Voters in states and districts with below-average seniority should be most consistently enthusiastic about term limits applicable to the entire legislature since such limits would not only decrease the ideological slack between them and their representatives but also gain the state or district a greater share of legislative benefits. Those in states and districts with above-average seniority are harder to predict. Entry barriers and collective action pressures to vote for ideologically divergent representatives are greater, giv-

[46] See Part IV.A above.

ing them more to gain from term limits. But they also may have something to lose—a greater than average share of governmental benefits.

V. POTENTIAL OBJECTIONS TO TERM LIMITS

A. Overinclusion

A strict term limit may sometimes remove a candidate from the ballot who is actually the best match to the voters' political preferences. The size of this cost depends mostly on the degree of substitutability between potential candidates. If other candidates with roughly the same political preferences and representative abilities are available, then (ignoring the advantage of incumbency in a large government) the opportunity cost of being forced by a term limit to replace an incumbent will be small.

Given the population size of districts and states today, we expect that the cost of any drop off from the best to second best representative will be small. In contrast, the cost of entry barriers and collective action pressures that entrench incumbents is potentially much higher since the incumbent may be far worse than the alternative representative. Nonetheless, when the population of districts was smaller, the costs of term limits may have been higher because there were fewer viable candidates. This may have made term limits unattractive considering that their benefits were also lower at the time because smaller government transfers and average tenure levels meant lower entry barriers and collective action pressures.[47]

B. The Lame Duck Problem

Another criticism of term limits is that they create a certain end to service, thus leading to greater shirking, not only in the last period in office, but more immediately as well. Viewing the relationship between voters and representatives in a game theoretic perspective, it has been argued that creating a certain end period to the voter-representative relationship would destroy the cooperative equilibrium in a prisoner's dilemma type game.[48] However, this is not necessarily true.

[47] See Parts III.B, IV.A above.

[48] See Linda Cohen and Matthew Spitzer, *Term Limits*, 80 Geo L J 477 (1992) ("Cohen & Spitzer, *Term Limits*").

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First, the evidence is that legislators who have decided on retirement do not significantly change their voting behavior in their final term.[49] Any shirking that does occur takes the form not of political shirking but of leisure shirking, that is less frequent voting.[50] A legislator's incentive to care about his future reputation may be sufficient to severely limit leisure shirking in his final term. Indeed, since a reputation for working hard will be more valuable to a legislator returning to the private sector, and since legislators in their final period under term limits are more likely to contemplate future employment rather than retirement, leisure shirking should be less prevalent in the final period under term limits.[51] In addition to these reasons, rules in Congress induce cooperation among its members in a variety of ways. Both houses of Congress have rules of behavior and membership that induce cooperation among the membership and limit the amount of leisure shirking. There is no reason to suppose that such rules would necessarily change dramatically in the presence of term limits.

Second, legislators in their final term under term limits will often be seeking future office. They may plan to run for higher office in the legislature, to obtain an administrative appointment, to switch from federal to state office, or vice-versa. This keeps them accountable either directly to an electorate or to someone who is politically accountable, and they will generally want to preserve a reputation for representing their electorate well. Indeed, empirical evidence indicates that legislators who leave a seat to

[49] See Lott, *Effect of Nontransferable Property Rights* (cited in note 28); James R. VanBeek, *Does the Decision to Retire Increase the Amount of Political Shirking?*, 19 Pub Fin Q 444 (1991) ("VanBeek, *Decision to Retire*"); John R. Lott, Jr. and Michael L. Davis, *A Critical Review and an Extension of the Political Shirking Literature*, 74 Pub Choice 461 (1992); John R. Lott, Jr. and Stephen G. Bronars, *Time Series Evidence on Shirking in the U.S. House of Representatives*, 76 Pub Choice 125 (1993) ("Lott & Bronars, *Time Series Evidence on Shirking*").

[50] See John R. Lott, Jr., *Attendance Rates, Political Shirking, and the Effect of Post-Elective Office Employment*, 28 Econ Inquiry 133 (1990).

[51] Of course, one might justifiably worry that this will make legislators under term limits unduly influenced by potential future employers. But the total divergence this can cause is probably minimal. Former legislators will probably be highly attractive to employers whether or not the legislator favored that employer's interest. And even if employers wish to exchange job offers for legislative favoritism, they face obstacles. They cannot directly offer a quid pro quo without running afoul of bribery laws. Further, if they try to develop a reputation for hiring legislators who favored them in the past, they have a collective action problem because each employer has incentives to free ride on other employers' hiring of legislators who in the past favored their industry. In any event, the total divergence that can be caused by the prospect of future employment is probably minimal since each person needs only one future job. In contrast, each person running for reelection must favor many groups to get campaign contributions.

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run for other office exhibit no more ideological divergence from their districts than legislators running for reelection.[52]

Third, most of the state-enacted term limits did not impose an absolute final term; they imposed a rotation requirement.[53] Such a rotation requirement leaves an incumbent departing under term limits free to run again in the future for that seat after letting one or more terms pass. Thus, no true last period is imposed. The prospect of perhaps returning to office (even if not ultimately fulfilled) may be enough to overcome any incentive to shirk politically in the last term of office.

C. Legislator Impatience

It has been argued that imposing term limits will induce legislators to become impatient and favor short term government projects at the expense of more valuable long term ones. The argument, which is related to the lame-duck objection, is that voters care only about past results and not about commitments to future actions.[54] Therefore, legislators interested in re-election will supposedly be biased toward short term projects. Limiting the tenure of legislators supposedly increases this bias because incumbents have no incentive to look beyond the maximum possible term of their service. The result is a prediction that legislators subject to term limits will give little or no thought to future endeavors and will vote only for programs which have immediate returns.

But if it is really true that voters care about past results and not about promises of future action, perhaps that implies that voters want governments only to engage in very short term initiatives. The supposed myopia of legislators, therefore, would be nothing more than an optimal response to true voter preferences. To argue that legislators act in accordance with voters' preferences, but that the result is somehow suboptimal defies the underlying assumption of democratic government, that people should choose what best pleases them, whether or not an outsider sees it as "good for them."

[52] See VanBeek, *Decision to Retire,* at 450-456 (cited in note 49); Lott & Bronars, Time Series Evidence on Shirking, at 136-143 (cited in note 49). For more mixed evidence that provides one specification where this might not be true, see Mark A. Zupan, *The Last Period Problem in Politics: Do Congressional Representatives Not Subject to a Reelection Constrain Alter Their Voting Behavior?,* 65 Pub Choice 167, 173-75, 178 nn 14, 16, 18 (1990).

[53] Only five of the twenty-three states enacting term limits enacted absolute ones; the rest enacted some form of rotation requirement.

[54] See Cohen & Spitzer, *Term Limits,* at 487-88 (cited in note 48).

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Furthermore, it seems unlikely that in fact voters care only about past performance and not about expectations of future performance. If voters care about long term policy consequences, they will vote for those candidates whose long term policy views most closely match their own. Legislators will then vote for programs which have the appropriate long term effects. It is quite common for governments to make international treaties or enact domestic programs that commit future unknown office holders to specific actions, and those commitments are typically kept. Long term government bonds, for example, commit future Congresses to authorize sufficient funds for payment. As yet, no Congress has been willing to abrogate that promise, and financial markets appear to believe that such promises are going to be kept in the future. International treaties also appear to have some effect on the behavior of nations beyond the terms of the officials who actually sign the agreements. The point is that even though it may be true that current office holders cannot certainly promise that future office holders will complete long term projects, such problems are routinely overcome and such commitments tend to be kept. In the end, there is no guarantee that even long term office holders would keep commitments made in previous years. If a chosen policy path becomes unpopular, it may be optimal for the policy to change. Such changes can occur whether the originally acting legislators are in office or not.

In any event, under this theory the supposed benefit of lessened legislative impatience is purchased at the cost of increasing the political insulation of incumbents.[55] There is no general reason to think that the benefits of greater patience are worth the costs of incumbents who are generally more wayward. After all, senior legislators with a large incumbency advantage may discount the future less but pursue goals different than the electorate would choose. And even the legislative impatience theory concedes that larger incumbency advantages increase the incentive to favor short-term programs in early terms in order to achieve the seniority that garners political insulation.[56]

VI. CONCLUSION

The Supreme Court's conclusion that term limits are unconstitutional depended heavily on its premise that they would improperly interfere with the democratic preferences of future electorates.

[55] See id at 492 (arguing that legislative impatience results precisely because term limits increase electoral competitiveness).

[56] See id at 491 ("incumbency advantages exacerbate the tendency to choose short-run programs").

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But drawing on insights about entry barriers and nonsalvagable investments from the industrial organization literature, we demonstrate that term limits can be a means to solving a pre-commitment problem faced by voters. If entry barriers exist anywhere, it should be in political markets; and such barriers can be reduced by term limits. In addition, voters face a free-riding problem. In many (and possibly most) districts, voters may want to replace their incumbent representatives with other individuals who would more closely reflect the voters' political preferences. Recognizing that they would thereby be sacrificing the benefits that the incumbent's seniority brings to the district, however, voters may hesitate to vote against the incumbent. If voters facing this predicament could reach agreements with voters in other districts to turn out incumbents on a regular basis, these problems would be solved. However, this is a course of action to which voters across states or voting districts cannot credibly commit themselves. Term limits act as a means for implicitly reaching such agreements. Despite the decision of the majority in *U.S. Term Limits,* it is not a simple matter of voters removing those politicians with whom they disagree.

To be sure, there are plausible objections to term limits. But they seem unlikely to have a significantly negative effect on future electorates' ability to get accurate representation. To the extent the matter is debatable, adherence to democratic meta-principles require allowing the matter to be resolved through our democratic processes. Rather than respecting the results of this democratic process, the *U.S. Term Limits* Court prevented voters from removing a serious constraint on their democratic choice that voters quite rationally (and in our view correctly) concluded had antidemocratic effects far greater than term limits might have. The result is that, far from protecting "the right of people to vote for whom they wish," the Court probably condemned future electorates to more frustration of their democratic preferences than they would have experienced with term limits.

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