

# IDAHO'S MESSY HISTORY WITH TERM LIMITS: A MODEST RESPONSE

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# IDAHO'S MESSY HISTORY WITH TERM LIMITS: A MODEST RESPONSE

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## I. INTRODUCTION

## A. A Response

In November 2014, *Idaho Law Review* published an article by Scott W. Reed entitled, *How and Why Idaho Terminated Term Limits*.<sup>1</sup> Knowing of Mr. Reed's historical involvement in the state court litigation challenging the 1994 term-limit initiative, and legislative repeal, I was initially pleased to know Idaho's term-limit adoption and repeal history would be preserved.

After reading Mr. Reed's article, I believed there was plenty of academic and historical room for varied opinions and comments, since Idaho's term limit history is so messy. This response does not seek to denigrate Mr. Reed's perspective or experience. Rather, this article is intended to provide my insider's point of view, provide a contrasting interpretation, and make limited important corrections.

In 2002, I was in my second term in the Idaho Senate, serving in leadership as Senate Majority Caucus Chairman. I voted to repeal term limits. I voted to override Governor Dirk Kempthorne's veto. Within twenty-four days of the veto override, the 2002 election cycle began with the filing of declarations of candidacy.<sup>2</sup> I, like others, had to defend my unpopular vote in a vigorously contested primary and general election.

Amid allegations of thumbing noses at term-limit supporters, protecting self-interests, and improperly clutching elected positions, the Idaho legislature returned home to ask primary and general election voters to send them back to office.<sup>3</sup>

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1. Scott W. Reed, *How and Why Idaho Terminated Term Limits*, 50 IDAHO L. REV. 1 (2014).

2. The veto override occurred on February 1, 2002, and the filing of declarations of candidacy began on February 25, 2002. See Michael Janofsky, *Idaho Legislature Repeals Term Limit Law, Undoing Voter-Approved Measure*, N.Y. TIMES (Feb. 2, 2002), <http://www.nytimes.com/2002/02/02/us/idaho-legislature-repeals-term-limit-law-undoing-voter-approved-measure.html> (last visited Apr. 10, 2016); see also *Election Laws of the State of Idaho*, IDAHO SECY OF ST. (2015), <http://www.sos.idaho.gov/elect/Law/Election%20Laws.pdf> (last visited Apr. 10, 2016) (explaining in IDAHO CODE § 34-704 that declarations of candidacy must be filed beginning on the twelfth Monday until the tenth Friday preceding the primary election, and explaining in IDAHO CODE § 34-106 that the primary election is held the third Tuesday in May).

3. See, e.g., Don Morgan & Dennis Mansfield, *Voters will fight back with ballot*, IDAHO STATESMAN, February 10, 2002. ("The Legislature's complete and utter disregard for the voters' will on an issue like term limits dramatically shows why, in fact, term limits are needed."); Don Morgan, *As 'hired help,' Legislature has no right to trump voters*, IDAHO STATESMAN, May 7, 2002. ("So, what would have been the honorable way for career politicians in the Legislature and the county courthouses to advance their anti-term limits agenda? They should have, once again, gone back to the people and asked, that's how...[b]ut instead, a handful of career power-brokers imposed their will on the public, ignoring two votes of the people.").

The “how” and the “why” of Mr. Reed’s article are significant historical questions, but neither of those questions were answered from my insider’s perspective. This article, however, will attempt to do so.

### B. A Messy History

On a Saturday in June 2000, I attended the Idaho Republican Party’s biennial convention in Pocatello, Idaho.<sup>4</sup> The keynote speaker was the iconic Charlton Heston, who was then president of the National Rifle Association.<sup>5</sup> At the convention, the fervent Heston challenged those present to be true to constitutional principles and stick to their guns – firmly shoving a rifle in the air – and with bold methodical cadence declared, “from my cold, dead, hands . . .”

Only Republicans heard Mr. Heston that night, but two competing factions heeded the admonition. One significant issue separating the two was a proposed platform plank opposing term limits.<sup>6</sup>

In the years leading up to that convention, term limits enjoyed strong support in Idaho among populists and libertarians,<sup>7</sup> some Democratic legislators,<sup>8</sup> and many Republican legislators.<sup>9</sup> In spite of this or-

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4. Mark Warbis, *Idaho Republicans Seek to End Term Limits*, THE SPOKESMAN-REV., June 25, 2000, at B3.

5. *Id.*

6. *Id.*

7. The first effort to impose term limits by ballot measure in Idaho was begun just days after the 1992 election by supporters of Ross Perot, an Independent candidate for president that year who came in an historically strong third place in Idaho in the general election. *See Perot Supporters Launch Term-Limit Drive*, THE SPOKESMAN-REV., Nov. 21, 1992, at B2.

Out-of-state libertarian influences came later, when wealthy Libertarian Party backer Howie Rich founded U.S. Term Limits in 1992 and sent resources to Idaho. *See JOHN DAVID RAUSCH, JR. ET AL., THE TEST OF TIME: COPING WITH LEGISLATIVE TERM LIMITS* 225, 226 (Rick Farmer, John David Rausch, Jr. & John C. Green eds. 2003); *Term-limit Backers Campaign in Idaho*, MOSCOW-PULLMAN DAILY NEWS, Sept. 30, 1993, at 4A.

While populists and libertarians might occasionally occupy concurrent circles with Republicans, they are identifiably distinct movements. The role of these two term limit proponents is discussed in greater detail *infra* Part III.B.

8. *See, e.g.*, S. JOURNAL 51, 2d Sess., at 213 (Idaho 1992) (three Democratic state senators voted for S.J. Res. 108, 51st Leg., 2d Sess. (Idaho 1992)); H. JOURNAL 51, 2d Sess., at 335 (Idaho 1992) (eight Democratic state senators voted for S.J. Memorial 116, 51st Leg., 2d Sess. (Idaho 1992)).

9. *See id.* The first pieces of term limits legislation introduced in 1992 in the Idaho Legislature were S.J. Res. 108, which would have amended the Idaho Constitution limiting executive branch terms to two and legislative terms to five, but failed to garner even a simple majority in the Idaho Senate. The other was S.J. Memorial 116, which was adopted and called on the United State House of Representatives and Senate to amend the Constitution to limit terms in Congress. S.J. Memorial 116 was sponsored by Senate President Pro Tempore Michael D. Crapo, a Republican, and S.J. Res. 108 was co-sponsored by Senator Jerry Thorne, a Republican, and Senator Claire Wetherell, a Democrat. The large majority of aye votes for each were Republicans.

ganized political effort, it was Idaho voters who inserted term limits in Idaho Code with an initiative in 1994.<sup>10</sup>

At the June 2000 Republican convention, delegates ultimately chose a platform plank that supported the repeal of term limits.<sup>11</sup> Convention delegate Dean Haagenson, former state legislator and the sponsor of the repeal plank, acknowledged “[T]he people have spoken,” referring to the 1994 Initiative. But, then he added, “[t]hey were wrong.”<sup>12</sup>

At that time, the finality of the term limit voter initiative was unclear and uncertain. Would the Idaho Supreme Court overturn the law? Would term limits be implemented? Would term limits bar a significant percentage of Idaho’s county, municipal, and school board officials from appearing on the ballot?

Ultimately, the Idaho legislature repealed the 1994 Initiative in 2002.<sup>13</sup> In doing so, Idaho became the first state to repeal term limits, and to date remains the only state legislature to repeal term limits imposed by ballot initiative.<sup>14</sup>

The eight-year course of events from term-limit enactment in 1994 to repeal in 2002 is a tightly-bound law-making lesson wrapped up in one single political issue. Idaho’s term-limit history *touched every step of the law-making and review process*: legislative, executive, judicial, and at the ballot box. The legislative steps involved a successful initiative, legislative repeal, gubernatorial veto, legislative veto override, unsuccessful referendum, and a legal constitutional challenge in both the state District Court and Idaho Supreme Court.<sup>15</sup>

By *ballot initiative* in 1994, Idaho voters codified term limits on state constitutional officers, state legislators, county officials, city councilors and mayors, school board trustees, and others.<sup>16</sup> In 1995, the U.S. Supreme Court overturned state-imposed term limits as applied to Congress.<sup>17</sup> Then-Idaho District Court Judge N. Randy Smith determined Idaho term limits were facially unconstitutional in 2000,<sup>18</sup> but on December 13, 2001 the Idaho Supreme Court reversed the District Court, holding term limits constitutional.<sup>19</sup>

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10. 1995 Idaho Sess. Laws 1371–73.

11. Warbis, *supra* note 4.

12. *Id.*

13. *See infra* Part III.E.

14. NAT’L CONF. OF STATE LEGS., *The Term-Limited States*, NCSL.ORG (Mar. 3, 2015), <http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> (last visited Apr. 12, 2015).

15. Former Senator Joseph Stegner first brought this observation to my attention.

16. *See* 1995 Idaho Sess. Laws, *supra* note 10.

17. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 779–80 (1995).

18. *Rudeen v. Cenarrusa*, 38 P.3d 598, 602, 136 Idaho 560, 564 (2001).

19. *Id.* at 609, 136 Idaho at 571.

In 2002, the Idaho Legislature passed H425 repealing term limits for all elected officials in the state.<sup>20</sup> Days later, the governor vetoed the bill.<sup>21</sup> Both houses of the legislature overrode the governor's veto.<sup>22</sup> And then a referendum to overturn the legislature's enactment of H425 was placed on the ballot, but voters approved the term-limit repeal.<sup>23</sup>

This article will explain the mechanics of ballot measures in Idaho focusing specifically on term limits, from initiative to referendum. It will then discuss the progression of term limits in Idaho—from introduction, to enactment, to rejection. Finally, this article will explain how and why the 1994 term limits initiative was repealed.

With the assistance of former legislators and others involved in the events,<sup>24</sup> I wrote this article according to my perspective and experience as a legislator, and I seek to supplement the record, offer another point of view, and make corrections to the historical record.<sup>25</sup>

## II. BALLOT MEASURES IN IDAHO

### A. Idaho & Initiated Constitutional Amendments

To understand term-limit repeal, readers must know enactment limitations on ballot measures. Other than by state constitutional convention,<sup>26</sup> Idaho's constitution can only be amended by: (i) the passage of a joint resolution that proposes an amendment by a two-thirds vote of

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20. H.B. 425, 56th Leg., 2d Sess. (Idaho 2002).

21. H. JOURNAL 56, 2d Sess., at 81–82 (Idaho 2002).

22. Ch. 1, 2002 Idaho Sess. Laws 3.

23. See *Idaho Initiative History*, IDAHO SEC'Y OF ST. <http://www.sos.idaho.gov/elect/inits/inithist.htm> (last visited April 10, 2016) ("Term limits remain repealed" by a vote of 50.2% yes and 49.8% no.).

24. I express my gratitude to former legislators Bruce C. Newcomb, Celia Gould, Robert L. Geddes, Joseph Stegner, and Kent Kunz who served when H425 was passed and the veto overridden, as well as Gary Moncrief, distinguished professor emeritus at Boise State University, and Steve Ahrens, who all shared their personal recollections and provided valuable insight.

25. The impetus for this article comes from reading Scott Reed's article, *see supra* note 1. Mr. Reed passed away while I was researching and drafting. I join with his family and the community of Coeur d'Alene in honoring his long legal career and civic-mindedness. Mr. Reed played a significant role in *Rudeen* as counsel for the Idaho Association of Counties. Although I respect his legal contribution, I disagree with some of his analysis of legislative motives in repealing term limits. In part, he appears to suggest that the repeal was based on the notion that when term limits were about to affect Republican legislative leaders, they forced a repeal of the popular will of the people to maintain their position in power. (In addition, Mr. Reed's article contains some imprecisions, such as misstating party and office affiliation for some of the participants.)

26. A state constitutional convention must be called by the legislature. IDAHO CONST. art. XX, § 3.

both houses of the legislature;<sup>27</sup> and (ii) ratification by a simple majority vote of the people at the next general election.<sup>28</sup> Unlike some states, Idaho's constitution provides no procedure for direct amendment by initiative.<sup>29</sup> In other words, the initiative process in Idaho can only be used to create statute and cannot be used to amend the State Constitution.

The first three states—California, Colorado, and Oklahoma—adopted legislative term limits by initiated constitutional amendments in 1990.<sup>30</sup> Currently, fifteen states maintain legislative term limits.<sup>31</sup> Maine is the only state with legislative term limits in statutes instead of the state constitution.<sup>32</sup> Louisiana, which also prohibits direct initiative amendments to its Constitution, is the only state to impose legislative term limits by its legislature.<sup>33</sup> Oregon remains the only state to have passed an initiated constitutional amendment and later have the provision removed.<sup>34</sup>

### B. Idaho & Directly Initiated Statutes

Though lacking a mechanism to amend the Idaho Constitution solely at the ballot box, Idaho voters do have the “power to propose laws and enact the same at the polls,” which lawmaking right was added to Idaho's Constitution in 1912.<sup>35</sup> Some states have an indirect initiative process, where an initiative is placed on the ballot, voted on by the people, and if it is supported by a majority, then the initiative is presented for

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27. IDAHO CONST. art. XX, §§ 1–4.

28. IDAHO CONST. art. XX, § 1.

29. IDAHO CONST. art. XX, §§ 1–4.

30. *The Term-Limited States*, *supra* note 14.

31. *Id.*

32. *Id.*

33. NAT'L CONF. OF STATE LEGS., *Frequently Asked Questions About Term Limits*, NCSL.ORG, <http://www.ncsl.org/research/about-state-legislatures/frequently-asked-questions-about-term-limits.aspx> (last visited Apr. 10, 2016).

34. See Marjorie Taylor, *Background Brief on Term Limits*, LEGIS. COMM. SERVS. (May 2004), [https://www.oregonlegislature.gov/citizen\\_engagement/Reports/2004EJ\\_Term\\_Limits.pdf](https://www.oregonlegislature.gov/citizen_engagement/Reports/2004EJ_Term_Limits.pdf) (last visited Apr. 10, 2016) (explaining that Ballot Measure 3 was approved in the November 1992 general election, yet provisions were overturned by *Lehman v. Bradbury* for violating the “single subject rule”); see also *Lehman v. Bradbury*, 37 P.3d 989, 1000–01 (OR. 2002) (holding that federal term limits and state office term limits were separate subjects because federal offices were not mentioned in the Oregon Constitution before the amendment in question, but state offices were, therefore the amendment was void in its entirety for failure to follow the single-subject rule for constitutional amendments).

35. IDAHO CONST. art. III, § 1.

legislative approval.<sup>36</sup> However, under Idaho's Constitution, voters can directly write or amend statutes "independently from the legislature."<sup>37</sup>

There are, however, limitations on the power to enact laws at the ballot box. An initiated statute is not allowed to "violate any constitutional provision of the United States or of the State of Idaho."<sup>38</sup> Since the voters' power is derived from the same source as the legislature, it is subject to the same constitutional prohibitions.<sup>39</sup> Initiated statutes have "equal footing" with legislative acts and do not have "any more force or effect" simply because they come directly from the people.<sup>40</sup> Additionally, the Idaho Legislature has no constitutional or statutory limitation on amending or repealing an initiated statute.<sup>41</sup>

Although the initiative and referendum process was authorized in the 1912 amendment to Idaho's constitution, there was no enabling leg-

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36. See *Comparison of Statewide Initiative Processes, Initiative & Referendum Inst.*, [http://www.iandrinstitute.org/docs/A\\_Comparison\\_of\\_Statewide\\_IandR\\_Processes.pdf](http://www.iandrinstitute.org/docs/A_Comparison_of_Statewide_IandR_Processes.pdf) (last visited May 25, 2016) (explaining that nine states allow for indirect initiatives, which includes two (Utah and Washington) that allow for statutory initiatives through the direct and indirect process. The seven other states are: Alaska, Maine, Massachusetts, Michigan, Nevada, Ohio, and Wyoming).

37. See IDAHO CONST. art. III, § 1.

38. *State v. Finch*, 315 P.2d 529, 530, 79 Idaho 275, 276 (1957) (dealing with the Idaho Dredge Mining Protection Act, which was an initiative approved by Idaho voters in the 1954 general election. When describing the facts, the court notes, "Initiative legislation is of the same force and effect as that enacted by both houses of the legislature and approved by the governor, and must not violate any constitutional provision of the United States or of the State of Idaho" (citing *Luker v. Curtis*, 136 P.2d 978, 64 Idaho 703 (1943)). However, a constitutional challenge to a proposed initiated statute that has qualified for the statewide ballot, but has not yet been voted on, is not ripe for judicial review and does not present a justiciable controversy until enactment. *Noh v. Cenarrusa*, 53 P.3d 1217, 1222, 137 Idaho 798, 803 (2002). Before drawing a bright line in *Noh*, the court did review challenges to proposed initiated statutes that had qualified for the ballot. For an interesting analysis of when the Supreme Court might still entertain a preemptive strike on a proposed initiated statute, see the conclusion of former Chief Justice Gerald Schroeder's article *The Scope of a Preemptive Strike in Initiative Law* 44 IDAHO L. REV. 1, 18 (2007).

39. *Westerberg v. Andrus*, 757 P.2d 664, 670, 114 Idaho 401, 407 (1988) (citing *Luker v. Curtis*, 136 P.2d 978, 979, 64 Idaho 703, 704 (1943)) (A 1986 initiative passed with 60% voter approval to create a state lottery. From adoption of the constitution in 1890 until 1988, IDAHO CONST. art III, § 20 prohibited the legislature from creating a state lottery. *Westerberg* held that an initiative was subject to the same constitutional restraints as the legislature. Months after the decision, Idaho voters narrowly approved the repeal of the lottery prohibition at issue in *Westerberg*).

40. *Luker*, 136 P.2d at 979, 64 Idaho at 704.

41. Amending or repealing an initiated statute is called "legislative tampering." California prohibits the legislature from amending or repealing an initiated statute without submitting the change to the voters. CAL. CONST. art. II, § 10. Other states, like Alaska, require a certain time to lapse before amending or repealing an initiated statute. ALASKA CONST. art. XI, § 6. Others, like Nebraska, require a supermajority to repeal or amend an initiated statute. NEB. CONST. art. III, § 2. Idaho has no restrictions on legislative action on initiated statutes. See IDAHO CONST. art. III, § 1; IDAHO CODE § 34-1801, *et seq.*



isolation until 1933.<sup>42</sup> The 1933 act imposed a minimum threshold for signatures from registered voters to gain ballot access.<sup>43</sup> The threshold at that time required signatures from at least ten percent of the total number of votes cast in the previous gubernatorial race.<sup>44</sup> Over time, that requirement became more and more permissive, resulting in an increased number of initiated statutes on the ballot in the 1980s and 1990s.<sup>45</sup> However, the trend reversed course in 1997, when a geographic component was added.<sup>46</sup> The 1997 law required signatures from six percent of registered voters *in at least twenty-two Idaho counties* to sign a petition. The additional geographic requirement was then struck down for its unequal treatment of voters, specifically due to population variance in Idaho counties. However, that Ninth Circuit opinion, *in dicta*, proposed that legislative districts might provide a constitutionally viable geographic alternative.<sup>47</sup> Legislative districts keep relatively equal populations since they are redrawn decennially.<sup>48</sup> In 2013, the Idaho

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42. Ch. 210, § 5, 1933 Idaho Sess. Laws 341, 434 [herein *1933 Act*]. The process for municipalities of a certain size to conduct ballot measures was enacted almost immediately after adoption of the 1912 amendment. See Brian Kane, *If the Citizens Speak, Listen: Idaho's Local Initiative Process*, 50 THE ADVOCATE 17 (2007).

43. *1933 Act*, *supra* note 42, at § 5 (which states: "After the form of the initiative or referendum petition has been approved by the Secretary of State as in this Act provided same shall be printed by the person or persons or organization or organizations under whose authority the measure is to be referred or initiated or circulated in the several counties of the state for the signatures of legal voters. Before such petitions shall be entitled to final filing and consideration by the Secretary of State there shall be affixed thereto the signatures of legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for Governor at the general election next preceding the filing of such initiative or referendum.").

44. IDAHO CODE § 34-1805 (1981) (amended 1997, 2007, and 2013).

45. Governors in Idaho had two-year terms until 1946. Elections for governor have been conducted every four years since 1946 in even years between presidential elections. Since 1980, turnout in presidential elections has remained relatively flat, while turnout in off-year general elections has declined by as much as 20 points. Declining participation in gubernatorial elections had the effect of lowering the number of signatures necessary relative to the number of registered voters. See *Idaho General Election Registration and Turnout 1980 – 2012*, IDAHO SEC'Y OF ST., <http://www.sos.idaho.gov/ELECT/VoterReg/Vtrrgchst.htm> (last visited Apr. 14, 2016).

46. IDAHO CODE § 34-1805 (1997) (amended 2007 and 2013), invalidated in part by *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1078 (9th Cir. 2003). Idaho Code § 34-1805 (1997) added that the petition for initiative "must contain a number of signatures of qualified electors from each of the twenty-two (22) counties equal to not less than six percent (6%) of the qualified electors at the time of the last general election in each of those twenty-two (22) counties." Later amendments removed the geographic component after *Idaho Coal. United for Bears* ruled that the language violated the Equal Protection Clause by giving rural voters preferential treatment.

47. *Idaho Coal. United For Bears*, 342 F.3d at 1078.

48. See *Bingham Cnty. v. Idaho Comm'n for Reapportionment*, 55 P.3d 863, 865, 137 Idaho 870, 872 (2002) (A legislative district that deviates by more than 10% at the time

legislature enacted this judicial suggestion, and it is still in force today.<sup>49</sup>

Six states have repealed term limits.<sup>50</sup> Of those six, all but one of those states had codified term limits only in statute.<sup>51</sup> The highest appellate court in three states—Massachusetts, Washington, and Wyoming—overturned term limit statutes on the grounds that statutes cannot alter qualifications for state office.<sup>52</sup> In 1994 the Utah legislature imposed twelve-year term limits to avoid a more restrictive initiative, but in 2003, three years before the effective date and one year after Idaho's successful repeal, the Utah Legislature repealed their statute.<sup>53</sup>

### C. Idaho's Referendum Process

The same 1912 Idaho constitutional amendment that granted the right to legislate by initiative, also granted the right to demand a referendum, or “the power to approve or reject at the polls any *act or measure* passed by the legislature.”<sup>54</sup> Also called a veto referendum or a popular referendum, a referendum reserves to voters the ability to repeal or accept a law enacted by the legislature. The same signature requirements exist to place an initiative and a referendum on the ballot, but the requisite signatures for a referendum must be turned in to the Secretary of State within sixty days of adjournment *sine die* of the legislative session that passed “the bill on which the referendum is demanded.”<sup>55</sup>

Historically, it was not clearly defined what constituted an “act or measure.”<sup>56</sup> Generally a *referendum* was the submission of any act of a

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the map is drawn is *prima facie* discriminatory. This is understood to mean plus or minus 5% from the ideal.)

49. IDAHO CODE § 34-1805 (6% of registered voters statewide and 6% of registered voters in at least 18 legislative districts).

50. See NAT'L CONF. OF STATE LEGS., *The Term-Limited States*, NCSL.ORG, (Mar. 13, 2015), <http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> (last visited Apr. 25, 2016) (noting that Idaho, Massachusetts, Oregon, Utah, Washington, and Wyoming have all repealed term limits).

51. *Id.*

52. See *League of Women Voters v. Sec'y of the Commw.*, 681 N.E.2d 842, 847 (Mass. 1997); *Gerberding v. Munro*, 949 P.2d 1366, 1377–78 (Wash. 1998); *Maxfield v. State*, 294 P.3d 895, 902–04 (Wyo. 2013); *Cathcart v. Meyer*, 88 P.3d 1050, 1067 (Wyo. 2004). Oregon repealed its term limit law in 2002 through the state supreme court. The Court ruled that the initiative imposing term limits violated the single-subject requirement for initiatives, and was therefore unconstitutional.

53. S.B. 240, 2003 Leg., Gen. Sess. (Utah 2003); see also Todd Donovan, *Direct Democracy As “Super-Precedent”?: Political Constraints of Citizen-Initiated Laws*, 43 WILLAMETTE L. REV. 191, 205 (2007)

54. IDAHO CONST. art. III, § 1.

55. See *supra* Part II.B.; IDAHO CODE § 34-1803.

56. See IDAHO CONST. art. III, § 1.

legislative body (legislature, county commission, or city council) to the people to approve or reject an act, while an *initiative* was a proposal for a law that originated from the people to be voted upon directly by the people.<sup>57</sup> In the past, the Idaho Supreme Court explained if the subject is legislative in nature, it was subject to a referendum, and when the subject was administrative in nature, it was not.<sup>58</sup> But the Court later recognized the complexity of this determination, and allowed the initiative or referendum process to play out regardless of whether it is an act or measure. This approach acknowledges that the initiative power is a constitutional mandate, enabling voters to address matters of concern without semantic obstacles.<sup>59</sup>

#### D. The Idaho Legislature & Advisory Questions

Infrequently, the Idaho legislature has asked advisory questions (also called an advisory referendum) of voters.<sup>60</sup> For instance, in 1998 Idaho voters were asked whether term limits should be repealed, after the United States Supreme Court ruled that term limits no longer applied to Congress.<sup>61</sup> That question stated: “Since the United States Supreme Court has ruled that Idaho’s 1994 term limits law does not apply to members of Congress, shall term limits for state elected officials, state legislators, county elected officials, city elected officials and school district trustees remain in place?”<sup>62</sup>

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57. *City of Boise v. Keep the Commandments Coal.*, 141 P.3d 1123, 1125, 143 Idaho 254, 256 (2006), quoting *Weldon v. Bonnor County Tax Coalition*, 124 Idaho 31, 38, 855 P.2d 868, 875 (1993).

58. *City of Boise v. Keep the Commandments Coal.*, 141 P.3d 1123, 1125, 143 Idaho 254, 256 (2006) (“If a subject is legislative in nature, it is appropriate for action by initiative. On the other hand, if the proposed initiative is administrative in nature, it falls outside the scope of action allowable by initiative. There is no bright line rule that clearly distinguishes what is legislative in nature, as opposed to administrative in nature.”).

59. *See, e.g., id.*; *Weldon v. Bonner Cnty. Tax Coal.*, 855 P.2d 868, 124 Idaho 31 (1993); *Gumprecht v. City of Coeur d’Alene*, 661 P.2d 1214, 104 Idaho 615 (1983); *Perrault v. Robinson*, 29 Idaho 267 (1916).

60. In addition to the 1998 advisory question, a statewide advisory question has only occurred one other time. However, legislative referenda formed part of several term limits proposals from 1992 to 1999 in different forms, none of which became law. A legislative referendum is an act the legislature passes but which does not become effective until affirmatively approved by the voters in the next election. For a more indepth analysis of the difference between an advisory question/advisory referendum and a legislative referendum, see *Initiative Referendum and Recall*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited May 25, 2016).

61. Ch. 255, § 1998 Idaho Sess. Laws 824, 824–825 (1998).

62. *Id.*

In that election, the voters answered the question: “yes.”<sup>63</sup>

Conducting advisory votes is not provided for constitutionally or statutorily at the state level, and occurs by passing a bill directing the Secretary of State to cause a specified question to appear on the ballot. Since the vote is advisory in nature, the result of the vote is not binding on the legislature and does not change the law.

### III. THE HISTORY OF TERM LIMITS IN IDAHO

#### A. Early Term Limits History

From statehood, all executive officers served two-year terms without any limit.<sup>64</sup> In 1944 the Constitution was amended to provide that the executive branch officers’ terms would be four years, provided however, that a sitting governor could not “succeed himself in office.”<sup>65</sup> When the legislature met the following year, it codified the four-year terms as well as the prohibition on the governor from succeeding himself, but it also clarified that after the passage of one full term out of office, a governor could again hold that office.<sup>66</sup> After Republican Governor Robert E. Smylie was elected in 1954, he successfully pushed for an amendment lifting the constitutional restriction on sitting governors running for reelection.<sup>67</sup> Thus, from 1946 to 1956 constitutional and statutory ballot access restrictions existed for Idaho’s governors.<sup>68</sup>

Governor Smylie was reelected for two additional consecutive

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63. IDAHO SEC’Y OF ST., *Idaho General Election Results*, SOS.IDAHO.GOV (November 3, 1998), <http://www.sos.idaho.gov/elect/results/1998/general/98gnrslt.htm> (last visited May 25, 2016).

64. IDAHO CONST. art. IV, § 1 (amended in relevant part in 1944 & 1956). In 1927, the Idaho Supreme Court struck down a prior constitutional amendment that extended the length of terms from two to four years. They held that the question put to voters could be read to be contra to the actual constitutional language – four year terms vs. a term not to exceed four years. *Lane v. Lukens*, 283 P. 532, 48 Idaho 517, 521 (1929).

65. IDAHO CONST. art. IV, § 1; IDAHO SEC’Y OF ST., *Idaho Constitutional Amendment History*, SOS.IDAHO.GOV [http://www.sos.idaho.gov/elect/inits/hst40\\_50.htm](http://www.sos.idaho.gov/elect/inits/hst40_50.htm) (last visited Apr 14, 2016).

66. IDAHO CODE § 34-203 (1945).

67. See *Idaho Constitutional Amendment History*, *supra* note 65. The lore is Governor Smylie made several deals with legislators to secure passage in the legislature and place the constitutional change on the ballot. One deal was with legislative Democratic power broker and advocate for north Idaho, Tom Boise, to reopen what is now Lewis-Clark State College, in Lewiston, instead of reopening Albion State Normal School in Cassia County. Quade Kenyon, *Former Idaho Governors Tell it Like it Was: Smylie, Andrus Soon Will Publish Books About Their Time in Office and How They Got Things Done*, THE SPOKESMAN-REV. (June 29, 1994), <http://www.spokesman.com/stories/1997/dec/22/former-idaho-governors-tell-it-like-it-was-smylie/> (last visited May 25, 2016).

68. Governors C.A. “Doc” Robins and Len Jordan are the only governors who were not permitted to succeed themselves.

terms, three consecutive terms in total.<sup>69</sup> However, and most significantly, the companion 1945 statute implementing four-year terms and prohibiting a governor from running for consecutive terms *was not repealed until 1965*.<sup>70</sup> The title of the bill deleting the term limit prohibition, *after Governor Smylie had twice been reelected*, announced that the bill “DELETE[D] A PROVISION REPEALED BY CONSTITUTIONAL AMENDMENT.”<sup>71</sup>

It is intellectually unfair to consider history, exclusively through the lens of modern judicial decisions. However, the juxtaposition of the 1946 statutory imposition of gubernatorial term limits, its 1965 repeal, Governor Smylie’s two intervening candidacies and elections in which he succeeded himself, and modern judicial holdings regarding enforceability of statutory term limits, makes for interesting ruminations.<sup>72</sup> There was no apparent political, public, or legal consternation when Governor Smylie sought election—twice—contrary to Idaho’s statute. Rather, Idahoans appeared to believe that qualifications for holding elected office must be in the Constitution. Since that constitutional ballot access limitation was repealed in 1956, neither the Governor nor the legislature were unduly troubled that the same limitation existed in statute. The 1965 legislation appeared to be a mere cleanup bill, not intended as a shift in public policy.<sup>73</sup>

Years later in 1994, ballot access limitations would again be codified. When the 1994 Initiative was challenged in Idaho’s District and Supreme Court, it does not appear that Idaho’s prior messy legal history and legislative perspective regarding Governor Smylie’s candidacy and election were raised, nor addressed by the Court.

Governor Smylie ran for a fourth term, but was defeated in the Republican primary by Don Samuelson.<sup>74</sup> Term limits did not emerge again for another thirty years.

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69. See *Idaho Blue Book*, IDAHO SEC’Y OF ST. 64–65 (23d ed. 2015–16), <http://www.sos.idaho.gov/elect/bluebook/index.html>.

70. 1965 Idaho Sess. Laws 223; IDAHO CODE § 34-203 (1965).

71. 1965 Idaho Sess. Laws 223.

72. See generally, *infra* Part III.D.

73. I interviewed former Senator William C. Roden on April 12, 2016 by telephone. Senator Roden served in the Senate from 1960 through 1968. During his tenure in the Senate, he served in leadership, ultimately as the Senate Majority Leader. He confirmed the legislature believed the repeal was merely a cleanup piece of legislation, because these types of restrictions should have been in the constitution. He reported that there were public and political discussions about Governor Smylie’s gubernatorial elections, because of the number of terms he had already served. But none of those discussions revolved around a statutory proscription.

74. See *supra* note 69.

B. Legislative Term Limits Movement Comes to Idaho

Idaho Republicans have controlled both houses of the legislature since 1960.<sup>75</sup> Republican control, however, was never more in doubt than during the 51<sup>st</sup> Legislative Session from 1990 to 1992.<sup>76</sup> Popular Democrat Cecil Andrus was the Governor, and he was in his record-breaking fourth and final term in office.<sup>77</sup> Both Idaho Congressional seats were held by Democrats,<sup>78</sup> and the Idaho Senate was equally divided between Republicans and Democrats, 21-21.<sup>79</sup> Republican C.L. “Butch” Otter, who presided over the Senate as Lieutenant Governor, broke a tie to organize and elect the Senate President Pro Tempore.<sup>80</sup> It was in this historically divided and partisan environment that legislative term limits first arrived at the Idaho Legislature in 1992.

Two different term limit measures were introduced in the Idaho Senate in 1992. A proposed constitutional amendment, S.J. Res. 108, sought to limit elected officials in executive branch offices to two terms and those in the legislature to five consecutive terms.<sup>81</sup> S.J. Res. 108 was co-sponsored by Senator Jerry Thorne, a Republican, and Senator Claire Wetherell, a Democrat.<sup>82</sup> A two-thirds supermajority was required for legislative passage, but S.J. Res. 108 failed to garner even a simple majority in the Senate.<sup>83</sup>

The other measure, S.J. Memorial 116, called on the United States House of Representatives and Senate to amend the Constitution to limit terms in Congress.<sup>84</sup> Republican Senate President Pro Tempore Michael D. Crapo sponsored the measure.<sup>85</sup> He also ran for Congress that same year.<sup>86</sup> S.J. Memorial 116 was adopted by both the Senate and the

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75. *Id.* at 199–201.

76. *Id.*

77. *Id.* at 63–64.

78. *Id.* at 51–52.

79. *Id.* at 199–201.

80. Breaking the tie in the President Pro Tempore race was the subject of litigation. The Republican caucus nominated Senator Crapo and the Democratic caucus nominated Senator Bruce Sweeney for President Pro Tempore. Ultimately, Lieutenant Governor Otter broke the tie vote, and Senator Crapo was elected President Pro Tempore. *Journal of the State Senate*, 51, 1st Sess., at 1–2 (Idaho 1991). The Lieutenant Governor’s vote when the Senate was equally divided on organizational matters was upheld. *Sweeney v. Otter*, 804 P.2d 308, 119 Idaho 135 (1990).

81. *See supra* notes 8–9.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Idaho General Election Results: November 8, 1994*, IDAHO SEC’Y OF ST. <http://www.sos.idaho.gov/elect/results/1994/general/rsltgn94.htm> (last visited Apr. 10, 2016).

House, with bipartisan support, although Republicans constituted a large majority of the "aye" votes.<sup>87</sup>

The Republican presidential nominee has carried Idaho in every presidential election since 1968, and the election of 1992 was no exception.<sup>88</sup> Just days after the 1992 general election, a drive for a term limits initiative petition began with Barbara Marsh, a Pocatello activist who was statewide coordinator for Independent Presidential candidate Ross Perot.<sup>89</sup> United We Stand America, the Idaho chapter of Perot's citizen action organization, spearheaded the petition drive. Media reports at the time indicate that the proposed initiative limited members of the Idaho and U.S. House of Representatives to six years of office, and Idaho and U.S. Senators to twelve years of service, and included salary and pension caps on state legislators.<sup>90</sup>

In 1993 two more term limit bills were proposed. S1209a, co-sponsored by Republican Senator Evan Frasure and Democratic Senator Wetherell, attempted to limit service to two terms in the U.S. Senate, and six terms in the U.S. House of Representatives.<sup>91</sup> S1209a passed the Senate, but the House did not consider the legislation.<sup>92</sup> The other bill, S1208, proposed to limit executive branch office holders to two terms, and Idaho state legislators to six consecutive terms. Also, S1208 granted the final approval to voters.<sup>93</sup> S1208 passed the Senate.<sup>94</sup> When Senator Frasure presented S1208 to the House State Affairs Committee,<sup>95</sup> he told the committee that if the legislature did not pass this bill, a more restrictive Perot initiative could become law.<sup>96</sup> Some committee members felt that referring final enactment to the voters was improper, and some others felt the restrictions were inadequate. The legislation was not advanced from the House committee.<sup>97</sup>

By mid-1993, United We Stand America-Idaho publicly acknowledged that the effort to gather the 32,061 signatures needed to place the

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87. See *supra* notes 8–9.

88. *Idaho Blue Book*, *supra* note 69, at 285.

89. See *Organizers: Perot Drive a Success*, THE SPOKESMAN-REV., May 6, 1992, at B2; *Perot Supporters Launch Term-Limit Drive*, *supra* note 7.

90. Perot endorsed Marsh's petition, but his organization of supporters had yet to officially endorse the effort. See *Term-limits fans admit initiative hasn't caught on*, MOSCOW-PULLMAN DAILY NEWS, June 17, 1993, at 4A.

91. S.B. 1209a, 52nd Leg., 1st Sess. (Idaho 1993).

92. Journal State S. 52, 1st Sess., at 269 (Idaho 1993).

93. S.B. 1208, 52d Leg., 1st Sess. (Idaho 1993).

94. Journal State S. 52, 1st Sess., at 196 (Idaho 1993).

95. *House will amend term limit measure*, MOSCOW-PULLMAN DAILY NEWS, Mar. 24, 1993, at 6A.

96. *Id.*

97. *Id.*

initiative on the ballot was stalling.<sup>98</sup> An offer of assistance for Marsh and United We Stand America-Idaho came from the newly-organized U.S. Term Limits.<sup>99</sup> This national pro-term limits organization was created by Howie Rich with support from Charles and David Koch, all wealthy supporters of Libertarian candidates and causes.<sup>100</sup> The offer, however, was rebuffed by Marsh because U.S. Term Limits would not reveal all its financial sources.<sup>101</sup> In the media, Marsh explained, “We’re going to stay poor and steady. . . . We don’t need any outside help.”<sup>102</sup> Marsh’s effort failed, but U.S. Term Limits were successful.<sup>103</sup>

### C. The 1994 Initiative

During the 1994 legislative session, Senator Frasure returned again with two term limit bills. S1481 would limit the terms of the U.S. Senate and House if approved by the voters, but would not take effect until 25 states had similarly limited their federal delegation.<sup>104</sup> S1530 sought to limit service in Idaho’s legislative, county, municipal, and school district offices to 12 consecutive years.<sup>105</sup> In spite of efforts to amend the bills on the Senate floor, both bills failed.<sup>106</sup>

With these legislative failures, term limits supporters had little in their way to delay their initiative efforts. U.S. Term Limits had abandoned the Perot-backed petition, and formed and funded a new organization called Idahoans for Term Limits. Beau Parent, executive director of Idahoans for Term Limits, reported they had secured about 8,000 signatures in March of 1994, well short of the 32,061 needed, when he spoke against Senator Frasure’s bills in the Senate State Affairs Committee.<sup>107</sup> At the Republican State Convention in Lewiston that June, proposals to support Idahoans for Term Limits’ effort were presented, but all failed, meaning the effort proceeded without the endorsement of

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98. *Id.* Signature gatherers needed 10% of the total number of voters in the 1990 gubernatorial election. *See supra* Part II.B.

99. *See Term-limit Backers Campaign in Idaho, supra* note 7.

100. *See Rausch, Jr., supra* note 7.

101. *See Term-limit Backers Campaign in Idaho, supra* note 7.

102. *Id.*

103. *See infra* Part III.C.

104. S.B. 1481, 52d Leg., 2nd Sess. (Idaho 1994).

105. S.B. 1530, 52d Leg., 2nd Sess. (Idaho 1994).

106. *See Senate Rocks Term-Limit Alternative Attempt to Exempt School Boards, City and County Officials Nixed by 16-14 Vote*, THE LEWISTON MORNING TRIB. (Mar. 15, 1994), [http://lmtribune.com/senate-rocks-term-limit-alternative-attempt-to-exempt-school-boards/article\\_6e85fbd0-be5d-5166-9bc8-5e6741668905.html](http://lmtribune.com/senate-rocks-term-limit-alternative-attempt-to-exempt-school-boards/article_6e85fbd0-be5d-5166-9bc8-5e6741668905.html) (last visited Apr. 10, 2016).

107. *Id.*



the Idaho Republican Party.<sup>108</sup> July 8, 1994 was the final date to secure signatures.<sup>109</sup> Signature gatherers were successful, in large part, because of a push to gather signatures at the Boise River Festival just days before the deadline.<sup>110</sup> As a result, the 1994 term-limit initiative appeared on the November general election ballot. Idahoans would decide the term limits issue.

With the 1994 Initiative on the ballot, elected leaders and candidates began to settle in to their term-limit campaign position. Republican Congressman Crapo opposed it.<sup>111</sup> At a conference in Boise, he explained the effects the 1994 Initiative would have on local races and his belief that congressional term limits should be uniform across states.<sup>112</sup> His presentation persuaded his colleague in Congress Republican Senator Larry Craig to walk back on his prior public support.<sup>113</sup> Democratic Congressman Larry LaRacco completely opposed term limits.<sup>114</sup> His challenger, Republican Helen Chenoweth, vigorously supported them.<sup>115</sup> While stumping in north Idaho for Larry Echo Hawk, the Democrats' nominee for governor in 1994, Governor Andrus predicted that Idahoan's support for the 1994 Initiative would "run like the forest fires this summer."<sup>116</sup> His position, however, was nuanced, saying he supported term limits "down to the commissioner level."<sup>117</sup> Idaho voters, however, did not have that option on the ballot.

November 8, 1994 was a successful day for term-limits supporters in Idaho. The voters enacted the Term Limits Act. This initiative limited ballot access for state elected officials to eight of the previous fifteen years; legislators to eight of the previous fifteen years; county commissioners to six of the previous eleven years; any other county elected offi-

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108. *Term limits proponents make 'giant leap'*, THE LEWISTON MORNING TRIB. (June 29, 1994), [http://lmtribune.com/term-limits-proponents-make-giant-leap/article\\_692b2813-fe49-55b7-a1b7-4af5025dbf4f.html](http://lmtribune.com/term-limits-proponents-make-giant-leap/article_692b2813-fe49-55b7-a1b7-4af5025dbf4f.html) (last visited Apr. 10, 2016).

109. *Id.*

110. *Id.*

111. *Craig changes stance on Idaho term limits*, THE SPOKESMAN-REV. Oct. 12 1994, at B4.

112. *Id.*

113. *Id.*

114. *Id.*

115. She was successful in her run for Congress in 1994 and was reelected twice. Honoring her pledge to serve no more than three terms, she did not seek reelection in 2000. She passed away in an automobile accident in 2006, but her daughter reportedly told Congressman Raúl Labrador that Congressman Chenoweth regretted making the term-limit pledge. Betsy Z. Russell, *After seeing D.C., Labrador now backs term limits*, THE SPOKESMAN-REV. (Sept. 27, 2011) <http://www.spokesman.com/stories/2011/sep/27/after-seeing-dc-labrador-now-backs-term-limits/?prefetch=1> (last visited Apr. 11, 2016).

116. *Term limits will hurt local level*, THE SPOKESMAN-REV. Nov. 3 1994.

117. *Id.*

cial to eight of the previous fifteen years; mayors to eight of the previous fifteen years; city councilors to eight of the previous fifteen years; and school district trustees to six of the previous eleven years.<sup>118</sup>

Subsequent to that general election, however, public support began to wane.

#### D. Idaho Judicial Determinations

In 1995, the United States Supreme Court issued an opinion that altered the legislative and public conversation regarding term limits.<sup>119</sup> In short, Arkansas's state constitution<sup>120</sup> restrictions on congressional terms were struck down as a violation of Article I of the U.S. Constitution.<sup>121</sup>

*U.S. Term Limits, Inc. v. Thornton* focused on state power over congressional representation, and whether the qualifications listed in the Constitution are exclusive.<sup>122</sup> In a 5-4 decision, the Court held that states may not add qualifications beyond those specified in the U.S. Constitution.<sup>123</sup> The age, citizenship, and residency requirements set out in the Qualifications Clauses of the United States Constitution are the only requirements for those seeking congressional office.<sup>124</sup> Allowing states to add requirements, without a constitutional amendment, violated fundamental democratic principles and was "inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."<sup>125</sup> Without a U.S. constitutional amendment, states could not impose term limits or other qualifications.<sup>126</sup> The Supreme Court ruling in 1995 provided new hope for term limit opponents across the nation, including those in Idaho.

During these years, states, courts, legislatures, political parties, and the general public struggled to determine their respective political, judicial, and legislative positions. For example, in 1994, the Idaho Republican Party refused a platform plank supporting term limits, but in June 2000, its platform specifically opposed term limits.<sup>127</sup>

In response to *Thornton*, term limits proponents in Idaho suc-

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118. See *supra* note 10.

119. See generally, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

120. ARK. CONST. amend. 73 § 3.

121. *Thornton*, 514 U.S. 785–86.

122. *Id.* at 798.

123. *Id.* at 779.

124. *Id.* citing U.S. CONST. art. I, § 2, cl. 2 and art. I, § 3, cl. 3.

125. *Id.* at 783.

126. See *id.* at 837.

127. Emily Simmitt, *Big Strides Being Made by Republicans in Skirts*, IDAHO ST. J. (June 24, 2000), at A3.

cessfully placed another initiative on the ballot in 1996 (herein 1996 Initiative), which was adopted into law with a vote of 56.1%.<sup>128</sup> The 1996 Initiative enacted the Congressional Term Limits Act, which required non-incumbent candidates for Congress and the legislature to support amending the United States Constitution to allow for term limits and to vote in favor of such an amendment. Any candidate that would not make that pledge, the phrase “DECLINED TO SUPPORT TERM LIMITS” would be printed next to the candidate’s name on the ballot.<sup>129</sup> Incumbents faced a similar obligation and would be brandished with “DISREGARDED VOTERS’ INSTRUCTIONS ON TERM LIMITS” on the ballot for failing to comply.<sup>130</sup> The 1996 Initiative was judicially challenged by then-Speaker Michael K. Simpson and Senate President Pro Tempore Jerry Twigg, with a bipartisan group of eight other sitting legislators, and most of the law was found unconstitutional.<sup>131</sup>

With the term limits pledged struck down, term limits proponents successfully placed another initiative on the 1998 general election ballot (herein *1998 Initiative*).<sup>132</sup> The 1998 Initiative enacted the Term Limits Pledge Act, which gave candidates for Congress the option to sign a pledge to serve no more than three terms in the United States House of Representatives or two terms in the United States Senate.<sup>133</sup> Candidates who signed the Term Limits Pledge would have “Signed TERM LIMITS pledge to serve no more than” two or three terms, for the corresponding office.<sup>134</sup> If a candidate signed the Term Limits Pledge but appeared on the ballot in violation of the pledge, that candidate would have “Broke TERM LIMITS pledge” placed next to their name on the ballot and on all state-sponsored educational material and ballot information.<sup>135</sup> The 1998 Initiative was adopted with 54.7% of the vote.<sup>136</sup> Like the 1996 Initiative, the Idaho Supreme Court also found the 1998 Initiative to be unconstitutional before it affected any election.<sup>137</sup>

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128. 1997 Idaho Sess. Laws 1345–1350.; *Idaho Initiative History*, *supra* note 23.

129. IDAHO CODE § 34-907A(2)–(4) (repealed 2002).

130. *Id.*

131. The court held that voting restrictions violate the Speech and Debate Clause in U.S. CONST., art. I, § 6, for sitting members of Congress and in IDAHO CONST., art. III, § 7, for sitting legislators. Similarly, the term limits pledge was found to violate the free speech rights of candidates for Congress and the legislature in both the United States and Idaho Constitutions. The sections of the 1996 Initiative calling for a term limits amendment in the U.S. Constitution were upheld. *Simpson v. Cenarrusa*, 944 P.2d 1372, 130 Idaho 609 (Idaho 1997).

132. 1999 Idaho Sess. Laws 1189–1350; *Idaho Initiative History*, *supra* note 23.

133. IDAHO CODE § 34-907B(2) (repealed 2002).

134. IDAHO CODE § 34-907B(3) (repealed 2002).

135. IDAHO CODE § 34-907B(4) (repealed 2002).

136. *Idaho Initiative History*, *supra* note 23.

137. The 1998 Initiative would have applied to candidates in the 2000 primary election, but implementation of the law was delayed pending the court’s decision challenging the

On that same general election ballot, voters were provided an advisory question, whether, in light of the Thornton decision, did they want to repeal term limits with the passage of H644.<sup>138</sup> Governor Phil Batt allowed H644 to become law without his signature and the non-binding question was placed on the 1998 General Election ballot.<sup>139</sup> When he returned H644 unsigned, Governor Batt, in his message to the legislature, noted that it appeared “the inclusion of local officials was a mistake,” and his hope that an “overwhelming vote either way would clarify” if Idahoans intended term limits for state and local offices.<sup>140</sup> A more likely result, Governor Batt continued, is that “no clear majority of opinion will emerge, further clouding the issue.”<sup>141</sup>

Idaho voters once again stated their support for term limits by answering affirmatively—with a vote of 53.2%—to the advisory question.<sup>142</sup> However, with a narrower margin of support for term limits than in both the 1994 Initiative and the 1996 Initiative, Governor Batt’s prediction of more cloudiness around the issue of term limits proved true.

With the Idaho Supreme Court’s decision of *Simpson* and *Van Valkenburgh*, in which the Court struck down two term-limit ballot-disclosure pledges for candidates, the only legal challenge remaining was the direct attack of term limits as a violation of Idaho’s Constitution.

In January 2000, *Rudeen v. Cenarrusa* was filed in Power County, Idaho.<sup>143</sup> The District Court judge assigned to the case was Judge Smith, the 1994 chairman of the Idaho Republican Party.<sup>144</sup>

The case, *Rudeen v. Cenarrusa*, involved twenty-two county, city, and school board trustee public elected officers who argued that Idaho’s term limits were an unconstitutional violation of the right to vote.<sup>145</sup> The Plaintiffs focused on three particular provisions of the Idaho Term Lim-

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constitutionality of the law. *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1131 135 Idaho 121, 123 (2000). The court found that because the 1998 Initiative infringed on a fundamental right—voting—strict scrutiny applied, and that the state failed to demonstrate the compelling governmental interest served by the law. *Id.* at 1133–36, 135 Idaho at 125–28.

138. See *supra* Part II.D.

139. Journal State H. 54, 2d Sess., at 393 (Idaho 1998).

140. *Id.*

141. *Id.*

142. See Idaho Constitutional Amendment History, *supra* note 65.

143. 38 P.3d 598, 136 Idaho 560 (2001). The Plaintiffs in *Rudeen* were represented by Jerry D. Mason and Scott W. Reed. Mr. Reed is the author of *How and Why Idaho Terminated Term Limits*, *supra* note 1.

144. Mark Warbis, *Idaho Republican committee propose repealing term limits*, MOSCOW-PULLMAN DAILY NEWS, June 24 & 25, 2000, at 3A.

145. See *Rudeen*, 38 P.3d 602, 136 Idaho 564.

its Act: the first provision created term limits for elected county officials;<sup>146</sup> another imposed limits on school district trustees;<sup>147</sup> and the third limited access to the ballot for multi-term incumbents.<sup>148</sup> These public officials argued that there is a fundamental right to suffrage in the Idaho Constitution, including the right to ballot access.<sup>149</sup> In his decision, Judge Smith ruled that the right of suffrage is a fundamental constitutional right in Idaho, specifically guaranteed by Article I, Section 19.<sup>150</sup> Judge Smith further determined that Idaho's Constitution, judicial precedent, and historical proceedings of the Idaho's constitution convention were evidence that the right of suffrage included the right to access the ballot to run for public office.<sup>151</sup> Finally, Judge Smith provided an extensive explanation of constitutional procedure and judicial interpretation, in which he concluded the right of suffrage can only be changed by a constitutional amendment, and the term limit law violated the Equal Protection clause of the Idaho Constitution.<sup>152</sup> The District Court determined that the Term Limits Act was unconstitutional.<sup>153</sup>

#### E. Raw Messy Politics

The pending litigation before Judge Smith added an additional spark to an already contentious debate in Idaho's Republican Party. At the Republican Party's 2000 convention held in Pocatello, the Platform Committee passed a plank opposing term limits 30-7, and the Resolutions Committee passed a resolution against term limits 29-3 without any vocal opposition.<sup>154</sup> But the full convention only passed the platform plank by a vote of 162-155.<sup>155</sup>

However, Governor Dirk Kempthorne, who during the prior election had pledged to veto a complete repeal of term limits, left the convention before the term limits plank and resolution were considered.<sup>156</sup> Term limits opponents believed the Governor had changed his mind on the issue, and they used this perception as an opportunity to push forward with a vote on the plank. Governor Kempthorne was not there to

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146. IDAHO CODE § 34-907(e) & (f) (repealed 2002).

147. Idaho Code § 33-443 (repealed 2002).

148. Idaho Code § 50-478 (repealed 2002).

149. Rudeen v. Cenarrusa, CV00-00012 at 5 (Idaho Dist. Ct. March 17, 2000) (Memorandum Decision and Order).

150. *Id.* at 9.

151. *Id.* at 10.

152. *Id.* at 20.

153. *See id.*

154. *See* Warbis, *supra* note 144.

155. Mark Warbis, *Republicans seek to end term limits*, THE SPOKESMAN-REV., June 25, 2000, at B3.

156. *Id.*

rebut. In contrast, proponents of term limits argued that the party should wait for a judicial ruling, Governor Kempthorne's opposition was clear, and the people had spoken. They argued that a vote to repeal by the legislature would be considered an act of "self-protection."<sup>157</sup> Nevertheless, convention delegates approved the plank.<sup>158</sup>

The following year, the Idaho Supreme Court heard the oral arguments in the appeal of *Rudeen v. Cenarrusa*.<sup>159</sup> At that point, all provisions of the 1994 Initiative were under review, including the application of term limits to state legislators and elected state officials.<sup>160</sup> On December 13, 2001, the Idaho Supreme Court issued its decision on term limits, and reversed Judge Smith's grant of summary judgment in favor of Plaintiffs.<sup>161</sup> That Court held that the right of suffrage did not include the right to hold public office.<sup>162</sup> Additionally, the Court determined the Term Limits Act could add qualifications for this right to suffrage.<sup>163</sup> Third, the Court held there was no violation of Idaho's equal protection provision.<sup>164</sup>

The 2002 legislative session began. On the 8<sup>th</sup> legislative day, H425 was introduced. Legislators were being asked to balance the voices of their constituents, their parties, their legislative leadership, their Governor, Judge Smith's opinion, and their state Supreme Court.

In the end, during the 2002 legislative session, the House and Senate voted to repeal term limits.<sup>165</sup> Governor Kempthorne vetoed the bill.<sup>166</sup> In his veto message, the Governor cited the 1994 Initiative and the three subsequent votes as the basis for his veto.<sup>167</sup> However, both the

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157. *Id.*

158. *Id.*

159. 38 P.3d 598, 136 Idaho 560 (2001).

160. Pete Hamblen and Stephen Safranek intervened on behalf of Citizens for Term Limits, and Dennis Colson intervened as an attorney for legislative respondents. *Rudeen*, 38 P.3d at 601–02, 136 Idaho at 563–64. On September 26, 2000, the Idaho Supreme Court granted Speaker Newcomb and Senate President Pro Tempore Geddes's motion to intervene in the appeal. *See* Intervenors-Respondents' Brief, *Rudeen v. Cenarrusa*, Intervenors-Respondents' Brief (Oct. 18, 2001) (No. 26975). On October 23, 2001, the Idaho Supreme Court granted Republican State Treasurer Ron Crane and Democratic State Controller J.D. Williams' motion to intervene in the appeal. *Rudeen*, 38 P.3d at 602, 136 Idaho at 564.

161. *Rudeen*, 38 P.3d 609, 136 Idaho 571.

162. *Id.* at 570, 136 Idaho 600.

163. *Id.*

164. *Id.*

165. Journal State H. 56, 2d Sess., at 57 (Idaho 2002); Journal State S. 56, 2d Sess., at 61 (Idaho 2002).

166. Journal State H. 56, 2d Sess., at 81–82 (Idaho 2002).

167. *Id.*

House and the Senate garnered the sufficient two-thirds vote to override the Governor's veto, confirming the repeal of term limit laws.<sup>168</sup>

A referendum petition began.<sup>169</sup> Sufficient signatures were gathered and certified.<sup>170</sup> The term-limit question was returned to voters on the 2002 general election ballot.<sup>171</sup> Voters were asked to accept or reject the legislature's repeal.<sup>172</sup> As the Secretary of State's Election Division explained, "Rejection of H425, by this referendum will enact ballot access restrictions that will have the practical effect of imposing term limits on state elected officeholders, state legislative elected officeholders, county elected officeholders, and municipal elected officeholders and school board members."<sup>173</sup>

Term limit opponents used Idaho's well respected retiring Secretary of State, Pete T. Cenarrusa,<sup>174</sup> as their spokesperson, and argued that the issue was one of voter rights.<sup>175</sup> In contrast, the term limit proponents engaged in a passionate effort to reject the repeal.

#### IV. WHY IDAHO REPEALED TERM LIMITS

Mr. Reed writes that the imposition of term limits was a Republican and Libertarian idea.<sup>176</sup> I agree that many Republicans and Libertarians supported term limits, but there was also support by many Democrats.<sup>177</sup>

He also stated that repeal of term limits was a Republican idea, dreamed up to extend the political careers of senior Republican legislative leaders and without "reported precedent."<sup>178</sup> That is inconsistent with my memory and judgment.

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168. *Id.* at 82; Journal State S. 56, 2d Sess., at 69 (Idaho 2002).

169. *Year 2002 Proposed Referendum*, IDAHO SEC'Y OF STATE, (May 14, 2002), <http://www.sos.idaho.gov/elect/inits/02init06.htm> (last visited Apr. 10, 2016).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Mr. Cenarrusa was elected to the Idaho House of Representatives in 1950. He served as a Representative for sixteen years, and was Speaker of the House for six of those. He was appointed Secretary of State in 1967, and was re-elected seven times. In 2002, rather than running for another term, Mr. Cenarrusa supported his long-time deputy, Ben Ysursa.

175. Betsy Z. Russell, *Supporters of term limit won't go away*, THE SPOKESMAN-REV. B1, Nov. 7, 2002.

176. *See generally* Reed, *supra* note 1.

177. *See id.*, at 4–5.

178. *See id.*, at 25. Mr. Reed described the repeal of term limits in Idaho as an act without "reported precedent." Although Idaho citizens had never before repealed term limits, Idaho has precedent of repeal and modification of other initiatives in other areas such as real property taxes and spending.

As a legislative leader who was directly involved with these events, this article now attempts to articulate some explanations and motivations for the repeal. Each factor is not dispositive, but when collectively analyzed presses back against the accusation of partisan self-interest.

#### A. Substitution of Legislative Judgment

It appears to me that if Idaho voters could directly amend Idaho's constitution, Idaho would have term limits today. Other states that enacted term limits into their state constitution still have term limits, with one exception—Oregon.<sup>179</sup> Since Idaho's voters were limited to initiated statutes, the legislature could amend or repeal those statutes. In part, the legislature repealed term limits because it could. Though brashly stated, the legislature substituted its judgment for the will of the people. Whether it should or not, is in the eye of the beholder.

The legislature, however, was in a unique position to see the effects of term limits in other states, reasonably project those effects in Idaho, and understand the damage they would do at the local level. Public and scholarly discussion of their value and detrimental impact continues, years after enactment. For instance, newspaper editorials in several other states highlight their negative impact on their state's government.<sup>180</sup> The political science literature on term limits has been equally unkind.<sup>181</sup> If Idaho had a direct mechanism for an initiated constitution-

179. Oregon passed an initiated constitutional amendment, which was later determined to violate the single subject rule and thus removed. See Taylor, *supra* note 34.

180. See, e.g., Steve Sebelius, *Reconsidering term limits won't happen this year*, THE LAS VEGAS REVIEW-JOURNAL (Apr. 15, 2015), <http://www.reviewjournal.com/columns-blogs/steve-sebelius/reconsidering-term-limits-won-t-happen-year> (last visited Apr. 10, 2016) (Term limits have "caused nothing but trouble ever since, and the state would be immeasurably improved by [its] immediate repeal."); Dan Haley, *Term limits have failed*, THE DENVER POST (May 4, 2008), [http://www.denverpost.com/haley/ci\\_9124955](http://www.denverpost.com/haley/ci_9124955) (last visited Apr. 10, 2016) ("Term limits, much like junior high school and bell-bottom pants, have been a failed social experiment."); *Editorial: Term limits must end to improve Missouri legislature*, ST. LOUIS POST-DISPATCH (Nov. 7, 2011), [http://www.stltoday.com/news/opinion/columns/the-platform/editorial-term-limits-must-end-to-improve-missouri-legislature/article\\_0b869219-366c-5380-87b2-3347f57c4409.html](http://www.stltoday.com/news/opinion/columns/the-platform/editorial-term-limits-must-end-to-improve-missouri-legislature/article_0b869219-366c-5380-87b2-3347f57c4409.html) (last visited Apr. 10, 2016) ("The failure has been so spectacular that many early supporters of the concept . . . have come to realize that term limits have drained the Capitol of the brain power, institutional knowledge and collegiality needed to push complex issues forward over several years of debate.").

181. See, e.g., Peverill Squire & Gary Moncrief, STATE LEGISLATURES TODAY: POLITICS UNDER THE DOMES (2d ed. 2015) ("[C]areful studies of term limits have identified some clear consequences. The most obvious is greater turnover in most term-limited legislatures. And this, in turn, has led to instability in standing committee systems. [C]ommittees are a crucial element in the lawmaking process. The upshot is that the informational, deliberative and gatekeeping roles of the committees are undermined by term limits. Further-



al amendment—and it had been used—Idaho would likely feel the negative effects of term limits today.

### B. Breadth of Application & Sweeping Impact

The 1994 Initiative was the most comprehensive term limits statutory scheme in the United States.<sup>182</sup> No state enacted more sweeping restrictions at the local level.<sup>183</sup> Idaho counties would have been hit particularly hard: 44 of 132 county commissioners, and 30 county sheriffs, 29 county clerks, 24 county treasurers, 27 county assessors, and 34 county coroners from Idaho's 44 counties would not have been able to seek reelection to any county office in 2002.<sup>184</sup> Certainly rural communities would have been dealt a substantial blow,<sup>185</sup> at a level that holds significant responsibilities for the state.<sup>186</sup>

If the drafters of Idaho's term limits had excluded county, municipal, and school board officials in the 1994 Initiative, the law would have been substantially similar to the remaining states with term limits, and Idaho might still have term limits. But voters had approved the very broad 1994 Initiative. The effect: nearly sixty percent of county officials would be barred from the ballot in 2002.

My colleagues and I were keenly aware of and troubled by the likely destructive impact on local and rural communities. This troubled the Idaho legislature. These concerns were the primary motivation for legislative action.

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more, strong evidence suggests that term limits put legislatures at a disadvantage in their relations with the executive branch.”)

182. James B. Weatherby & Randy Staplius, *GOVERNING IDAHO: POLITICS, POWER AND PEOPLE* 210 (2005) (“Idaho’s term limits law...was radical, the most far reaching measure of its kind in the United States[.]”).

183. Some states allow counties and municipalities to choose whether or not to impose term limits. Others that have term limits have extended the length of those limits. See generally Chanon Bell & Jacqueline Byers, *History of County Term Limits* (Feb. 2011), <http://www.naco.org/newsroom/pubs/Documents/County%20Management%20and%20Structure/County%20Term%20Limits.pdf> (last visited Apr. 10, 2016).

184. Daniel A. Smith, *Overturing Term Limits: The Legislature’s Own Private Idaho?*, 36 *POL. SCI. & POL.* 215, 216 (2003).

185. Rural communities have fewer people who are able or willing to seek public office, particularly when the office has little to no compensation, but requires several hours a week of commitment or volunteer time. See e.g., Charles Mahtesian, *How to get rid of excellent public officials*, *GOVERNING* vol. 11 no. 10, 25, 25–28 (July 1998) (Oneida County prosecutor, the only attorney in the county with a population of 3,600, would be barred from appearing on the ballot).

186. See Weatherby & Staplius, *supra* note 182, at 153. (“But despite the mandated nature of their existence, counties are central players in the governmental system. If counties did not [exist], the state [] would have to act.”).

C. Public Policy Considerations

Term limits restrict the right to run for office. In Idaho, the law was not a complete ban, but severely inhibited access—leaving a write-in campaign as the only remaining option.<sup>187</sup> Term limits are also anti-democratic, because voters are denied the ability to have every candidate on the ballot. Justice Stevens wrote in the plurality opinion in *Thornton* that “the opportunity to be elected [is] open to all,” with “the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives . . . .”<sup>188</sup> *Thornton* decided only the narrow issue of whether “the [U.S.] Constitution forbids States to add to or alter the qualifications” for election to Congress.<sup>189</sup>

In contrast, the Idaho Supreme Court declined to find that the right to suffrage includes the right to hold office.<sup>190</sup> The Court explained that “[a] national search of the case law” revealed nothing to interpret suffrage so broadly.<sup>191</sup> However, *Rudeen* failed to mention the *Thornton* holding that there is a close relationship between suffrage and the right to be on the ballot.<sup>192</sup>

As a matter of public policy, term limits were a solution without a problem. Idaho historically has all the trademarks of a citizen legislature: part-time, low pay, and small staff.<sup>193</sup> Another measure of legislative professionalism *vis-à-vis* a citizen legislature is the number of lawyers in the legislature. In 2007, 15.2% of state legislators nationwide

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187. IDAHO CODE § 34-907 (repealed 2002).

188. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995) (referencing *Powell v. McCormack*, 395 U.S. 486 (1969)).

189. *Id.* at 787.

190. *Rudeen v. Cenarrusa*, 38 P.3d 598, 605, 136 Idaho 560, 567 (2001).

191. *Id.* at 604, 136 Idaho at 566.

192. The dissent in *Thornton* accuses Justice Stevens’ plurality opinion of finding a right to run for office in *Powell*. *Thornton*, 514 U.S. at 879 (Thomas, J., dissenting). Justice Stevens’ responds that is not so, but the “[Qualifications] Clauses did . . . further the interest of the people of the entire Nation in keeping the door to the National Legislature open to merit of every description.” *Thornton*, 514 U.S. 794 at n.11. This, obviously, is not a right to run for office, but something closer to a right than Idaho Court found and certainly something at least worthy of of judicial consideration.

193. *Full- and Part-Time Legislatures*, NAT’L CONF. OF ST. LEGISLATURES (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> (last visited Apr. 10, 2016). NCLS categorizes Idaho among sixteen Gold or Gold Lite states: states most like a traditional citizen legislature. *Id.* Idaho is most likely placed in the Gold Lite category because Idaho’s legislative salary is much closer to the national median legislative salary than it is to the bottom. *Id.*

listed their occupation as lawyer.<sup>194</sup> At current count there are 13 legislators with a J.D. out of 105 state legislators, or 12.4%, a high watermark in recent memory.<sup>195</sup> In 2002, when the repeal and veto override votes occurred, there were *only two lawyers* in the Idaho Senate.<sup>196</sup>

Additionally, term limits increased the power of lobbyists and special interest groups. In 2002, Boise State University professor of political science, Professor Moncrief, testified before the House State Affairs Committee when H425 was considered.<sup>197</sup> He shared a survey of lobbyists from states that had term limits. Professor Moncrief stated the survey showed that a comfortable majority of those lobbyists believed legislators relied more on staff to write legislation, were less knowledgeable about issues, failed to follow parliamentary procedure, and paid less attention to statewide issues.<sup>198</sup>

By even greater margins, lobbyists thought the Governor, governmental departments and agencies, and special interest groups had greater influence.<sup>199</sup> Lobbyists admitted that they wielded greater power within this new legislative paradigm. Yet, 2002 Idaho polling showed that voters were less likely to support term limits if the effect gave lobbyists greater power.<sup>200</sup>

Regardless of term limit's turnover impact, lobbyists remained. Term limits decimate legislative institutional memory, leaving institutional government bureaucrats and lobbyists to provide their version of history and vision of the future. The result, an easier glide path to passage of special interest legislation, because there is little memory to explain prior legislative experience that resulted in a different approach.

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194. *Legislators' Occupations in All States, 1976, 1986, 1993, 1995, 2007 (Percentages)*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/legislator-occupations-national-data.aspx> (last visited Apr. 10, 2016).

195. *Senate Membership, State of Idaho*, <http://legislature.idaho.gov/senate/membership.cfm> (last visited Apr. 10, 2016); *House Membership, State of Idaho*, <http://legislature.idaho.gov/house/membership.cfm> (last visited Apr. 10, 2016). As of April 10, 2016, twelve legislators are members of the Idaho State Bar, six serving in the Senate and six serving in the House.

196. Senator James E. Risch and me.

197. Hearing on H.B. 425 Before the H. State Affairs Comm., 2002 Leg., 56th Sess. 2 (Idaho 2002).

198. *Id.*

199. *Id.*

200. John Watts, *Idahoans Against Term Limits: A Public Opinion Survey Prepared for the Idahoans Against Term Limits* (Sept. 1998). This private survey, commissioned by Idahoans Against Term Limits, is included with the permission of Steve Ahrens, who was then executive director of the Idaho Association of Commerce and Industry (IACI). IACI was one of the principal backers of Idahoans Against Term Limits' anti-term limits efforts. Roughly 45% of respondents said they would reject term limit if it increased power of bureaucrats and lobbyists. Compared to other responses in the polling, the charge of increasing the power of bureaucrats and lobbyists was the argument most likely to sway voters to oppose term limits.

D. Term Limit's Benefits – Theory vs. Reality

There are additional misconceptions about term limits and their effects. One argument states that term limits prevent career politicians. However, studies show that the problem of 'career politicians' does not exist in Idaho. The Idaho Legislature, for instance, has a significant turnover rate which has remained steady over time. In 1992, Professor Moncrief testified before the Idaho Senate State Affairs Committee regarding S.J. Res. 108. His premise: Idaho's legislators are not long-time fixtures in the Capitol. To illustrate, he used the legislative class of 1982.<sup>201</sup> Of 21 House members elected in 1982, only six were still serving ten years later.<sup>202</sup> Similarly, of 13 Senators elected to in 1982, only four were still serving the next decade.<sup>203</sup> Professor Moncrief also focused on the years of 1978 to 1992. On any given year in that period, at least 73% of the Idaho Legislature had served less than five two-year terms.<sup>204</sup> Professor Moncrief's conclusions still hold true today, since 86% of the Senate and 81% of the House have completed *less than five consecutive terms* in their respective body.<sup>205</sup>

Term limit supporters also argue that term limits make elections more competitive, add diversity in the legislature, and limit the influence of special interest groups. A research fellow at Stanford University conducted a study to determine the accuracy of these claims.<sup>206</sup> The research resoundingly found none of these claims to be true.<sup>207</sup> Term lim-

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201. Hearing on S.J. Res. 108 Before the S. State Affairs Comm., 51st Leg. 2nd Sess. at 160, 213 (Idaho 1992).

202. *See id.* The last year of flatorial districts in Idaho was 1992. For a discussion on flatorial districts, see 81A C.J.S. States § 126 n. 3. Thus, in 1992 the House of Representatives had eighty-four members at the time of Professor Moncrief's presentation, instead of seventy as today. At some point during the ten years after their election in 1982, nine members of the class lost a primary or a general election, nine left voluntarily (in some cases to run for other office), and one passed away. Therefore, the total percentage of the class remaining in the House was 28.6%, or 7.1% of the entire House. *See id.*

203. *See id.* In 1992, because of flatorial districts, the Idaho Senate had forty-two Senators, instead of the current thirty-five. Of the thirteen Senators elected in 1982, two or three lost a primary or a general election, five or six left voluntarily (in some cases to run for other office), and one passed away. Therefore, the total percentage of the class remaining in the Senate was 30.8%, or 9.5% of the entire Senate.

204. *Id.*

205. *See supra* note 195. The current average number of terms served is 3.3 terms in both the Senate and the House.

206. Carson Bruno, *Sacramento Spotlight: Comprehensive Good Governance Reform Part 2 – Eliminating Term Limits* EUREKA (Oct. 24, 2013), <http://www.hoover.org/research/sacramento-spotlight-comprehensive-good-governance-reform-part-2-eliminating-term-limits> (last visited Apr. 10, 2016).

207. Lazarus, Jeffrey, *Term Limits' Multiple Effects on State Legislators' Career Decisions*, 6 ST. POLITICS & POL'Y Q. 357 (2006) ("While term limits certainly do stop a legisla-

its do not add competitiveness to elections nor limit the influence of special interest groups.<sup>208</sup> State legislative incumbents are in no more danger of losing seats today than pre-term limits and “open-seat races are not any more competitive under term limits than before.”<sup>209</sup> Term limits also have no effect on diversity in the legislature when measured ideologically or across a range of demographic characteristics.<sup>210</sup>

#### E. Self-Protection, Hubris, or Candor

Voting to repeal term limits was not an act of political self-preservation. If that was the purpose, Idaho legislators were not very strategic. We could have insulated ourselves from an unpopular repeal by introducing H425 after the deadline to file declarations of candidacy.

Instead, we knowingly introduced the repeal, held public hearings, voted on the repeal, received the Governor’s veto, and overrode the veto before – not after – legislative candidates filed for reelection. The window to file for office lasts two weeks often in the middle of March. When that deadline arrives, the legislature is typically in session or about to adjourn *sine die*. At that time, legislators return home to campaign for their respective party’s nomination in the May primary election.<sup>211</sup> But in 2002, Speaker Bruce C. Newcomb introduced the bill the second week of the session, making term limits the first important issue of the session.<sup>212</sup> Once the legislature overrode Governor Kempthorne’s veto, H425 was the first bill to become law in 2002.<sup>213</sup>

That year, the legislature adjourned *sine die* on March 14th.<sup>214</sup> Speaker Newcomb could have introduced the bill the last day after declarations of candidacy closed, then stayed a week or two longer to shepherd a repeal bill through both houses, to the governor, and then over-

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tor from seeking re-election to a seat after a specified number of terms, I find that those that wish to pursue a long-term political career are not, in general stopped by term limits.”)

208. *Id.*

209. Seth E. Masket & Jeffery B. Lewis, *A Return to Normalcy? Revisiting the Effects of Term Limits on Competitiveness and Spending in California Assembly Elections* 7 ST. POLITICS & POL’Y Q. 20 (2007). This is because a serious competitor will wait to run for office when an incumbent is term limited out of running because the wait is usually only a few years.

210. John M. Carey et al., *The Effects of Term Limits on State Legislatures: A New Survey of the 50 States* 31 LEGIS. STUD. Q. 105 (2006).

211. *See Idaho Blue Book*, *supra* note 69, at 203–04. (Dates the legislature adjourned *sine die* in election years during the era discussed in this article: March 15, 1996; March 23, 1998; April 5, 2000; March 14, 2002; March 20, 2004).

212. Vincent J. Schodolski, *Term-limits repeal sparks a political revolution in Idaho*, CHICAGO TRIB. (Mar. 2 2002), [http://articles.chicagotribune.com/2002-05-02/news/0205020210\\_1\\_term-limits-issue-term-limits-idaho-house](http://articles.chicagotribune.com/2002-05-02/news/0205020210_1_term-limits-issue-term-limits-idaho-house) (last visited Apr. 10, 2016).

213. *See supra* note 22.

214. *See supra* note 211.

ride the veto. If so, then opponents who would challenge an incumbent on the basis of their term-limit repeal vote would have to wait until the election cycle, two years later.

In 2000, only 206 legislative candidates were on the ballot. In 2002, 301 candidates ran for the legislature in a historically large number, in part due to the repeal of term limits.<sup>215</sup> Legislators were electorally exposed. Voters had every opportunity to personally challenge legislators that voted to repeal, both in the primary and general election. Voters were fully aware of every incumbent's position on term limits. Furthermore, legislators voted to repeal just weeks before the filing deadline. Even with this reality, more than two-thirds of both bodies voted to repeal the 1994 Initiative. Of legislators who voted to override Governor Kempthorne's veto of H425 and sought reelection, only eleven were defeated in 2002, but not all lost reelection because of their term limits vote.<sup>216</sup>

#### F. Repeal & Political Opportunity

In 2002, Idaho Republican legislative leadership was comprised of the Senate President Pro Tempore Robert L. Geddes, Majority Leader James E. Risch, Assistant Majority Leader John Sandy, and Majority Caucus Chairman Bart M. Davis in the Senate,<sup>217</sup> and in the House, Speaker Newcomb, Majority Leader Frank Bruneel, Assistant Majority Leader Lawrence Denney, and Majority Caucus Chairman Dan

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215. 2002 was the first election after redistricting, and more candidates often file to run after redistricting, in part because that process often creates open legislative positions and pits incumbents against each other. Although 301 candidates filed to run in 2002, it should be noted that in 2012, the first election after the next redistricting, an even slightly larger number of candidates filed for legislative office. Consequently, it is possible that the high number of 2002 legislative candidates is more a reflection of redistricting than the term limit repeal. See *List of All Candidate Declarations for 2012*, IDAHO SEC'Y OF STATE (May 11, 2012), [http://www.sos.idaho.gov/elect/candidat/2012\\_primary\\_candidates.pdf](http://www.sos.idaho.gov/elect/candidat/2012_primary_candidates.pdf) (last visited Apr. 10, 2016).

216. Legislators that supported the veto override of H425 who lost reelection were: Senators Clyde Boatright, Darrel Deide, Grant Ipsen, Robbi King-Barrutia, and Moon Wheeler, and Representatives Janet Arave Aikele, Frank Bruneel, Twila Hornbeck, Kent Higgins, Don Pischner, and Cameron Wheeler. However, because it was the first election after redistricting, *see id.*, several legislators lost because they were drawn into the same district as another legislator, to wit: Senator Wheeler, and Representatives Aikele, Hornbeck, Cuddy, Higgins, and Wheeler. Additionally, another Senator lost reelection after a DUI arrest in early 2002. Then-Senator Kathy Sims was the only legislator in either body to vote for H425 in support of repeal but against veto override. She narrowly lost election running against Senator John Goedde, who voted for H425 and to override the veto, when both were drawn into the same district. Not included in this figure are two representatives who lost seeking seats in the Senate: Kent Kunz and Sher Sellman.

217. Journal State S. 56, 2d Sess., at 269 (Idaho 2002).

Mader.<sup>218</sup> Of the eight Republican leaders, Senator Sandy was the only one to vote against the veto override of H425.<sup>219</sup>

The members of majority leadership who would have immediately benefited from repealing term limits were Senators Risch and Sandy, Speaker Newcomb, and Representatives Bruneel, Denney, and Mader. However, neither Senators Sandy and Risch, nor Representative Mader sought reelection, and Bruneel was not reelected in 2002.<sup>220</sup> For at least three members of majority leadership it cannot be said that their vote to repeal term limits immediately advanced their political career.

Term-limit supporters and critics of legislative repeal asserted that term limits would weed out career politicians, but a contrary result was foreseeable.<sup>221</sup> If term limits remained in effect the incumbents serving as Secretary of State, Attorney General, and State Controller would be barred from running for any constitutional office in 2002, and the incumbent Governor, State Treasurer, and Superintendent of Public Instruction would be barred from running for any constitutional office in 2006.<sup>222</sup> However, many senior legislators were serious possible candidates for these constitutional offices. The repeal of term limits actually limited higher political office opportunities for legislators. Also, if term limits remained, a large number of local government offices would have opened at the city and county level. With many elected officials restricted from running for the same office again, the 2002 election could have been an historic reshuffling of elected officials within other statewide and county and city offices.

In addition, the Senate President Pro Tempore and House Speaker, often in consultation with other members of legislative leadership, appointed committee chairmen, and because the Idaho legislature has a strong committee system, chairmen of the standing committees wield significant power.<sup>223</sup> Nearly twenty back-bench Republican legislators in their first or second term in office, particularly in the House, voted to

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218. Journal State H. 56, 2d Sess., at iv (Idaho 2002).

219. *Id.* at 82; Journal State S. 56, 2d Sess., at 69 (Idaho 2002).

220. Senator Risch sought and won the Lieutenant Governor's seat. Senator Sandy decided not to run for reelection. Representative Bruneel sought reelection but lost in the general election to Democrat Mike Mitchell.

221. See *supra* Part IV.D.

222. IDAHO CODE § 34-907 (repealed 2002).

223. See Weatherby & Staplius, *supra* note 182. ("To understand the Idaho legislative process is to understand the crucial role committees play in the process. Deference is given to the committee system . . . This specialization in functions and responsibilities works because of the "lay" complexion of the Legislature and the strong tradition in support of the committee process engendered by the many years of Republican majority rule . . . In this committee-oriented system, committee chairs are very influential. They control the committee agenda . . . Committee chairs can single-handedly kill bills they do not like and rarely are they successfully challenged.").

repeal term limits.<sup>224</sup> A vote to uphold Governor Kempthorne's veto of H425 in the House of Representatives would have opened every majority leadership position and nearly every chairmanship. This group of young Republican legislators stood to promptly advance into positions of power and influence in the legislature by keeping term limits. Instead, they voted against their immediate self-interest.<sup>225</sup>

#### G. Voters' Inconsistent Actions

Although Idaho citizens overwhelmingly supported term limits, they nevertheless voted for legislators who opposed term limits and served more than three terms. A March 2015 poll of registered voters found 85% of Idahoans strongly support or somewhat support term limits on Idaho officials.<sup>226</sup> Idaho Republicans, Democrats, and Independents support term limits at essentially identical levels.<sup>227</sup> However, the same poll shows that nearly 50% of Idahoans and 72% of Republicans have a favorable opinion of Governor Otter,<sup>228</sup> who was reelected in November 2014 to a third consecutive term.<sup>229</sup>

Former Senator Craig initially supported term limits, later changed his opinion,<sup>230</sup> and still garnered significant support from Idaho voters, winning and serving three U.S. Senate terms.<sup>231</sup> Senator Crapo, who has served in Congress since his election in 1992, is viewed favorably by 55% of Idahoans and 68% of Republicans.<sup>232</sup> Senator Crapo as recently as 2010—while seeking reelection for a third term to the Sen-

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224. Young House Republicans who voted to override the veto of H425: Representatives Janet Arave Aikele, Sharon Block, Larry Bradford, Gary Collins, George Eskridge, Steve Hadley, Jim Clark, Todd Hammond, Kent Higgins, Wayne Kendall, Eulalie Teichert Langford, Shirley McKague, Mike Moyle, Del Raybould, Sher Sellman, Mary Lou Shephard, Bert Stevenson, Tom Trail, and Cameron Wheeler.

225. Former Representative Kent Kunz reminded me of this observation about young House Republicans. He recalls making this point on the House floor while debating in favor of H425.

226. Bob Bernick, *Idahoans Overwhelmingly Favor Term Limits for Legislators*, IDAHO POLITICS WEEKLY (Apr. 5, 2015), <http://idahopoliticsweekly.com/politics/221-idahoans-overwhelmingly-favor-term-limits-for-legislators> (last visited Apr. 14, 2016).

227. *Id.*

228. *Id.*

229. *Nov 04, 2014 General Election Results: Statewide Totals*, IDAHO SEC'Y OF STATE, [http://www.sos.idaho.gov/elect/results/2014/General/statewide\\_totals.html](http://www.sos.idaho.gov/elect/results/2014/General/statewide_totals.html) (last visited Apr. 14, 2016).

230. *Craig now opposes term limits*, MOSCOW-PULLMAN DAILY NEWS, Oct. 21, 1994, at 4A; see also *supra* text accompanying notes 111-113.

231. Craig, Larry Edwin, (1945- ), Biographical Directory of the United States Congress <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000858> (last visited Apr. 14, 2016).

232. Bernick, *supra* note 226.



ate—said he personally does not think term limits are effective, but added that “if Idahoans indicate that they believe that that’s what we should do, I would support the wishes of Idahoans in moving that direction.”<sup>233</sup> Voters in the Second Congressional District initially elected Congressman Simpson in 1998,<sup>234</sup> the only candidate in the Primary or General Election of either party to not sign a term limits pledge that year.<sup>235</sup> Since then, voters have comfortably reelected him eight times.<sup>236</sup>

Concurrent with the 1994 Initiative approval, Idaho voters reelected then-Lieutenant Governor Otter to a third term,<sup>237</sup> and four years later a fourth term to that office.<sup>238</sup> Voters also elected Secretary of State Pete Cenarrusa who held that office since 1967, to his penultimate term in 1994,<sup>239</sup> and his final term in 1998.<sup>240</sup> Also in 1998, Idaho voters reelected Democrat J.D. Williams to a third term as State Controller, demonstrating their bi-partisan agnosticism regarding term limits.<sup>241</sup>

Since the 2002 Referendum upholding the repeal of term limits, Idaho voters have elected Treasurer Ron Crane to a fifth term,<sup>242</sup> Attorney General Lawrence Wasden to a fourth term,<sup>243</sup> and former Secretary of State Ben Ysursa to a third term.<sup>244</sup> All of the foregoing examples demonstrate that Idaho voters may support term limits conceptually, but they do not vote against politicians for holding contrary views on term limits or seeking additional terms.

Even if term limits seemed to enjoy sweeping bipartisan support in Idaho, the support appears to be in concept and not in application. Na-

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233. *Transcript: iTownhall Meeting August 4, 2010*, United States Senator Mike Crapo, [http://www.crapo.senate.gov/documents/media/trans\\_ithownhall\\_08042010.pdf](http://www.crapo.senate.gov/documents/media/trans_ithownhall_08042010.pdf) (last visited Apr. 14, 2016).

234. Idaho General Election Results: November 3, 1998, *supra* note 63.

235. B. Drummond Ayres Jr., *Political Briefing: Another G.O.P. Primary, Another Term-Limits Test*, N.Y. TIMES (May 22, 1998), <http://www.nytimes.com/1998/05/22/us/political-briefing-another-gop-primary-another-term-limits-test.html> (last visited Apr. 14, 2016). (Then-Speaker Simpson’s Republican primary opponents for Congress, former Senators Dane Watkins and Ann Rydalch and then-Representative Mark Stubbs, all signed a term limits pledge, as did his Democratic general election opponent former Congressman Richard Stallings.)

236. Simpson, Michael K., (1950- ), Biographical Directory of the United States Congress <http://bioguide.congress.gov/scripts/biodisplay.pl?index=s001148> (last visited Apr. 14, 2016).

237. Idaho General Election Results: November 8, 1994, *supra* note 86.

238. Idaho General Election Results: November 3, 1998, *supra* note 63.

239. Idaho General Election Results: November 8, 1994, *supra* note 86.

240. Idaho General Election Results: November 3, 1998, *supra* note 63.

241. *Id.*

242. Nov 04, 2014 General Election Results: Statewide Totals, *supra* note 229.

243. *Id.*

244. *November 2, 2010 General Election Results: Statewide Totals*, IDAHO SEC’Y OF ST. [http://www.sos.idaho.gov/elect/results/2010/General/tot\\_stwd.htm](http://www.sos.idaho.gov/elect/results/2010/General/tot_stwd.htm) (last visited Apr. 14, 2016).

tional pollsters have noticed a phenomenon where voters simultaneously hold unfavorable views of institutions, but generally favorable views of their representative in those institutions.<sup>245</sup> This explains how Congress can have a favorability rating of 14%,<sup>246</sup> but 95% of incumbents are reelected.<sup>247</sup> If voters know their representative's name, they are even more likely to have a positive impression.<sup>248</sup>

One possible explanation is voters want term limits on politicians they do not know or have the opportunity to elect. In a legislative body, the voter may be able to vote for a few of the members, but not members from the other side of the state or other side of the country. Voters have no electoral recourse against any representatives other than their own, although they are affected by the actions of all members of a legislative body. Therefore, just as the low favorability of Congress is not imputed to a voter's own Congressman, it appears the conceptual desire for term limits likewise does not strongly apply to the offices for which a voter can vote.

## V. CONCLUSION

The enactment and repeal of term limits in Idaho was indeed messy, but elegant. The voters, by initiative, had chosen to impose term limits. Overturning an initiated statute, drafted and enacted by the people, using their constitutionally protected power to legislate independent from the legislature was certainly a complicating factor—perceived as an act of hubris. For some, overturning the express will of the people will always be unpardonable heresy, even though the 2002 Referendum vote affirmed repeal.

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245. Elizabeth Mendes, *Americans Down with Congress, OK With Own Representative*, GALLUP (May 9, 2013), <http://www.gallup.com/poll/162362/americans-down-congress-own-representative.aspx> (last visited Apr. 14, 2016) (“Although Americans overwhelmingly disapprove of the job Congress in general is doing, voters re-elect most members of Congress in every election. This phenomenon is partly explained by the finding that Americans have significantly more positive views of their own representative than they do of Congress overall.”).

246. Rebecca Rifkin, *2014 U.S. Approval of Congress Remains Near All-Time Low*, GALLUP (Dec. 15, 2014), <http://www.gallup.com/poll/180113/2014-approval-congress-remains-near-time-low.aspx> (last visited Apr. 14, 2016) (Average for Congressional approval for 2014).

247. *Reelection Rates Over the Years*, OpenSecrets.org, <https://www.opensecrets.org/bigpicture/reelect.php> (last visited Apr. 14, 2016).

248. See Rifkin, *supra* note 246. ([T]hose who do not know their representative's name hold him or her in lower regard. Thus, people who don't know the name of their representative may be evaluating that person largely on their generally negative feelings about how the broader institution is doing.).

In 2002, however, the legislature could see the likely adverse impacts of term limits.<sup>249</sup> Perhaps I overstate the good done by the repeal of the 1994 Initiative, the policy reasons, the veto override, and the successful campaign in support of the rightness of the repeal. Although it may sound Pollyannaish, we believed in our votes.

Like many of my legislative colleagues, I believed that my repeal and override votes might cost me not only my election, but any political future. To me and others, my repeal and override votes were not acts of political preservation or promotion, but an anticipatory death-knell. These votes were acts of courage, not brash acts of self-preservation.

With hindsight's benefit, it appears that many Idahoans supported term limits to get the rascals from other states out of Congress. Looking back—after the referendum's defeat—it appears that Idahoans did not support the breadth of term-limit application. Instead, it turns out, they preferred the right to decide for themselves.

President Ronald Reagan, after his presidency, supported the repeal of the 22<sup>nd</sup> Amendment to the U.S. Constitution, which imposes a presidential term limit. His stated reason: "I charge that the 22<sup>nd</sup> is a violation of the people's right to vote for whomever they want."<sup>250</sup>

Idaho, with the assistance of the legislature, has preserved this right of suffrage—the right to vote for whomever they want.

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249. As this article goes to print, Ronald Longmore, Bonneville County Clerk, just announced his retirement. Since 1979, Ron quietly, capably, and professionally performed his various duties. The County trusted him. There was never a scandal. There was never any doubt. Instead, he was diligent, year-after-year. Ron rarely contacted me for legislative assistance, but when he did I knew it was vital. During the 2002 legislative session, he did not ask my position on term limits. Ron was about to lose his career, but his focus was on job performance not continuity. One day during that legislative session, I recall seeing him from afar at the Capitol, and then stating something like, "There's Ron Longmore, Bonneville County's long-time county clerk. In my opinion, he's Exhibit 'A' for why term limits are bad public policy." I still believe that. Ronald Longmore personifies diligent public service.

250. 150 CONG. REC. 11,712 (2004) (Senator Tom Daschle quoting from personal correspondence he received from President Reagan).