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A CONSTITUTIONAL ANALYSIS OF CONGRESSIONAL TERM LIMITS: IMPROVING REPRESENTATIVE LEGISLATION UNDER THE CONSTITUTION

James C. Otteson*

INTRODUCTION

"Throw the bums out!"1 was a rallying cry among American voters during the congressional elections of 1990. One angry voter organized a grassroots movement to get rid of incumbents, whom he blamed for a variety of governmental failures.2 Others have suggested campaign finance reform3 and even term limitations4 as solutions to the incumbency “problem.” Despite this popu-

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BUT I'M NOT GOING TO GIVE IN TO THOSE CLOWNS! Maybe one person can't make a difference, but you and I together can! And here's what we must do:

The root of all of our problems is elected officials who use their incumbency to put a stranglehold on their office. They devote most of their time and energy to raising money for re-election, rather than to running the country properly. I propose that we simply rise up and VOTE EVERY INCUMBENT SENATOR AND CONGRESSMAN OUT OF OFFICE!

Id.
3. Out of Order, supra note 1, at 32.
4. Id.; Timothy Egan, Building on Mistrust of Officials, Voters in West Try to Limit Terms, N.Y. TIMES, Sept. 23, 1991 (nat'l ed.), at A1. Indeed, the recent trend among journalists is to link nearly every point of dissatisfaction with national government to the term limitation movement. See, e.g, David Broder, Term-Limits Juggernaut May Flatten Some Unintended Victims, CHI. TRIB., Oct. 17, 1991, § 1, at 27 (op-ed) (“Fed by the fury at the Senate's late-night pay raise, the House check-bouncing scandal and even the gruesome Clarence Thomas hearings, the term-limits movement is running . . . strongly . . . .”); William Neikirk, Poisonous Politics Erodes Citizens' Faith, CHI. TRIB., Oct. 13, 1991, § 1, at 1, 4 (“Term limitation, once considered a fringe idea, gains in political respectability with each new scandal or with each new failure by Congress and the Bush administration to deal with pressing domestic issues . . . .”); William Safire, Hail to the House, N.Y. TIMES, Oct. 7, 1991 (nat'l ed.), at A13 (op-ed) (“Term limitation is the specter that is haunting the House, and scandal is the two-by-four that gets the attention of the most mulish
list fervor and its accompanying debate on editorial pages across America, over 96% of both House and Senate incumbents were reelected in 1990.\textsuperscript{5} Many people still believe that some sort of congressional election reform is necessary.\textsuperscript{6} Voters seem to love their individual representatives while they hate Congress. This ambivalent relationship between Congress and the people reveals a sense that our government has a deep, systemic problem, but both Congress and the people lack the will to do anything about it.

Without diminishing its importance, the popular "feeling" that Congress is inept is not enough to justify a radical change such as limiting congressional terms. A more rational and deliberate dialogue is needed to muster deep and broad popular support to change the Constitution. Indeed, to consider limiting congressional tenure is to consider changing the very legal and institutional framework by which laws themselves are made. Such a proposal should be approached earnestly and thoughtfully by both the "everyday" people of America and the political and intellectual elite.\textsuperscript{7}

This Article is intended as a step in the direction of a rational dialogue about term limits, and contains three stages. Part I lays the interpretive foundation for an institutional analysis of Congress by exploring the theoretical underpinnings of representative legislation. The Constitution will be explored textually and historically to discover Congress' original constitutional mandate. Part I will argue that the Constitution requires representative legislation to reflect two fundamental principles: legitimacy, meaning that members of Congress should meet several normative selection criteria; and effectiveness, meaning that legislation should occur in a procedural framework of legitimacy and deliberation to create policy that embodies the national interest.\textsuperscript{8}


\textsuperscript{6} For example, since the 1990 elections, even President Bush has indicated that he will support both the elimination of political action committees ("PACs"), Maureen Dowd, \textit{State of the Union Address}, N.Y. TIMES, Jan. 30, 1991, at A1, and a constitutional amendment limiting the terms of members of Congress, Michael Oreskes, \textit{Bush Backs Move For Limiting Terms of U.S. Lawmakers}, N.Y. TIMES, Dec. 12, 1990, at A1.

\textsuperscript{7} See Bruce A. Ackerman, \textit{The Storrs Lectures: Discovering the Constitution}, 93 YALE L.J. 1013, 1039 (1984) (discussing the importance of "sustained debate and struggle" among people when formulating "higher," constitutional legal principles).

\textsuperscript{8} At this point, I would like to explain why an interpretivist approach is necessary to analyze and improve representative legislation. I will illustrate by discussing two alternatives to interpretivism. The first alternative is to describe what Congress is doing now as representative legislation, and let this definition justify Congress' institutional existence. The problem with this circular approach is one of relativism. If the way in which government is conducted is judged only by prevailing practices, government may devolve into a free-for-all in which Congress may set rules for itself that progressively deteriorate over time. Textual and historical interpretation provides a more detached standard by which to judge the operation of government.

A second alternative to interpretivism is to compile and analyze currently available knowledge on government and then formulate the "best" modern theory of representative legislation. After all, why should modern Americans be the prisoners of James Madison and company? The answer is that using the Constitution's text and history as a standard does not make modern citizens
The second stage of the analysis (Part II) will measure Congress against these constitutional standards of legitimacy and effectiveness. The third stage of the analysis (Parts III, IV, and V) will explore the best way to restore congressional legitimacy and effectiveness. In Part III, campaign finance reform and the judicial regulation of the political process will be criticized as grossly inadequate solutions to the problem. Part IV will review antifederalist arguments for a rotation of legislators, and will examine modern proposals for limiting congressional tenure. Finally, Part V will propose limiting members of Congress to one term in each House. This Part will argue that the elimination of the reelection incentive will improve representative legislation by strengthening parties, and by giving representatives incentives to solve national problems through deliberation and cooperation.

I. REPRESENTATIVE LEGISLATION: LEGITIMACY AND EFFECTIVENESS

A. Starting Points: Article I and the Preamble

One can begin an analysis of Congress as a political institution by asking two questions: (1) What is Congress supposed to be? and (2) What is Congress supposed to do? Superficially, these questions are answerable with one sentence: Congress is a representative body that is supposed to make law; that is, Congress is supposed to engage in representative legislation. Although the Constitution does not explicitly define representative legislation, a working definition can be found in the text and history of the Constitution.

Briefly, representative legislation under the Constitution should embrace two fundamental principles: (a) representative legitimacy, meaning that elected members of Congress should meet certain normative requirements to be fully authorized to act for the people; and (b) legislative effectiveness, meaning that legislation enacted by Congress should further broad national goals like those stated in the Preamble. Although any given law incorporates a variety of substantive values, effective legislation can be defined as occurring under certain procedural conditions.

prisoners. One of the great virtues of a constitutional system is that it allows for the self-conscious revision of government. The best available knowledge can still be used to improve government. Reference to the Constitution merely ensures that norms that were once endorsed after a rational, extended debate by a large percentage of the population will not be scrapped just because modern political and intellectual elites think they know what is “best” for America. Instead, would-be reformers must get “the People” to thoughtfully consider the old rules and judge them on their own merits while also examining the reasons the rules were adopted in the first place. See generally id. (arguing that “the People” hammer out new principles to guide public life after “sustained debate and struggle”). Interpretation thus provides a self-conscious fusion of the present and the past by which modern people attempt to understand the reasons our government’s founders chose the original rules. See generally HANS-GEORG GADAMER, TRUTH AND METHOD (1975) (exploring the problem of hermeneutics, or the “phenomenon of understanding,” which pervades “all human relations to the world”).

9. See generally U.S. CONST. pmbl. The full text of the Preamble is reproduced infra note 21.
1. What Congress Is Supposed To Be: Explaining Representative Legitimacy

Article I, Section 2 of the United States Constitution sets forth three normative requirements for the legitimacy of members of the House of Representatives. The first is that “[t]he House of Representatives shall be composed of Members . . . chosen by the People of the several States.”\(^{10}\) The Constitution mandates that legitimate authority to act requires election by the people; thus, legitimacy is a function of popular sovereignty. The second requirement is that “[n]o person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”\(^{11}\) This residency requirement means that a representative’s authoritative legitimacy comes through election by the people of the district or state in which the representative lives. The third requirement for representative legitimacy in the House is that legislators should represent roughly equal numbers of voters, divided geographically.\(^{12}\) Proportional representation means that numerically equal groups of voters should have equal influence in the lawmaking process.\(^{13}\)

In short, the Constitution requires that for Congress to be legitimate, its members must: (1) be elected by the people; (2) come from the districts or states they represent; and (3) equally represent similarly sized groups of voters (or in the Senate, equally represent states). Legitimacy is a concept that expresses what Congress is supposed to be. Legitimacy embodies the idea that Congress derives its authority to make law from the people and the Constitution.

2. What Congress Is Supposed To Do: Explaining Legislative Effectiveness

The first sentence of Article I of the Constitution provides: “All legislative Powers herein granted shall be vested in a Congress of the United States.”\(^{14}\) Legislation, which apparently is Congress’ primary constitutional task, is defined as “making laws, levying and collecting taxes, and making financial appropriations.”\(^{15}\) Thus, Congress is supposed to make law,\(^{16}\) “lay and collect

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13. Although theoretically equal, influence between districts is not equal in practice. See infra note 71 and accompanying text (discussing the disproportionate congressional influence of a few areas of the country). The Senate, of course, is not based on proportional geographic representation, but rather equality of statehood, as each state is represented by two senators. See U.S. CONST. art. I, § 3, cl. 1. Thus, states should have equal influence in the Senate.


15. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 683 (1986). This modern definition of legislation is consistent with Congress’ enumerated powers in the Constitution. See U.S. CONST.
Taxes,"" regulate Commerce,"" coin Money,"" and ""declare War.""

Yet the Preamble suggests that legislation should do more than just match a definition. In addition to being a general statement about government, the Preamble can be read as an admonition to enact effective legislation. Effective legislation "form[s] a more perfect Union," "insure[s] domestic Tranquility," and "promote[s] the general Welfare." Most people favor "effective legislation" that "furthers the national interest." However, varying social and ideological values color people's conceptions of these terms. It seems futile to try to define "effectiveness" and "national interest." How can the Constitution offer a workable definition of effective legislation while itself remaining a neutral arbiter of the political process? This reasoning suggests that legislative effectiveness may be meaningless as a constitutional principle.

Despite this dilemma, effective legislation is a meaningful goal that is endorsed by both the text and history of the Constitution. Instead of focusing on the substantive values embodied in policy, the Constitution suggests that legislation can be presumed to be effective if it is made within a framework of two procedural conditions: (1) by a legitimate legislature (see the definition of legitimacy above); and (2) in a deliberative environment in which representatives discuss substantive issues so that the "national interest" at any given time will be formed according to the country's substantive needs.

Representative legitimacy improves the presumptive effectiveness of legislation in several ways. Requiring the election of lawmakers allows the people to participate, albeit vicariously, in making policy, which is presumed to reflect the public good more than if the people had not voted. Residency requirements for representatives ensure that citizens generally are represented by those acquainted with their local problems, which, of course, are relevant considerations for "promoting the general Welfare." Likewise, proportional

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art. I, §§ 7-8.
18. U.S. CONST. art. I, § 8, cl. 3.
21. The Preamble states:
   We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
U.S. CONST. pmbl.
22. Id. (emphasis added).
23. See id.
24. The assumption that legislation is more effective when the people vote for their representatives is grounded in the constitutional amendments expanding suffrage. U.S. CONST. amends. XV, XIX, XXIV, & XXVI. Intuitively, it is difficult to imagine how legislation could "form a more perfect Union" while relevant members of the Union are denied the right to vote.
25. U.S. CONST. pmbl. Residency requirements do not, however, guarantee the election of rep-
representation promotes effectiveness by giving equal groups of citizens roughly equal voices in the political process.26

Yet despite its importance for effective legislation, representative legitimacy itself does not guarantee effectiveness.27 Constitutional history demonstrates that deliberation is also a crucial legislative procedural condition for effective lawmaking. The development of the constitutional principle of deliberation is best understood in historical context.

B. The Era of Instruction

1. Legislative Similarity and Proximity to the People

During the decade following Independence, many Americans seemed to believe that the legislatures ought to be similar and proximate to the people. John Adams stated, "[The legislature] should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them."28 Following their experience with the British Parliament, which legislated with representatives who are sensitive to the interests of political minorities within a given district. This problem, which is a function of the fact that voters are grouped by geography rather than by another demographic trait, allows local district majorities to continually reelect representatives who promote the majorities' views in Congress.

26. One should note that perfectly proportional geographic representation does not guarantee legislative effectiveness for two reasons. First, the geographic dispersal of political minorities means that their political input will also be dispersed, tending to lessen their influence over legislation. For example, suppose that political minority X, which is defined by the preference of its members for legislation banning gasoline-burning vehicles, makes up 20% of the population. One might suppose that despite its minority status, group X ought to be able to influence legislation in proportion to its size, leading to at least some regulation (if not an outright ban) of gas-burning cars. But suppose also that members of group X are relatively well dispersed throughout the country, so that they make up, at most, only 40% of any given congressional district. This dispersal makes it unlikely that group X will be able to elect even a small number of legislators to promote its interests in Congress, which means that gas-burning cars may remain largely unregulated.

The second reason proportional representation cannot guarantee legislative effectiveness has to do with differences in need among districts of equal political power. Assume that the things districts need are called "benefits." Some districts begin the political process already having more benefits than others. Assuming equal political power between districts (due to proportional representation), and assuming districts will use their power to protect the benefits they already have, one would expect an inertia against the distribution of benefits to needier groups. This is true even if a majority of people in wealthier districts recognize that "effective" legislation requires redistribution of benefits to needier districts.

27. See supra notes 25-26 (describing the inadequacy of residency requirements and proportional representation for promoting effective legislation).

out any direct input of the colonists to represent American interests, early Americans were tired of being represented by people whose interests differed greatly from their own.\textsuperscript{29}

This notion of legislative similarity and proximity apparently had demographic implications, with some people insisting that the legislature should represent all professions.\textsuperscript{30} These people argued that a demographically similar legislature would make good law because it would do what the people would do if assembled personally.\textsuperscript{31} Thus, early drafters of the state constitutions tried to make legislatures as much like the people as possible.\textsuperscript{32} However, as the preratification experience of American state governments illustrates, one of the problems with the goal of a demographically similar legislature was that it

\textsuperscript{29} A belief in virtual representation, the theory that certain nonvoting citizens could be adequately represented by legislators elected by other citizens with similar interests, was sometimes offered as a justification for Parliament's authority over the American colonies. But colonial Americans reacted strongly against the idea that members of Parliament (for whom the Americans did not vote) could virtually represent them, because the colonists' interests were perceived to differ greatly from those of British subjects across the Atlantic who did vote. For a description of the American rejection of virtual representation and early thoughts on actual representation, see \textit{Wood}, \textit{supra} note 28, at 173-88.

\textsuperscript{30} Antifederalist Richard Henry Lee stated, "[A] fair representation, therefore, should be so regulated, that every order of men in the community... can have a share in [the legislature]—in order to allow professional men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature...." \textit{Kenyon, supra} note 28, at lii (quoting \textit{3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia, in 1787}, at 32 (Jonathan Elliot ed., 2d ed. 1896)).

Hamilton, writing as Publius, responded, "The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice." \textit{The Federalist No. 35} (Alexander Hamilton), \textit{supra} note 10, at 214.

\textsuperscript{31} The principle of demographic similarity in a legislature has appeal for the modern pluralistic or interest group theories of politics. Pluralistic legislators implement the predetermined preferences of relevant groups into legislation, without substantive alteration informed by deliberation. \textit{See} Edmund Becker, \textit{A Theory of Competition Among Pressure Groups for Political Influence}, 98 Q.J. Econ. 371, 374 (1983). \textit{See generally} Cass R. Sunstein, \textit{Beyond the Republican Revival}, 97 Yale L.J. 1539, 1542 (1988) (exploring the definition of "pluralism" and arguing that the pluralist system is one of aggregate citizen preferences). Theoretically, an interest group's influence in a demographic legislature is roughly proportional to its share of demographic representation. "The promise of pluralism is that the cumulative benefits of majoritarianism—that there will be more winners than losers—should redound to \textit{all} relevant groups in society as they form cross-cutting alliances on different issues." Akhil R. Amar, Note, \textit{Choosing Representatives by Lottery Voting}, 93 Yale L.J. 1283, 1284 n.4 (1984). Although not achieving complete demographic diversity, a lottery voting system would create a legislature that would proportionally represent groups defined by constituents' first-choice votes. Demographic representation would depend on the importance voters attached to demography relative to other voting criteria. \textit{See generally id.} (arguing that lottery voting would come close to creating a proportionately representative legislature). \textit{But cf.} Ackerman, \textit{supra} note 7, at 1028 (noting danger of equating legislature with the people—something Ackerman calls "mimetic representation").

\textsuperscript{32} \textit{See infra} notes 34-39 and accompanying text (describing state constitutional provisions designed to make legislators more like "the People").
was unrealistic and unworkable.83

2. Control of State Legislatures in the Late 1770s

The first state constitutions ratified after the Declaration of Independence contained numerous declarations and controls to make legislatures more like the people.84 The Maryland and Delaware Constitutions stated that elections ought to be “free and frequent,”85 and many early constitutions provided for annual elections of representatives.86 One common device to ensure legislative similarity was the residency requirement,87 and a few constitutions limited legislative tenure.88 The Pennsylvania Constitution asserted that by limiting tenure, “the danger of establishing an inconvenient aristocracy will be effectually prevented.”89

Another control on legislatures employed by voting citizens at this time was the practice of instructing state representatives how to vote on certain legislative issues.40 “Instruction” reflected the ideals of political equality and participation, implying that constituents were the political equals of their representatives, and that citizens should be aware of legislative issues and influence political outcomes. Instruction allowed voters to control the legislature even

33. See The Federalist No. 35 (Alexander Hamilton), supra note 10, at 214-15 (“The idea of an actual representation of all classes of the people by persons of each class is altogether visionary . . . . this will never happen under any arrangement that leaves the votes of the people free.”) See generally Wood, supra note 28 (examining the problems of the “preratification experience”).

34. Several state constitutions also made general declarations that governmental power originated with the people, and not their rulers. See, e.g. Del. Const. of 1776, Decl. of Rights, art. I; Md. Const. of 1776, Decl. of Rights, art. I; N.C. Const. of 1776, Decl. of Rights, art. I; Pa. Const. of 1776, Decl. of Rights, art. IV.

35. Md. Const. of 1776, Decl. of Rights, art. V; Del. Const. of 1776, Decl. of Rights, art. V; see also Mass. Const. of 1780, Decl. of Rights, art. IX; N.C. Const. of 1776, Decl. of Rights, art. VI; Pa. Const. of 1776, Decl. of Rights, art. VII (all declaring that elections should be free).

36. See, e.g., Del. Const. of 1776, art. III; Pa. Const. of 1776, chap. II, § 9; Va. Const. of 1776, para. 3. A common rallying cry of state constitution writers during this time was “Where ANNUAL ELECTION ends, TYRANNY begins.” Wood, supra note 28, at 166.

37. See, e.g., Del. Const. of 1776, art. IV; Pa. Const. of 1776, chap. II, § 7; Va. Const. of 1776, para. 3.

38. See Pa. Const. of 1776, chap. II, § 8 (prohibiting legislators from serving more than 4 terms in 7 years); Va. Const. of 1776, para. 4 (establishing rotation system for senators); cf. The Federalist No. 39 (James Madison), supra note 10, at 241 (concerning tenure limits for governors). Publius noted, “According to all the [state] constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years.” Id.


40. For a description of the practice of instruction between 1776 and 1787, see Wood, supra note 28, at 188-96. Some Americans seemed to think that representatives were “mere attorneys of those who elected them” who “ought to do as they are bid” and who “ought not to prefer their own private opinions to the judgments of their constituents.” Id. at 189.

Although not explicitly mentioning the right to instruct representatives, the early constitutions of Delaware and Maryland declared that the right of citizens to participate in legislation was “the foundation of liberty.” Del. Const. of 1776, Decl. of Rights, art. VI; accord, Md. Const. of 1776, Decl. of Rights, art. V.
when it was not the "exact [demographic] portrait" of the people envisioned by John Adams.41

3. The Decline of Instruction

By 1787, some blamed the practice of excessive instruction for a parochial crisis of public law that threatened to lock the wheels of government.42 Noah Webster declared that constituents, "on a view of their local interest," believed themselves to be "better judges of the propriety of law" than representatives who had the benefit of reasoned policy debate in the assembly.43 One author noted that "the use of binding instructions and the growing sense that the representative was merely a limited agent or spokesman for the local interests of his constituents in the decade after Independence ate away the independent authority of the representative and distorted, even destroyed, the traditional character of representation."44 This marked the decline of instruction by constituents.

41. See Wood, supra note 28, at 165.

Like the eighteenth-century emphasis on demography, instruction is also reminiscent of modern political pluralism. In both systems, voter preferences are taken as exogenous, predetermined goals of legislation, and representatives are charged with implementing these preferences without substantive alteration. Both systems also have majoritarian elements. While Revolutionary representatives responded to local pressure by a majority of the most vocal constituents, see Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1059 (1989); WOOD, supra note 28, at 188-96, modern pluralistic outcomes are determined by aggregated majority preferences, see Sunstein, supra note 31, at 1543 (arguing that the pluralistic goal is a system of "aggregate citizen preferences").

The major difference between legislatures of 1780 and modern pluralistic legislatures is that pressure groups in the former mostly were confined to geographic areas, see WOOD, supra note 28, at 379-89, while modern pluralistic pressure groups can be defined by common economic goals or demographic traits, as well as by geography. See generally Becker, supra note 31; Sunstein, supra note 31.

Other aspects of instruction are also reminiscent of modern pluralism. For instance, both systems downplay deliberation and the possibility of a better solution than can be provided by implementing unreviewed preferences. See Amar, supra, at 1059; Sunstein, supra note 31, at 1544-45; see also Wood, supra note 28, at 194-95 (noting the mounting criticism of instruction). Similarly, both systems ignore the possibility that constituent desires might change if ideas could be exchanged in a deliberative setting. Cf. Amar, supra note 31, at 1304 n.111 (asserting that low-cost exchange is available in legislatures). The fact that preferences may not be debated or filtered also means that bad preferences may be implemented, like a preference for slavery in the 1770s or discrimination in the 1990s. See Sunstein, supra note 31, at 1543-44. Finally, both systems tend to favor groups which can easily mobilize, regardless of the relative societal importance of their preferences. See Michael A. Fitts, The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process, 136 U. PA. L. REV. 1567, 1583 (1988).

42. Although it may be unclear exactly how many held this view, I will argue that the Federalists believed instruction to be a problem, and that the Constitution was structured to prevent it.

43. WOOD, supra note 28, at 380 (quoting Noah Webster, Government, AMERICAN MAGAZINE 205-07 (1878-88)).

44. Id. at 387 (citing Loose Thoughts on Government, in AMERICAN ARCHIVES 731 (Peter Force ed., 4th ed. 1837-46)).
C. The Rise of Deliberation as a Representative Principle

Although some people during and after the framing period continued to argue for demographic similarity and the use of instructions, the Constitution embodied a legislative philosophy that rejected these principles. One of the most fundamental concepts associated with representation during this period was deliberation, by which representatives arrived at legislative decisions through rational dialogue.

From an historical perspective, the role of deliberation in Congress was clarified even more in August 1789, when the House of Representatives debated a proposed amendment that would have made the instruction of congressmen an explicit constitutional right of the people. The amendment was soundly defeated, and the most powerful arguments in opposition focused on how instruction would destroy the important deliberative function of Congress.

45. See Kenyon, supra note 28, at liii.

46. Several members of the House in the First Congress argued for a constitutional amendment explicitly granting constituents the right to instruct representatives. Mr. Page argued, “Our Government is derived from the people, of consequence the people have a right to consult for the common good; but to what end will this be done, if they have not the power of instructing their representatives? Instruction and representation in a republic appear to me to be inseparably connected . . . .” 1 Annals of Cong. 762-63 (Joseph Gales ed., 1789).

47. Publius alludes to the importance of deliberation several times when discussing the mechanics of representation:

On a comparison of the different States together, we find a great dissimilarity in their laws, and in many other circumstances connected with the objects of federal legislation, with all of which the federal representatives ought to have some acquaintance. Whilst a few representatives, therefore, from each State may bring with them a due knowledge of their own State, every representative will have much information to acquire concerning all the other States.

The Federalist No. 57 (James Madison), supra note 10, at 348-49. This passage demonstrates the importance of deliberation and discussion in the education of representatives as to the circumstances in other states.

Publius also points out that “the natural limit of a republic is that distance from the center which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs.” The Federalist No. 14 (James Madison), supra note 10, at 100-01. Obviously, the only reason it is “necessary” for representatives to meet is for them to deliberate. If the legislative process were conducted by instruction, meeting would be unnecessary, because each district could just send a letter to the capital expressing its views on proposed laws.

Thomas Jefferson recognized the importance of independent, deliberative lawmaking in 1776. Regarding the creation of the Virginia State Senate, Thomas Jefferson stated, “I had two things in view: to get the wisest men chosen, and to make them perfectly independent when chosen.” 1 Papers of Thomas Jefferson 503 (Julian P. Boyd ed., 1950).

48. See 1 Annals of Cong., supra note 46, at 760-76.

49. The vote on this amendment in the House was 10 votes for and 41 against. Id. at 776.

50. Several statements of representatives in this debate are illuminating. Congressman Hartley stated:

It appears to my mind, that the principle of representation is distinct from an agency, which may require written instructions. The great end of meeting is to consult for the common good; but can the common good be discerned without the object is reflected and shown in every light. A local or partial view does not necessarily enable any man to comprehend it clearly; this can only result from an inspection into the
The insights into the Framers' views on deliberation help illustrate this famous passage from The Federalist No. 10:

The effect of [representation in a republic] is . . . to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.81

The Framers hoped to exchange self-interested, instruction based, parochial politics82 for reasoned decision-making, which would make use of wisdom and public virtue. Deliberation was closely associated with the idea of public virtue, which required representatives to sacrifice private and constituent agendas for the good of the whole.83 Deliberation and public virtue were the means by which the effective legislation envisioned by the Preamble could be attained.

aggregate . . . [p]erhaps a majority of the whole might not be instructed to agree to any one point, and is it thus the people of the United States propose to form a more perfect union, provide for the common defence, and promote the general welfare?

1 Annals of Congress, supra note 46, at 762.

Congressman Clymer stated:

[Instruction] is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments: they prevent men of abilities to the community that are in their power, destroying the object contemplated by establishing an efficient General Government, and rendering Congress a mere passive machine.

Id. at 763.

Congressman Sherman maintained:

[T]he words [of the amendment] are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet with others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him . . . . It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support.

Id. at 763-64.

Madison added, "I do not believe that the inhabitants of any district can speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people; hence the consequence that instructions are binding on the representative is of a doubtful, if not of a dangerous nature." Id. at 767. Interestingly, Madison indicated that freedom of speech and of the press would allow citizens to give their opinions freely, making the use of instructions unnecessary. Id.

51. The Federalist No. 10 (James Madison), supra note 10, at 82.

52. See generally id. (discussing the control of factions).

53. It is not coincidental that the statesmen of the late eighteenth century often linked deliberation with the good of the whole community. Representative Hartley, in the debate on the instruction amendment, implied that deliberation was fundamental to accomplish the goals of the Preamble, to "form a more perfect union, provide for the common defence, and promote the general welfare." 1 Annals of Cong., supra note 46, at 762. For further discussion on the role of public virtue in republican government, see Sunstein, supra note 31, at 1550, 1554-55.
Although the authors of the Constitution did not view Congress as a demographic mime of the electorate, they apparently believed that some similarity was necessary for legitimate representation. The constitutional provisions of frequent elections and residency requirements achieved this similarity. But theoretically, a representative's similarity to her constituents could hinder deliberative independence from parochial concerns. After all, a representative who was unduly attached to local interests would not be able to effectively consider the national interest.

The federalist role for legislative similarity, and the need for representative legitimacy, are partially revealed by the mechanics of deliberation itself: although not a predetermined decision-making formula, local experience and the opinions of constituents are a legitimate starting point for the deliberative process. Thus, a legislator is expected to be familiar with district circumstances—including those of political minorities—because he represents the entire district, not just the majority coalition that elected him.

D. Representative Legislation—The Role of Constitutions

In summary, the constitutional text and history teach that representation by Congress should be legitimate: its members should be elected by the people,

54. See Ackerman, supra note 7, at 1028.
55. See supra notes 10-11 and accompanying text; see also The Federalist No. 52 (James Madison), supra note 10, at 327 (“Frequent elections are unquestionably the only policy by which [the House's dependence on the people] can be effectually secured.”).
56. Perhaps Madison was referring to the chaos of parochial state legislatures in asking, “Does [the advantage of the Union over the States] consist in substitution of representatives whose enlightened views and virtuous sentiments render them superior to the local prejudices and to schemes of injustice?” The Federalist No. 10 (James Madison), supra note 10, at 83-84 (emphasis added).
57. The Federalist No. 56 (James Madison), supra note 10, at 348. Madison stated: The representatives of each State will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts, but will probably in all cases have been members, and may even at the very time be members, of the State legislature, where all the local information and interests of the State are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States.
Id. Constituent desires probably will not exist for every legislative issue. When they do exist, they should be used as part of the formula for making a decision. Under this system, a representative's actions will probably conform to her constituents' desires. When this is not the case, the representative should be able to offer a reasonable explanation such as lack of constituent information on the issue. See Hanna F. Pitkin, The Concept of Representation 209-40 (1967). Deliberation is the process by which rational explanations are formulated for legislative decisions.
58. “By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests.” The Federalist No. 10 (James Madison), supra note 10, at 83 (emphasis added).
59. Publius emphasized the importance of considering minority rights in despairing that “the public good is disregarded in the conflicts of rival parties, [and] measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” The Federalist No. 10 (James Madison), supra note 10, at 77.
meet residency requirements, and proportionally represent the people (or states in the case of the Senate). Furthermore, Congress should make effective law that embraces the national interest by legislating within a framework of legitimacy and deliberation.

Realizing the susceptibility of representative government to the influence of self-interested factions, the Framers sought to protect congressional legitimacy and effectiveness by inserting controls into the plan of government itself—the Constitution. Publius asserted in *The Federalist*:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

Among the Constitution's "effectual precautions for keeping them virtuous" were the requirements of frequent popular election, residency, and proportional representation discussed above. Publius also argued that the Constitution's jurisdiction over such a large republic would cause localized factions to cancel each other out. The separation of powers would also allow the very branches of the government to prevent each other from usurping power for selfish reasons. In theory, the resulting stalemate would force Congress into deliberative, effective lawmaking.

But suppose that at some future time in the Republic, the people discover that these controls are not enough to guarantee that representative legislation is both legitimate and effective. If the Constitution's purpose is to control representatives to ensure effective government envisioned in the Preamble, the example of America's Founding experience may imply a right and duty of the people to change constitutional controls when the old ones falter. Today, Congress has lost much of its representative legitimacy, and its legislation is ineffective. However, changing the constitutional controls of government can remedy these problems—by setting constitutional limits on congressional tenure.

II. MODERN CONGRESSIONAL MALFUNCTIONS

This section of the Article argues that the problems of congressional legitimacy and effectiveness are the result of institutional incentives that encourage members of Congress to engage in ineffective, factional lawmaking. In fact,
this section presents individual members of Congress as a collective faction with its own special interest: reelection.64

A. Effects of the Reelection Incentive

By being elected, modern congresspersons meet the formal requirements of popular authorization. Representatives also might argue that their electoral dependence implies a duty to do what the people "want."65 Interestingly, however, much of what modern constituents seem to "want" has no immediate connection to what we normally think of as legislation. For example, commentators have argued that representatives' desire to be reelected encourages them to do casework66 and advertising,67 which arguably have little to do with legislation.68 The reelection incentive also encourages congresspersons to do things we typically think of as more traditional legislative activities, like pork-barreling69 and influence peddling.70 While congresspersons reply that these activi-


65. Hanna Pitkin argues that representation does not imply that a representative should automatically and mechanically do what constituents "want." See Pitkin, supra note 57, at 214-15. Rather, a representative should base legislative decisions on constituents' best overall interests, which the representative may know because she has more information (perhaps obtained through deliberation). Constituent wants and interests will usually coincide, but when they do not, a representative should be free to make a choice based on the best information about the people's interests. Id. at 217. A choice that goes against constituent wishes requires a reasonable explanation, but should not be prohibited. Id.

66. Casework, or constituent service, is a simplified term for the bureaucratic "unsticking" activities that members of Congress perform for constituents (e.g., procuring delayed social security checks or tax refunds). Fiorina, supra note 64, at 42-45.

67. Formal and informal advertising can include "frequent visits to the constituency, nonpolitical speeches to home audiences, the sending out of infant care booklets and letters of condolence and congratulation." Mayhew, supra note 64, at 49-52. Incumbents also have frequent access to broadcast and print media, including (for some) regular television and radio programs. Id.; Fiorina, supra note 64, at 19 (noting how incumbents use the growing pool of media sources to lengthen their stay in office).

68. Admittedly, dialogue between representatives and constituents concerning policy could be characterized as "advertising," but it is also clear that much advertising has nothing to do with policy-making.

69. Pork-barreling is the procurement of a high-profile federal project for which a congressperson can claim credit in the home district. See Fiorina, supra note 64, at 41-42.

70. Influence peddling is where a congressperson trades influence (including constituent service) or policy support to get campaign contributions or some other reelection support. This has been facilitated by the decentralization of power in Congress. See Fiorina, supra note 64, at 62-70; Mayhew, supra note 64, at 92-97. Influence peddling often results in campaign support from sources outside the congressperson's home district. Mayhew, supra note 64, at 57.

The well-publicized case of the "Keating Five" senators is an example of influence peddling that included the "sale" of "constituent service." In the Keating Five case, Charles Keating made substantial campaign contributions to five senators, four of whom represented other states, who then influenced a regulatory agency on behalf of Keating's savings and loan institution, which was under investigation by the agency. John R. Cranford, Keating Hearings Take Senate Into Thick
ties strengthen their ties with the people, the following argument shows that pork-barreling and influence peddling seriously frustrate legislative legitimacy and effectiveness.

1. Impact on Representative Legitimacy

Pork-barreling allows a disproportionate allocation of federal projects to the districts of the more senior members of Congress. This allocation undermines proportional representation, as it makes the political voices of similarly sized groups of citizens radically different. The fact that senior, influential congresspersons may procure bigger slices of the pie does not, by itself, prove the existence of unequal distribution of influence or federal funding. In theory, every district will have a senior representative once in a while, so pork-barreling should balance out in the long run. Yet the fact that the Speaker of the House hailed from either Texas or Massachusetts for a period spanning almost half of the last century convincingly undercuts the “balance over time” argument.71

Advertising, much of which is done at government expense,72 franking,73 staff privileges, trip allowances, and office resources give incumbents a tremendous resource lead in elections.74 To the extent that they are elected, incumbents do get their authority from the voters—but with a big hand from the national treasury.76 Perhaps incumbents deserve this advantage because of their expertise and the efficient way they manage the business of lawmaking. However, one could maintain that such a significant resource pool damages the notion that an incumbent’s authority is firmly based on popular sovereignty.78

Another result of the effective77 reelection efforts of congresspersons is long
Arguably, long tenure contradicts Article I residency requirements for members of Congress, because incumbents do not really come from the states and districts they represent, but rather from the District of Columbia.

Thus, long-term members of Congress may lose touch with the experiences and the problems of people at home. To the extent that these local experiences are relevant to deliberation, long tenure also damages legislative effectiveness. Long tenure also prevents the participation of many competent and energetic (including ethnically diverse) citizens in the legislative process, preserving Congress as the quintessential "old boys' club."

2. Influences on Legislative Effectiveness

a. General effects of the reelection incentive

Despite whatever value excessive casework and advertising may have for cultivating connections between Congress and the people, these activities arguably waste time and money that could be used for research and discussion of policy issues. These extra-legislative activities may also divert voters' attention from representatives' substantive positions on policy. Thus, congresspersons may gain even more flexibility to sell support for specific programs to interest groups in exchange for campaign money.

Furthermore, influence peddling exacerbates political and economic disparities between interest groups. It is obviously more difficult for poorer (and often less educated) groups to mobilize lobbying efforts, but it is far from clear that their needs and preferences are less important than the preferences of more affluent and influential groups. Although not provable by empirical data, it is at least more likely that needy, immobilized groups will receive more benefits from a Congress that emphasizes reasoned discussion and public virtue over reelection strategies.

b. More specific impacts on effectiveness

One specific example of how the reelection incentive hinders lawmaking is seen in the field of federal tax law. Most people have recognized for some time that much of the complexity (and perceived unfairness) of the Internal Revenue Code is caused by the lobbying of special interests to get self-serving pro-

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78. House members leaving office between 1975 and 1985 had average tenures of nearly 12 years. Mark Tushnet et al., Judicial Review and Congressional Tenure: An Observation, 66 Tex. L. Rev. 967, 976 (1988). Average House tenure in the 100th Congress was 10.3 years. Id.

79. U.S. CONST. art I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

80. See Amar, supra note 41, at 1080-81 (noting that congresspersons spend most of their time together "in a one industry town of lawyers and power brokers—a lifestyle hardly 'representative' of the average citizen").

81. Fiorina, supra note 64, at 41 (arguing that lawmaking is Congress' primary responsibility); see supra notes 15-20 and accompanying text (same).

82. Voters may be more aware of congressional voting on large social programs, like social security, which attract more constituent attention. However, most voters are relatively ignorant of roll-call voting records. See Tushnet et al., supra note 78, at 978.
visions inserted into the Code. This lobbying succeeds because numerous congressional committee members with influence over tax legislation, who are also anxious to be reelected, push the right legislative buttons for special interests, who reciprocate by making campaign contributions. The end result is a federal tax policy that is overly complicated by special rates, exemptions, and deductions for numerous special interests. But note that special interests, being self-interested by definition, cannot really be blamed for the problem. Nor can Congress fairly shoulder all of the blame. The main cause of our convoluted tax code is the reelection incentive, which robs legislators of the deliberative will to make unbiased decisions about proposed tax rules.

The reelection incentive also has severe implications for overspending. Since no single congressperson can be blamed for bad fiscal policy, each member has an incentive to maximize her own short term career goals and reelection strategies by doing two things: (1) procuring government projects for her home district; and (2) supporting spending programs for groups whose interests are affected by her committees. Representatives also seem to have a more general tendency to resist tax increases while approving more spending. In the end, the present system favors the overlegislation of small spending programs and federal projects for which legislators can take credit electorally. Unfortunately, the system hinders the resolution of critical national issues as large and important to the "general Welfare" as the budget deficit.


84. While acknowledging that part of the complexity of the tax law may be caused by special interests, one author has pointed out that congressional efforts to reform the Code and "strengthen the IRS against the abuse of exempt entities" has actually led to greater complexity of the Code. Zelinsky, supra note 83, at 40-41. Thus, Zelinsky would probably argue that eliminating the reelection incentive would not eliminate all complexity. However, a truly deliberative Congress might be able to simplify the Code to the point that complicated enforcement provisions would also be unnecessary.

85. See generally E. Donald Elliott, Constitutional Conventions and the Deficit, 1985 DUKE L.J. 1077 (1985) (arguing that the popular movement to call a constitutional convention to consider possible amendments to control federal budget deficits is "wise and enlightened").

86. Fiorina, supra note 64, at 41, 73, 82.

87. One author goes further, arguing that members of Congress are socialized into approving the individual appropriation for almost any given program. He also points out that while the reelection incentive may be the major socializing mechanism, this "brainwashing" is so thorough that even retiring legislators continue to vote for almost any spending package. James L. Payne, The Congressional Brainwashing Machine, 100 THE PUBLIC INTEREST 3 (1990).

88. See id. at 5 (noting Congress' tendency toward spending); see also Fiorina, supra note 64, at 73 (discussing ability of individual legislators to spend while avoiding responsibility for overall budget problems); Mayhew, supra note 64, at 128, 144-45 (same).
Congress' glaring inability to work together to solve a snowballing national problem—the budget deficit—was never more evident than during the budget fiasco of October 1990. This experience demonstrates two lessons. First, while everyone knows that the budget is sorely overburdened with hundreds of spending programs of varying importance, individual representatives are completely unwilling to examine which or how many of these programs must be jettisoned. The reason is clear. Some group, somewhere, is counting on each of these programs. And several members of Congress probably used their influence to help each group get its program. In turn, these legislators were compensated electorally. Representatives are simply unwilling to critically examine the programs upon which they depend to get reelected. They also hesitate to examine other legislators' programs, because "what goes around comes around"; that is, each individual congressperson must cultivate the goodwill and support of other members to get her particular programs. Thus, the reelection incentive ultimately thwarts responsible fiscal policy.

A second lesson learned from the 1990 budget fiasco may be even more serious. Apparently, members of Congress as a collective body are willing to protect their reelection empires by deceiving the general public about how bad things really are.

B. Instruction Revisited?

An eighteenth-century commentator complained that state legislatures were composed of "plain, illiterate husbandmen, whose views seldom extended farther than to the regulation of highways, the destruction of wolves, wild cats, and foxes, and the advancement of the other little interests of the particular counties, which they were chosen to represent." Although upon first impres-
It may seem absurd to compare modern representatives and senators to “plain, illiterate husbandmen,” the analogy actually is quite good. The only difference is that the “wolves” and “wild cats” that concern modern congresspersons are a plethora of special interests,\textsuperscript{94} including their own interest in reelection. Thus, just as the Framers sought to create a Congress free from the destructive influences of parochialism, we might well consider restructuring Congress to address the problem of the reelection incentive.

III. Improving the Legitimacy and Effectiveness of Congress

Once one recognizes that the reelection incentive, at least in its modern context, has a profoundly negative influence on representative legislation as envisioned by the Constitution, the compelling conclusion is that something must be done about it. Assuming that electorally motivated congresspersons can be collectively thought of as something like a Madisonian faction, it is interesting to note that “[t]here are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”\textsuperscript{95} Two possible strategies to combat the “effects” of reelection desire are campaign finance regulation and judicial remedies.

A. Campaign Finance Regulation

Some have offered strict limits on campaign spending and contributions as a way to lessen the incumbency advantage and restore electoral legitimacy.\textsuperscript{96} By reducing the incumbents' dependence on contributions from special interests, this regulation would theoretically discourage incumbents from peddling influence or policy support for campaign funds. One attempt to remedy the problem has been to set limits on the amount a single contributor may donate to one candidate.\textsuperscript{97}

But special interest groups can circumvent contribution limits for individual donors by giving to political action committees (PACs), which then direct funds to designated incumbents. PACs are one of the major reasons why

\begin{itemize}
\item 1829).
\item 94. In commenting on the inability of party leaders to impose discipline to support national party policy goals, David Obey, chairman of the Democratic Study Group, stated, “Members won't tolerate discipline. Campaign funding is dispersed and decentralized. We're being eaten alive by the single-issue groups.” Otto Friedrich, To Reform the System; Needed: Major Changes in Government—but Not Constitutional Surgery, \textit{Time}, Feb. 23, 1981, at 32 (emphasis added).
\item 95. \textit{The Federalist No. 10} (James Madison), \textit{supra} note 10, at 78.
\end{itemize}
House incumbents in 1990 were able to raise an average of $385,000 to their challengers’ $83,000, an advantage of more than 4.5-to-1. Thus, meaningful campaign finance laws should include a way to either eliminate PACs or to regulate them closely. But just as PACs represent a way to get around limits on individual contributions to incumbents (who are more influential than the challengers, and thus more attractive targets of political “bribery”), clever ways may also exist to circumvent the elimination or regulation of PACs. For example, wealthy special interests may try to funnel large amounts of money to incumbents by dispersing it among many small “facilitating” contributors, who could then donate funds individually to avoid detection or regulation. In addition, even without any PACs, congresspersons may feel obligated to donors who contribute large amounts of money that are nevertheless within the limit. Thus, it is hard to imagine extinguishing incumbents’ desire to cater to special interests while ignoring overall problems like the budget.

Even if PACs were eliminated and strict contribution limits and total expenditure caps were enforced, the electoral incentive would still induce incumbents to do casework, informal advertising, and pork-barreling, which hinder well reasoned policy-making. If there are difficulties enforcing these campaign finance regulations, incumbents will come out ahead due to their greater ability to raise money in the first place. Incumbents also retain their office resources, staff privileges, and media access. With these built-in advantages, caps on total campaign spending may actually hurt, and not help, challengers as challengers will be unable to spend the extra $500,000 to make up the gap. Additionally, incumbents may still avoid necessary spending cuts and

98. If Money Talks, Mr. Smith Won’t Go to Washington, 48 CONG. Q. Wkly. REP. 3756 (1990). Even more noteworthy is the fact that House incumbents raised $74.7 million in PAC funds compared to only $4.7 million for challengers, an advantage of 16-to-1. Id. In the Senate, incumbents in 1990 out-raised challengers by an average of $3.3 million to $1.3 million. The total PAC advantage for incumbent senators was $26 million to $6.8 million. Id.

99. PAC contributions already are limited to $5000 per election. Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(2). But a technique called “bundling,” an inventive evasion of this regulation, is already widely practiced, and was used extensively in the Keating scandal. With bundling, “someone raises many individual contributions [including PAC contributions] and hands them over in a lump sum designed to impress the politician.” Alston, Image Problems, supra note 96, at 277. Bundling is just one example of how loopholes in campaign finance laws can be exploited to make regulation futile. This begs the question of how new campaign finance regulation could make a significant difference.

100. See supra Part II.A (discussing problems with these activities).

101. As mentioned above, supra notes 96-97, enforcement problems will favor incumbents because they are more influential than challengers, who have relatively little political clout. Thus, the presence of loopholes in campaign finance laws will mean more money for incumbents. Incumbents also have resource and visibility advantages over challengers to reach out to broad constituencies to get more contributions from small donors. For example, Representative Stephen Solarz, chairman of the House Subcommittee on Asian and Pacific Affairs, has amassed an enormous campaign war chest with donations from many small contributors, almost all of whom are Asian-Americans living outside his Brooklyn, New York district. Chuck Alston, Solarz Looks Abroad to Find Election Cash at Home, 47 CONG. Q. Wkly. REP. 501 (1989).

102. A 1975 estimate valued an incumbent’s office resources, staff, and advertising advantages
tax increases for fear of offending revenue-conscious voters.

Another approach might be setting a cap on total campaign expenditures, or requiring that campaigns be financed entirely with public funds. But the Supreme Court held in *Buckley v. Valeo* that limiting the use of personal funds and setting expenditure caps violate the First Amendment's guarantee of free speech.\(^3\) Thus, enacting these types of controls will require the Court to rethink its position in *Buckley* or require a constitutional amendment.\(^0\) Finally, one must remember in any discussion of campaign finance regulation that Congress is the body that must promulgate these reforms. Unfortunately, members of Congress have strong incentives to leave loopholes in the system through which they may continue to draw the resources they need to remain entrenched on the Hill.

**B. Judicial Remedies**

Traditional judicial remedies to cure pluralistic malfunctions that threaten minority interests have included: (a) applying process-based analysis;\(^108\) (b) examining the fairness of election laws;\(^106\) and (c) ordering redistricting plans.\(^107\) While these may have worked in the past, courts presently are unsuited to remedy\(^108\) substantial deficiencies like "bad" fiscal policy.\(^109\) This is

in a Congressional campaign at $500,000. ALEXANDER, *supra* note 74, at 55. When this amount is added to the "official" fundraising figure of $395,000 for House incumbents in 1990, the "true" incumbency advantage in the House is really $885,000 versus $83,300, a lead over challengers of more than 10-to-1. See *supra* note 98 and accompanying text (noting how PACs create a fundraising advantage of 4.5-to-1 in favor of incumbents).

103. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the plaintiff challenged the constitutionality of several amendments to the 1971 Federal Election Campaign Act. These amendments (a) limited the political contributions an individual or group could give to a federal candidate; (b) restricted the general election campaign expenditures each candidate could make; and (c) required Political Action Committees to keep detailed records of any contribution or expenditure which exceeded $10 dollars. *Id.* at 15-28. The United States Supreme Court found the record-keeping provisions to be constitutional, and the campaign expenditure and contribution provisions to be unconstitutional. *Id.* at 54, 67, 78. The Court reasoned that while the government had substantial interests in informing the electorate and preventing the corruption of the political process, *Id.* at 67, 78, the expenditure ceilings on individuals and candidates violated First Amendment rights, *id.* at 39. The Court further found that the ceilings "placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression." *Id.* at 54.

104. Sunstein has argued that a "republican" approach to the First Amendment would result in greater deference to these types of campaign finance laws. Sunstein, *supra* note 31, at 1576-77.


107. *Id.*

108. See, *e.g.*, Brilmayer, *supra* note 105 (criticizing effectiveness of process-based protection...
partly because judicial inquiries normally are limited to narrowly drawn facts
for the resolution of specific disputes. Thus, the only benefactors of judicial
intervention are specific litigants, not the broad range of groups whose inter-
ests may be slighted by the current system. 110

Although Publius concluded in The Federalist No. 10 that factions were
best controlled by regulating their effects, perhaps reelection-motivated con-
gresspersons can be dealt with by removing the cause of "bad" behavior. Since
the cause of this behavior is the desire to be reelected, one simple solution may
be to eliminate reelection. Although a constitutional amendment limiting con-
gresspersons to one term in each house may seem like a drastic measure, it is
the best way to improve the legitimacy and effectiveness of representative leg-
islation mandated by the Constitution. The balance of this Article will argue
that one-term tenures are both reasonable and workable.

IV. HISTORICAL AND CONTEMPORARY ARGUMENTS FOR LIMITING TENURE

The idea of tenure limits for legislators is not new. This section will review
antifederalist opposition to the absence of tenure limits in the Federal Consti-
tution. A brief survey and analysis of some more recent proposals for congres-
sional term limits will follow.

A. Eighteenth-Century Thought on "Rotation"

Mechanically limited legislative (and executive) tenure, otherwise known as
"rotation," dates back to the late eighteenth century when the drafters first
began to write state constitutions. The abandonment of term limits in the Fed-
eral Constitution surprised many people who had earlier attached great impor-
tance to rotation as a primary principle of republican government. 111

Advocates of rotation viewed the system as a way to maintain legislative
similarity and proximity because newly elected representatives would be more
likely to share the concerns and preferences of the people. Rotation also would
allow many people to participate as actual legislators. This "hat passing" pro-
vided first-hand experience with the reins of government. Gilbert Livingston, a
delegate at the New York convention, asserted that congresspersons "should
not only return, and be obliged to live with the people, but return to their
former rank of citizenship." 112 George Mason, Virginia Governor and delegate

under Carolene Products); Schuck, supra note 106 (criticizing judicial intervention in politics,
particularly partisan politics).

109. See Amar, supra note 31, at 1285 n.9.
110. See id. at 1285 n.12.
111. Thomas Jefferson stated, "[Another] feature I dislike, and strongly dislike, is the abandon-
ment, in every instance, of the principle of rotation in office . . ." Thomas Jefferson, Letter From
Jefferson to Madison (Dec. 20, 1787), in 2 THE WRITINGS OF THOMAS JEFFERSON 330, 330 (H. A.
112. KENYON, supra note 28, at 391 (quoting Gilbert Livingston). Antifederalist penman
"Montezuma," writing sarcastically as if a proponent of the Constitution, "exulted" that the ab-
sence of rotation would prevent "the representatives from mixing with the lower class," thus pre-
to the Philadelphia Convention, remarked that "[n]othing is so essential to the preservation of a republican government as a periodical rotation," presumably referring to both the participatory benefits and legislative controls afforded by limited tenure.

A deep mistrust of power underlay the antifederalist concern about the absence of rotation from the Constitution. They felt that "the predominant thirst of dominion . . . has invariably and uniformly prompted rulers to abuse their power." Thus, during the state ratifying conventions, the Antifederalists predicted two ill effects. First, incumbents would abuse congressional perquisites to circumvent free elections and ensure life tenure. Then, congresspersons would become a political and social aristocracy with little in common with the people.

Additionally, the Antifederalists viewed the Constitution's legislative controls of residency requirements and frequent elections as grossly inadequate weapons for taming the national rulers' lust for power. Patrick Henry contended, "The only semblance of a check is the negative power of not re-electing them. This, sir, is but a feeble barrier, when their personal interest, their ambition and avarice, come to be put in contrast with the happiness of the people."

In contrast, the Federalists argued that the regular election of the House and Senate would be sufficient to restrict tenure "for a limited period," even if tenure were not explicitly set at "a period of years" as it was in many state constitutions. In response to the antifederalist charge that representatives would continually be reelected, much like the delegates to Congress under the Articles of Confederation, Publius responded, "They [meaning the delegates under the Articles] are elected annually, it is true; but their re-election is considered by the legislative assemblies almost as a matter of course. The election serving the rulers' power while limiting participation of the lower classes. Id. at 62. Montezuma was an unidentified author of "strong feelings [with] much talent for inflammatory propaganda" during the ratification debates. Id.


114. Id. at 436 (statement of Patrick Henry).

115. It was believed that Congress' power would result in the "security of their reelection . . . amount[ing] nearly to an appointment for life." See KENYON, supra note 28, at 390-91 (quoting Gilbert Livingston at the New York ratifying convention, June 24, 1788); see also id. at 396 (noting the fear that the Senate would become a body of permanent representatives).

116. Antifederalist writers "Centinel" and "John DeWitt" argued that the reelection of powerful rulers would create an aristocracy. Id. at 89.

117. ELLIOT'S DEBATES, supra note 113, at 167 (quoting Patrick Henry, June 9, 1788).

118. THE FEDERALIST No. 39 (James Madison), supra note 10 at 241. Interestingly, Publius argued here that being authorized by the people and serving "for a limited period" were defining characteristics of representatives in a republic. Id.; see also THE FEDERALIST No. 49 (James Madison), supra note 10, at 316 ("The members of the legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections . . . embrace a great proportion of . . . society.").
of the representatives by the people would not be governed by the same principle." Thus, the Federalists did not seem to think that long tenure would be the rule under the new Constitution.

Placed in historical context, the Framers' rejection of tenure limits may have been based partially on a fear that rotating legislators would not have sufficient deliberative independence from the people, and that members of Congress might be more likely to be instructed by local interests. It is ironic that modern "instruction" of Congress by pressure from interest groups stems from the existence of reelection (or more precisely, the desire to be reelected), rather than its absence. Given the federalist emphasis on deliberative freedom from factions, one must speculate that the Framers may have considered tenure limits had they faced the problems with the reelection incentive prevalent today.

If, on the other hand, the Federalist rejection of tenure limits was related to an elitist skepticism about popular participation in government, the Antifederalists may be teaching a different republican heritage. Antifederalist literature on rotation emphasizes that widespread citizen participation is an integral part of effective and legitimate representation.

B. Recently Proposed Limits on Congressional Tenure

Since the First Congress, there have been a number of proposals in Congress to limit tenure, but more than three quarters of these have come since 1970. Most of the proposed amendments within the last fifteen years came during the late 1970s and then again in the late 1980s and 1990s. These

119. THE FEDERALIST NO. 53 (James Madison), supra note 10, at 335 (emphasis added).
120. Charles Beard argued, for example, that the framers and ratifiers of the Constitution were largely men who were creditors and had extensive property interests which they hoped to protect by the adoption of a new government. Thus, they had an interest in preventing the people at large—debtors and lessees—from participating in the ratification process. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1941). Commenting on the participation of the people in the ratification process, Beard concluded:

[T]he disfranchisement of the masses through property qualifications and ignorance and apathy contributed largely to the facility with which the personality-interest representatives carried the day. The latter were alert everywhere, for they knew, not as a matter of theory, but as a practical matter of dollars and cents, the value of the new Constitution.

Id. at 251.
121. Interestingly, despite the lack of tenure limits, a populist belief in participative lawmaking resulted in relatively short average tenure for congressmen almost until the twentieth century. See generally Robert Struble Jr., House Turnover and the Principle of Rotation, 94 Pol. Sci. Q. 649 (1979-80) (analyzing the principle of rotation through a statistical breakdown of House of Representative turners from 1824 to 1976). Thus, elements of the antifederalist philosophy seem to have been part of the American political psyche for some time after the Constitution was ratified.
123. See id. at 15. Most of the proposed amendments at this time were limits of 12 years or more for both the House and Senate. A few proposals included provisions for lengthening the
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proposals suggest multi-term limits of from two to nine terms for senators and representatives, while limiting total tenure to anywhere from about nine to eighteen years. None of these proposals, of course, has ever come to a full vote of the House or Senate for formal proposal as a constitutional amendment, and none has suggested a one-term limit for all members.

In predicting how these proposed amendments might affect congressional legitimacy and effectiveness, one is struck by the fact that the average tenure limit proposed by these amendments is about twelve years, which is close to the current average tenure of current members of Congress. Of course, average tenure would probably decrease under a twelve-year limit because there would be no long (meaning over twelve-year) tenures to factor into the average. But it will still be possible for a member of Congress to spend twelve years in Washington as a representative (and perhaps twelve more as a senator under some proposals) despite damage to representative legitimacy caused by a lack of real life experience in the district. On the positive side, these proposals would equalize seniority, thus encouraging the sharing of congressional leadership positions—and political power—among districts and states. Over time, this arrangement would strengthen proportional representation in Congress.

However, these proposals fail to fully comprehend the destructive influence of the reelection incentive. There is no good reason to expect members of Congress to do less to be reelected (within these multi-term limits) than they do now. This is especially true when former representatives may run for the Senate and vice versa. Given that more than half of all members of the House in the 100th Congress had tenures of between three and six terms, and assuming they engaged in average amounts of electorally motivated activities to be reelected from two to five times, why would they act any differently when

House term to three or four years. See infra note 124 (listing and describing the various proposed amendments).


125. See John Biskupic, Congress Snaps to Attention Over New Flag Proposal, 48 CONG. Q. WKLY. REP. 1877, 1880 (1990) (listing all proposed constitutional amendments that have come to a vote in one or both chambers of Congress since 1965).

126. See supra notes 123-24 (discussing proposals to limit congressional tenure before Congress in the late 1970s, late 1980s, and 1990s).

127. See Tushnet et al., supra note 78, at 981 (noting that the average tenure of the 100th Congress is 10.3 years).

128. See supra Part II (discussing the effects of the reelection incentive).

129. Tushnet et al., supra note 78, at 981.
limited to twelve total years in the House, followed by a possible twelve years in the Senate? This is very similar to what members of Congress do now anyway. Thus, it remains doubtful that any significant improvements in congressional legitimacy or effectiveness would result from a multi-term limit like those mentioned here.

The following Part argues that limiting members of Congress to one term in each House is a workable solution that avoids many of the problems described above, including those that would remain under a multi-term limit.

V. A Proposal For Limiting Congressional Tenure To One Term

A. Outline of Proposed Constitutional Changes

Under the proposed plan, members of the House of Representatives will be limited to a single term of four years. Terms will be staggered so that one half of the total House membership will be elected every two years (a 50% turnover every two years; a 100% turnover every four years). Senators will be limited to one term of eight years. The Senate will retain a staggered election pattern, so that one-fourth of the whole Senate will be elected every two years (a 25% turnover every two years; a 100% turnover every eight years).

Although no individual may serve more than one term in each House, former representatives and senators will be eligible to run for the other House after waiting at least four years from the expiration of their first term.

B. An Institutional Effect: The Enhanced Role of Parties

As an immediate effect of a one-term limit, one might expect legislative power to be more equally distributed—in terms of proportional equality. In other words, without the influence of congressional seniority to skew the balance of political power, each district would have a relatively equal voice in legislation. But what then? If every member of Congress acted as if she represented one little faction, there might be a danger that absolutely nothing will be accomplished. Unaccountable one-time congresspersons could use their

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130. See supra Part II (noting how reelection activities harm republican lawmaking under the current theory). National substantive lawmaking would probably remain ineffective because of members' incentives to work in particularized benefits. See Tushnet et al., supra note 78, at 981.

For other sources discussing limits on congressional tenure, see An Old Issue: Limited Number of Terms, 100th Cong., 2d Sess., 134 Cong. Rec. H9464 (OCT. 4, 1988); American Enterprises Institute, Legislative Analysis, 96th Cong., 1st Sess., Limiting Presidential and Congressional Terms (1979) (analyzing historical background and current proposals for limiting presidential and congressional terms); Hendrik Hertzberg, Twelve is Enough: A Simple Cure for Chronic Incumbency: Limiting Congressional Terms, New Republic, May 22, 1990, at 22.

131. While this Article is not first in suggesting a one-term limit, no serious constitutional analysis of such a proposal has been undertaken previously. See generally Jack Douglas, Reining in the Imperial Congress, Reason, Aug. 1984, at 31 (arguing for congressional term limits); Elliott, supra note 85 (mentioning one 12-year term for the Senate as a possible budgetary solution); Theodore H. Smith, Entrenchment—A Budget Problem, Defense Electronics, June 1989, at 31 (condemning congressional activities and briefly mentioning a one-term limit).
power to secure whatever political or social benefits are available “to make hay while the sun shines.”

On the other hand, public-spirited citizens might fill the ranks of Congress, not for the cynical purpose of building electorally dependent careers like many of the current members of Congress, but rather to apply their virtue and electoral independence to make deliberative, public-regarding law to benefit the whole. However, common sense suggests that it is naive to think most members of Congress will set aside personal ambitions and self-interest to concentrate on solving national problems.

If self-interested members rule the day, they probably will not be able to build sufficiently cohesive coalitions to solve complex problems like the budget deficit. Individual members may be pulled in so many directions that little will be accomplished. In fact, a one-term limit might actually exacerbate exactly what it seeks to eliminate: bare, self-interested factionalism.

However, another factor suggests a more positive outcome: political parties. Political parties by their nature must attract broad bases of support to gain control of institutions like Congress and the Presidency. Thus, a one-term limit coupled with the existence of a stable party system might lead to a different scenario than those posed above. First, individuals and interest groups (and their respective candidates) will begin to choose party sides to take advantage of the mobilizing abilities of the party machines. Eventually, all interest groups and other politically active players will be forced to seek party support to avoid the disadvantage of running against candidates affiliated with a party. One advantage of parties is that they formulate unified platforms that address both national and local interests.

One might speculate that once elected, it may be difficult to ensure that “unaccountable” one-term legislators follow the party platform. But in fact, each member would have strong incentives to follow the platform in exchange for party support of that member’s constituent or special interests. Additionally, first-time congresspersons will have incentives created by a desire for future party support in running for the other House.

This desire to serve again in Congress will not operate like the current re-election incentive. Under the current system, incumbents do not need to follow the party line to get reelected, because they can get plenty of donations by

132. See Fitts, supra note 41, at 1604.
133. One could argue that most interest groups have already chosen sides under the present system (e.g., labor is democratic, business is republican). But despite superficial allegiances, interest groups can readily obtain desired outcomes from the appropriate individual congressperson, regardless of party. See Fiorina, supra note 64, at 75.
134. This support could include group access to the party platform, or party-supported nomination of group members to run for office.
135. It seems probable under this proposal that the Senate will be filled mostly with former members of the House. Thus, the Senate will be a relatively experienced legislative body, with the most senior members having as much as eight years of experience in Congress. Of course, most lawmakers will also have experience in state legislatures, and some will probably be former governors.
servicing special interest groups. In addition, current incumbents gain electoral support in the home district through casework, advertising, and pork-barreling. With all of these reelection tools, incumbents can be party members in name only, deserting the party on even the most important platform issues.

Although "reelection" is possible under the current proposal, a congressperson must wait four years before running for the other House. Assuming that constituents and interest groups will have relatively short political memories, members of Congress will not benefit electorally from traditional reelection-related activities. Even if they do get some future support from interest groups or constituents with good memories, this will be small and attenuated compared to the party support they could procure by working together to help the party solve national problems. Thus, the term limits proposed here will probably lead to a stronger party system that will in turn solidify policy opinion through the party platforms.136

C. Effects of a One-Term Limit on Legitimacy

A one-term limit will greatly improve congressional legitimacy. First, legislators for any given term will always come directly from among the people of their district or state, strictly satisfying the residency requirements of Article I,137 and bringing fresh experience to mix into the deliberative recipe.

Next, the incumbency advantage in elections will disappear. Although former senators or representatives will often be matched against newcomers, they will have been out of service for at least one intervening election, preventing the use of congressional perquisites from overemphasizing the true value of experience. Participation in Congress will necessarily increase, affording service opportunities to many more people. Although pork-barreling will probably continue, the rewards will be evenly dispersed because of the parity of seniority among districts.138

Term limits will enhance widespread popular participation in government, which was stressed by the Antifederalists as essential for representative legitimacy. This is because a greater number of people will take part in the political process generally, due to a greater popular affinity for Congress. Many more people probably will know personally those who have either run for or served in Congress at one time or another.139 Further, at election time people will be

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136. In some ways, a government with a limit on congressional tenure will resemble the parliamentary system, in which voters base electoral decisions upon a party's national platform, and the success of that party at solving national problems.

137. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art I, § 3, cl. 3.

138. This enhances representation. See U.S. CONST. art. I, § 2, cl. 3. This would be true even for "incumbent" senators who have already served as representatives, because seniority will not transfer from one House to the other.

139. Madison argued that House members ought to be acquainted with the people in general. See The Federalist No. 49 (James Madison), supra note 10, at 316. Although it is an unverifiable empirical claim that more people will know current and former House members, logic argues that a much wider array of people (with their proportionately diverse family and social contacts) will at least consider running for Congress. It is logical to assume that a greater number of people
forced to focus more on issues than images, as the cast of candidates will be in constant flux. Voters will have to evaluate candidates' policy proposals rather than automatically voting for an incumbent.

Further, many more and different people will have direct access to the legislative process by actually serving or at least running for Congress. If public financing of congressional campaigns were adopted along with term limits, qualified candidates from socioeconomically depressed backgrounds would have greater opportunities to run successfully.

From the perspective of participation, a rotating legislature has much in common with the perfect theoretical jury. Interestingly, "pure" juries that are chosen by lot are good models of representation. They are composed of a cross-section of political equals who serve for a limited time and engage in deliberative decision-making on specific issues, all with an eye toward acting in the common good of the community.

Alexis de Tocqueville argued that jury service is "highly beneficial to those who judge [lawsuits]," in that people are educated in the law, and it is demystified for them. He also believed that juries strengthened the character of the people, because they "communicate the spirit of the judges to the mind of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right." Thus, the jury teaches people to take responsibility in dealing with real societal problems. Similarly, a rotating Congress would be both an educator and an instiller of societal values, because many more and different people would have the chance to serve or have contact with those who had served. It might also help us as a nation to take more responsibility for societal problems.

D. More Effective Legislation

1. Effects Independent of Parties

Under the one-term proposal, politicians will save both time and money, because there will be no incentive to do excessive casework and advertising. Some may argue that this will lead to too little emphasis on these services. However, personal and residential ties to the district will encourage members of Congress to be attentive to constituents. Furthermore, information dis-
semination will continue through the media, but in the form of useful news rather than campaign propaganda. If the loss of casework is still a concern, states or districts could set up ombudsman offices with connections to Congress and the federal bureaucracy. Term limits also will give legislators the electoral freedom to deliberate and think about their votes and the use of their political influence, which will lead to more principled decision-making than under the current system, which encourages influence peddling, and even the “selling” of constituent service to fill campaign coffers.

2. Greater Effectiveness With Parties

To the extent that parties are strengthened, the one-term limit will allow Congress to effectively tackle broad, national issues, like the budget deficit and poverty. This is because political parties, unlike individual politicians, will

Madison stated:

The members of the legislative department... are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.

Id.

146. The franking privilege also will still exist, but could perhaps be used to communicate more substantive policy information rather than image-building campaign fluff.

A related problem that may arise with term limits may be the incentive of sitting members of Congress to advertise on behalf potential party successors. Although the First Amendment guarantees the right of incumbents to endorse candidates, Buckley v. Valeo, 424 U.S. 1, 143 (1976), the rules of ethics and conduct of both the House and the Senate can be read to prohibit the use of congressional offices and staff in support of political candidates. See Manual and Rules of House of Representatives Rule XLV, at 679-80 (1982); Senate Manual, Standing Rules of the Senate Rule 38, at 68-69 (1979). Both House Rule XLV and Senate Rule 38 prohibit members from maintaining or using “ unofficial office accounts,” proceeds from which are used to defray unreimbursed office expenses. This means that members of Congress may not use their offices for unofficial purposes (i.e., campaigning for themselves or someone else) and excuse themselves by covering the cost through an unofficial facilitating account. See, e.g., Point of Personal Privilege—Charges Filed Before Committee on Standards of Official Conduct, 101st Cong., 2nd Sess., 136 Cong. Rec. H13017, H13020 (daily ed. Oct. 26, 1990) (discussing Representative Denny Smith’s violation of House ethics rules by using congressional staff and office resources for campaign fund solicitation).

147. One author suggests that citizen panels of 12 people, chosen by lot from the electorate, might be placed strategically in federal agencies to monitor the actions of bureaucrats. Perhaps they could also serve as liaisons for citizens’ red tape problems. David Lempert, A Return to Democracy, ch. I (1987) (unpublished manuscript, on file with Professor Akhil Amar, Yale Law School).

148. The resolution of the Keating Five case illustrates the nonexistent conscience of many lawmakers with respect to influence peddling. Although all five of the Keating senators had received contributions from Keating and taken steps to influence an S&L regulatory investigation of Keating’s Lincoln Savings & Loan, four of the “Keating Five” escaped without any kind of discipline. John R. Cranford, Decision in Keating Five Case Settles Little for Senate, 49 Cong. Q. Wkly. Rep. 517 (Mar. 2, 1991). The Senate Ethics Committee’s decision reveals an attitude among lawmakers that they should be allowed to sell influence for money—something that clearly would be illegal and punishable if reelection did not exist.
have the necessary incentive and resources to solve these problems. Current congresspersons have no incentive to solve broad societal problems, as no one person can realistically claim credit for solving a national problem. However, a party has incentives to tackle larger problems, because successful national programs will earn a party the popular support it needs to stay in power. When a party's platform fails, control of the congressional agenda will pass to the other party.\textsuperscript{149}

Another benefit of limited tenure will be healthier debates on the issues,\textsuperscript{150} both in the general public and in Congress. Strong political parties will help focus and define policy debate. Party labels will actually mean something to the average voter, leading to greater electoral participation, perhaps even among the poor and less educated.\textsuperscript{151} Additionally, the continual flux of talent through the Capitol will ensure that policies do not stagnate. Thus, congressional effectiveness will improve as deliberation increases in both Congress and society in general.

\textit{E. The Power Balance: The President, Courts, and Bureaucracy}

With stronger parties and fewer, if any, congressional demagogues, the Presidency may be strengthened relative to Congress. Critics may argue that this increases the possibility of tyranny. However, a healthy party system will ensure that an alternative view is always available to check executive excesses.\textsuperscript{152} Congress will also retain the formal executive checks of the veto override and the confirmation of executive appointees, along with the deliberative power to apply these powers effectively.

Although legislation adopted by the new Congress may be presumptively more deliberative and effective, the role of courts should not substantially change. One must remember that even if Congress is more representative than previously, it remains a mere stand-in for the people, and should not be thought of as the people themselves.\textsuperscript{153} Judicial review can and should remain available to prevent the reigning party from completely entrenching itself, or trampling the rights of minorities.\textsuperscript{154}

The death of the reelection incentive should lead to a more controlled and efficient bureaucracy, as "cozy" triangles of legislators, lobbyists, and bureaucrats are eliminated.\textsuperscript{155} With a unified platform and electoral deliberative free-

\textsuperscript{149} See Fitts, \textit{supra} note 41, at 1606-07
\textsuperscript{150} See generally Hertzberg, \textit{supra} note 130 (arguing for a 12-year limit on congressional terms).
\textsuperscript{151} See Fitts, \textit{supra} note 41, at 1607-08.
\textsuperscript{152} See \textit{id.} at 1610-12. See generally Hertzberg, \textit{supra} note 130 (arguing that a 12-year term limit will lead to a more effective opposition party to check the party in power).
\textsuperscript{153} See Ackerman, \textit{supra} note 7, at 1028.
\textsuperscript{154} \textit{Id.} at 1028-29. The Federalists also warned that an overabundance of power in the hands of any body, even the people's representatives, could result in tyranny. \textit{The Federalist No. 47} (James Madison), \textit{supra} note 10, at 301.
\textsuperscript{155} For a description of the interplay between these entities, see Fiorina, \textit{supra} note 64, at 66-67. Critics of this proposal may counter that members' incentive to run for the other House
dom, Congress should be able to eliminate some of the largesse from the “Fourth Branch.” Although federal agencies and affected industries will probably try to preserve their power, they will be forced to go to the parties for help, and will have to justify their existence with reasons that will withstand deliberative scrutiny. Otherwise, legislation that protects or favors these government agencies and related industries will not be a part of the party platform. This will lead to more deliberative and effective policies than those influenced by campaign checks from lobbyists.156

F. Arguments Against Limiting Tenure

1. Limiting the Choice of the People

Some argue that tenure limits prevent people from returning competent incumbents to office. This is said to be an “anti-democratic perversion of popular sovereignty.”187 Under the current system, however, voters have no choice but to return incumbents to office. Although voters may recognize that incumbents focusing on reelection create a deep, systemic problem with policy-making, it is still consistent for voters to return their own incumbents to office. In effect, the voters are faced with a prisoners’ dilemma: removing a senior incumbent will cost the district federal money and political clout vis-à-vis other districts. The electorate is a hostage that must support the jailkeeper by reelecting its incumbent.188 Thus, limiting tenure will actually create greater candidate choice substantively, as a substantial number of new legislators bring new ideas and experience to Congress every term.189

2. Loss of Experience and Expertise

A second criticism of term limits is the assertion that Congress will lose valuable leadership experience and expertise. While it may be true that leaders like Tom Foley, George Mitchell, and Dick Cheney are not developed overnight, much of current legislators’ expertise lies in the area of reelection-motivated activities, which have little to do with substantive lawmaking. Without the pressure of casework and campaigning, congresspersons will have more

will negate anticipated benefits. However, a four-year gap between terms of service should attenuate the incentives of lobbyists affected by programs that may change dramatically in the interim. 156. See generally Fiorina, supra note 64, at 77-79 (discussing the weapons wielded by bureaucrats against elected officials to protect their “kingdoms”).

157. Nelson W. Polsby, Limiting Terms Won’t Curb Special Interests, Improve the Legislature, or Enhance Democracy, PUB. AFF. REP., Nov. 1990, at 9 (“[T]erm limitations won’t enhance representative democracy. Just the opposite, since they create an artificial barrier preventing voters from returning to office legislators they might otherwise favor.”); Why Put Deadlines on Democracy?, N.Y. TIMES, Dec. 13, 1990, at A30 (editorial) (“In limiting terms, it would limit and dilute democracy.”). Current members of Congress will surely be vocal advocates of this position.


159. No one could seriously argue that today’s electorate has a meaningful choice when over 96% of incumbents who run are reelected. See 1990 Election Results, supra note 77.
time and staff support to thoroughly research relevant policy issues, thus developing more policy-making expertise in a shorter time than current legislators. Further, parties will have an incentive to support the nomination of candidates who already are well qualified, and to train new legislators in committee and other legislative duties, so that the party’s national policy goals will succeed. Finally, loss of experience and stability will be tempered by the possibility of running for the other House, longer terms for representatives and senators, and staggered elections. Under the limited tenure proposal, at any given time at least seventy-five percent of the Senate and fifty percent of the House will have had some legislative experience.

3. Loss of the Presidential Training Ground

A third argument against term limits is that it will destroy the training ground for future presidential candidates. However, if one assumes that most presidential candidates come from the Senate, and that they also will have served at one time in the House, these candidates will have the benefit of twelve years of federal lawmaking experience (because of the longer terms of both representatives and senators). It is also probable that many candidates will have both legislative and executive (gubernatorial) experience from working at the state level, both before and in between their terms in Congress. Thus, most Presidential hopefuls probably will have well over twenty years of experience in government, with twelve years in Congress.

4. Loss of Accountability

A final argument against tenure limits is the loss of accountability. If members may not run for reelection, how can they be punished or rewarded by the voters? As discussed above, congresspersons will have incentives to stick to party platforms to secure party support for constituent interests and to leave open the possibility of running for the other House later. Additionally, parties will have incentives to support the nominations of qualified, intelligent, and responsible candidates, because the success of the party’s platform (and the party’s control of Congress) will depend on the competence of the party’s members in Congress. To protect against a particularly “bad” legislator who blatantly ignores constituent interests after being elected, voters also could be given a constitutional right of recall upon a two-thirds vote. This right could become operative after a certain percentage of voters had signed a petition supporting a recall.

A possible check against dishonesty in lawmaking could be the establishment of strict bribery laws, and rules prohibiting the service of congresspersons on committees making policy in which they might have a financial or direct professional interest. Additionally, members of Congress could be prohibited from working for companies or in industries that were affected by leg-

160. See supra note 102 and accompanying text.
islation a member worked on directly, much like "revolving door" laws applicable to former Defense Department officials.161

CONCLUSION

While the changes proposed here would substantially improve the legitimacy and effectiveness of representative government, they will probably meet with opposition, especially on the part of Congress itself. This presents an obvious problem with an Article V amendment to the Constitution, because the normal amendment route is proposal by two-thirds of Congress, followed by ratification by three-fourths of the state legislatures. Even if the other Article V amendment route were pursued, that is, if two-thirds of the states called for a constitutional convention, Congress' position and influence would remain a serious obstacle to an amendment.

Although it is beyond the scope of this Article to propose an implementation plan, several possibilities deserve mentioning. First, reforms could be attempted at the state level before the federal level, similar to those already proposed in California and Colorado.162 Once changes have been shown to be


162. See Egan, supra note 4, at A1; Robert Pear, 1990 Elections, N.Y. TIMES, Nov. 11, 1990, at A26. The Colorado Plan restricts the tenure of both state and federal legislators. See 5 COL. REV. STAT. ANN. § 3 (West Supp. 1991); 18 COL. REV. STAT. ANN. § 9 (West Supp. 1991). This amendment passed by a margin of 71% to 29%, and is the only state law which limits the tenure of federal legislators. See FACTS ON FILE, Nov. 11, 1990, at 1. The amendment provides:

(1) In order to broaden the opportunities for public service and to assure that members of the United States Congress from Colorado are representative of and responsive to Colorado citizens, no United States Senator from Colorado shall serve more than two consecutive terms in the United States Senate, and no United States Representative from Colorado shall serve more than six consecutive terms in the United States House of Representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991 . . . .


Other states have followed Colorado's lead. Both Oklahoma and California already have laws that restrict the tenure of state legislators. Egan, supra note 4, at A1. In November, 1991, voters from the following 21 states will determine whether to limit the tenure of state and/or federal legislators: Alaska, Arizona, Arkansas, Florida, Georgia, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. See CHI. TRIB., July 14, 1991, § C, at 13.

Recently the California Supreme Court found term limitations for state legislators to comport with the Federal Constitution. See Legislature of California v. March Fong Eu, No. S019660, 1991 Cal. LEXIS 4529 (Cal. Oct. 10, 1991). The Legislature of California case concerned "The Political Reform Act of 1990," an initiative referendum aimed at eliminating "career politicians," which was adopted on November 6, 1990. Id. at *11. The initiative contains three sections: (a) restrictions on the retirement benefits of state legislators; (b) limitations on the state-financed incumbent staff and support services of legislators; and (c) limitations upon the numbers of terms
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successful, public support could be mustered for amending the Federal Constitution. Several writers also have suggested the possibility of amending the Constitution outside of Article V—namely, by the people themselves. After all, who could be better than “the People” to make changes improving the legitimacy and effectiveness of a government based on the authority of the people?

state legislators could serve. Id. at *2-3.

In an unusual move, the California Supreme Court reviewed the case by asserting original jurisdiction. Id. at *3. Although the court struck down the retirement benefit restrictions as an “unconstitutional invalid impairment of contract,” it held that the limitations, both on the number of terms and on incumbent staff and services, were constitutional. Id. at *5-6. In balancing the competing interests, the court reasoned that the state interests in restoring “free, fair and competitive elections,” in encouraging “qualified candidates to seek public office,” and in eliminating “unfair incumbent advantages” overrode the infringement upon the incumbent’s right to run for public office and the voters’ right to reelect the incumbent to that office. Id. at *41-42, 48.

A problem with Colorado’s term limits for federal lawmakers is that they may violate the Federal Constitution. In fact, the constitutionality of the Colorado Plan currently is being litigated. See Egan, supra note 4, at A1. But see Roderick M. Hills, Jr., Popular Sovereignty and Colorado’s Amendment Fire: A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. PITT. L. REV. (forthcoming Nov. 1991)). Another problem with this approach is that even if Colorado’s limits on federal legislative terms are constitutional, other states have a disincentive to follow suit because they risk losing both federal influence and money by giving up seniority in favor of other states. Nevertheless, efforts by states like Colorado to limit congressional terms are admirable because they generate important public dialogue on the issue of federal term limits.

163. See generally Ackerman, supra note 7, at 1062 (noting that a possibility exists that “future generations of Americans might, like the Federalists themselves, be called upon to elaborate the higher law of ‘We the People’ of the United States through legally anomalous lawmakers forms’”); Amar, supra note 41 (arguing that “We the People” should enjoy “an unenumerated right to amend our Constitution” outside Article V).