

# Republican Constitutional Skepticism and Congressional Reform

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Constitutional scholarship, a progressive scholar claims, lacks a rigorous skeptical tradition.<sup>1</sup> Robin L. West believes that the debate over the Constitution's meaning dominates scholarship to the exclusion of a debate over the Constitution's value.<sup>2</sup> Constitutional scholars, she surmises, ought to be asking whether the Constitution is desirable as written.<sup>3</sup> Academics should scrutinize the Constitution for how broadly it protects such values as free expression, self-actualization, and political debate, and whether protection of those values is desirable.<sup>4</sup> As a progressive, West looks to the Constitution as a solvent of private power, and finds it lacking.<sup>5</sup> She concludes, for example, that the Constitution fails to prevent private power from restricting the equality and freedom of "subordinated peoples."<sup>6</sup>

The following discussion shall build upon West's call for constitutional skepticism. To begin the skeptical analysis of how well the Constitution provides for representative government, Part I of this Note briefly examines the United States Congress and concludes that two broad problems with Congress—irrational spending patterns and excessive and standardless delegation of power to the executive—should compel constitutional skeptics to entertain and debate ideas directed toward congressional reform.

Part II examines the prevailing constitutional jurisprudence and examples of the legal scholarship surrounding term limits and radical campaign finance reform. The United States Supreme Court has declared aggregate spending limits, unaccompanied by public campaign funding, to be violative of the First Amendment.<sup>7</sup> While the Court has not considered whether Congress-imposed or state-imposed term limits violate Article I's qualifications provisions,<sup>8</sup> or

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1. Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

2. *Id.* at 766.

3. *Id.*

4. *Id.* Rhetorically she asks, "Are [these values] worth the damage to our social cohesion, our fragile sense of fraternity with others, and our attempts at community that they almost undeniably cause?" *Id.* at 767.

5. *Id.* at 775.

6. *Id.* at 775-79.

7. *Buckley v. Valeo*, 424 U.S. 1 (1976).

8. U.S. CONST. art. I, §§ 2, 3. These sections provide that no person shall be elected to the House of Representatives who has not reached the age of 25, or to the Senate who has not reached the age of 30. They also provide that no person shall be elected to Congress who has not been a citizen of the United States for seven years (House) or nine years (Senate), or who is not a resident of the state from which he has been chosen.

the First Amendment, many scholars believe they would.<sup>9</sup> The constitutional arguments surrounding each issue suggest that Lockean interest, group liberalism prevails as our accepted philosophy of representative government. Legal scholarship regarding these reforms has tried either to derogate the given reform exclusively on the basis of prevailing constitutional theory or to support it on the basis of promoting alternative interpretations to the Constitution.

To help build a framework for debating congressional reform proposals in the political arena, Part III discusses how the recent revival of classical republican theory, sometimes termed civic republicanism,<sup>10</sup> provides a coherent philosophical basis for altering the Constitution and the American philosophies of political equality and representation. Part IV contrasts the prevailing models of Lockean representation with a republican alternative: the Burkean legislator. This contrast reveals more specifically the goals to which major congressional reforms should aspire.

Part V discusses the importance of political parties in the debate over whether, and how, to reform Congress. Finally, Part VI evaluates two reforms that scholars have suggested would restore Congress to a responsible legislature:<sup>11</sup> radical campaign finance reform<sup>12</sup> and congressional term limits.<sup>13</sup> This evaluation examines whether these ideas actually promote the

9. See generally Joshua Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913 (1992); Neil Gorsuch & Michael Guzman, *Will the Gentleman Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991); Jonathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966 (1993); Julia C. Wommack, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361 (1993). Three lawsuits were filed in 1993 to challenge the constitutionality of state-imposed term limits. As of this writing, only one court had rendered a substantive judgment on any of the three lawsuits. *Thorsted v. Gregoire*, 1994 WL 37838 (W.D. Wash.) (holding that term limits on United States House and Senate members enacted by the voters of the State of Washington violate Article I, sections 2 and 3 and the First and Fourteenth Amendments of the Constitution). See also Susan B. Glasser, *Lawsuits in Three States Now Challenging Constitutionality of Hill Term Limitations*, Roll Call, Dec. 21, 1992.

10. See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

11. The reforms discussed in this Note, while acknowledging the necessary interdependence of governmental branches, focus on ways to remodel Congress as a discrete body so that it may perform as the Founders intended it to perform. Various ideas that might help solve governmental problems in ways that would not emphasize the primacy of Congress include the presidential line-item veto and the balanced budget amendment. These reforms represent electoral mechanisms rather than internal congressional reforms. I have chosen electoral mechanisms because they invigorate the broader debate over how America should define representative government and political equality.

12. Before delving too far into this issue, the term *radical campaign finance reform* must be clarified. For the sake of simplicity, this Note will focus on only one system of campaign finance reform in order to enhance the debate regarding that which the Supreme Court forbids: limiting aggregate expenditures by campaigns without also providing public campaign subsidies. I have termed this approach radical not because it represents an undebated, unfathomed idea about reform, but because it should be differentiated from other campaign reforms which would fall within the Supreme Court's current restrictions. See *Buckley v. Valeo*, 494 U.S. 1 (1976) (holding limitations on aggregate expenditures by political campaigns, *inter alia*, unconstitutional).

13. See generally SARA FRITZ & DWIGHT MORRIS, *GOLD PLATED POLITICS, RUNNING FOR CONGRESS IN THE NINETIES* (1992); FRANK SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* (1992); GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992). Term limits come in many forms and from a variety of sources. A state's voters may choose to limit congressional terms by initiative, or a state legislature may impose

republican/Burkean philosophy and what effects each of these reforms might inflict on Congress vis-a-vis congressional debate, congressional officeholders, interest groups, political parties, Congress' irrational spending patterns, and Congress' habit of delegating excessive and standardless power to the executive branch. Both reforms have already been discussed thoroughly as matters of contemporary constitutional jurisprudence.<sup>14</sup> This Note critiques the nature of these debates and adds legal and political analysis to them.

### I. SYMPTOMS OF A SICK CONGRESS

Before prescribing the cure, it would be best to diagnose the disease. Is there really anything wrong with Congress? Scholars of congressional reform have not spent a great deal of time defining what about Congress demands reform. Many utilize anecdotal evidence in the hope that such evidence magically builds itself into a critical mass of systematic cancer.<sup>15</sup> Others skim the issue or ignore it altogether and proceed straight to the remedial discussion.<sup>16</sup> A meaningful discussion of congressional reform must define specifically what systematic problem needs correction.

Unfortunately, no smoking gun proves Congress' failure to live up to the Founders' ideals. This is so because, as at least one scholar has noted, we cannot reach consensus as to what outputs Congress ought to provide.<sup>17</sup> Two serious symptoms, however, indicate Congress' disease: excessive delegation of power to the executive branch and irrational spending patterns.

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them. Representatives could even limit their own terms. They may be for one term, two terms, or longer. Some may even provide that voters can write in an otherwise ineligible candidate's name. See *infra* notes 108-09 and accompanying text. Campaign spending limit proposals also come in a variety of forms. This Note does not deal with these various nuances. Instead it deals with the fundamental assumptions behind term limits and radical campaign finance reform and the problems their advocates want to correct.

14. See generally DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE* (1991); HOWARD R. PENNIMAN & RALPH K. WINTER, JR., *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* (1972); Brendan Barnicle, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992); Archibald Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982); Robert C. DeCarli, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 TEX. L. REV. 865 (1993); Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989); Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); Mansfield, *supra* note 9; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001; see also FRITZ & MORRIS, *supra* note 13; WILL, *supra* note 13; Gorsuch & Guzman, *supra* note 9; Levy, *supra* note 9. For an article that discusses constitutional theory and begins to discuss the policy merits of term limits, see Wommack, *supra* note 9. For an article which discusses the policy debate over term limits, see Erik H. Corwin, *Limits on Legislative Terms, Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569 (1993).

15. See, e.g., JAMES K. COYNE & JOHN H. FUND, *CLEANING HOUSE, AMERICA'S CAMPAIGN FOR TERM LIMITS* (1992); WILL, *supra* note 13 (compiling an impressive and persuasive array of anecdotes, but also utilizing the empirical study of James Payne, which this Note also uses, as an indication of systematic irrationality in Congress); see also *infra* notes 39-47 and accompanying text.

16. See, e.g., *supra* note 9.

17. ALAN L. CLEM, *CONGRESS: POWERS, PROCESSES, AND POLITICS* 250 (1989).

*A. Excessive and Standardless Delegation of Power  
to the Executive Branch*

Citing excessive congressional delegation of power as a sign that something is wrong with Congress and its philosophical underpinnings is certainly not new. In 1969, Theodore J. Lowi complained that "delegation has been elevated to the highest of virtues and [congressional] standards have been relegated to the waste basket of history because that is the logic of interest-group liberalism."<sup>18</sup> Lowi does not pretend that Congress alone can navigate its way through the details and complexities of modern government. Indeed, he has written that it would be foolish to deny absolutely Congress' ability to delegate power, since delegation is "inevitable and necessary."<sup>19</sup> His point, however, is that Congress has systematically converted delegation from necessity to virtue.<sup>20</sup>

Lowi demonstrates his point by examining the history of governmental expansion from the late nineteenth century through the 1970's. He notes that governmental regulation began with specific manifestations of industrial development, such as railroads in 1887, and gradually encompassed more and more sectors of society—such as the regulation of the entire United States economic system with the Social Security Act.<sup>21</sup> One collateral phenomenon of this more abstract regulation was more administrative discretion.<sup>22</sup> For example, Congress created the Occupational Safety and Health Administration ("OSHA") and the Consumer Product Safety Commission ("CPSC") ostensibly to help labor and consumers, but neither piece of public policy even attempted "to identify a single specific evil that the regulatory agency was to seek to minimize or eliminate . . . Congress provided no standards whatsoever for employers or producers, nor did Congress provide any standards for the conduct of these two regulatory agencies."<sup>23</sup>

When Congress delegates power, those who exercise power become less accountable. Lowi tied loss of accountable law-making with interest group liberalism. He stated: "Interest [g]roup liberalism has little place for law because laws interfere with the political process."<sup>24</sup> In other words, a process dominated by interest group pressures can only expect delegations without standards, because power without standards remains perpetually malleable to the desires of the well-organized. Another scholar of the administrative process confirms this notion, and notes that "agencies unduly favor organized interests, especially the interests of regulated or client business firms and

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18. THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 144 (1969) [hereinafter *LOWI, THE CRISIS OF PUBLIC AUTHORITY*].

19. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 *AM. U. L. REV.* 295, 295 (1987).

20. LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 145.

21. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 97-105 (2d ed. 1979) [hereinafter, *LOWI, THE SECOND REPUBLIC*].

22. *Id.* at 105.

23. *Id.* at 117.

24. LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 125.

other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor.<sup>25</sup>

Of course, better organized interests generally benefit at the expense of less organized interests at any level (congressional or bureaucratic) in an interest group dominated system. But at the congressional level the decision-makers are at least elected and directly accountable. Electoral accountability provides at least a superficial representational balance vis-a-vis organized interests. Lowi points out that "the demand for representation will take place at the point of discretion" and if the point of discretion is not electorally accountable, the Constitution cannot balance competing interests,<sup>26</sup> and electoral accountability becomes nothing more than superficial.

Excessive congressional delegation of power is a function of Congress' lack of ability to deliberate. Congress often finds it easy to identify a problem, but lacks the discipline to debate the tough, detailed solutions required.<sup>27</sup> Richard B. Stewart reminds us that Congress has not been willing to commit to the intensive investigation and review that detailed legislation in complex areas requires.<sup>28</sup>

One recent manifestation of congressional delegation as deliberation is the mandate Congress gave to the United States Sentencing Commission.<sup>29</sup> Congress, under pressure to regularize sentences for federal offenders and to remove judicial discretion in criminal sentencing, but apparently without the "expertise" to decide many important details of sentencing created an independent commission to do the work for them.<sup>30</sup> The result of the Sentencing Commission's work is the United States Sentencing Guidelines.<sup>31</sup> Justice Scalia, the lone dissenter in *Mistretta v. United States*,<sup>32</sup> which upheld the constitutionality of the guidelines,<sup>33</sup> pointed out that "the whole theory of lawful congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to

25. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1684-85 (1975).

26. Lowi, *supra* note 19, at 297-98.

27. See, e.g., *supra* text accompanying note 23 (describing OSHA and CPSC legislation).

28. Stewart, *supra* note 25, at 1695.

29. 28 U.S.C. § 991(a) (1988).

30. See-Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883-87 (1990) (discussing the pressure Congress faced that led to sentencing reform); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993) (noting "Congress's failure to resolve several significant sentencing issues, thereby assuring that key political decisions would be made by the commissioners appointed by the President"); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993) (discussing Senator Kennedy's argument that Congress did not have the expertise or time to promulgate sentencing guidelines); but see Nagel, *supra*, at 902-08 (discussing the parameters and standards Congress set for the Commission and the majority's conclusion in *Mistretta v. United States*, 488 U.S. 361 (1989), that Congress had met and exceeded the intelligible principle test in delegating power to the Commission); Stith & Koh, *supra*, at 284 (concluding that congressional action and intent account for the outcomes the Commission has reached).

31. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1993).

32. *Mistretta*, 488 U.S. 361 (1989).

33. *Id.* at 412.

someone else."<sup>34</sup> According to Scalia, Congress may not legitimately delegate instead of decide an issue. To do so would be to abdicate Article I authority. Yet Congress does it and will continue to do it<sup>35</sup> because Congress lacks incentives to deliberate and resolve enormously complex issues.

Lowi argues that the Supreme Court should revive the rule of *A.L.A. Schechter Poultry Corp. v. United States*<sup>36</sup> and strike down standardless congressional delegation of authority.<sup>37</sup> Lowi believes that the Supreme Court determines the fate of political theory in the United States and that the Supreme Court can therefore correct liberalism's spasmodic anomalies, such as excessive and standardless congressional delegation.<sup>38</sup>

I depart from Lowi here, believing that the problem of excessive congressional delegation arises from the nature of America's overdependence upon liberalism as the root of representative government and not upon the failure of liberalism to live up to its own standards. Liberalism, because it promotes interest group politics to the degree it does, provides the wrong incentives for members of Congress. The solution does not generally lie in court intervention because the Court is bound by the interest-group liberal tenets of the Constitution. Rather, changes must arise from the determination of the American public that the Constitution should balance the excesses of interest group liberalism with a different philosophy of representation.

### *B. Irrational Spending Patterns*

The huge federal deficit is a glaring indication of Congress' inability to lead. Empirical evidence of congressional behavior identifies a congressional pathology which has contributed significantly to the federal deficit. James L. Payne, in considering why Congress spends as much money it does, studied fourteen congressional hearings and tabulated the testimony of 1060 witnesses.<sup>39</sup> Payne concluded that "*overwhelmingly, Congress' views on spending programs are shaped by government officials themselves.*"<sup>40</sup> Of his witnesses, 47% were federal administrators, 10% were state and local government officials, 6% were members of Congress, and 33% were private

34. *Id.* at 417 (Scalia, J., dissenting) (emphasis in original).

35. President Clinton's health plan should provide a classic case study in modern congressional delegation. The plan calls for the creation of a National Health Board which will regulate the proposed health alliances. Such a board would again represent Congress acting as a delegating rather than a deliberating body. See James P. Pinkerton, *Health Plan: Drowning in Details*, NEWSDAY, Sept. 23, 1993, at 107.

36. *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935). The Court struck down portions of the National Industrial Recovery Act and held that "[t]he Congress is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested." The Court stated that Congress itself must establish standards of legal obligation. *Id.* at 530.

37. LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 297-98.

38. See LOWI, *THE SECOND REPUBLIC*, *supra* note 21, at 298-310. Lowi also argues for increased use of sunset legislation by Congress, for more formal administrative rules, and for presidential vetoes of overly broad congressional delegations of power.

39. James L. Payne, *The Congressional Brainwashing Machine*, 100 THE PUB. INTEREST 3, 4 (1990).

40. *Id.* at 5 (emphasis in original).

lobbyists, 55% of whom were funded by the government (including such well-known groups as the National Education Association, People United to Serve Humanity, the National Council of Churches, the League of Women Voters, and the Sierra Club).<sup>41</sup> Of the 1060 witnesses tabulated, only seven opposed spending.<sup>42</sup> From these data, Payne concluded the following:

If [members of Congress] are actually the victims of a brainwashing campaign on spending, then the longer they stay in Congress the more they should favor spending. This is exactly what happens. The correlation between seniority and pro-spending attitudes gives a rough demonstration of the point: *in both parties, pro-spending attitudes increase with longer tenure in Congress.*<sup>43</sup>

Payne's statistics attest to one reason why Congress fails to make tough spending cuts: Pro-spending testimony "brainwashes" Congress.<sup>44</sup> That is not to say that an argument for congressional reform should be equated with an argument for a particular level of spending.<sup>45</sup> Rather, as George Will argues, the irrational spending patterns on wasteful projects, not the amount of government spending itself, indicates that Congress has lost all perspective of responsibility.<sup>46</sup> The spending patterns are rational only to the extent that they ease the road to re-election.<sup>47</sup>

Standardless delegation of power and incoherent spending patterns indicate the need for congressional reform. Constitutional skeptics should look to provide a political environment that facilitates careful congressional deliberation and coherent spending choices. The ideas of radical campaign finance reform and congressional term limits must address these problems to merit support. The legal arguments surrounding each are valuable in that they begin to reveal each idea's philosophical groundings and possibilities for improving Congress.

## II. PREVAILING JURISPRUDENCE AND SAMPLES OF LEGAL SCHOLARSHIP

### *A. Radical Campaign Finance Reform*

The landmark case in the field of campaign finance reform is *Buckley v. Valeo*.<sup>48</sup> The *Buckley* Court concluded that money equals speech, so any statutory restrictions on political campaign expenditures necessarily restrict speech, thereby violating the First Amendment.<sup>49</sup>

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41. *Id.* at 5-6.

42. *Id.* at 4.

43. *Id.* at 11 (emphasis added).

44. *Id.*

45. WILL, *supra* note 13, at 61.

46. *Id.* at 60.

47. *Id.*

48. *Buckley*, 424 U.S. 1 (1976).

49. *See id.* at 39.

The Supreme Court has applied this First Amendment interpretation to various types of political speech.<sup>50</sup> For example, the Court struck down a Massachusetts statute that limited corporate expenditures to influence the outcome of referenda other than referenda that directly affected the corporation.<sup>51</sup> Likewise, the Court invalidated restrictions on contributions to groups advocating or opposing ballot measures.<sup>52</sup> The *Buckley* interpretation has also been used to invalidate restrictions on independent expenditures by political action committees,<sup>53</sup> and a state law prohibiting the use of paid circulators of political initiative petitions.<sup>54</sup> Finally, the Court struck down provisions of the Federal Election Campaign Act which prohibited direct expenditure of corporate funds in a political campaign as they applied to a non-profit corporation whose sole purpose was to express political ideas.<sup>55</sup>

The Supreme Court's interpretation of the First Amendment in the political finance cases supports theorists who posit that the representative government and the First Amendment are premised on the liberalism of John Locke.<sup>56</sup> That is, the Constitution places political liberty over political virtue in the vein of such liberals as Locke.<sup>57</sup> I am not arguing that the Constitution is exclusively Lockean, in that it completely ignores the role of virtue, or even that the principles I refer to as Lockean were influenced only by Locke.<sup>58</sup> But I am arguing that, at least in the sphere of electoral and representative politics, the Constitution reflects a predisposition that individuals should retain the liberty to preserve their self-interests through the government. Locke championed government as an institution that protected private property and that was limited by that mandate. This strain of thought influenced Thomas Jefferson's writings, including the Declaration of Independence, and permeated the Constitution through Article I and, derivatively, the First Amendment.<sup>59</sup>

The dominance of interest-group politics in the United States and the Supreme Court's resistance to measures that hinder such groups illustrates the pervasiveness of Lockean theory.<sup>60</sup> Interest groups see government the way Locke did—as a means for the protection of private interests. Clearly, however, the government has expanded beyond this limited Lockean role and now aspires to virtue at least to the extent that it redistributes property. The

50. See James A. Gardner, *Consent, Legitimacy, and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 253 (1990).

51. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

52. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

53. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985).

54. *Meyer v. Grant*, 486 U.S. 414 (1988).

55. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

56. See, e.g., Gardner, *supra* note 50, at 205.

57. Harvey C. Mansfield, Jr., *Social Science and the Constitution*, in *CONFRONTING THE CONSTITUTION* 411, 413 (Allan Bloom ed., 1990) (noting the influence of seventeenth century liberals such as Hobbes, Spinoza, and Locke on the Constitution).

58. See *id.*

59. See Mansfield, *supra* note 9, at 971; see Gardner, *supra* note 50, at 206-07, 256.

60. See ROBERT C. GRADY, *RESTORING REAL REPRESENTATION* 3 (1993).



issue is whether the Constitution's provisions for political equality and representative government can expand commensurately.

Many commentators who advocate rigorous campaign finance reforms have attacked the Court's reasoning and have outlined alternative First Amendment interpretations.<sup>61</sup> The following three perspectives, though they have each contributed important alternatives to the First Amendment debate associated with *Buckley*, each demonstrate the flaw in the nature of this debate.

Judge J. Skelly Wright, for one, describes *Buckley* as "tragically misguided."<sup>62</sup> Wright feels that the Supreme Court has interpreted the First Amendment in a way that opposes political equality.<sup>63</sup> Citing Alexander Meiklejohn, Wright argues that regulations on political expenditures are necessary to maintain the coherence of political debate, in the same way that rules of order govern the conduct of a town meeting.<sup>64</sup> Wright proposes that the Court reexamine its approach to the First Amendment and distinguish between regulations on the content of political speech (which should be invalidated) and regulations on the quantity of political speech (which the Court should uphold in view of the First Amendment's goal of encouraging political equality).<sup>65</sup> Underlying this proposed shift in interpretation is Wright's view that the First Amendment should not be interpreted solely as a prohibition, but also as a mandate for the enhancement of equality.<sup>66</sup>

Archibald Cox has also criticized the Supreme Court's interpretation of the First Amendment as it applies to campaign finance laws.<sup>67</sup> Cox notes that, prior to *Buckley*, the Supreme Court had followed a two-tiered review of First Amendment cases: a strict standard if the case involved a restriction on the content of speech, but "[a] somewhat less demanding test is applicable to restrictions upon expressions that are designed to obviate serious public evils other than dangers supposedly inherent in the content of speech . . . ."<sup>68</sup> The *Buckley* Court, Cox argues, simply chose the wrong tier.<sup>69</sup> Campaign finance restrictions generally obviate the evils of inequality and corruption that large concentrations of money bring to the political arena. Because the amount of money spent in a campaign "bears almost no relation to the number of issues discussed . . . [and] restrictions upon campaign spending neither suppress

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61. See, e.g., Cox, *supra* note 14; Gardner, *supra* note 50; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

62. Wright, *supra* note 61, at 609.

63. *Id.*

64. *Id.* at 638-39. The analogy to the town meeting is particularly poignant in an era of "electronic town meetings" such as those utilized by various news organizations and presidential candidates Bill Clinton and H. Ross Perot. Clearly, town meetings where one party has bought and paid for the whole affair and which promote themselves as a method of participatory democracy for the entire nation are far removed from the participatory ideal of early New England America.

65. *Id.* at 644. Wright notes: "We should be asking 'How must we interpret and implement the first amendment in order to enhance equality?'" *Id.* at 642 (emphasis in original).

66. *Id.*

67. Cox, *supra* note 14.

68. *Id.* at 415.

69. *Id.*

ideas nor effect the competition of ideas based on their intrinsic merit . . . . [M]oney buys chiefly repetition."<sup>70</sup>

Cox makes his goal for First Amendment reinterpretation clear when he notes that Justices Blackmun and O'Connor seem open to various empirical effects arguments,<sup>71</sup> and that "it seems quite probable that judicial understanding may change as public comprehension of the evil increases."<sup>72</sup> Support for Cox's theory that the Supreme Court may begin to realign itself arises in the case of *Austin v. Michigan Chamber of Commerce*.<sup>73</sup> Here, the Court upheld restrictions on corporate expenditures where the purpose of the corporation, although a non-profit corporation, was economic (as opposed to political).<sup>74</sup> *Austin* represents a slight movement away from the *Buckley* standard as interpreted in *Massachusetts Citizens for Life*.<sup>75</sup> While this move may signify a shift in First Amendment perspective for the Court, at least one First Amendment scholar has concluded that the Court only thought it was applying *Buckley* in a more specialized context.<sup>76</sup>

The third perspective on the Supreme Court's *Buckley* jurisprudence I wish to analyze is that of Professor James A. Gardner. Instead of contrasting electoral reform cases with other types of First Amendment cases, Gardner contrasted two different types of electoral reforms and the Court's responses to each.<sup>77</sup>

To begin, Gardner finds the Supreme Court's role in striking down election laws troubling to the extent that "election laws represent deliberate legislative attempts to prevent precisely the type of electoral irregularities that . . . call into question . . . the accuracy of the electoral outcome and . . . the legitimacy of the elected government."<sup>78</sup> Gardner then divides electoral reform laws into two types: those that prohibit flagrant physical attacks on the integrity of elections (such as ballot box stuffing, ghost voting, and direct bribery of voters), which Gardner refers to as Newtonian, and those that restrict more subtle, yet equally pernicious influences on electoral accuracy, which Gardner refers to as modern.<sup>79</sup>

Having traced the histories of Newtonian (that is, anti-fraud) laws such as the Enforcement Act,<sup>80</sup> the Force Act,<sup>81</sup> the Corrupt Practices Act,<sup>82</sup> and

70. *Id.* at 416.

71. That is, these Justices are open to arguments in favor of upholding laws that limit expenditures in support of political referenda issues if the party advocating support shows the Court empirical evidence that excessively one-sided expenditures might stifle public participation. *Id.* at 417-18 (describing Justice White's dissenting opinion relying on a factual inquiry and Justices Blackmun and O'Connor's support of this method in their concurrence in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981)).

72. Cox, *supra* note 14, at 418.

73. *Austin*, 494 U.S. 652 (1990).

74. *Id.* at 661-65.

75. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *see supra* note 55 and accompanying text.

76. Gardner, *supra* note 50, at 254.

77. *Id.*

78. *Id.* at 230.

79. *Id.* at 231-32.

80. Ch. 114, 16 Stat. 140 (1870) (current version at 42 U.S.C. § 1981 (1988)).

81. *Id.*

82. 2 U.S.C. §§ 241-56 (1988).

the Voting Rights Act of 1965,<sup>83</sup> Gardner found that the Court has consistently upheld Congress' power to provide for fair elections.<sup>84</sup> Gardner notes that the concepts of "free" votes and "pure" elections have been important to the Court in these cases.<sup>85</sup> Gardner identifies this approach of the Court as consistent with "Lockean notions of popular sovereignty" and the Lockean view of "election law as a guarantor of electoral accuracy and governmental legitimacy."<sup>86</sup>

Gardner contends that the Court has deviated from this Lockean notion of preserving the political marketplace when it has interpreted modern election laws. Modern election laws include the Federal Election Campaign Act ("FECA"),<sup>87</sup> which originally included the campaign finance reforms struck down in *Buckley*. Congress' goal with FECA remained the improvement of electoral accuracy and the protection of governmental legitimacy. The Court, however, broke from its embrace of such regulations and instead voiced its distaste for FECA encroachment of speech.<sup>88</sup> Gardner characterizes the Court's approach to modern electoral laws as "within a narrow first amendment framework."<sup>89</sup> Gardner concludes that the Court's First Amendment doctrine prevents it from considering questions about governmental legitimacy.<sup>90</sup> He argues that if the Court were to adhere to its Lockean principles with respect to election laws, it could interpret the Constitution as requiring at the very least a balance between Congress' interest in maintaining accurate elections (that is, a legitimate government) and the First Amendment's protection of speech.<sup>91</sup> Under the current regime, the Court has reached "the ironic pass of employing a constitutional provision aimed at assuring self-government in such a way as to defeat self-government."<sup>92</sup> Gardner, quite simply, seeks Lockean rectification in First Amendment jurisprudence.

The three commentators discussed in this Part have all advocated a change in the way the Court interprets the First Amendment vis-a-vis campaign finance laws. Each posits a new legal analysis to replace the prevailing one. What each fails to recognize is that radical campaign finance reforms do not relate solely to the Court's model of the First Amendment. They also relate to broader philosophies of political equality and representative government.

83. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988).

84. Gardner, *supra* note 50, at 244; *see, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Ex Parte Clark*, 100 U.S. 399 (1879); *Ex Parte Siebold*, 100 U.S. 371 (1879). *But see, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876).

85. Gardner, *supra* note 50, at 244.

86. *Id.* at 245.

87. Pub. L. No. 92-225, 86 Stat. 3 (1971), as amended by Pub. L. No. 94-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-456 (1982) and in scattered sections of 18 U.S.C. and 47 U.S.C.).

88. Gardner, *supra* note 50, at 252-55.

89. *Id.* at 252.

90. *Id.*

91. *See id.* at 266-67.

92. *Id.* at 266.

J. Skelly Wright wants the Court to view the First Amendment as a mandate of political equality.<sup>93</sup> The problem with this approach is that the concept of "political equality" remains as enigmatic as "free speech." The Court has only the prohibitive language of the First Amendment to follow. The Constitution nowhere defines political equality in more precise terms.<sup>94</sup> Constitutional skeptics should favor more precise, more predictable changes to the prevailing political models than what the Supreme Court might provide on its own. They should examine alternative theories of equality and propose them for public debate.

Archibald Cox indicates that the Court only needs to choose the correct line of First Amendment jurisprudence in order to uphold campaign spending limits.<sup>95</sup> Cox's conclusion evades the argument over whether the prevailing political model should survive unfettered in a constitutional sense. Certainly, Cox appears to favor more governmental regulation on campaign spending. Instead of advocating an approach that would take the issue back to the political forum, however, Cox has found a way to sneak decidedly un-Lockean campaign finance reform laws<sup>96</sup> past a Lockean Constitution.<sup>97</sup> Instead, legal scholarship ought to be in the business of directing what properly belongs in the political sphere back to the political sphere.

Gardner comes the closest to recognizing the Court's position. He sees that the Court is bound by the Constitution's Lockean mandates.<sup>98</sup> In fact, Gardner feels that, if only the Court would stick to its Lockean guns, campaign finance reform laws would be unsheathed in all their glory and promise of political equality (and legitimate government).<sup>99</sup>

I disagree with Gardner's argument that the Court has deviated from the Lockean path in its interpretation of the First Amendment. On the contrary, the Court has recognized that Lockean legitimacy is preserved only through Lockean processes: through the clash of individual interests. The Court has reasoned that laws restricting money spent on campaigns restrict the full impact of social forces that comprise the Lockean clash which in turn produces legitimate government (according to the Constitution's current definition of legitimate government). Gardner advocates an interpretation of the First Amendment that balances free speech with a government that is legitimate because it is produced through a particular notion of equality. The

93. See *supra* notes 62-66 and accompanying text.

94. Terms such as "equal protection" and "privileges and immunities" are not much more helpful. Each remains open to wide-ranging interpretations; neither represents a concrete way in which equality among citizens is preserved. Specific preservations of rights, such as the right to vote, the right to counsel, and the right to a republican form of government guarantee specific attributes of equality, but they do not define political equality in any abstract, generally applicable sense.

95. See *supra* notes 67-70 and accompanying text.

96. That is, they inhibit the Lockean pluralist and populist influences from impacting elections.

97. For a more in-depth discussion on how the Constitution operates in Lockean fashion, see *infra* part IV.

98. See *supra* notes 77-92 and accompanying text.

99. See *supra* notes 77-92 and accompanying text.

goal is laudable, but it de-emphasizes Lockean equality—unrestricted access to the process.

While congressional attempts to change campaign finance laws signify a strong public desire to rectify the prevailing political model to alleviate Lockean pitfalls, the debate has not yet reached the proper level—changing the underpinnings of representation in the Constitution. Constitutional skeptics must recognize that it is not the Court's role to keep pace with changing political models; rather, it is the Court's role to preserve the model brought forth in the Constitution.

### B. *The Non-Jurisprudence of Term Limits*

The debate over the constitutionality of term limits, and especially state-imposed term limits on members of Congress, has not yet died in the courts and retreated to academic corridors where it might slowly decay. Rather, the debate is still being conceived in academic journals in anticipation of courtroom showdowns. In November, 1992, fourteen states passed referenda that limit the number of consecutive terms their congressmen may serve.<sup>100</sup> Legal battles over the constitutionality of state-imposed term limits have already begun, even though no legislator would be displaced by term limits until after 1996.<sup>101</sup> Thus, the debate over the constitutionality of state-imposed term limits is fresh, lively, and strikingly consequential.

At least one scholar presents a very persuasive argument that term limits, whether imposed by Congress on themselves or by state legislatures on Congress, would violate the various Qualifications Clauses of Article I, Sections 2 and 3 of the Constitution.<sup>102</sup> Joshua Levy examines various landmark cases involving the Qualifications Clauses,<sup>103</sup> as well as the Time, Place, and Manner Clause,<sup>104</sup> and concludes that term limits represent a qualification.<sup>105</sup> Levy adopts from *Hopfmann v. Connolly*<sup>106</sup> the following test of whether an election regulation amounts to a qualification: If the

100. Bill McAllister, *Success of Term-Limit Measures Puts 'Incumbents on Notice'*, WASH. POST, Nov. 5, 1992, at A37. These states include Arizona, Arkansas, California, Florida, Michigan, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming. Mike Christensen, *The People Decide*, ATLANTA J. & CONST., Nov. 5, 1992, at C7.

101. As of this writing, lawsuits in three states had challenged the constitutionality of state imposed term limits: Washington, Arkansas, and Florida have litigation pending. Glasser, *supra* note 9. Colorado's congressional delegation could be in a position to challenge the constitutionality of state-imposed term limits as early as 1996. *Id.* The Arkansas suit was resolved on a procedural matter: the Arkansas Amendment limiting congressional terms did not contain the magic language "be it enacted" and was therefore invalid. Mark P. Petracca, *Officials Will Do Anything to Thwart Term Limits*, HOUS. CHRON., Sept. 10, 1993, at 19. House Speaker Tom Foley has succeeded, at least initially, in challenging Washington State's term limitation provision. *Thorsted v. Gregoire*, 1994 WL 37838 (W.D. Wash. Feb. 10, 1994).

102. Levy, *supra* note 9.

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

104. U.S. CONST. art. I, § 4, cl. 1. This clause gives the states the power to regulate the time, place, and manner of federal elections, with the qualification that Congress can override any such provision.

105. Levy, *supra* note 9, at 1939-40.

106. *Hopfmann*, 746 F.2d 97 (1st Cir. 1984).

“candidate could be elected if his name were written in by a sufficient number of electors” then the regulation is not a qualification.<sup>107</sup> Levy concludes that if a member of Congress who had served the maximum allowable time in Congress could not serve even if elected through a write-in campaign, the regulation amounts to a qualification.<sup>108</sup> Therefore, neither the states nor Congress may provide term limits under prevailing jurisprudence.<sup>109</sup>

In *Powell v. McCormack*,<sup>110</sup> the Court struck down a congressional resolution refusing to seat Adam Clayton Powell (even though the voters of his district had re-elected him) for alleged financial wrongdoing. The Court ruled that such refusal improperly added to the qualifications for members of Congress set forth in the Constitution, and that those qualifications are a complete list; Congress may not add to it.<sup>111</sup> Further, Levy concludes that “[t]he state’s impotence in this area appears never to have been seriously doubted by the courts.”<sup>112</sup>

Others disagree with Levy’s assessment of term limits as a qualification. Neil Gorsuch and Michael Guzman make a case for perceiving term limits as a manner restriction under Article I, section 4.<sup>113</sup> Gorsuch and Guzman rely on *Storer v. Brown*,<sup>114</sup> which upheld California’s right to limit ballot access for candidates who had resigned from the party under whose name they had previously run and who now wished to run as independents.<sup>115</sup> They argue that the Court should consider an election regulation a manner restriction “unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.”<sup>116</sup> Because term limits present subtle and complex effects on voters and political models, they would be better examined under more flexible constitutional standards, such as the First or Fourteenth Amendments.<sup>117</sup> Term limits, as imposed by state legislatures on members of Congress, would be constitutional under the First and Fourteenth Amendments.<sup>118</sup>

107. Levy, *supra* note 9, at 1921 (citing *Hopfmann*, 746 F.2d at 103).

108. *Id.*

109. *See id.* at 1921-22. To be more precise, neither the states nor Congress may limit congressional terms without allowing voters to write in the names of those whose allowable terms have expired. Given the strength of individual political campaigns, however, one wonders about the effectiveness of term limits to accomplish any sweeping reforms where voters can write in the names of long-time incumbents. Arizona, Arkansas, California, Florida, Nebraska, Montana, Washington, and Wyoming all have write-in provisions. *See infra* part VI.B.3; *cf.* Wommack, *supra* note 9.

110. *Powell*, 395 U.S. 486 (1969).

111. *Id.* at 550; *see also* Levy, *supra* note 9, at 1921-22.

112. Levy, *supra* note 9, at 1928.

113. Gorsuch & Guzman, *supra* note 9, at 354.

114. *Storer*, 415 U.S. 724 (1974); *see also* Gorsuch & Guzman, *supra* note 9, at 356-57.

115. *Storer*, 415 U.S. at 726, 728; Gorsuch & Guzman, *supra* note 9, at 356-57.

116. Gorsuch & Guzman, *supra* note 9, at 363. Such provisions include age, citizenship, and residency. U.S. CONST. art. I, §§ 2, 3.

117. Gorsuch & Guzman, *supra* note 9, at 364.

118. *Id.* at 380-81. This conclusion varies slightly from that of Robert C. DeCarli, who argues that term limits are constitutional if enacted by voter initiative, though not if enacted by state legislatures or Congress. DeCarli, *supra* note 14, at 867.

Legal skeptics of term limits also raise the issue of whether limiting congressional terms may unconstitutionally restrict voters' First Amendment rights.<sup>119</sup> Julia C. Wommack, for example, notes both sides of the argument: "Some voters contend that term limitations deny their right to vote by restricting the choice of incumbents as elected officials. However, the current system denies voters an effective right to vote by virtue of tremendous incumbency advantages."<sup>120</sup> Wommack concludes that term limitation measures that preserve voters' right to write in whomever they choose do not violate the First Amendment.<sup>121</sup>

Unfortunately, the debate over the constitutionality of term limits masks the more important debate over whether limiting congressional terms is a good idea. As proponents and opponents line up on opposite sides of term limits as a policy, impending litigation reduces their debate to one over term limits as a legal device.<sup>122</sup> Instead of debating whether term limits might cure what ails Congress (in a politically and philosophically acceptable way), legal analysts involved in the fray strain to find legal theories to support their positions.<sup>123</sup> Contorting the Constitution to facilitate a desired political outcome suppresses political dialogue. The competing factions retreat from the battlefield and hide behind judicial robes. Legal scholars should instead encourage debate over term limits in the political arena.

The constitutional debate over term limits, despite the incantations of the above-mentioned scholars, boils down to the same basic problem as radical campaign finance reform. Term limits threaten the status quo; that is, resorting to term limits would acknowledge the failure of an overly-Lockean Constitution. If the Supreme Court strikes down term limits as unconstitutional, that result will be completely consistent with its position on campaign

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119. See, e.g., Wommack, *supra* note 9.

120. *Id.* at 1402.

121. *Id.* at 1406. Wommack's analysis has not carried the day in the initial stages of the legal debate. In the *Foley* case, the district court judge included the provisions' violation of the First Amendment rights of Washington voters among his reasons for overturning Washington's term limits law. *Thorsted v. Gregoire*, 1994 WL 37838 at \*11 (W.D. Wash. Feb. 10, 1994). Again, write-in provisions might defeat the purpose of term limits by rendering them no more significant than other campaign reforms designed to equalize the electoral process between incumbents and challengers. For a broader discussion of the dichotomy between incumbents and challengers, see *infra* part VI.B.

122. Gorsuch and Guzman present such a mysterious and complex reading of potential constitutional interpretations, one cannot help but conclude that they are desperately searching for an excuse to call term limits constitutional. For example, what is an unavoidable analogy to an age or citizenship requirement? Indeed, partisanship shines brightly in Levy's article as well. Two statements indicate how badly skewed the term limit debate has become even before it has reached the courts in that they presume that advocates and opponents of term limits as policy will accordingly support or oppose term limits as a legal matter, for example that supporters of term limits must think they are legal and vice versa. Levy states: "Term limit proponents are likely to raise two textual arguments to support their interpretation of the Qualifications Clauses." Levy, *supra* note 9, at 1930. Gorsuch and Guzman state: "Opponents of term limits frequently emphasize the absence of a limit on congressional term in the Constitution as evidence that the Framers intended to preclude such a measure." Gorsuch & Guzman, *supra* note 9, at 345.

123. The author recognizes that this is the traditional role of the lawyer and even of legal scholarship. The point is, however, that legal scholarship should not obviate the need for political philosophy.

finance reform: let the Lockean wills clash and government will be legitimate.<sup>124</sup> Constitutional skeptics should recognize that the Constitution provides for this Lockean overkill and that it can and should be changed only by amendment.<sup>125</sup>

Term limits are the type of medicine that would take the body politic through a profound metabolic change with unknown side effects. That is why political debate over term limits becomes so important. Such a drastic rectification of political outcomes to fit desired public goals should not win or lose based on restrictive and stifling legal analysis. The desirability of sticking with a Lockean system must be matched against the desirability of implementing legitimate (meaning consistent with America's philosophical roots) alternatives. The real question is not whether the current regime will allow us to change, but whether it is time to change the prevailing regime.

### III. CONTEMPORARY INTERPRETATION OF CLASSICAL REPUBLICAN THEORY AND CONGRESSIONAL REFORM

It is no secret that classical republican theory offers a meaningful alternative philosophy of representation to classical liberalism. This Part offers a brief review of contemporary interpretations of classical republican theory as it relates to political equality and political representation.<sup>126</sup> Republicanism, as it will be called here (at the risk of glossing over meaningful differences between classical republicanism and civic republicanism), operated at the Founding alongside classical liberalism as a basis for America's political institutions.<sup>127</sup> Where classical liberalism provided for

124. For further discussion of the un-Lockean nature of term limits, see Mansfield, *supra* note 9, at 971-72.

125. George F. Will begins to get at this point when he says that "if term limitation is inscribed as a constitutional value it will perform, as law frequently does, an expressive and affirming function." WILL, *supra* note 13, at 164. However, Will backs away from arguing that term limits must necessarily arrive in the form of constitutional amendment and ends up confusing political advocacy with legal advocacy. *Id.* at 223-27; see also George F. Will, *Contested Term Limits on Left Coast Terrify Politicians on the Other Coast*, HOUSTON CHRON., Jan. 18, 1994, at 17 [hereinafter *Term Limits*]. Will argues that term limits are no different than procedural restrictions to ballot access, à la Wright, *supra* notes 62-66 and accompanying text. This sort of argument really undermines the purpose of term limits—to exact wholesale change in the way America envisions representative government. If term limits are really "just another mode," of electoral regulation, then why all the fuss? See WILL, *supra* note 13, at 223-25. To be sure, Will supports the imposition of term limits by alternative means because Congress will not let a proposed amendment come up for a vote. *Term Limits, supra*. But Will's rhetoric devalues his impassioned belief in term limits.

126. See generally Sunstein, *supra* note 10, at 1539. The term "civic republicanism" was coined in order to differentiate it from the Republican Party and from the meaner aspects of classical republicanism, such as patriarchy and slavery. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); see also WILL, *supra* note 13, ch. 3.

127. S. Candice Hoke notes that "In the post-Revolutionary era, democratic self-government and republican emphasis on virtue were in tension. . . . A number of key figures during the Revolutionary War and the Constitutional Convention elaborated and sought to establish a republican constitutional framework." S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 698 n.50. As Gordon S. Wood notes, "it was republicanism and republican principles that ultimately destroyed the monarchical society." GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN*



democracy, for example, republicanism influenced the federal structure of our government.<sup>128</sup> Classical liberalism assumes the human quality of inalienable rights, and serves as the philosophical basis for constitutional fundamental rights arguments. Republicanism, on the other hand, conceives of rights as only those recognized through the political process.<sup>129</sup> The basic tenets of republicanism help preserve under republican auspices what are guaranteed under liberal auspices, such as the freedoms of speech and association. But republican tenets also interpret classical liberalism's freedoms in a way that emphasizes the importance of the political system to human affairs.<sup>130</sup>

The four basic tenets of republicanism include deliberation through civic virtue (understood loosely as scrutinizing private interests in light of public demands), political equality, universalism (the ideal that deliberation and reason will yield consensus regarding fundamental disputes), and citizenship (broadly granted rights of participation).<sup>131</sup> Republican tenets should properly balance the pluralism of classical liberalism in the American political system. As Cass Sunstein notes, "[p]ublic choice theory has shown that cycling problems, strategic and manipulative behavior, sheer chance, and other factors prevent majoritarianism from providing an accurate aggregation of preferences."<sup>132</sup> In other words, implementing measures that would promote republican ideals would provide for healthier, more principled and rigorous debate over public policy.<sup>133</sup> Simultaneously, however, the classical liberal norms of individual rights and autonomy must balance the republican tendency to focus on the form of community debate rather than substance.<sup>134</sup> As republican writers remind us, republicanism is linked to slavery and extreme patriarchy.<sup>135</sup> Therefore, advocates of measures designed to revive republican

REVOLUTION 95 (1992) (footnote omitted).

128. The civic republican revival reflects this strain of republican thought in that it fights against "centripetal pressures within our governmental structures and law." Hoke, *supra* note 127, at 703. Hoke notes, however, that not all civic republicans might agree with this theory; that is, some civic republicans tend to be more nationalistic. *Id.* at 703 n.80 (citing Sunstein, *supra* note 10).

129. *See id.* at 706 n.94.

130. *See* WOOD, *supra* note 127, at 104.

131. Sunstein, *supra* note 10, at 1548-57. Although he articulates these tenets as the basis for republicanism, Sunstein notes that: "Republican conceptions of politics diverge substantially from one another; there is no unitary approach that can be described as republican." *Id.* at 1547 (footnote omitted). This approach to republicanism might account for a divergence of debates regarding what, exactly, the goal of a more thoroughgoing republican system might be. For example, the American left might favor republicanism because they would like to see a more active government role in regulating industry and the environment. *See* Hoke, *supra* note 127, at 711 n.118. The libertarian strain of the American right might favor republican values since they favor less centralized control, and less control over industry, period.

132. Sunstein, *supra* note 10, at 1545 (footnote omitted).

133. Civic republicanism and Burkean thought share the notion that rights do not exist prior to political association. But since political association is natural for man, the existence of rights is perpetual, yet open to debate. *See id.*; *see also* ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 12, 20 (1975) (noting that for Burke the rights of man at the inception of civil society include "in their totality, the right to decent, wise, just, responsive, and stable government in the circumstances of a given time and place").

134. For such criticism, see Richard A. Epstein, *Modern Republicanism, or the Flight From Substance*, 97 *YALE L.J.* 1633 (1988); *see also* Hoke, *supra* note 127, at 708.

135. Kerber, *supra* note 126.

institutions must be careful not to undercut classical liberal protections of freedom and liberty.<sup>136</sup> In the context of Congressional reform, republicans should examine rigorously proposals such as term limits and radical campaign finance reform for the fealty to republican ideals.

#### IV. THE REPRESENTATIVE'S ROLE IN AMERICAN GOVERNANCE

The populist and pluralist models of representation arise out of the philosophy of John Locke and dominate the American scheme of representative government.<sup>137</sup> The populist model insists that the legislator vote and debate in accordance with the whims and desires of the majority that elected him.<sup>138</sup> The pluralist model, also known as interest group liberalism,<sup>139</sup> does not necessarily champion the primacy of parochial interests. It does, however, conceive of the legislator as one who is open to the persuasion of all interested parties, not just other legislators. This model seeks to preserve as many open channels to government as possible so that constituencies centered around various policy proposals may find legislators sympathetic to their causes.<sup>140</sup> Not only do geographic constituencies instruct the legislator, but interest group constituencies do as well.

A specific manifestation, or sub-category, of republicanism provides an alternative model of representation.<sup>141</sup> Edmund Burke championed and exemplified the role of the legislator as the debater. To Burke, the legislator was the trustee of his constituents, and the legislator remained somewhat removed from the fickle histrionics of the public while serving in office.<sup>142</sup> This model represents the republican ideal of reasoned deliberation in the context of the legislature. And it is this model, as this Part will discuss, that congressional reform proposals should promote. The Burkean model conceives of the legislator as one who, having debated public issues during the campaign and having disclosed his or her ideological commitments to the electorate, exercises independent judgment in the legislature.<sup>143</sup> The legislator retains contact with the electorate but is not bound by its instructions.<sup>144</sup> Burke felt that, since Parliament was a deliberative assembly, the

136. Hoke, *supra* note 127, at 708.

137. For the populist connection, see THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 255 (1988) (For Locke, legislators "are to be the [will] of the people, and their will is to be no more and no less than the people's will"). For the pluralist connection to Locke, see GRADY, *supra* note 60, at 3 ("Accompanying the ascendancy of interest group politics was an emphasis on social consensus about the proper relationships between the public and private spheres. This value consensus was frequently associated with the philosophy of John Locke.")

138. PANGLE, *supra* note 137.

139. See LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18.

140. Gotlieb, *supra* note 14.

141. The author acknowledges his indebtedness to George F. Will for the direction and inspiration Will provides regarding the Burkean and republican conceptions of the legislator. WILL, *supra* note 13.

142. See CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* 71-79 (1992).

143. *Id.* at 74 (citing Burke's letter to Samuel Span).

144. WILL, *supra* note 13, at 99.

members of Parliament ought to use reason and persuasion in deliberation, not the whims of the electorate.<sup>145</sup>

These models are not mutually exclusive. In thinking about how to remedy Congress' problems, however, constitutional skeptics should recognize which model dominates the legislative branch under the current regime. In an era of budget deficits projected at over \$300 billion,<sup>146</sup> one might conclude that the populist model has pushed Congress to the edge by demanding more and more government pork for the district each member of Congress. Or, considering that Political Action Committees ("PAC's") gave congressional candidates \$159 million during the 1989-1990 campaign cycle,<sup>147</sup> one might conclude that the pluralists are to blame. Together, these figures suggest that legislators go about their business in ways that preserve their incumbency. This means pleasing the electorate and the interest groups by promoting legislation that will either bring each federal money or relieve each of an onerous (though perhaps necessary) regulation.

The missing model is the Burkean ideal of serious, reasoned, unprostituted deliberation. For Congress to regain its former (and intended) stature, the system should emphasize the role of the legislator as an independent thinker. Legislators must be encouraged to grasp the responsibility the electorate grants them in such a way as to lead the nation, not in a way that they are led by a multiplicity of incompatible, incoherent interests: A legislature which does not need to fawn over special interests and constituent whims would likely engage in a more robust debate over national interests. Such a legislature would be less likely to vote for needless government projects just to satisfy local industries that rely on government contracts or to vote for subsidies for various interests which have been valuable sources of campaign funding. That is, the Burkean legislature would produce outputs (for example, spending patterns) that reflect more rational (and presumably more responsible) national political choices.

In many cases, of course, the difference between the Burkean legislator and the populist legislator is only one of description, since the electorate is likely to choose as its representative a person with values and ideological commitments similar to its own. The real difference lies, however, where a divergence exists between the national interest and the parochial interest. While the populist model would demand that the legislator vote in favor of the parochial interest, the Burkean model would command the legislator to deliberate and choose the course best for the nation, having accounted for that decision's effect on his constituents.

This conception—and this conclusion—must respond to critics before proceeding to a discussion of remedies. Stephen F. Gottleib notes that "Burkeans must try to show that elite processes meet democratic criteria and,

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145. See O'BRIEN, *supra* note 142, at 75 (Burke's speech to voters of Bristol).

146. Stephen Mufson, *Administration to Unveil Deficit Scenarios*, WASH. POST, Jan. 6, 1993, at F2.

147. FRITZ & MORRIS, *supra* note 13, at 5.

therefore, that such processes perform that role better."<sup>148</sup> Gotlieb, blind to the notion that any system of representation produces elites,<sup>149</sup> argues against more serious restraints on independent PAC campaign expenditures and against interpreting the First Amendment to allow limits on aggregate campaign spending. He does not believe that one model of representation should a priori triumph over another:

[D]emocracy should not be defined by a set of rules, but by approximations to that goal. In a sense, therefore, we are and must be Burkeans, populists and pluralists. The issue becomes whether and when the Burkean, populist or pluralist conclusions best accomplish the joint goal of a well-functioning democratic system. This is a question of mixed fact and theory. It cannot be answered a priori or on the basis of normative agreement.<sup>150</sup>

Gotlieb concludes that democracy does not permit devices which would limit popular ability to control which model of representation prevails. Therefore, campaign funding limits that constrict any outlet of political influence, whether it be political parties, interest groups, campaigns, or individuals, should be viewed dimly. Additionally, methods of campaign finance ought to be issues themselves, and "[t]he marketplace of ideas requires that candidates have the right to choose their own financing systems among legitimate alternatives."<sup>151</sup> In a sense, voters should approve or disapprove of a candidate's campaign financing scheme each election.

Gotlieb's discussion, despite his statement otherwise, assumes that the populist and the pluralist models must predominate a priori. For Gotlieb, the norm is constant democratic ratification, including ratification of the idea that the electorate ought to be ratifying. What he fails to recognize is that the Burkean model does not reject voter ratification of congressional work. The Burkean model does not conceive that legislators be chosen based on wealth or pedigree.<sup>152</sup> Under the Burkean model, the legislator persuades the electorate that his ideological preferences and commitments are better than his opponent's, then he acts on those preferences and commitments, and a few years later the voters decide whether or not they still want him to do so. What the Burkean model injects into the system is a sense of structure about the process. It eliminates the whimsical, fickle pressure of each constituent long enough for the legislator to reason his way to a series of cogent conclusions regarding national affairs. Reforming Congress to correspond better to the Burkean model would encourage Congress to debate more effectively. Congress would then balance the Lockean forces which have reduced its

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148. Gotlieb, *supra* note 14, at 249.

149. For more on this point, see GEORGE F. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 90 (1983); and WILL, *supra* note 13, at 142.

150. Gotlieb, *supra* note 14, at 278.

151. *Id.* at 289.

152. Though Burke himself believed in long-term, elitist government, an emphasis of Burke in American representation clearly should reject such extremism. This Note emphasizes a return to positive Burkean traits. For a discussion of Burkean elitism, see WILL, *supra* note 13, at 142.

relative importance in government and which have led it into irrational patterns of decision-making.<sup>153</sup>

What Gottleib suggests, though he rhetorically denies it, logically winds up with the conclusion that a democracy should constantly reinvent itself, that is, that a democracy must constantly ratify the system that maintains order and allows democracy to work.<sup>154</sup> Such a system would, and does, result in chaotic outputs and incoherent policy determinations. The Burkean model would account for popular will at the ballot box, and then allow the elected leaders to lead, not follow. The utility of the Burkean conception of the legislator is implicit in the failings of Congress as dominated by the pluralist and populist models.<sup>155</sup>

Congress' current inability to perform with any resemblance to the Burkean ideal, as documented in Part I, attests most convincingly to its need for reform. As Robin West suggests, scholars must inquire skeptically whether the Constitution provides, or is able to provide the fundamental right of modern society—good government. If it cannot, we should balance the forces that, though they make the American system possible, also prevent it from performing well. We should balance Locke's pluralist overkill with Burke's republican judgment. Doing so will affect not only Congress, but other American political institutions, such as political parties, which influence the way Congress represents America.

## V. THE BURKEAN MODEL, REPUBLICANISM, AND POLITICAL PARTIES

A debate regarding congressional reformation must consider the effects a given reform will have on political parties. Columnist David Broder summarizes the impact political parties have on government as follows: "The governmental system is not working because the parties are not working."<sup>156</sup> The debate over specific congressional reforms must include an account of whether or not strong political parties can co-exist philosophically with a legitimate conception of how Congress ought to govern. In the context of this

153. See *supra* part I.B.

154. Gottleib notes that "[s]ome forms of Democracy can prove self destructive. . . . It is necessary that [limitations on campaign finance] do not damage popular control." Gottleib, *supra* note 14, at 251-52. In other words, some modicum of political norms must triumph, or else a democracy might be free to vote away the liberties it was meant to protect. Why Gottleib is unable to embrace the Burkean model as a limit to the damage a democracy is allowed to inflict upon itself is not clear. Alexander Bickel, writing about the value of Burkean thought in a legislative body, echoes Gottleib's concerns: "Our problem is the totalitarian tendency of the democratic faith, and the apparent inconsistency of most remedies for that condition. Our problem has been, and is most acutely now, the tyrannical tendency of ideas and the emptiness of politics without ideas . . ." BICKEL, *supra* note 133, at 12. The lesson to be drawn from Bickel, as from Burke, is that democracy cannot really regenerate itself in a vacuum, as Gottleib implies. The challenge is to experiment with new ideas that improve the system and regenerate the democratic spirit without debasing the system or the spirit.

155. By the failings of Congress, I actually mean the overabundant successes of the populist and pluralist models.

156. MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1980*, 2 (1984) (quoting David Broder).

Note, the debate over congressional reform must determine what role political parties should play in the Burkean and Republican models.

The notion of developing and maintaining strong political parties seems diametrically opposed to the Burkean ideal of an independent, deliberative legislator. Indeed, the following quotation of an advocate of strong parties is sure to arouse Burkean suspicion: "[Members of Congress] can vote however they please on most issues, knowing that their party leaders have no control over the real organization that ensures their reelection."<sup>157</sup> This statement conveys the notion that a strong, independent political machine enables a member of Congress to remain an independent thinker.

Closer scrutiny of the forces at work in Congress reveals the trouble with the assumption that political parties restrain political debate in a way that violates the Burkean model. Members of Congress, absent strong party influence, are not necessarily, if at all, independent thinkers or deliberators; rather, the influence of interest groups replaces the influence of the party. The influence of hundreds of narrow ideas that lead to incoherent policies replaces the influence of one set of coherent policy ideas.<sup>158</sup>

For the Burkean model to work, legislative debate must focus on coherent policy choices. Deliberation is not consideration of 535 points of view. It is the proposal of an idea followed by the debate on its merits. Parties help to focus the debate into a concise message supported or rejected by individual perspectives. Interest group demands, not party discipline, cloud deliberation. Parties coherently debate the effect ideas will have on the national interest and then formulate their party's positions. Interest groups and party-independent legislators fragment deliberation by stressing the primacy of individual interests.<sup>159</sup>

Strong parties mold legislative debate primarily through candidate recruitment.<sup>160</sup> Parties aggregate diverse ideas into sets of coherent policy choices and then recruit candidates that vigorously support those policy choices. Voters choose the policy choices they prefer, and the legislature has a clear mandate to implement those policy choices.

Party discipline may be the secondary,<sup>161</sup> though no less important, component of the party role in legislative debate. Deliberation occurs within the party caucus, where the individual interests are aggregated, and on the House and Senate floors, where a debate over specific issues yields a policy outcome. What happens to the legislator who happens to disagree with his party on a particular issue? Clearly, it depends on the importance of the issue. Presumably, the party will recruit candidates based on their positions with

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157. FRITZ & MORRIS, *supra* note 13, at 9.

158. The relative strength of interest groups resulted in various PACs giving \$159 million to campaigns during the 1989-1990 election cycle. *See id.* at 5. Meanwhile, congressional candidates gave party organizations \$5.5 million in 1989-1990. *Id.* at 33.

159. On the subject of unification versus fragmentation of debate and power, Martin Wattenberg explains that "[i]n a system designed to fragment political power, parties have been held to be the one institution capable of providing a unifying centripetal force." WATTENBERG, *supra* note 156, at 1.

160. *Id.* at 74 (noting that candidate recruitment is perhaps the most crucial role parties perform).

161. For a more complete discussion of what parties do, see *id.* at 1-2.

regard to the highest priority issues. If a legislator changes his mind on one of those issues, he has deceived the party and the electorate, and he may deserve to lose party support. On a small number of occasions, or on matters of low priority, the legislator may deviate from the party norm without fear of discipline. The party will be more concerned about the legislator's aggregate performance and positions on vital issues of the day.

By discouraging the primacy of individual interests, political parties also promote republicanism, properly understood. Consider first that, in aggregating ideas, parties promote the republican ideal of universalism. They represent a method of focusing government on those policies upon which a part of the electorate can reach consensus. Such consensus promotes more focused debate over disagreements that arise between competing parties. Second, because parties aggregate political ideas and desires, they demand some measure of self-sacrifice, or civic virtue, from the party members for the good of the party as a whole. Further, parties promote participation and political equality through candidate and volunteer recruitment.<sup>162</sup>

While not writing in support of, or in the context of, a debate over political parties, Cass Sunstein, a staunch advocate of civic republicanism, notes that "a large purpose of participation is . . . to limit the risks of factionalism and self-interested representation."<sup>163</sup> Strong parties reduce factional forces and the self-interested mentality that government often engenders. Parties focus legislators on the mandate of deliberation for a greater good than themselves.

Critics of civic republicanism, however, dispute the conclusion that republicanism and strong political parties are mutually supportive. One commentator criticizes Sunstein for promoting proportional representation of different interest groups and discouraging political party influence in the legislature.<sup>164</sup> This criticism may be completely accurate with regard to Sunstein's articulation of the republican ideal. Refined notions of republican ideas, however, promote political parties as institutions that secure political equality. Parties seek broad appeal, so they recruit members and supporters from diverse backgrounds and interests, promising each a voice in party debates. The debate regarding the public good, then, occurs at a level additional to the legislative level. Party debate aggregates the diverse interests that it seeks and articulates them as a platform from which to promote the national good. The party in control can then deliberate with the minority in the legislature, choosing and refining policy preferences, and deliver the

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162. The participatory aspect of recruitment should be clear. The egalitarian aspect is much more subtle. Strong parties in this model would not recruit primarily on the basis of wealth and political standing. They would recruit on the basis of dedication to the party's ideological commitments. When candidates are left to nominate themselves, as often happens in a weak party system, personal wealth plays a considerable part in deciding to run for office. Consequently, those with limited personal resources do not run in the numbers as those with greater personal wealth. Stronger parties, however, would offset the mental block less wealthy but talented candidates might have to running. They also help offset the very real financial burden of running for office.

163. Sunstein, *supra* note 10, at 1556.

164. Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *YALE L.J.* 1651, 1652-55 (1988).

policies demanded by the interests aggregated at the party level. The party acts as a buffer between diverse interests and the legislature and helps to focus national debate.

Properly conceived and implemented, strong political parties can serve as a link between the Burkean independent legislator and the republican ideal of deliberation. Parties promote both models of the system by refining them and directing them in useful ways: toward focused deliberation of the national interests and through additional planes of participation. Parties also promote a strain of classical liberal thought in that they promote popular control of the legislative debate (instead of interest group control). Parties remain accountable to the electorate, but interest groups do not.<sup>165</sup> The voters choose which party's aggregation of interests they prefer, and the majority party receives a mandate to implement electoral preference, tempered by inter- and intra-party debate. Conservative constitutional skeptics should promote constitutional reforms which will enhance the stature of political parties in Congress.

## VI. HOW TERM LIMITS AND RADICAL CAMPAIGN FINANCE REFORM RELATE TO THE BURKEAN MODEL AND CIVIC REPUBLICANISM

### A. Term Limits

#### 1. Republicanism and Term Limits

Scholars of term limits have traced the republican roots of term limits through the Burkean and Jeffersonian attitudes and institutions surrounding the Founding and back to the ancients.<sup>166</sup> Term limits embody the Aristotelian notion of rotation in office which found its most vociferous voice among the anti-federalists at the Founding.<sup>167</sup> Though republican thought permeated the Constitution in the general form of representative government,<sup>168</sup> rotation of representatives did not make it into the Constitution.<sup>169</sup>

Representative government is republican in the sense that representatives go to Washington to debate and deliberate ideas, removed one step from those who elected them. For republicans, the problem of direct democracy lies not merely in its numeric and geographic unmanageability, but also in the notion that such a system equals an impassioned clashing of wills. Individual struggles for government preferment reflect the belief of John Locke that

165. Robert Grady, arguing for juridical democracy (that is, workplace democracy and other "democratic functional jurisdictions") argues that interest group liberalism provides a basis for voter apathy and cynicism because it closes the system from public inspection and participation. GRADY, *supra* note 60, at 7.

166. See, e.g., COYNE & FUND, *supra* note 15, at 109-16; WILL, *supra* note 13, ch. 3; Mark P. Petracca, *Rotation in Office: The History of an Idea*, in LIMITING LEGISLATIVE TERMS 19 (Gerald Benjamin & Michael J. Malbin eds., 1992).

167. Petracca, *supra* note 166, at 28-33.

168. The specific ways in which representative government works in conjunction with the First Amendment, however, appear to be more Lockean. See *supra* part II.A.

169. For a discussion of the idea of rotation in office at the Founding, see Petracca, *supra* note 166.



individuals' desires to protect their own interests would necessarily result in the pursuit of the public good.<sup>170</sup> The Founders sought to temper this strain of liberal thought by constructing institutions in which sober, reasoned discussion about the common good would occur. Will notes that: "[A] republic is a society presumed to have a broad diffusion of thoughtfulness. In a republic, persuasion rather than inspiration—reason rather than emotion—is supposed to move the citizenry."<sup>171</sup> However, the influence of the First Amendment has resulted in an imbalanced Lockean theory of representation.

In place of Lockean liberal pluralism at the center of government, republicans seek to promote more reflective debate in decentralized sources of power. Republicans find authority for such attitudes regarding government in Aristotle, who thought that man, by nature, was a political animal.<sup>172</sup> Being a political animal, man needs for his fulfillment to engage in the deliberative processes of government. Government is not simply, as Locke later perceived it, a ferreting out of wills and interests. It is that, but it is also much more. Again, Will makes the connection:

The importance of the philosophy of classical republicanism in the American founding means that America's intellectual and moral origins and [sic] are not exclusively in modernity, not just in the liberalism that founds liberty on individualism, rights and materialism. America also arises from the ancient republicanism that stressed the fulfillment of man's political nature through political participation.<sup>173</sup>

This political participation, moreover, does not end with the allocation of property interests and goods and services. Aristotle teaches that a properly understood republican ethic demands that the republic, through the political class, constantly strive for the highest good.<sup>174</sup> Such deliberation, according to Aristotle, ought to take place in a system that encourages political participation.<sup>175</sup> Accordingly, republicans champion as their tenets civic virtue<sup>176</sup> and the use of political equality and participation as means of approaching truth in fundamental matters.

Republican values indubitably played an important part in America's founding,<sup>177</sup> though they have often been lost in the dominance of Lockean

170. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., student ed. 1988). Locke reasoned that mankind formed government out of a need to protect private property. The end of government, and the public good, is limited to this protection.

171. WILL, *supra* note 13, at 115.

172. ARISTOTLE, *THE POLITICS*, bk. 1, ch. 2 (Louise R. Loomis ed. 1943).

173. WILL, *supra* note 13, at 165. Aristotle wrote that "to know what virtue is is not enough; we must endeavor to possess and to practise it, or in some other manner actually ourselves to become good." ARISTOTLE, *THE NICHOMACHEAN ETHICS* bk. 10, ch. 10 (Louise R. Loomis, ed. 1943). In the context of politics, this means participation in government, which is aimed at the highest good.

174. ARISTOTLE, *supra* note 172, at bk. 1, ch. 1 ("The state or political community, which is the highest of all [communities], and which embraces all the rest, aims, and in a degree greater than any other, at the highest good.")

175. WILL, *supra* note 13, at 156.

176. Will defines civic virtue as "a steady predisposition to prefer the public good to private advantages when they conflict." *Id.*

177. James Madison promoted republican principles because they prevent the tyranny of the masses, stating: "A republic, by which I mean a government in which the scheme of representation takes place,

clashes among interest groups. Advocates of term limits posit that term limits will restore the intensely deliberative aspect of republicanism by removing the incentives to submit to pluralist battles of the will.<sup>178</sup> With a restricted time in office, the legislator will less likely depend on pluralist or populist good will for his inspiration. Instead, he will act with the good of the country in mind, ready to sacrifice, and not predisposed to a pluralist faction regardless of that faction's merit.<sup>179</sup> Term-limits advocates seek to build a stronger republican tradition into the Constitution. Republicans must be sure, however, that term limits consistently promise republican results.

## 2. Term Limits and the Burkean Model

Term-limits advocates argue that limiting the terms of United States Senators and Representatives would promote the Burkean ideal of the independent-thinking legislator by removing the legislator's incentive to depend constantly on various interests for his re-election. A legislator who is not primarily concerned with perpetual re-election will carry to Congress a mindset different from that of a legislator bent on developing the type of political machine which not only can defeat all comers, but which can also discourage serious challenges in the first place.<sup>180</sup>

Building such a machine depends in large measure on attracting special interest money and on directing federal dollars to one's home state or district. Granted, a legislator in his first term of a maximum twelve-year career, for example, may still work to direct federal money to his district and to attract support from special interests in order to protect what limited incumbency he has. But even that legislator will not operate under the assumption that such an attitude will be constantly necessary: he will only be building for one or two more campaigns, not for a thirty-year career in Congress. Relieved of the burdens of a perpetual campaign, members of Congress will have more incentives to act in accordance with their beliefs about what is good for the country, or at least have fewer incentives to act contrary to collective good.

Term limits would not eliminate every conceivable incentive for a member of Congress to act in his or her narrow self-interest. But they would remove

opens a different prospect, and promises the cure for which we are seeking. . . ." The delegation of decision-making will refine and enlarge the public views. THE FEDERALIST No. 10, at 59 (James Madison) (Modern College Library Editions); see also WOOD, *supra* note 127, at ch. 6; Hoke, *supra* note 127, at 697 (discussing the role of classical republican thought at the Founding).

178. See generally WILL, *supra* note 13; LIMITING LEGISLATIVE TERMS, *supra* note 166.

179. See WILL, *supra* note 13, at 163-64. But see Michael J. Malbin & Gerald Benjamin, *Legislatures After Term Limits*, in LIMITING LEGISLATIVE TERMS, *supra* note 166, at 209, 211 (arguing that term limited legislators would naturally covet higher office, thereby replacing re-election behavior with pre-election (to higher office) behavior).

180. Fritz and Morris put it this way:

It is often said that incumbent members of Congress amass huge campaign war chests just to scare away potential challengers. What is seldom said is that incumbents do not just sit on their money—they actually spend it in ways that make it virtually impossible for a challenger, even a well-funded one, to compete.

FRITZ & MORRIS, *supra* note 13, at 8.

what has proven to be the most important self-interest incentive: perpetual re-election.<sup>181</sup> Populists might argue that, no matter how long a member of Congress expects or desires to be in office, he or she will always vote in ways that improve that member's immediate station—political, financial, or otherwise. This viewpoint would logically conclude that the voters of each state or district ought to choose Representatives and Senators whose personal interests most nearly align with theirs; term limits fracture that link and therefore are not a good idea.

The populist conclusion misses the necessary dichotomy of interests under the current regime between the representative and the represented. The electorate has only a stake in their parochial interests,<sup>182</sup> no matter who represents them. The representative has a personal stake in his or her own longevity. The representative, therefore, pursues his self-interest beyond what is good for his constituents. The result is that the representative indulges, at the expense of his constituents and the nation, special interests that enhance his re-election prospects. The constituents recognize this problem (hence they despise Congress as a body),<sup>183</sup> but do not act against their own Congressman since he usually pursues their immediate interests as well as his own. Under a regime of term limits, the representative's personal interests would more likely conform to national interests. That is, the representative's personal interests, to the extent they are linked to perpetuation in office, would shrink relative to other interests that the holding of political office might fulfill, such as the national interest.

George Will makes an important point regarding how term limits can be decidedly un-Burkean, however. He notes that Burke perceived legislators to be an elite class, elected to their offices because they possess those characteristics of leadership not generally found in the common man.<sup>184</sup> In fact, for Burke it is this very elitism that justifies deliberation through reason and independent thought. Term limits, however, would undercut one logical conclusion of this strain of thought. Term limits assume that even the best legislators are dispensable and replaceable, which dilutes the sense of elitism one understands Burke to mean. Will explains the acceptability of this dilution, however, as a sort of American compromise between the classical liberal notion of political equality and the classical republican notion of government detached from the people.<sup>185</sup>

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181. For the link of re-election pressures to congressional action, see *infra* notes 228-30 and accompanying text.

182. The populist perspective necessarily proceeds from the proposition that the agglomeration of parochial interests results in the national interest. Thus, to speak of a constituency in a populist regime having both parochial and national interests would be redundant.

183. A 1992 public opinion poll in the wake of the House banking scandal found that 75% of those questioned disapproved of how Congress was doing its job. Richard Morin & Helen Dewar, *Approval of Congress Hits All-Time Low, Poll Finds*, WASH. POST, Mar. 20, at A16.

184. WILL, *supra* note 13, at 36.

185. *Id.* at 164. For more about the contrast between classical republican thought and classical liberal thought, see *supra* part III.

When viewed this way, one might conclude that Congress as it stands today remains imperiled because it has over-emphasized the wrong Burkean trait—longevity. Term limits seek to promote a healthier Burkean system by emphasizing the characteristics of deliberation and reason while reminding legislators of their dispensability. In rejecting this notion of longevity, term limits actually face anti-Burkean critics such as Gotleib head-on: Term limits promote the type of continual electoral ratification Gotleib demands because they force the electorate to reassess their legislators at least every twelve years or so in a much more meaningful way (that is, without the easy persuasion of unnecessary federal projects, and because a race without an incumbent would presumably be a more competitive race).

### 3. The Purpose and Probable Effects of Term Limits

The solution of term limits targets the problem of incoherency in congressional policy evident in Payne's study of congressional spending choices.<sup>186</sup> Remember, Payne linked members' inclinations to spend with the length of their service in Congress. Longevity in office is not a rational basis for policy choice. Congress might more readily face the budget deficit if it did not have to worry about marshalling pork barrel projects to take back home, term-limits advocates argue.<sup>187</sup> Arguably, term limits would free legislators to think more about the country than about their status and station as a member of Congress.

The effect term limits would have on political parties is not altogether clear. Perhaps parties might become more robust as they recruit more candidates to run for more frequently vacated offices. On the other hand, higher turnover in Congress might dissipate party discipline since committee chairmanships could become a matter of lot rather than a matter of seniority or party loyalty.<sup>188</sup> Regarding state legislative term limits, Michael Malbin and Gerald Benjamin note that the declining importance of committee chairmen may reduce their independence and correspondingly increase the importance of the party chair.<sup>189</sup> They conclude, however, that short-term legislators would be too independent to allow strong party leadership.<sup>190</sup> The assumption that term-limited legislators could possibly become more independent is dubious, especially with regard to Congress.<sup>191</sup> Malbin and Benjamin's larger point, however, can be understood to mean that term limits do not guarantee stronger parties as a natural consequence. Parties will have to step

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186. See Payne, *supra* note 39.

187. See WILL, *supra* note 13, at 185.

188. See Malbin & Benjamin, *supra* note 179, at 212.

189. *Id.*

190. *Id.* at 213.

191. See FRITZ & MORRIS, *supra* note 13, at ch. 2 (discussing the entrepreneurial and independent nature of congressional campaigning machines). To be fair, Malbin and Benjamin are generally talking about state legislative campaigns. Their comments, however, would be examined for applicability to Congress.

affirmatively into the term limited milieu and assert their authority and legitimacy.

Further, recent scholarship has tied party vitality to financial matters.<sup>192</sup> One might fairly conclude that if limiting congressional terms curbs interest group power by limiting the influence of their money, then the same might be true of political party influence over the candidate, resulting in an anti-republican outcome.<sup>193</sup> More likely, however, party power will remain at least constant in an absolute sense since parties are not generally large sources of money for contemporary congressional political machines.<sup>194</sup> Term limits, while they may not enhance the party's strength in an absolute sense, will likely enhance party strength relative to interest groups, since an interest group's financial influence would be curtailed in greater proportion than a party's financial influence.

Another theory, however, contends that decline in party control over the past quarter-century has also been the product of less presidential control over the party in Congress.<sup>195</sup> Members of Congress now run individualized, media-oriented campaigns, as does the President, relieving these members of having to rely on their party's president or presidential candidate for necessary electoral support. Long congressional terms exacerbate this problem, as David Adamany notes: "The independence of Congressmen from the President is also heightened by the increased electoral security that accompanies incumbency."<sup>196</sup> A continual stream of fresh candidates for Congress might depend more on their party's president or presidential candidate, or at least on the party generally, to shape the candidate's message and identity. Such enhanced party identity would help give the electorate a clearer choice at the polls, translating into a Congress with a mandate to lead and to govern in the republican spirit of deliberation.<sup>197</sup> The trade-off is that increased reliance on the President or presidential party might undermine efforts to restore Congress to its primacy in leading the nation.

The effect term limits would have on interest groups would no doubt be significant. Whether they would be significantly favorable or unfavorable is the question. Advocates of term limits expect that the constant pressure and threat of interest group pre-eminence would dissipate because the same member of Congress is not going to be protecting an interest group's slice of the federal budget from year to year.

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192. See ALAN EHRENHALT, *THE UNITED STATES OF AMBITION* (1991). Ehrenhalt derides self-nomination as follows: "In allowing people to nominate themselves to any office . . . we have dismantled the structure of peer review, the screening process, that used to guarantee that qualities besides ambition, stamina, glibness, and face-to-face charm would be counted in the selection of leaders." *Id.* at 267. Ehrenhalt notes that self-nomination often means candidates' financial independence vis-à-vis political parties. See *id.* at 17. See generally FRITZ & MORRIS, *supra* note 13.

193. See *supra* part V.

194. See *supra* note 158.

195. David Adamany, *Political Finance and the American Political Party*, 10 HASTINGS CONST. L.Q. 497 (1983).

196. *Id.* at 508.

197. See *supra* part V.

Certainly, however, pluralism would retain significant influence over Congress. Most members would like to be re-elected as many times as allowable, possibly making them dependent on some level of interest group support. Additionally, term limits might increase reliance on lobbyists for information, ideas, and institutional memory in lieu of experienced lawmakers. This conclusion, however, assumes that parties will decline in influence, or at least not assert their influence, in a term-limits regime. Parties can help insulate legislators from interest groups, but some critics feel that term limits may reduce the party's role.<sup>198</sup> If the role of interest groups depends that heavily on the role of parties, then republicans should be that much more wary of the effect term limits will have on parties. They may even wish to consider ancillary steps to enhance the role of the party in a term-limits regime. Malbin and Benjamin, although speaking about state legislative term limits, make what is perhaps the most important point of all: Many states already have term limits in effect on their state legislatures, which affords an opportunity for "a rare natural experiment."<sup>199</sup> Republicans may wish to hedge their support for term limits against the results of these state legislative experiments.

The question remains whether term limits would temper excessive congressional delegation of power to the executive. To the extent that delegation occurs from Congress' lack of incentives to deliberate, term limits might help. That is, just as members of Congress would be less tempted to vote in favor of an interest group's proposal in the hope of campaign support, members of Congress would also be less tempted to divert decision on the matter to an executive body which special interests hold in tighter captivity.<sup>200</sup>

Political scientists Michael Malbin and Gerald Benjamin raise another criticism of term limits. They argue that, although term limits may remove the residual self-interested attitudes that re-election pressures bring, representatives will naturally aspire to higher office and their attitudes "might shift from their current to their potential constituencies. If so, those members would simply replace re-election behavior with pre-election behavior."<sup>201</sup> Furthermore, since legislators could not count on building electorally safe seats, they might be less likely to take policy risks than they now are.<sup>202</sup>

Malbin and Benjamin really prove too much with this argument. They begin with an acceptance of political cynicism among the political class: that all they want is personal power and media attention.<sup>203</sup> The expectation that most legislators would jockey for higher offices is neither provable nor disprovable, but it seems reasonable given the contemporary trend toward

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198. *E.g.*, Malbin & Benjamin, *supra* note 179, at 218.

199. *Id.* at 210.

200. *See supra* notes 18-24 and accompanying text.

201. Malbin & Benjamin, *supra* note 179, at 211.

202. *Id.*

203. *Id.* at 211-12.

individual, entrepreneurial campaigns.<sup>204</sup> Proceeding from that assumption, however, to the conclusion that only safe legislative districts will encourage any sort of risk-taking among legislators requires Malbin and Benjamin to argue against any sort of electoral reform which would decrease incumbent advantages. Legislative risk-taking involves two components of risk: policy risk (whether a given policy makes the problem it addresses better or worse) and political risk (whether advocating a given policy subjects a legislator to political defeat). Malbin and Benjamin's posture does not propose to encourage risk-taking among legislators; rather, it proposes to eliminate the notion of political risk. That is, their position would keep legislators safe from the repercussions of legislative decision-making, thereby eliminating the accountability portion of legislative risk-taking.

Term limits invite this same criticism; a term-limited legislator is not as personally accountable because he will eventually leave office no matter what positions he supports. This criticism, however, does not stand up. Term limits promote the primacy of the legislative institution, not the legislator. This means that term limits seek to hold policies themselves accountable, rather than holding individual legislators accountable. They allow the polity a real opportunity to elect new representatives to undo bad policies. The current system has proven ineffective at insuring individual accountability but has not replaced it with policy accountability. Instead, it has encouraged less accountability, as standardless delegation of legislative discretion indicates. Term limits might provide more frequent policy accountability and better deliberation. Advocates of term limits hope that delegation with standards would result. It is important to mention again the role political parties must play in this process: Parties can focus debate and offer meaningful choices to the electorate. If term limits in fact undermine this quality of parties, they undermine republican goals.

To the extent that excessive congressional delegation of power is a function of expertise (or lack thereof in Congress), however, term limits may only exacerbate the problem. Opponents of term limits in fact argue that term limits would decrease Congress' ability to deal with complex problems. Members of Congress might then demand larger staffs to help cope with the workload.<sup>205</sup> This increased dependence might translate into a more entrenched congressional bureaucracy with power and processes similar to the executive branch.

George Will responds to concerns over increased dependency on congressional staffs by noting that the average stay of a congressional staffer in a staff position is five years in the House and 5.7 years in the Senate.<sup>206</sup> Such stays are less than even the fulfillment of one term in the Senate, and equivalent to two and one half terms in the House, which is less than most limitations

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204. See FRITZ & MORRIS, *supra* note 13, at 27-64.

205. See, e.g., Corwin, *supra* note 14, at 603-04 (arguing against term limits because of the value of experienced members of Congress); see also COYNE & FUND, *supra* note 15, at 124 (raising and refuting the idea that less experienced legislators will demand more powerful staffs and lobbyists).

206. WILL, *supra* note 13, at 57.

proposals would allow.<sup>207</sup> But these current statistics do not account for possible changes were the political process to replace members of Congress more frequently. Staffers might have more incentives to stay longer if in doing so they would wield more responsibility, and they might become a floating bureaucracy among the constantly changing House and Senate memberships.

Three general concerns arise with regard to large congressional staffs.<sup>208</sup> First, scholars often recognize that congressional staffs should ideally improve the abilities of Congress as a whole, and Congress generally, to handle complex matters and increasing agendas.<sup>209</sup> Staffs should help reduce congressional dependency on the bureaucracy and special interests for information and assistance, thereby rendering Congress more independent.<sup>210</sup> However, electoral incentives drive members of Congress to assign staff to tasks that will enhance members' images and chances for re-election.<sup>211</sup> This phenomenon, in addition to having a quality of unfairness toward non-incumbents, "contribute[s] to information overload rather than alleviate[s] it."<sup>212</sup> Term limits squarely address this concern. Members of Congress not worried about continual re-election will not need as much staff to work solely for the purpose of image enhancement. While members of Congress will certainly remain concerned about helping residents of their districts with governmental problems, they would not, under a term-limits regime, retain the same incentives to focus heavily on that aspect of congressional work. Staff size and influence might actually decline as it relates to constituent services.<sup>213</sup>

Second, scholars raise the concern that staff expansion undermines Congress' ability to deliberate since they filter and buffer information and deliberative conversations between members.<sup>214</sup> As Morris Fiorina puts it, "[m]embers rush from committee meeting to committee meeting and flit back and forth between Washington and their districts. Meanwhile, staffs deliberate, and understanding is not the goal—credit is."<sup>215</sup> Republicans should be particularly wary of this concern. After all, the fundamental goal of republicans is to restore deliberation among members of Congress. As Fiorina states, this concern for deliberation relates to a third concern: accountability of

207. Most allow at least three terms for House members, two terms for Senators. See Wommack, *supra* note 9, at nn. 90-91 and accompanying text.

208. See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989).

209. *Id.* at 119.

210. *Id.*

211. *Id.* (noting that the proportion of personal staff devoted to constituency affairs "surely exceeds 50%") (citing Michael Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff, in THE NEW CONGRESS* 143 (Thomas Mann & Norman Ornstein eds., 1981)).

212. FIORINA, *supra* note 208, at 120.

213. Coyne and Fund in fact argue that legislative careerism, not lack of expertise, breeds dependence on staffs, especially among powerful committee chairs. COYNE & FUND, *supra* note 15, at 101-08, 126.

214. FIORINA, *supra* note 208, at 120.

215. *Id.*



decision-makers.<sup>216</sup> Discretion and delegation go hand in hand.<sup>217</sup> Because more staff means more delegation, and a need for more expertise under a term limits regime means more staff, term limits opponents might suggest that limits render policy-making less accountable since more legislative discretion would occur at the staff level.<sup>218</sup> And, again, larger staffs undermine efforts to increase deliberation.

Consider, however, the alternative: the current regime, which delegates excessive authority to the executive branch. Term limits opponents argue that members of Congress under a term limits regime can be expected to depend upon staff more for expertise since the representatives themselves will not have the time to develop that expertise.<sup>219</sup> If this is true, then cannot we actually expect a shift in the pattern of delegation of power from the executive to the legislative branch? That is, if members of Congress under the current regime delegate excessive discretion to the executive branch because they lack expertise,<sup>220</sup> term limits might actually shift this flow of delegation back into the legislative branch.<sup>221</sup>

To the extent that Congress undermines its deliberative qualities by delegating duties to anyone, term limits may not provide the answer republicans are seeking. Term limits fall short of addressing all causes for excessive delegation, and in fact may enhance delegation. But that result may be less an argument against term limits than a realization that term limits do not solve everything. That is, it is odd to say that a congressman should be re-elected just to keep power out of the hands of the staff. To remain logically consistent, those who oppose term limits for fear of overly powerful staffs ought to be arguing for life congressional terms if they fear staff power that much.<sup>222</sup> The solution to excessive congressional staff power is not longer congressional terms, but staff reforms, such as a congressional staff procedures act.<sup>223</sup>

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216. *Id.*

217. *Id.*

218. Though not discussing term limits, Karla Simon argues that currently much of the writing of the tax code occurs at the legislative staff level, thereby reducing accountability for that legislation. She feels that Congress actually should delegate more discretion for promulgation of tax laws to the treasury and that this would increase accountability for the tax law. Karla W. Simon, *Congress and Taxes, A Separation of Powers Analysis*, 45 U. MIAMI L. REV. 1005, 1017.

219. See Corwin, *supra* note 14, at 603-04.

220. And it is not clear that this is why they delegate power. See LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 124 (arguing that delegation to the executive branch is not a function of technical complexity, but of legislative abstraction).

221. Contrarily, Alan Rosenthal argues that, at least in state legislatures, term limits will undermine legislative power vis-a-vis the executive, resulting in a stronger bureaucracy. Alan Rosenthal, *The Effect of Term Limits on Legislators*, in *LIMITING LEGISLATIVE TERMS*, *supra* note 166, at 207-08.

222. This is similar to my criticism of Benjamin and Malbin, *supra* text accompanying notes 203-04.

223. A leading critic of excessive staff power notes that the only way to cut back on excessive delegation of power to staff may be for Congress to limit the congressional agenda. The problem may be circular, as larger congressional staffs tend to broaden the congressional agenda. Congressional staffs, with incentives to promote themselves as innovators, listen to marginal ideas which may inspire innovative congressional action. This phenomenon affects the political system positively in that marginal, possibly less organized voices can acquire proponents of their ideas within the political system. It affects the system negatively in that these marginal ideas enlarge the congressional agenda

Regarding accountability, America might be better off if Congress delegated power to the legislative staff rather than to the executive branch since the legislative branch under term limits would offer frequent turnover at 535 points of power.<sup>224</sup> This phenomenon might prevent the legislative bureaucracy from becoming as entrenched as the executive branch bureaucracy. New congressmen might mean new, or at least revitalized, priorities and personnel. Further, scholars have noted that congressional staffers do not form the same sort of bureaucracy as the executive branch staffers. Congressional staffers maintain team norms such as courtesy, rewarding personal initiative, less formality of assigned tasks, personal loyalty, and persistence rather than bureaucratic norms such as merit promotion, rigorous selection procedures, seeking professional achievement, and encouraging a standard pattern of careers.<sup>225</sup> American government may be more accountable if the bureaucracy to which Congress delegates its power remains more loyal to the accountable parties (members of Congress) than if the executive branch's more isolated and entrenched bureaucracy remains accountable to neither the Congress or the President.

### *B. Radical Campaign Finance Reform*

#### 1. Republicanism and Radical Campaign Finance Reform

Involuntary limits on aggregate campaign expenditures (without public subsidies) reject the notion that money is speech. In *Buckley v. Valeo*, the Court held that money is speech, since money buys things like TV and radio airtime, posters, direct mail, etc. To limit how much one spends on such technology is to limit how much that person may promote his ideas.<sup>226</sup> Here, the Court reflected the classical liberal notions of disposing of one's property as one pleases, of speaking as one pleases, and of influencing the political process as one pleases. Republicans, however, see political speech differently. Political equality, one of the four basic tenets of modern republicanism, demands a substantive analysis of what liberals promote as equality. Republicanism sees limits on aggregate campaign expenditures as an effort properly directed at countering distortions to political equality that exorbitant campaign expenditures bring about.<sup>227</sup> As Sunstein explains, "[a] deliberative conception of the First Amendment, incorporating a norm of political equality, would lead to a quite different analysis than the marketplace model. . . . republican understandings would point toward large reforms of the electoral process in an effort to improve political deliberation and to promote

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beyond manageability and fragment debate. MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES* 248-49 (1981).

224. *But see* Simon, *supra* note 218, at 1016-17 (arguing that power in the hands of the executive branch bureaucracy is more accountable than in the hands of legislative staff).

225. HARRISON W. FOX, JR. & SUSAN W. HAMMOND, *CONGRESSIONAL STAFFS* 156 (1977).

226. *Buckley*, 424 U.S. 1, 19 (1976).

227. Sunstein, *supra* note 10, at 1570.

political equality and citizenship."<sup>228</sup> Republicans perceive limits on campaign spending as a way to promote the reality of equality.

Spending limits assume, quite clearly and quite reasonably, that incumbents can and do spend more than challengers.<sup>229</sup> The republican idea is for candidates to be heard equally, so that the merit of their speech is judged based on the quality of their ideas, not the quantity of speech. This idea conforms to the Aristotelian and Jeffersonian notions of deliberation: What the political system demands is the elevation of all ideas in an equal way so that each may be judged unprostituted. Exorbitant amounts of campaign spending are not necessary to free speech. In fact, an overabundant quantity of one candidate's speech violates the essence of the other candidate's political equality.

That argument, however, clashes with the Lockean tenets of the Constitution, as interpreted by the Supreme Court.<sup>230</sup> And campaign reform-minded republicans have not been able to persuade Congress to enact spending limits along with public financing.<sup>231</sup> Those who advocate radical campaign finance reform must recognize that they advocate a fundamental change in the Constitution's underpinnings of political equality and representation. If, after scrutinizing the prevailing political culture and its constitutional roots with a skeptic's eye, campaign finance reformers still see a need for change, then constitutional amendment is the proper tool.

## 2. Radical Campaign Finance Reform and the Burkean Model

Radical campaign finance reform promotes the Burkean model by attacking the pluralist model. Limits on aggregate campaign expenditures would reduce the candidate's demand for money; therefore, the candidate does not need to tailor his views to the preferences of as many interest groups. As campaigns work now, congressional candidates, especially incumbents, must commit themselves to positions on specific issues before deliberation in Congress even begins. Sara Fritz and Dwight Morris report that "incumbents frequently find that as a consequence of their fund-raising efforts they have taken political positions that make them feel uncomfortable . . ."<sup>232</sup> The pressure on incumbents to commit to special interests apparently succeeds. While PAC's began to level activity as a whole in 1990, contributions to incumbents rose, amounting to over seventy-five percent of all PAC donations.<sup>233</sup> Consider congressional party and committee leaders, where congressional power is most concentrated and with whom serious deliberation should most unquestionably

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228. *Id.* at 1577.

229. Fritz and Morris tabulate that, on average, incumbents outspent challengers in 1990 \$390,387 to \$133,231 in House races and \$4,101,338 to \$1,686,616 in Senate races. FRITZ & MORRIS, *supra* note 13, at 14-17 (tbls. 1-1 & 2-2).

230. See generally *supra* part II.

231. Such a scheme, if voluntary, would pass constitutional muster under *Buckley v. Valeo*, 424 U.S. 1 (1976).

232. FRITZ & MORRIS, *supra* note 13, at 172.

233. *Id.* at 173-74.

occur: Here, PAC money gushes to the point of making junior members of Congress jealous.<sup>234</sup>

What radical campaign finance reform lacks is a similar attack on the populist model. As the discussion above indicates, the Burkean model has not triumphed in the American system because it has been held back by the easy acceptance of populist as well as pluralist norms. Legislators, no matter how much money they may spend on campaigns, or how much others may spend on their behalf, will still evade the ideal of Burkean deliberation if following some other model makes re-election easier. Clearly, a legislator facing re-election can impress his electorate much easier by reminding them of the federal jobs he saved for the state or district than by trying to explain why he voted to close the state's military bases, even though the latter was better for the country.

Here we begin to see the divergence between the goals of term limits and the goals of radical campaign finance reform. Both are often voiced as remedies to invigorate a stagnant Congress. Both promote electoral competition and legislative independence.<sup>235</sup> Yet, as the above discussion reveals, radical campaign finance reform would attack congressional maladies only partially.

### 3. The Purpose and Probable Effects of Radical Campaign Finance Reform

One might reasonably infer that campaign finance reform legislation is recommended as a prophylactic to corruption.<sup>236</sup> Indeed, the Supreme Court requires this prophylactic justification to support any campaign finance reform measure in order to demonstrate a compelling state interest which counterbalances First Amendment guarantees.<sup>237</sup> The Court struck down limits on aggregate independent expenditures and aggregate campaign expenditures because the government could not show that they were reasonably related to corrupt campaign practices.<sup>238</sup>

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234. *Id.* at 175.

235. Term limits would clearly provide more frequent non-incumbent races. Limiting how much campaigns could spend would lessen the amount a challenger had to raise to match the incumbent's strength. On the other hand, aggregate limits on campaign expenditures might actually hurt a challenger with superior fundraising ability, since that challenger would not be able to spend more than the incumbent in order to overcome the incumbent's advantages of office (including franking privileges, higher initial name recognition, etc.). The general trend, however, seldom finds challengers spending more than incumbents. *See id.* at 88. It does happen, however. Fritz and Morris note that Representative Andy Jacobs (D-IN) won re-election in 1990 against a better-funded opponent. *Id.* at 11.

236. Although the Federal Election Campaign Act was enacted prior to Watergate, that scandal prompted Congress to add important and controversial teeth to the act to prevent "corruption emanating from powerful economic entities or individuals." Steven H. Mogck, *Constitutional Law—Substance Prevails over Form in Corporate Political Speech*: *Austin v. Michigan Chamber of Commerce*, 16 J. CORP. L. 341, 346-47 (1991) (citation omitted).

237. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976).

238. *Id.* at 45, 55.

Recent data provides support for an argument that congressional campaigns have become systematically corrupt. Sara Fritz and Dwight Morris of the *Los Angeles Times* assert that congressional campaigns are outrageously expensive, largely because substantial amounts of money are available from various sources, including rich individuals as well as PAC's.<sup>239</sup> Fritz and Morris debunk the notion that campaigns require thousands and millions of dollars because TV and radio time are so expensive:

For Senate candidates, radio and television costs averaged 35 percent of the campaign budget.

. . . .  
Less than 40 percent of all the money spent by congressional incumbents during the 1990 election cycle was devoted to communicating with voters through the traditional methods: advertising, mailings, rallies, and the like. Instead, the bulk of the spending went to cover costs of building their political organizations: overhead, consultants, and fundraising.<sup>240</sup>

This data immediately raises (at least) two suggestions. First, contrary to the Supreme Court's holding in *Buckley*, money is sixty percent more than speech.<sup>241</sup> Second, there may be something systematically corrupt about how candidates hoard money, spending it lavishly on expensive office space, sophisticated computer systems, and expensive dinner parties.<sup>242</sup> The corruption lies in the political inequality that such concentrated wealth engenders. Fritz and Morris put it bluntly: "The overwhelming lesson of the 1990 congressional election . . . was that big money still virtually ensures victory for an incumbent."<sup>243</sup> They note that Senator Bill Bradley (D-NJ) and Representative Newt Gingrich (R-GA) faced tough challenges from woefully underfunded opponents and narrowly escaped with victory by spending from their over-stuffed coffers in the last days of their campaigns.<sup>244</sup>

At this sort of news, republicans brim with the excitement of victory in the debate over political equality. For republicans, the stories of Bradley's and Gingrich's narrow victories should be interpreted as what happens when incumbents outspend challengers, not that the incumbents were fortunate the Supreme Court had preserved their rights to speak as much as they wanted. Republicans feel that money distorted those campaigns, and it distorted the cherished process of deliberation. It is that distortion that has systemically corrupted the process. Limits on campaign expenditures, republicans argue, would restore the political equality that individual political machines have stripped from the process.

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239. See generally FRITZ & MORRIS, *supra* note 13.

240. *Id.* at 2, 7.

241. *Buckley*, 424 U.S. 1 (concluding that money is speech).

242. FRITZ & MORRIS, *supra* note 13, at 27-55. Fritz and Morris report that Senator Bill Bradley (D-NJ) spent \$10,000 per month on office space during the 1990 election cycle. *Id.* at 36.

243. *Id.* at 6.

244. *Id.*

The primary effect of such limits on officeholders might be to make their campaigns more efficient. With expenditure ceilings, the argument runs, political campaigns would focus more money on political debate and would spend less money on personal and political extravagances.

Additionally, congressional candidates would rely less on impressing big-money sources and promising support to special interests, knowing that the financial support of such interests is completely replaceable with a well-directed fundraising plan that seeks smaller contributions from more people.<sup>245</sup> Put another way, congressional candidates would cut some aspect of fundraising, and solicitation of special interests would be the first to go because it is less politically acceptable. Implicitly, interest group influence over the process would then decline.

The premise is dubious at best, however. Fritz and Morris make clear that one of the advantages of financing campaigns with PAC money is that doing so takes much less time than raising individual donations.<sup>246</sup> So, one cannot be sure that aggregate spending limits would achieve their desired impact of lessening PAC contributions. Further, interest groups and wealthy individuals have discovered ways to circumvent the direct limitations of FECA through PAC's, contribution bundling, and soft money techniques.<sup>247</sup> Campaign finance reformers should always account for the unexpected ways in which money will seep into the pockets of the least noble. For example, if aggregate campaign expenditures are limited, independent expenditures on behalf of (but not affiliated with) campaigns could be expected to skyrocket. If we amend the Constitution to limit both types of expenditures, we might expect campaigns covertly to coordinate several groups to spend money on their behalf. That cure might be worse than the disease, since the electorate would not know exactly which interests finance which candidates. A nagging weakness of campaign expenditure limits is that they might open the door to less desirable campaign financing schemes.<sup>248</sup>

Aggregate limits on campaign expenditures have the goal of placing incumbents and challengers on a level field of combat. Challengers could spend less time raising money and more time developing a message or name

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245. Congressman Robert Dornan vigorously pursues direct mail fundraising because, though the contributions are often small, they multiply rather quickly and come without any quid pro quo implications. *Id.* at 144. But, direct mail doesn't mean that candidates restrict themselves to the resources of their states and districts either, and "[s]ome House candidates raised virtually all their money outside their home states in 1990." *Id.* at 139.

246. *Id.* at 174.

247. PAC's arose as the corporate response to the FECA ban on corporate and labor contributions. 2 U.S.C.A. § 431 (1985). Money bundling involves gathering contributions from several individuals and presenting them to a candidate in a bundle so as to increase the bundler's influence with the candidate. Rich individuals give soft money when they give large amounts to state parties, which may not limit how much individuals can give. The state parties earmark that money for particular candidates of the donor's choice. For more in-depth discussions of these phenomena, see generally FRITZ & MORRIS, *supra* note 13, chs. 7-9.

248. For a discussion of unexpected consequences of radical campaign financing schemes, see Don M. Millis, Comment, *The Best Laid Schemes of Mice and Men: Campaign Finance Reform Gone Awry*, 1989 WIS. L. REV. 1465 (1989).

recognition without worrying about being drowned in a tsunami of incumbent spending one week before the election. Nonetheless, limits on expenditures could also backlash against challengers by disabling them from overcoming the advantages of incumbency. One scholar goes so far as to say, "[T]o achieve the control of spending seems to make the plight of challengers worse."<sup>249</sup> And voluntary spending limits accompanied by public funding offer no real solution for challengers either. The Chair of the Minnesota Ethical Practices Board notes that a challenger who refuses public funding and spending limits in Minnesota will likely face an incumbent who can receive both public funding and no spending limit.<sup>250</sup> Such absurd outcomes quickly whither support for radical campaign finance reform.

The effect of aggregate spending limits on political parties would likely, but not necessarily, be positive. Because candidates would be limited to a certain level of aggregate expenditures, the limited amount parties may give to candidates would either maintain its present level of significance or would become greater relative to other groups. One might reasonably expect a candidate to return a PAC check before returning a party check. Further, a candidate with a limited amount to spend might rely more on his party's independent expenditures and informational activities to promote his candidacy. The extent of such reliance, however, would depend upon the extent to which the party is limited in making independent expenditures. Thus, republicans ought to argue for favorable treatment of political parties given their important role in maintaining and promoting the republican model of Congress.<sup>251</sup> Such treatment would involve either persuading Congress to raise the amount of money parties can give their candidates or persuading the Supreme Court that restrictions on party spending in campaigns violates the First Amendment because limits unduly restrict the political expression of the parties.<sup>252</sup>

More fundamentally, does radical campaign finance reform directly address the two problems with Congress this Note raises? First, how would radical campaign finance reform encourage Congress to spend money more rationally? Remember that Payne linked spending patterns to longevity in office.<sup>253</sup> Radical campaign finance reform, unlike term limits, does not guarantee turnover in Congress. Rather, radical campaign finance reform only makes the electoral process more equitable. Thus, longevity in Congress might be less likely under a system that limits campaign spending (since challengers might stand a better chance of defeating incumbents), but the incentives for members of Congress to spend tax money irrationally in order to increase their chances of achieving longevity would not be eliminated.

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249. SORAUF, *supra* note 13, at 210.

250. Bruce D. Willis, *Campaign Finance in Minnesota, Tune-Up or Overhaul?*, THE HENNEPIN LAWYER, July-Aug. 1992, at 12.

251. See generally *supra* part V.

252. For a circumspect discussion of this argument, see Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns, and Opportunities*, 56 FORDHAM L. REV. 53 (1987).

253. Payne, *supra* note 39, at 11.

Second, how does radical campaign finance reform address the problem of excessive congressional delegation of power to the executive branch? Again, radical campaign finance reform does not pack the surefire punch of term limits in restoring Congress' capacity for deliberation. Such restoration is essential to curb excessive delegations of power and/or to provide incentives for Congress to delegate more power (out of a desire for expertise) to the congressional staffs than to the executive branch bureaucracy (which might circumscribe congressional delegations of power with more accountability).<sup>254</sup> Remember that one reason term limits might help restore deliberation and stem delegation is that members of Congress would be less focused on re-election and the related disincentives to deliberate. Radical campaign finance reform does not eliminate those disincentives. Members of Congress will still be viable candidates for their seats and will, in order to enhance their re-election chances, avoid tough, possibly unpopular and divisive decisions that they can delegate to the executive branch.

Finally, radical campaign finance reform does not in any way address the other half of the excessive delegation problem: the need for expertise. Remember that term limits have some impact on this problem to the extent they may drive members of Congress to rely more on their staffs for expertise since they will not have the time to become legislative experts themselves.<sup>255</sup> Only if radical campaign finance reform actually results in much higher congressional turnover will such a measure affect delegation based on a need for expertise. Even then, the effect radical campaign finance reform might have would be parochial compared to term limits. Term limits would affect delegation in every area of congressional action. Radical campaign finance reform would affect delegation haphazardly, depending upon who becomes most vulnerable to spending limits.

Even if radical campaign finance reform conforms to republican and Burkean standards, it does not promise relief from Congress' fundamental diseases. Republicans should therefore remain skeptical of the ability of radical campaign finance reform to exact wholesale congressional change. Spending limits advance the republican idea of equality, but they would likely fall short of advancing the republican theory of representation.

## CONCLUSION

Theodore Lowi states that the history of American political philosophy has rested with the Supreme Court since the beginning of the Republic and will probably continue to do so.<sup>256</sup> Scholars who disagree with the Court's decisions often argue for different decisions based on different philosophical foundations. Constitutional skeptics step back from that exercise and examine

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254. See *supra* notes 214-25 and accompanying text.

255. See *supra* notes 214-25 and accompanying text. But remember Lowi's conclusion that delegation occurs only as a result of congressional abstraction, not complex problems. See LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 220.

256. LOWI, *THE CRISIS OF PUBLIC AUTHORITY*, *supra* note 18, at 314.



how political action, rather than legal action, can determine the course of America's political philosophy. The debates of legal scholars over term limits and radical campaign finance reform have not, with a few exceptions, come to grips with the understanding that these debates are about changing the American philosophies of political representation and political equality. This Note attempts to invigorate legal scholarship to look beyond the legal arguments surrounding institutional reforms.

Incoherent spending patterns and excessive and standardless congressional delegation of power to the executive branch demonstrate that the Constitution may insufficiently compose the legislative branch. Madison's fears of popular control shall always ring with truth, but Madison's remedies were ephemeral. Republicans heed Madison's fears by advocating new governmental mechanisms that emphasize America's republican heritage and check the runaway Lockean interest group liberalism that currently dominates Congress.

For term limits and radical campaign finance reform to gain republican acceptance, each must be proper grist for the mill of debate regarding whether to amend the Constitution. That is, each must promise solutions to identifiable congressional problems in ways that promote the ideas of congressional primacy and deliberative representation.

Term limits, because they emphasize the importance of the legislative institution rather than the importance of the individual legislators largely succeed at the theoretical level (albeit with a few caveats). Republicans should examine the effects of term limits on state legislatures before embracing them as a congressional reform to be inscribed in the Constitution, however.

Radical campaign finance reform, although it promotes republican philosophical conceptions of equality and the Burkean alternative to our dominantly Lockean system, falls short of promising a more robust Congress. Campaign spending limits would facilitate greater equality, fairness, and integrity in the electoral arena, but they would not remove the disincentives to deliberation that hinder Congress' capacities to lead and govern. Only if enacted in addition to term limits could radical campaign finance reform be expected to add to Congress' deliberative capacities.

Constitutional skeptics of all stripes should identify those issues before the courts which properly belong in the political arena, and encourage political debate. Strict legal analysis of such issues often stifles meaningful debate. Furthermore, policy debate which resides exclusively within the extant Lockean constitutional framework misses the point of many new ideas. Such is the case with term limits and radical campaign finance reform. Each represents a change in American political culture and institutions so sweeping that leaving their fate to the limited framework of legal analysis would deprive our nation of the rigorous debate that fundamental change deserves.