# TERM LIMITS AND COMPELLED SPEECH: A NEW FRONTIER

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The proponents of term limits for United States representatives and senators may have opened a new chapter in constitutional law in their struggle to restrict the time representatives can serve in Congress. Their efforts to institutionalize term limits have resulted in two bedrock decisions by the United States Supreme Court that provide new insight into the interplay between the First Amendment and the Qualifications Clauses in Article I of the Constitution, and may have opened the door to new and intriguing strategies to achieve indirectly the equivalent of term limits. The success of those strategies will be likely be determined by the manner in which the First Amendment is interpreted and applied. The purpose of this article is to sketch how those scenarios may play out, and to suggest what First Amendment theory will boost or thwart some suggested strategies.

**(1) Setting the stage: state imposed term limits and mandatory term limit ballot labels.**

On November 3, 1992, the voters of Arkansas approved an amendment to the Arkansas State Constitution that prohibited the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate.[1] Ensuing challenges to these term limits were resolved by the United States Supreme Court in *U.S. Term Limits, Inc. v. Thornton* (hereinafter Thornton),[2] in which the Court struck down the Arkansas amendment, and ruled that states lack authority to add to or alter the qualifications for congressional service set forth in the Qualifications Clauses.[3]

Constitutionally prohibited from directly imposing federal congressional term limits via individual state initiatives, proponents of term limits embarked on a new strategy: adopting a "Congressional Term Limits Amendment" to the United States Constitution.[4] Under Article V of the Constitution, such an amendment requires approval by two-thirds majority of both houses of Congress and ratification by three-fourths of the state legislatures.[5] In order to achieve the former, advocates of term limits attempted to pressure congressional representatives to vote in favor of a constitutional amendment setting term limits.[6]

In 1996, voters in Missouri enacted such a scheme through a ballot-approved amendment to Article VIII of Missouri's constitution, which amendment required Missouri's Secretary of State to add a label to a congressional candidate's name on primary and general election ballots revealing the candidates position on term limits.[7] Under the provisions of the Missouri constitutional amendment (hereinafter "Article VIII") nonincumbent candidates were required to take a pledge to do everything in their legislative power to enact the term limit constitutional amendment.[8] If they refused to make such a pledge, the label "Declined to Pledge to Support Term Limits" was appended to their names on the ballot.[9] The amendment also instructed the members of Missouri's congressional delegation to do everything in their power to enact the term limit constitutional amendment, including voting in favor, offering a second, proposing a vote, rejecting any effort at delay, declining to sponsor a vote against or any longer term limits, and favoring all votes be public and recorded.[10] If a member of Missouri congressional delegation refused or failed to perform any of those designated acts, then the label "Disregarded Voters' Instruction on Term Limits" was appended to the incumbent candidate's name on the ballot.[11]

A candidate for Congress who opposed the term limits pledge brought a federal lawsuit against the Missouri Secretary of State challenging the constitutionality of Article VIII.[12] His challenge was ultimately resolved by the United States Supreme Court in *Cook v. Gralike* (hereinafter Gralike),[13] in which the Court struck down Article VIII.[14] In doing so, the Court appears to have strengthened its decision in *Thornton*, but to have backed away from the opportunity provided by lower court decisions in *Gralike* to provide political candidates with First Amendment protection against compelled political speech.

In order to explore these issues, this article will examine closely the United States Supreme Court decisions in *Thornton* and *Gralike*, contrast the bases for the United States Supreme Court's and the Eighth Circuit's respective decisions in *Gralike*, review the principal United States Supreme Court decisions prohibiting both Congress and the states from altering the qualifications for serving in Congress and thereby preserving democratic, electoral processes, review the principal United

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States Supreme Court decisions providing protection against compelled political speech, and attempt to ascertain the implications of the United States Supreme Court reliance on the latter, rather on the former, constitutional protections in deciding *Gralike.*

**(2) *U.S. Term Limits, Inc. v. Thornton*: Primacy of Qualifications Clauses in Article I.**

As noted above in this article, in *U.S. Term Limits, Inc. v. Thornton* ,[15] the United States Supreme Court struck down an amendment to the Arkansas state constitution that attempted to impose term limits on its United States congressmen and senators.[16] The Arkansas amendment prohibited the name of an otherwise eligible candidate for the United States House of Representatives and United States Senate from appearing on the general election ballot if he or she had already served three terms in the former or two terms in the latter.[17] In a 5-4 decision, the United States Supreme Court ruled that the Arkansas ballot restriction was an impermissible attempt to impose term limits on congressional incumbents in violation of the Qualifications Clauses in Article I of the Constitution, rather than a permissible exercise of the State's power to regulate election procedures under the "Times, Places and Manner of holding Elections for Senators and Representatives" under the Elections Clause in Article I, § 4, cl. 1.[18]

Noting that the offices at stake arose from the Constitution itself,[19] the Court reasoned that the authority of the state to regulate election to those offices could not precede their very creation by the Constitution, and, therefore, such power was delegated to, rather than reserved by, the states.[20] The delegated power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," was subject to the authority of Congress to "make or alter such Regulations."[21] No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment.[22] Hence, states may regulate the incidents of such elections, including balloting, but only as a delegated power under the Elections Clause.[23] As the Court noted, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[24] Hence, while the Elections Clause grants states broad power to prescribe the procedural mechanisms for holding congressional elections,[25] it does not grant them power to alter the qualifications of candidates for United States Congress beyond those found in the Qualifications Clauses in Article I of the Constitution.[26]

Because the Arkansas constitutional amendment "had the likely effect of handicapping a class of candidates with the purpose of creating additional qualifications indirectly," the Court ruled the Arkansas amendment improperly imposed qualifications for members of congress in addition to those set forth in the Constitution and contrary to the Qualifications Clauses in Article I of the Constitution.[27] In short, Qualifications Clauses of Article I of the Constitution are the exclusive descriptors of qualifications of candidates for the United States Congress, and states individually lack power to modify those qualifications for their Congressional candidates. Hence the sole avenue available to modify qualifications of candidates for the United States Congress - including term limits that effectively disqualify candidates - is to implement a constitutional amendment to the Qualifications Clauses.

The impact of *Thornton* is significant. States cannot, either directly or indirectly, alter the qualifications set forth in the Qualifications Clauses of Article I for representatives serving in Congress, and thereby handicap candidates' or classes of candidates' chances to be elected to Congress. This important protection serves both the electorate (by insuring openness of elections and an unfettered variety of candidates) and the candidates for office (by insuring states cannot exclude candidates of a particular political stripes from seeking office by altering the qualifications for office).

**(3) *Cook v. Gralike*: Congressional candidates need not wear term limit "Scarlet Letters"**

As noted above in the article, the voters of Missouri approved a constitutional amendment that (1) declares the intention of people of Missouri to amend the United States Constitution to limit Representatives to three two-year terms and Senators to two six-year terms, (2) instructs the members of Missouri's Congressional delegation to do everything in their legislative power to support the proposed term limit amendment, and (3) specifies particular legislative acts that members of the Missouri delegation are affirmatively obliged to perform to enact the term limit amendment, including voting in favor, offering a second, proposing a vote, rejecting any effort at delay, declining to sponsor or vote against any longer term limits, and favoring all votes be public and recorded.[28]

Critically, the Missouri amendment mandated that the label "Disregarded Voters' Instruction on Term Limits" be added to the name of all incumbent candidates appearing on primary and general election ballots if they failed to take any one of enumerated legislative acts in support of the proposed amendment.[29] Likewise, candidates for Congressional office were required to pledge their commitment to advance the term limits amendment via the enumerated legislative acts.[30] If they refused to make such a pledge, the label "Declined to Pledge to Support Term Limits" was printed adjacent to their names on all primary and general election ballots.[31]

Donald Gralike, a nonincumbent candidate for election in 1998 to the United States House of Representatives from Missouri's Third Congressional District, brought suit in the United States District Court for the Western District of Missouri to enjoin the Secretary of State of Missouri from implementing the Missouri term limit amendment and appending the "Declined to Pledge Support Term Limits" label to his name on the election ballot.[32] The United States District Court granted Gralike's

Motion for Summary Judgment on the pleadings, and held that Missouri's term limit provisions: (a) violated the Qualifications Clauses of Article I of the Federal Constitution by improperly creating additional qualifications for Congress and handicapping a class of candidates for Congress, (b) impermissibly burdened the candidates' First Amendment right to speak freely about term limits by putting "negative words next to their names on the ballot," and using the threat of being disadvantaged in the election to coerce candidates into taking a position on the term limits, and (c) improperly advanced a Constitutional amendment contrary to the amendment provisions of Article V of the Federal Constitution by using negative ballot designations that placed an undue influence on legislators to vote in favor of the term limits amendment, rather exercise their independent judgment as provided in Article V.[33]

The United States Court of Appeals for the Eighth Circuit affirmed,[34] deciding (1) that the Missouri amendment "threatens a penalty that is serious enough to compel candidates to speak [to avoid] the potential political damage of the ballot labels," contrary to the First Amendment protections against compelled political speech, (2) "seeks to impose an additional qualification for candidacy for Congress . . . in a manner that is highly likely to handicap term limit opponents and other labeled candidates," contrary to the Qualifications Clauses of Article I, and (3) "coerce[s] legislators into proposing or ratifying a particular constitutional amendment" in violation of Article V of the Constitution.[35] The Court of Appeals also determined that, contrary to the Speech or Debate Clause in Art. I, § 6, cl. 1, of the Federal Constitution, Article VIII "establishes a regime in which a state officer, the secretary of state, is permitted to judge and punish Members of Congress for their legislative actions or positions."[36]

On appeal, the United States Supreme Court in *Cook v. Gralike*[37] affirmed the Eighth Circuit Court of Appeals. Notably, however, only two of the four issues resolved by the Eighth Circuit - whether Article VIII violated the First Amendment protections against compulsory political speech, and whether the ballot labels mandated by Article VIII violated the constitutional protections of the electoral processes provided by the Qualifications Clauses in Article I of the Constitution -- were dispositive. More particularly, the United States Supreme Court narrowed the scope of its decision by focusing on two arguments raised by the Secretary of State of Missouri: (a) that Article VIII merely represented a traditional exercise of the "right of the people to instruct" their representatives, which right had been reserved by the Tenth Amendment and was a permissible regulation of the "manner" of electing federal legislators within the authority delegated to the states under the Elections Clause, Art. I, § 4, cl. 1, and (b) that Article VIII merely advanced Missouri's interest in adding a term limits amendment to the Federal Constitution by both encouraging Missouri's congressional delegation to support such an amendment in order to avoid an unfavorable ballot designation when running for reelection, and encouraging the election of representatives who favor such an amendment.[38]

The United States Supreme Court rejected the first argument, because instructions to elected representatives employed in the Second Continental Congress, the Constitutional Convention, the early Congress, the selection of United States Senators before the passage of the Seventeenth Amendment, and the ratification of certain federal constitutional amendments, were advisory only, were not coupled with an express legal sanction for disobedience, and did not use the ballot as a means of giving its instructions binding force.[39]

The Court rejected the second argument, concluding that Article VIII was plainly designed to favor candidates willing to support the particular form of a term limits amendment, to disfavor those who either oppose term limits entirely, and to attach a concrete consequence to candidates who failed to comply with the term limits directives.[40] The Court noted that the term limit instructions imposed "substantial political risk" on "current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth in Article VIII for passing its term limits amendment,"[41] and that "the adverse labels handicap candidates 'at the most crucial stage in the election process--the instant before the vote is cast.'"[42] Such coercive force, the Court reasoned, placed "their targets at a political disadvantage to unmarked candidates for congressional office," and crossed the line from merely regulating the procedural mechanisms of elections to dictating electoral outcomes, contrary to *Thornton* and the Elections Clause.[43]

Notably, the Supreme Court's decision in *Gralike*, striking down the "Scarlet Letter" ballot measure that attempted to effectuate indirectly through the guise of "legislative instructions" what Arkansas was prohibited from doing directly in *Thornton*,[44] received the support of six Justices, thereby reinforcing the primacy of the Qualifications Clauses in Article I over the Elections Clause of Article I, § 4, cl. 1.[45]

Chief Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment of the Court, not on the basis of the Qualifications Clauses, but on First Amendment grounds. More particularly, Chief Justice Rehnquist advocated striking down Article VIII, because it violated the First Amendment rights of candidates for office, lawfully on the ballot, to have their names "appear unaccompanied by pejorative language required by the State."[46] Noting that prior ballot access cases recognize the First Amendment rights of both the voters and the candidate to challenge ballot provisions,[47] and " no one questions the standing of [candidates] to raise a First Amendment challenge to such laws,[48] Justice Rehnquist examined Article VIII as a "time, place, and manner" election regulation.[49] In doing so, Justice Rehnquist applied a three-part test in assessing its constitutionality: the ballot restriction must (a) be justified without reference to the content of the regulated speech, (b) be narrowly tailored to serve a significant governmental interest, and (c) leave open ample alternative channels for communication of the information.[50]

In applying the three-part test, Justice Rehnquist determined that Article VIII was not content neutral, "because only those candidates who fail to conform to the State's position receive derogatory labels."[51] Article VIII also flunked the third part of the test, because (a) the state injected "itself into the election process at an absolutely critical point - the composition of the

ballot, which is the last thing the voter sees before he makes his choice,"[52] and (b) the candidate so "singled out [has] no means of replying to [the] designation which would be equally effective with the voter."[53]

In reaching this conclusion, Justice Rehnquist equated the term limit label with the designation of the candidate's race on an election ballot that had been struck down in *Anderson v. Martin*.[54] In *Anderson,* the United States Supreme Court held that Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection Clause.[55] The Court stated: "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important - perhaps paramount - consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines."[56] Analogously, Article VIII violated the First Amendment, because it "skew[ed] the ballot" by selecting a single, paramount issue that highlighted the position of the candidate, not during the campaign when the candidate would have ample opportunity to reply, but at the last possible moment, leaving the candidate with " no means of replying to their designation."[57]

Notably, Justice Rehnquist disagreed with the First Amendment analysis of the Eighth Circuit, which struck down Article VIII as compelled political speech.[58] In brief footnote, Justice Rehnquist curtly dismissed the compelled political speech argument, saying he did not "believe a reasonable voter, viewing the ballot labeled as Article VIII requires, would think that the candidate in question chose to characterize himself" as either disregarding voters' instructions or declining to support term limits.[59] The First Amendment analysis employed Justice Rehnquist, then, focuses on preserving the openness and fairness of the election process by prohibiting the state's ability either to rig an election (e.g. by putting classes of candidates in a bad light by imposing election labels) or to limit a candidate's abilities to seek office (e.g. by changing the qualifications of candidates for Congress).[60]

**(4) Eighth Circuit decision in *Cook v. Gralike***

The Eighth Circuit Court of Appeals decided that Article VIII was unconstitutional, because it violated political candidates' First Amendment rights against compelled commercial speech,[61] and because it violated the Qualifications Clauses in Article I of the United States Constitution.[62]

Dealing first with the issue of compelled political speech, the Eighth Circuit held that Article VIII was "an impermissible attempt by the State of Missouri to compel candidates to express a point of view on term limits,"[63] because:

> The Missouri Amendment compels candidates to speak about term limits. First, it attempts to force candidates to speak in favor of term limits by threatening them with the ballot label if they fail to do so. Second, if a candidate refuses to speak in favor of term limits, the label on the ballot forces him or her to speak in opposition to the Amendment by noting that he or she failed to follow the voters' wishes. Either way, the Missouri Amendment does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak. First, the Missouri Amendment selects the topic for public debate: term limits. Second, it chooses an approved position: favoring term limits. Third, it provides the actual words which non-incumbent candidates shall speak: the pledge. Finally, in the event its attempts to compel speech in favor of term limits fail, the Missouri Amendment provides a mechanism to compel candidates to speak in opposition: the ballot labels.[64]

The Eighth Circuit also rejected the argument that Article VIII did not compel speech, because it imposes neither criminal nor monetary sanctions for refusing to speak, but merely publicized the candidates' views and/or prior record on term limits.[65] The essence of compelled speech was not the nature of the sanctions imposed, the court noted, but its compulsory nature by whatever means used.[66] More importantly, the court determined that the threat of potential political damage created by the ballot labels constituted genuine compulsion.[67] The Court found that the ballot labels convey a negative impression of the labeled candidate's views on, and commitment to, term limits, and imply the labeled candidate either refused to promise to do the people's bidding or failed to act in accordance with his or her constituents' wishes.[68] Either way, the court reasoned, the label characterizes the labeled candidate as untrustworthy to carry out the people's bidding and therefore unsuitable to serve in Congress.[69] Moreover, the "pejorative nature of the labels is heightened," because candidates who take the pledge or comply with the mandates of Title VIII while in office appear on the ballot without labels, and because the ballot label, an official state document, places the state's official stamp of disapproval on the noncompliant political candidate."[70] Hence, the Court concluded, the ballot labels were serious sanctions compelling candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot.[71] These serious sanctions were exacerbated, the Court observed, because "the labels appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label."[72]

The Eighth Circuit opinion, then, protects political candidates from being forced to speak about, to take a position on, or to be associated with, political issues, particularly through the device of pejorative ballot labels, which create the impression of official state disapproval of a candidate's position (or non-position) and against which the candidate has little or no opportunity to respond. While this protection is significant, it is plainly one-sided: only the interests of the political candidate are considered, while the considerations of the rights of the electorate and the importance of fair democratic processes are not.

In order to examine the latter considerations, it is necessary to review the major United States Supreme Court decisions dealing with qualifications for election to Congress.

**(5) Qualifications for election to Congress: minimal and immutable**

The Constitution establishes qualifications for membership in the Congress of the United States. With respect to the House of Representatives, the Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[73] With respect to the Senate, the Constitution provides: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."[74] In short, qualifications for members of Congress are marvelously minimal: age, citizenship and residence.

In *Powell v. McCormack* (hereinafter *Powell*),[75] the United States Supreme Court closely examined the qualifications for membership in Congress from an historical perspective, and linked their importance to democratic and electoral processes. The incident culminating in the Court's decision in *Powell* was the exclusion of Congressman Adam Clayton Powell, Jr. from the 90th Congress, despite his having been duly elected to office and his meeting the age, citizenship and residency requirements set forth in Art. I, § 2, cl. 2.[76] The House of Representatives refused to administer the oath of office to Congressman Powell, and passed a resolution excluding him from office and declaring his seat vacant, because a Select Committee of the House found that he wrongfully diverted House funds for his own use and made false reports on expenditures of foreign currency.[77]

Closely examining practices of the British Parliament (particularly the subsequently repudiated expulsion of John Wilkes from the House of Commons), practices followed by colonial legislative bodies, debates recorded during the Constitutional Convention (particularly the arguments of John Madison and Alexander Hamilton), commentaries published after the Constitutional Convention, and early congressional dealings with membership requirements, the Court concluded that the qualifications for membership in Congress expressly set forth in the Constitution could not be altered by Congress. Rather, those qualifications could only be altered by constitutional amendment.[78] Hence the House of Representatives lacked "authority to exclude any person, duly elected by his constituents who meets all of the requirements for membership expressly prescribed in the Constitution."[79]

Equally important, the Court declared its decision was mandated by fundamental principles of representative democracy, namely, as argued by Hamilton, that the people have the right to choose whomever they please to govern them, and, as argued by Madison, that limiting whom the people can select as their representatives is as deleterious as limiting their right to vote.[80] Hence both the intent of the framers of the Constitution and basic principles of the democratic system persuaded the Court that "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."[81]

In *Thornton*, the United States Supreme Court reiterated its analysis of the historic background of the Qualifications Clauses for membership in Congress.[82] Two features of this analysis are especially noteworthy. First, the Court relied heavily on James Madison's argument during the Constitutional Convention that the failure to limit the power of Congress to change membership requirements would subvert the democratic process.[83] Unless Congress's power to change membership requirements were severely restricted, Madison argued, the legislature could subvert the constitution and convert democracy to aristocracy or even oligarchy by simply limiting the number of people capable of being elected.[84] More particularly, unless restricted, Congress could simply decide that the legislature should be composed of any particular group or class of people (for example, lawyers, farmers, electricians, or religious ministers), and thereby restrict who might serve in Congress in future elections and subvert the principles of democracy envisioned by the Constitution.[85] Second, the Court relied on Hamilton's argument that qualifications of the persons who may be elected to Congress were both defined and unalterably fixed in the Constitution, so as to prevent the imposition of qualifications that restrict who may elect or who may be elected (for example the wealthy or the well-born).[86] Likewise, by using a limited number of restrictive qualifications (i.e. age, citizenship and residency), the Constitution implicitly excludes the use of other restrictions for membership in Congress (e.g. ownership of property or levels of wealth or religious persuasion), thereby maximizing the number of people eligible to serve and the political viewpoints that may be expressed and represented.[87]

These historical perspectives, of course, are highly complementary to the basic democratic principles the Court cites in support of minimal and inalterable qualifications for membership in Congress. More particularly, the Court emphasized that, unless restricted, the power to impose additional qualifications for membership in Congress would undermine the people's right to "choose whom they please to govern them,"[88] minimize "the egalitarian concept that the opportunity to be elected was open to all,"[89] and unnecessarily deny individuals the right to seek to legislative office, perhaps even leading to a self-perpetuating body contrary to democratic principles.[90] The interdependence of its historical analysis and the cited democratic principles is recognized by the Court:

> *Powell* thus establishes two important propositions: first, that the 'relevant historical materials' compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the fundamental principle of our

> representative democracy . . . that the people should choose whom they please to govern them.[91]

Citing the intertwined historical analysis and underlying democratic values, the Court ruled that states could not do what Congress was prohibited from doing: changing the qualifications for membership in Congress through the guise of term limits.[92]

Those same electoral process considerations were central in *Gralike*.[93] The Court expressed concern about the "substantial political risk the ballot labels impose on current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth in Article VIII for passing its term limits amendment."[94] Noting that the ballot labels handicap candidates for United States Congress "at the most crucial stage in the election process - the instant before the vote is cast"[95] - the court expressed concern that voters' attention was drawn to single consideration - fidelity to term limits - that was accorded enhanced status via the ballot labels as "an important - perhaps paramount - consideration in the citizen's choice."[96] Such use of ballot labels "surely place their targets at a political disadvantage to unmarked candidates for congressional office."[97] Hence, rather than merely regulating election procedures, the ballot labels improperly "dictate electoral outcomes."[98]

That the Court's opinion sought to preserve democratic electoral processes that maximize the spectrum of candidates eligible to serve in Congress is underscored by the concurring opinion of Justice Kennedy. Justice Kennedy observes that states are not permitted to impose "conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, § 4,"[99] and that the Elections Clause does not permit states to dictate electoral outcomes or to favor or disfavor a class of candidates.[100] In Justice Kennedy's view, the Elections Clause provides only limited power to regulate the time or place of federal elections, rather than an "attempt to control the actions of the State's congressional delegation."[101] Furthermore, the nature of Federalism itself and the theory of representative government, under which elected representatives are directly accountable to the people who elected them, preclude the use of pejorative ballot labels:

> The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred, with the legislators having the excuse of saying that they did not act in the exercise of their best judgment but simply in conformance with a state mandate. . . . . Missouri seeks . . . to wield the power granted to it by the Elections Clause to handicap those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred position on a certain issue. Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it.[102]

By way of summary, then, the United States Supreme Court decisions in *Powell*, *Thornton*, and *Gralike* seek both to preserve the sanctity of the electoral process and to uphold the representative nature of Federalism by prohibiting Congress and the states from modifying the qualifications for membership in Congress, except through constitutional amendment. The former considerations encompass both the desirability of permitting as wide a variety of candidates as possible to seek election, and the corollary interest of the electorate to be able to choose whomever they wish to represent them. By preserving as sacrosanct the minimal age, citizenship and residency qualifications found in Article I of the Constitution, the Court has maximized both the number of candidates for, and the choices of the electorate for representation in, the Congress. The Court has said unequivocally that it is equally wrong to limit the class of candidates eligible to serve, as it is to rig the outcome of an election via state imposed ballot labels. Hence both sides of the electoral equation are served by restricting Congress's and the state's ability to change qualifications for membership in Congress.

Moreover, the *Powell*, *Thornton* and *Cook* trilogy seeks to preserve the nature of Federalism and the representational form of government created by the Constitution. By restricting the power of Congress and the states to change qualifications for membership in Congress, the Court maximizes the ability of Representatives and Senators, unfettered by states' attempts to control how they might vote in Congress, to represent the people who elected them. Likewise, by allowing the people who elected them to hold Senators and Representatives directly accountable for how they conducted themselves in office, unfettered by state mandates influencing how they might vote in Congress, Senators and Representatives are more directly accountable to the voters for their actions while in office. Hence the nature of our representative form of government is strengthened by restricting Congress's and the state's ability to change qualification for membership in Congress.

**(6) First Amendment protections against compelled political speech.**[103]

As noted above, the majority opinion of the United States Supreme Court in *Gralike*, unlike the opinion of the Eighth Circuit Court of Appeals, did not address the First Amendment protections against compelled political speech.[104] The United States Supreme Court has on at least four occasions strongly endorsed First Amendment protections against compelled political

or ideological speech. In *West Virginia State Board of Education v. Barnette* (hereinafter *Barnette*),[105] the United States Supreme Court ruled that a resolution of the West Virginia State Board of Education requiring all teachers and pupils to participate in salute-to-the-flag ceremonies violated the First Amendment.[106] The Court recognized that the flag was employed by the State as a symbol of adherence to government, that the Board of Education resolution required the individual to communicate by word and sign his acceptance of the political ideas the flag represents, that a compulsory flag salute and pledge ceremony requires affirmation of a belief and an attitude of mind,[107] and that the "Bill of Rights which guards the individual's right to speak his own mind [does not permit] public authorities to compel him to utter what is not in his mind."[108] The Court struck down the resolution with emphatic language: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[109]

The United States Supreme Court reached essentially the same decision in *Wooley v. Maynard* (hereinafter *Maynard*).[110] In *Maynard*, a married couple, Jehovah's Witnesses, covered up the state motto "Live Free or Die" on their New Hampshire license plate, because it was contrary to their religious and moral beliefs. They sought declaratory and injunctive relief against enforcement of a statute requiring noncommercial motor vehicles to bear license plates embossed with the motto and making it a misdemeanor to obscure the state motto on the license plates. The Court held that New Hampshire may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[111] This ruling was founded on the correlative propositions inherent in the right to speak:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[112]

In reaching its decision, the Court examined the interests advanced by the state to justify its requirement that the motto be displayed on the license plates. Those interests included facilitating the identification of passenger vehicles and promoting appreciation of history, individualism, and state pride. The Court determined that those interests of the state were inadequate.[113] The Court stated that the interests of the state could be achieved by narrower means, which did not stifle fundamental personal liberties,[114] and that the latter interest was not ideologically neutral, in which case "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[115]

In *Riley v. National Federation of the Blind of N.C., Inc.* (hereinafter *Riley*),[116] the United States Supreme Court ruled that the North Carolina Charitable Solicitations Act (hereinafter the Solicitations Act) was an unconstitutional infringement on free speech. The Solicitations Act governed the solicitation of charitable contributions by professional fundraisers by, among other things, requiring professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations.[117] Noting that the solicitation of charitable contributions is protected speech,[118] the Court declared unconstitutional the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months. More particularly, because North Carolina had not advanced a sufficiently weighty interest in such a requirement, and because the means chosen to accomplish it were unduly burdensome and not narrowly tailored, the restriction was deemed to be a prohibited "compelled speech."[119]

Finally, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (hereinafter *Hurley*),[120] the United States Supreme Court ruled that the South Boston Allied War Veterans Council ("the Veterans Council"), an unincorporated association of individuals elected from various South Boston veterans groups which annually organizes and conducts Boston's St. Patrick's-Evacuation Day Parade ("the Parade"), could not be compelled by the government to allow the Gay, Lesbian and Bisexual Group of Boston ("GLIB"), a social organization of persons who are homosexual or bisexual and their supporters, to march in the parade.[121]

The United States Supreme Court unanimously ruled that the Parade was expression for purposes of the First Amendment. The Court observed initially that parades were festive events, containing people in costumes and uniforms, marching bands and floats, and colorful flags and banners, all of which entertained the spectators lining the streets and the television viewers in their homes.[122] While the Court conceded the Veterans Council was rather lenient in admitting diverse groups with a wide range of messages to its parade, such leniency did not forfeit the parade organizers' constitutional protections.[123] Rather, the Court noted, the First Amendment protects individuals' rights to assemble a multifaceted message of their own choosing, regardless of whether they merely assemble the voices or actually generate the communications, much the same way as the First Amendment protects cable operators' selection of programs to be rebroadcast and newspaper editors' assembly of diverse voices on the editorial page.[124] The Veterans Council was entitled to no less protection in selecting the contingents appearing in the parade.[125]

The Court also found that GLIB was formed for the very purpose of marching in and communicating its ideas as part of the Parade,[126] and that the "state court's application of [the public accommodations act] produced an order essentially requiring petitioners to alter the expressive content of their parade."[127] Such compelled speech "violates the fundamental rule

of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[128] The Court continued:

> Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.[129]

The four United States Supreme Court opinions examined above are widely disparate, involving unique modes of expression - a salute to the flag, a state license plate, a professional license, and a public parade - and a broad spectrum of messages - loyalty to the government, a personal, religious belief, disclosure of success as fund raiser, and pride in cultural heritage as a gay, lesbian or bisexual individual. Nonetheless, the four cases combine to provide a significant level of First Amendment protection not only to express and tailor views and opinions, but, equally important, to avoid being identified with expressions of others. These protections - deemed to be a "fixed star in our constitutional constellation"[130] - guarantee that no government official can proscribe orthodoxy in thought or opinion, or compel an individual by word or act to express, participate, or concur in the dissemination of the ideas or messages of others.

While the importance of First Amendment protections against compelled political speech should not be denigrated, the interest protected by those decisions is only one-dimensional: the speaker's right to choose not to be associated with certain viewpoints. Hence, basing a decision either to uphold or to overturn the power of Congress and the states to alter the qualifications for membership in Congress on First Amendment protections against compelled political speech focuses solely on the candidate's First Amendment rights. Such an approach overlooks the voters' rights to choose whomever they wish to represent them, to support whatever candidates they choose, and to have as wide a variety of candidates as possible. Using First Amendment protections against compelled commercial speech as justification for restricting changes in qualifications for membership in Congress, therefore, appears to be much more narrow than the interest in supporting the electoral process and preserving the principles of Federalism. If so, the United States Supreme Court in the *Powell*, *Thornton* and *Cook* trilogy may have taken the broader approach in resolving the conflicts between term-limits advocates and the right of the electorate to choose whomever they please to represent them.

This conclusion is illustrated by the application of the First Amendment test developed by Chief Justice Rehnquist in his concurring opinion in *Gralike*.[131] In his view, publicizing or disclosing the candidates position on particular issues through ballot labels would be acceptable, provided the ballot label (a) is justified without reference to the content of the regulated speech, (b) is narrowly tailored to serve a significant governmental interest, and (c) leaves open ample alternative channels for communication of the information.[132] Thus, for example, a state statute requiring the printing and distribution of hand cards that highlight candidates' voluntarily stated positions on a given issue (e.g. gun control legislation) outside of the voting place on the day of the election would likely pass muster under the Chief Justice Rehnquist's three part test, because: (a) the hand cards do not unfairly focus the voters' attention on a particular political issue, and the candidates are not derogatorily associated with a position on an issue, (b) the hand cards are designed inform the voters of candidates positions on significant issues, and hence narrowly serve a significant government interest, and (c) the candidates whose positions or non-positions are displayed on the hand card have ample opportunity to communicate their views to the electorate, for example through newspaper advertisements or alternative hand cards. Notably, this analysis focuses only on the candidate's First Amendment rights, and balances that interest against the public's First Amendment rights to engage in and be informed by communications during the election campaign. As one commentator noted, "[c]andidates for federal office have a First Amendment right - separate and distinct from the rights of voters - to appear on the ballot unaccompanied by the state's pejoratives."[133]

**(7) First Amendment vs. the Qualifications Clauses approaches in election issues.**

As indicated earlier in this article, the United States Supreme Court based its decision in *Gralike* on the Qualifications Clauses, rather than the First Amendment protections against compelled political or ideological speech. This approach was a bit surprising, because the first justification used by the Eighth Circuit Court of Appeals in striking down the mandatory ballot labels was First Amendment protection against compelled speech.[134] Moreover, as noted above, Chief Justice Rehnquist has crafted an alternative First Amendment test in evaluating term limit proposals. In short, there appear to be three approaches in resolving ballot label questions: (1) the interpretation of the Qualifications Clauses spelled out in *Thornton* and *Gralike*; (2) First Amendment protections against compelled political speech; and (3) Chief Justice Rehnquist's First Amendment test. While all three approaches appear to lead to the same conclusion - mandatory ballot labels disclosing the candidate's position on enumerated political issues are unconstitutional - the implications of each approach are quite different.

In order to illustrate those differences, it may be helpful to capsulize the three alternative approaches and then to apply them to three hypotheticals. Under the Qualifications Clauses, state mandated ballot labels disclosing a candidate's position on a political issue are unconstitutional if they (a) effect additional qualifications for membership in Congress, thereby impairing the people's right to choose whomever they want to govern them, (b) undermine the egalitarian concept that the opportunity to be elected is open to all, (c) unnecessarily deny individuals the right to seek to legislative office, thereby creating the risk of a

self-perpetuating legislative body contrary to democratic principles, or (d) undermine the direct accountability of elected representatives to the voters who elect them under the Federalist system of government.

Under the compelled speech approach, state mandated ballot labels violate the First Amendment if they highlight a particular political issue and force a candidate either to pledge support of, or to speak against, the identified political issue. The pejorative nature of the ballot label and corresponding appearance of official state disapproval force Congressional candidates to speak in favor of a particular political issue rather than risk the political consequences of being negatively labeled on the ballot at the most critical point in the election: the moment the vote is being cast.

Under Chief Justice Rehnquist's approach, a state mandated ballot label violates the First Amendment if it (a) cannot be justified without reference to the content of the regulated speech, (b) is not narrowly tailored to serve a significant governmental interest, and (c) fails to leave open ample alternative channels for communication of the information. Under this view, state mandated ballot labels containing political or ideological speech violate the First Amendment, if they undermine the openness and fairness of the election process by directing the citizen's attention to the single consideration, placing candidates in a bad light, and denying the candidate ample opportunity to communicate information to the voters. Likewise, state mandated ballot labels violate the First Amendment if they restrict the candidate's ability to seek office by altering or imposing the qualifications of candidates for elected office that are not narrowly tailored to a significant governmental interest.

***Hypothetical I.*** *A duly enacted statute requires the Secretary of the State on the day of all primary elections to distribute and display hand card models of the election ballot that are color-coded to demonstrate the positions of candidates for the United States Congress on federal support for stem cell research. The position of candidates who have announced that they oppose federal support for stem cell research appear in patriotic red-white-blue colors. The position of candidates who either have announced they favor federal support for stem cell research or have not disclosed their position on federal support for stem cell research are colored in sickening, disgusting colors highlighted with the label "Favors Human Cloning." These hand card models are distributed to voters as they approach the voting place in conformity with appropriate state regulations.*

By using the noxiously color-coded "Favors Human Cloning" stem cell research labels on the distributed hand cards ("the labeled hand cards), the Secretary of State is attempting to insure that only those candidates who oppose federal support of stem cell research emerge victorious in the primary election, by bringing to the attention of the voter's in a very vivid way the positions of the candidates on that issue. If the state is successful at the primary election level, it will also insure that only those candidates who oppose federal support of stem cell research win the general election and be elected to Congress.

Nonetheless, under the Qualifications Clauses, while the labeled hand cards characterize and publicize the Congressional candidates' positions on the issue of federal support for stem cell research, the labeled hand cards do not do so at the last possible moment just as the voters actually cast their votes. Rather, the candidate who dislikes the impression created by labeled hand cards may take alternative measures to counterbalance their effect, perhaps by distributing alternative hand cards or executing an advertising campaign warning the voters about the unfairness of the state imposed labels. Hence, the labeled hand cards do not appear to alter the qualifications of candidates for Congress, to limit the candidates that voters may choose to represent them, to restrict the right of individuals to seek election to Congress, to reserve membership in Congress to classes of individuals, or to limit the direct accountability of the elected official to the voters. That being so, the labeled hand cards would appear to be constitutional under the Qualifications Clauses.

Under the compelled speech approach, the labeled hand cards highlight a particular political issue, and will violate the Congressional candidate's First Amendment right against compelled speech, if the candidate is forced either to pledge support for, or to speak against, federal support for conducting stem cell research. Hence, if the Congressional candidate reasonably believes the labeled hand cards will be particularly effective in persuading voters to cast their ballots in favor of candidates who oppose stem cell research, the candidate may feel compelled either to oppose support for such research (and thereby gain the patriotic label) or to explain his position to the voters (and thereby minimize the impact of the disgusting label). While the candidate still has the opportunity to distribute countervailing hand cards or advertisements, the damage - compelled political speech - had already been inflicted. If so, the state-mandated use of the labeled hand cards may be deemed unconstitutional under the First Amendment protection against compelled political or ideological speech.

Under Chief Justice Rehnquist's approach, the state mandated use of the labeled hand cards does not violate the First Amendment, if the state has a significant interest in bringing the issue of Federal support of stem cell research to the attention of the voters, the use of the hand cards is the least intrusive means of doing so, and the political candidate affected by the label has ample opportunity communicate with the voters. Significantly, the labeled hand cards do not appear to effect a change in qualifications for office, and thereby thwart a candidate's ability to seek Congressional office by altering the qualifications for the office. Similarly, unlike the ballot labels in *Gralike*, the labeled hand cards do not affect the voters at the very last instant when their votes are being cast, and the candidate who dislikes the impression created by labeled hand cards may take alternative measures to counterbalance their effect. While the labeled hand cards are designed to direct the voter's attention to the single consideration and may place those candidates who support (or have not taken a position on) Federal funding of stem cell research in a bad light, the openness and fairness of the election process cannot be said to be undermined, if the candidate's ability to communicate with the voters is not impaired. The labeled hand cards, unlike the ballot labels, do not affect the fundamental fairness of the election from either the voter's or the candidate's point of view.

***Hypothetical II.*** *A duly enacted state statute prohibits the appearance of names of candidates for Congress on the ballot in either a primary or a general election, unless the candidates within sixty days of the election shall have filed with the Secretary of State personal financial statements and copies of their most recently filed federal income tax return. The mandatory financial statement disclosures include the candidates' assets and their historical cost, the candidates' liabilities and the identity of their creditors, and candidates' income and the identity of their income sources. The personal financial statements and the federal income tax returns filed with the Secretary of State are deemed to be public records accessible to the public under the state's public record law.*

As noted above, the Qualifications Clauses prohibit mandatory ballot labels that disclose a candidate's position on political issue, if they alter the qualifications for Congressional office, if they restrict candidate's ability to seek Congressional office by virtue of altered qualifications, if they perpetuate a restricted membership in Congress limited to certain classes of people, or if they undermine the direct accountability of the Congressional representative to the voters. While the mandatory financial statement disclosures in questions prohibit the appearance of a noncompliant candidate's name on the ballot, the candidate is not directly associated with a particular political issue, and the qualifications of candidates to serve in Congress are not affected. Hence, while the required financial disclosures may discourage potential candidates from running for Congress, they are not prohibited by virtue of qualifications for office from being a candidate. Nor is membership in Congress restricted in the future to a particular class or category of individuals. Nor are Congressional representatives made less directly accountable to the voters. Hence the mandatory financial disclosures detailed above do not appear to violate the Qualifications Clauses.

Under the compelled speech approach, the mandatory financial statement disclosure outlined above likely violates the First Amendment, if the disclosure highlights, and compels a candidate to disclose support of, or opposition to, a political or ideological issue. The nature of the disclosed financial information - assets and their historical cost, income and sources of income, liabilities and identity of creditors, and contributions and deductions disclosed on the tax return - may perforce mandate disclosure of political or ideological ideas and opinions. More particularly, the information disclosed reveals not only the candidate's balance sheet and income statement, but the relationships implicit in those disclosures, e.g., a pledge to a religious or political organization or an advance of financial support to political candidates. Likewise, the nature of income and the identity of deductions for charitable contributions disclosed on the tax return reveal the sources and applications of the candidate's financial resources, e.g., the identity of clients, the nature of income earned from clients, and the objects of the candidate's philanthropic efforts. Equally important, the required financial disclosures may discourage political candidates from making political and charitable contributions or selling services to certain individuals precisely because they must be revealed in order to appear on the ballot. Likewise, individuals may be reluctant to support Congressional candidates financially, if their relationship to Congressional candidates is disclosed in their financial statements. In either instance, the mandatory disclosure of financial information violates the fundamental principle that that no government official can proscribe orthodoxy in thought or opinion, or compel an individual by word or act to express concurrence in the dissemination of the ideas or messages of others.

The required financial disclosures do not appear to violate Chief Justice Rehnquist's First Amendment test. The disclosures do not seem to mandate Congressional candidates' association with particular political or ideological views, to alter qualifications of candidates for Congress, to undermine the openness and fairness of the Congressional election process by focusing the voters' attention on a single consideration, to place a Congressional candidate in a bad light, or to deny the Congressional candidate ample opportunity to communicate information to the voters.

***Hypothetical III.*** *A duly enacted state statute prohibits its residents from accepting campaign contributions to support their election to Congress, if they fail to provide assurances in writing that they are opposed to, and will take appropriate steps to prevent the enactment of, legislation designed to give the President of the United States fast-track authority to negotiate and reach agreement in international trade agreements.*

By prohibiting the acceptance of campaign contributions by Congressional candidates who refuse to provide written assurances that they oppose Presidential fast-track authority to negotiate international trade agreements, the Secretary of State is attempting to insure that only those candidates who oppose such fast-track negotiating authority are elected to Congress. Quite simply, by preventing such Congressional candidates from raising funds necessary to engage in the election campaign, the Secretary of State dooms the campaigns of all but the wealthiest candidates. If the state is successful in this effort, it will insure that virtually no Congressional candidates who support fast track negotiating authority are elected to Congress.

Under the Qualifications Clauses, the prohibition on accepting campaign contributions for election to Congress effectively converts a Congressional candidate's position on a political issue (opposing fast track negotiating authority) into a qualification to serve as a member of Congress, impairs the right of the people to provide financial support for and to elect proponents of fast track negotiating authority to Congress, undermines the egalitarian concept that Congressional office is open to all who seek it, creates a perpetual, Congressional membership requirement based on adherence to a political or ideological belief, and undermines the direct accountability of Congressional candidates for office (who can explain their action on the basis of the need to raise campaign funds).

Similarly, the prohibition on accepting campaign contributions unless the Congressional candidate pledges opposition to fast track negotiating authority appears to violate the First Amendment protection against compelled speech. A particular political issue is highlighted, and the Congressional candidates are forced to express opposition to fast track negotiating authority if they want to be elected to Congress. The compulsion is genuine, because an injunction against accepting campaign contributions forces the Congressional candidates to oppose fast track negotiating authority rather than risk the political consequences of being unable to finance the expenses of the election campaign.

Under Chief Justice Rehnquist's approach, a similar fate awaits the prohibition on accepting campaign contributions, unless the Congressional candidate pledges opposition to fast track negotiating authority. The restriction is not politically or ideologically neutral. Rather, it is based squarely on the Congressional candidate's view on fast track negotiating authority. The restriction is not narrowly tailored to serve a significant government issue. Rather, all of the political and ideological views of Congressional candidates are smothered, if they are prohibited from accepting campaign contributions and financing their campaigns. The restriction fails to leave open ample alternative channels for communication of information. Rather Congressional candidates who oppose fast track negotiating authority have no funds to gain access to the media to explain their position on any issues. Hence, the openness and fairness of the Congressional election process is compromised, by screening candidates on the basis of a single consideration, by placing Congressional candidates in an impossible political situation, and by denying Congressional candidates ample opportunity to communicate information to the voters. In short, the prohibition on accepting campaign contributions unless the Congressional candidate is opposed to fast track negotiating authority is a newly created, de facto qualification for Congress contrary to the First Amendment.

The application of the three theories to each of the hypotheticals appears to demonstrate that inconsistent results occur, as summarized in the following table:

| **Hypothetical** | **Qualifications Clauses** | **Compelled Speech** | **Rehnquist Approach** |
|---|---|---|---|
| Color-coded handcars labeling candidate's position | Acceptable | Unacceptable | Acceptable |
| Mandatory financial statement disclosure | Acceptable | Unacceptable | Acceptable |
| Restrict acceptance of campaign contributions | Unacceptable | Unacceptable | Unacceptable |

Certainly, in any event, the differences between the three theories are explored in an interesting exercise. Somewhat surprisingly, the compelled speech theory, which at first blush appears to be the narrowest theory because it focuses only on the candidate's rights, is less tolerable of the hypothetical election issues posed. The Qualifications Clauses, on the other hand, while couched in loftier language, do not appear to have the reach to impact the election-influencing tactics posed in the hypotheticals.

## SUMMARY

In striking down state-imposed, mandatory term limits on Congressional representatives, the United States Supreme Court in *Thornton* prohibited states from directly or indirectly altering the qualifications of candidates for Congress set forth in the Qualifications Clauses of Article I, thereby protecting the rights of the electorate to have open elections and choose their representatives from a wide variety of candidates, and the rights of candidates for office to seek office regardless of their particular political or ideological viewpoints. These interests are vitally important to a democratic form of government, because they reinforce the rights of the electorate to choose whomever they want to represent them and the rights of candidates to proselytize their views, however unpopular, in the election process.

In striking down mandatory election ballot labels that disclosed the Congressional candidates position on term limits, the United States Supreme Court in *Gralike* appears to have strengthened its decision in *Thornton*. *Gralike* prohibits States from imposing ballot-based sanctions on Congressional representatives if they fail to follow instructions on legislative actions, and bans the use of pejorative ballot labels to effect the indirect imposition of term limits, because the adverse ballot labels handicap Congressional candidates at the most crucial stage of the election process, the instant before the vote is case. In short, because the qualifications of candidates for Congress spelled out in the Qualifications Clauses are both minimal and immutable, the right of the voters to choose whomever they please to govern them is preserved, the egalitarian concept that the opportunity to run for election is open to all is promoted, the danger Congress may be converted to a self-perpetuating body contrary to democratic principles is minimized, and the notion Congressional representatives should be directly accountable to the voters who elected them is supported.

In addition to reinforcing our attention to, and respect for, basic principles of democracy and the Federalist system of government, the Court's decision in *Gralike* provides a rich opportunity to analyze and contrast supporting yet divergent legal principles: the Qualifications Clauses, the First Amendment protections surrounding elections, and First Amendment

protections against compelled political or ideological speech. By applying each approach to three hypotheticals, the strengths and weaknesses of each constitutional theory are better understood.

**ENDNOTES**

[1] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 784 (1995).
[2] 514 U.S. 779 (1995).
[3] *Id*. at 827. By 1994, when the U.S. Supreme Court struck down federal term limits in U.S. Term Limits v. Thornton, twenty-three states had passed term limits laws. See Benjamin J. Cluff, FEDERAL TERM LIMITS IN IDAHO: ONCE, TWICE, THREE TIMES UNCONSTITUTIONAL?, 36 Idaho L. Rev. 119, 120 (1999).
[4] The full text of the proposed amendment is as follows:

> Congressional Term Limits Amendment
>
> (a) No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of the United States Representative or who then holds the office shall serve for more than two additional terms.
>
> (b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve in the office for more than one additional term.
>
> (c) Any state may enact by state constitutional amendment longer or shorter limits than those specified in section 'a' or 'b' herein.
>
> (d) This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three- fourths of the several States."

*See* Cook v. Gralike, 531 U.S. 510, 514 n. 2 (2001). *See* also Thomas E. Baker, *Can a State Give Instructions to Members of Congress and Label Them If They Disobey?*, 2 ABA PREVIEW 56 (October 23, 2000).
[5] *See* Baker supra n. 3 at 56. Article V of the United States Constitution sets forth the two processes through which the United States Constitution may be amended: "the Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.". U.S. CONST. art. V.
[6] Cook v. Gralike, 531 U.S. at 513. Baker *supra* n. 3 at 57.
[7] Cook v. Gralike, 531 U.S. at 514-515. Baker *supra* n. 3 at 57.
[8] Cook v. Gralike, 531 U.S. at 515. Baker *supra* n. 3 at 57.
[9] Cook v. Gralike, 531 U.S. at 515. Baker *supra* n. 3 at 57.
[10] Cook v. Gralike, 531 U.S. at 514. Baker *supra* n. 3 at 57.
[11] Cook v. Gralike, 531 U.S. at 514. Baker *supra* n. 3 at 57.
[12] Cook v. Gralike, 531 U.S. at 516. Baker *supra* n. 3 at 57.
[13] Cook v. Gralike, 531 U.S. 510 (2002).
[14] *Id*. at 527.
[15] 514 U.S. 779 (1995).
[16] U.S. Term Limits, Inc. v. Thornton, 514 U.S. at. 833-34.
[17] *Id*. at 783-84.
[18] *Id*. at 833-34
[19] *Id*. at 805.
[20] *Id*. at 804. The Court reiterated this in Cook v. Gralike, 531 U.S. at 519:

> [T]he Constitution 'draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States.' On the one hand, in the words of Chief Justice Marshall, 'it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.' The text of the Tenth Amendment delineates this principle: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' On the other hand, as Justice Story observed, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them.' Simply put, '[n]o state can say, that it has reserved, what it never possessed.' (citations omitted)

[21] Art. I, § 4, cl. 1. *See* United States v. Classic, 313 U.S. 299 (1941).
[22] U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 801.
[23] *Id*. at 802, 805-806.
[24] *Id*. at 833-834

[25] These procedural mechanisms include such matters as notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns. Cook v. Gralike, 531 U.S. at 523-24. *See also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (the Elections Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections), Smiley v. Holm, 285 U.S. 355, 366 (1932) (these comprehensive words embrace authority to provide a complete code for congressional elections), and Storer v. Brown, 415 U.S. 724, 730 (1974) (states have authority to ensure that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic process").
[26] U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 833-834. The Constitution sets forth qualifications for membership in the Congress of the United States. Article I, § 2, cl. 2, which applies to the House of Representatives, provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Article I, § 3, cl. 3, which applies to the Senate, similarly provides: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 782-83.
[27] Baker supra n. 3 at 57. In U.S. Term Limits v. Thornton, the Court rejected the argument that the proposed term limits did not bar incumbents from participating in the election, because they could campaign as write-in candidates. The Court stated at 831-31:

> [W]e are advised by the state court that there is nothing more than a faint glimmer of possibility that the excluded candidate will win. Our prior cases, too, have suggested that write-in candidates have only a slight chance of victory. But even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election. In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded. More importantly, allowing States to evade the Qualifications Clauses by 'dress[ing] eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'

[28] Cook v. Gralike, 531 U.S. at 513-15. Baker supra n. 3 at 57.
[29] Cook v. Gralike, 531 U.S. at 514. Baker supra n. 3 at 57.
[30] Cook v. Gralike, 531 U.S. at 514-15. Baker supra n. 3 at 57. The nonincumbant's pledge read: "I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation 'Disregarded Voters' Instruction on Term Limits' will not appear adjacent to my name." Cook v. Gralike, 531 U.S. at 515 n. 4.
[31] Cook v. Gralike, 531 U.S. at 514-15. Baker supra n. 3 at 57.
[32] Cook v. Gralike, 531 U.S. at 516.
[33] Gralike v. Cook, 996 F.Supp. 917, 920 (W.D. Mo.1998), and Gralike v. Cook, 996 F.Supp. 901, 905-909, 910 (W.D. Mo. 1998).
[34] Gralike v. Cook, 191 F.3d 911, 918 (1999). While the appeal was pending, Donald Gralike withdrew from the 1998 election, and Michael Harmon, a nonincumbent candidate in the 2000 Republican congressional primary in the Seventh District of Missouri, intervened as an appellee. Harmon's intervention precluded the contention that the case was moot. Cook v. Gralike, 531 U.S. at 517, n. 6, citing Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974). (Even if the election were "long over and relief could not be provided to the candidates or voters," the case would not be moot, because the effects on candidates in future elections would ensue, and a controversy "capable of repetition" justifies the court's review.)
[35] Gralike v. Cook, 191 F.3d 911, 918, 924, 925 (1999).
[36] *Id*. at 922.
[37] Cook v. Gralike, 531 U.S. 510 (2001).
[38] Cook v. Gralike, 531 U.S. at 518.
[39] *Id.* at 520-22.
[40] *Id*. at 524.
[41] *Id*. at 525.
[42] *Id*., citing Anderson v. Martin, 375 U.S. 399, 402 (1964).
[43] Cook v. Gralike, 531 U.S. at 525-26.
[44] Baker *supra* n. 3 at 57.
[45] Justices Stevens, Kennedy, Scalia, Ginsburg, Breyer and Souter joined in Part IV of the decision upholding the primacy of the Qualifications Clauses in Article I over the Elections Clause of Article I, § 1, cl.1. Justice Thomas concurred, because, while he did not agree that the States have no authority to regulate congressional elections except for the authority that the

Constitution expressly delegates to them, the parties conceded the validity of this premise. He therefore concurred. Cook v. Gralike, 531 U.S. at 530.
[46] Cook v. Gralike, 531 U.S. at 530-31.
[47] *Id*., citing Bullock v. Carter, 405 U.S. 134, 143 (1972) ("laws that affect candidates always have at least some theoretical, correlative effect on voters"), and Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) ("voters can assert their preferences only through candidates or parties or both").
[48] Cook v. Gralike, 531 U.S. at 531.
[49] *Id*.
[50] *Id*., citing Clark v. Community for Creative Non- Violence, 468 U.S. 288, 293 (1984). ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.")
[51] Cook v. Gralike, 531 U.S. at 531-32.
[52] *Id*.
[53] *Id*. at 532.
[54] 375 U.S. 399 (1964).
[55] Anderson v. Martin, 375 U.S. at 402.
[56] *Id*.
[57] Cook v. Gralike, 531 U.S. at 532.
[58] Cook v. Gralike, 91 F.3d 911, 917 (8th Cir. 1999).
[59] Cook v. Gralike, 531 U.S. at 531.
[60] As noted below in this article, the concurring opinion of Justice Stevens takes a very different tact. Justice Stevens focuses on the notions of federalism and representative government, and insists that that representatives in Congress are responsible to the people that elected them to office rather than to the states from which they were elected, and that Article VIII improperly interferes with the people's right to select their representatives.
[61] Cook v. Gralike, 91 F.3d at 917-19.
[62] *Id*. at 922-24. The Eighth Circuit also decided that Article VIII violated the Speech and Debate Clause in Article 1, section 6, clause 1 of the United States Constitution, *id*. at 921-22, and that Article VIII violated the amendment provisions of Article V of the United States Constitution, *i.d* at 924-25. This article focuses only on the compelled speech and Qualifications Clauses aspects of the Eighth Circuit's decision.
[63] *Id*. at 917.
[64] *Id*. at 917-18.
[65] *Id.* at 918.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id*.
[70] *Id.* 918-19.
[71] *Id.* at 919.
[72] *Id*. at 919 n. 6.
[73] Article I, § 2, cl. 2. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 783.
[74] Article I, § 3, cl. 3. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 783.
[75] Powell v. McCormack, 395 U.S. 486 (1969).
[76] *Id*. at 490-93.
[77] *Id. See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 789-90.
[78] Powell v. McCormack, 395 U.S. at 521-22.
[79] *Id*. at 522.
[80] *Id*. at 547-48.
[81] *Id.* at 548.
[82] U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 790-93.
[83] *Id*. at 790-91.
[84] *Id*. at 791.
[85] *Id*.
[86] *Id*. at 792.
[87] *Id.* at 793.
[88] *Id*.

[89] *Id*. at 794, citing Madison's statement that "[u]nder these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." Powell v. McCormack, 395 U.S. at 540, n. 74.
[90] U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 794.
[91] *Id*. at 795.
[92] *Id.* at 806. The court reiterates its conclusion later in the opinion: "In sum, the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in Powell, reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution. U.S. Term Limits, Inc. v. Thornton, 514 U.S. at 827.
[93] Cook v. Gralike, 531 U.S. 510 (2001).
[94] *Id.* at 525.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 528.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] Much of the analysis found in Part (5) of this article is based upon research appearing in a prior publication of the authors. See Edward J. Schoen et al, *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech - Now you See It, Now You Don't*, AM. BUS. L.J. (forthcoming 2002), and Edward J. Schoen et al, Glickman v. Wileman Bros. v Elliott: *California Fruit Marketing Orders Prune the First Amendment*, 10 WIDENER JOURNAL OF PUBLIC LAW 21, 28-34 (2000).
[104] In Cook v. Gralike, 191 F.3d 911, 917 (1999), the Eighth Circuit relied on Wooley v. Maynard, 430 U.S. 705, (1977), West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991), and Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) in formulating its compelled speech analysis. Those decisions, supplemented by Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), also form the basis of the compelled speech analysis appearing below in this article.
[105] 319 U.S. 624 (1943).
[106] Student non-compliance was treated as "insubordination," the punishment for which was expulsion. Readmission was denied until the student complied with the policy. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. at 629.
[107] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. at 633.
[108] *Id*. at 634.
[109] *Id*. at 641.
[110] 430 U.S. 705 (1977).
[111] Wooley v. Maynard, 430 U.S. at 713.
[112] *Id*. at 714. (citations omitted).
[113] *Id*. at 715-716.
[114] *Id*. at 716-717.
[115] *Id*. at 717.
[116] 487 U.S. 781 (1988).
[117] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. at 784.
[118] *Id*. at 789, citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (invalidating a local ordinance requiring charitable solicitors to use, for charitable purposes 75% of the funds solicited), and Secretary of State of Md. v. Joseph H. Munseon, Co., 467 U.S. 947 (1984) (invalidating statute prohibiting charitable solicitation contracts in which the fundraiser retained more than 25% of the money collected).
[119] *Id.* at 798. The Court stated:

> We believe, therefore, that North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to a professional fundraisers go in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

[120] 515 U.S. 557 (1995).
[121] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. at 560, 580-81.
[122] *Id*. at 569.
[123] *Id.*

[124] *Id.* at 569-70.
[125] *Id.*
[126] *Id*. at 570.
[127] *Id*. at 572-73.
[128] *Id*. at 573.
[129] *Id*. at 573-74 (citations omitted).
[130] W. Va. State Bd. of Educ. V. Barnette, 319 U.S. at 633.
[131] Notably, in developing his First Amendment test, Chief Justice Rehnquist did not view the issue as one involving compelled political speech. Rather he construed the issue simply as an infringement of the political candidates' First Amendment rights of expression. *See* Cook v. Gralike, 531 U.S. 510, 530-31 (2001).
[132] Cook v. Gralike, 531 U.S. at 531.
[133] Thomas E. Baker, *First Things First: First Amendment Developments*, 8 ABA PREVIEW 418, 425 (August 2, 2001).
[134] Cook v. Gralike, 91 F.3d at 917-18. At least one commentator following the case agreed. *See* Baker supra n. 3 at 58.