# COOK v. GRALIKE

**SUPREME COURT OF THE UNITED STATES**
**531 U.S. 510**
**February 28, 2001**

**OPINION:** Justice Stevens...[At issue in this case is the constitutionality of Article VIII of the **Missouri Constitution** adopted by the Missouri voters in response to our decision in *U.S. Term Limits, Inc. v. Thornton.*[1]]

Article VIII "instructs" each Member of Missouri's congressional delegation "to use all of his or her delegated powers to pass the Congressional Term Limits Amendment" [to the United States Constitution] set forth in §16 of the Article. That proposed amendment would limit service in the United States Congress to three terms in the House...and two terms in the Senate. [The] provisions in Article VIII combine to advance its purpose...

Section 17(2) provides that the statement [see, below] shall be printed on the ballot adjacent to the name of any United States Senator or Representative who:

(a) **fails** to vote in favor of the proposed Congressional Term Limits Amendment...when brought to a vote or;

(b) **fails** to second the proposed Congressional Term Limits Amendment...if it lacks for a second before any proceeding of the legislative body or;

(c) **fails** to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment...if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment...or;

(d) **fails** to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment...before any committee or subcommittee of the respective house upon which he or she serves or;

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[1]Case 1-4 on this website.

(e) **fails** to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment...;

(f) **fails** to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment...regardless of any other actions in support of the proposed Congressional Term Limits Amendment...or;

(g) **sponsors or co-sponsors** any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment... or;

(h) **fails** to ensure that all votes on Congressional Term Limits are recorded and made available to the public.

The pledge, contained in §18(3), reads:

> I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation '**DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS**' will not appear adjacent to my name.

| Hey, Missouri! Very innovative even if misguided! |
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...The District Court...held that Article VIII...[is unconstitutional and] the...Court of Appeals... affirmed.

...Article VIII furthers the State's interest in adding a term limits amendment to the Federal Constitution in two ways. It encourages Missouri's congressional delegation to support such an amendment in order to avoid an unfavorable ballot designation when running for reelection. And it encourages the election of representatives who favor such an amendment. Petitioner argues that Article VIII is an exercise of the "right of the people to instruct" their representatives reserved by the Tenth Amendment, and that it is a permissible regulation of the "manner" of electing federal legislators within the authority delegated to the States by the Elections Clause, Art. I, §4, cl. 1. Because these two arguments rely on different sources of state power, it is appropriate at the outset to review the distinction in kind between powers reserved to the States and those delegated to the States by the Constitution.

As we discussed at length in *U.S. Term Limits*, the Constitution "draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States." On the one hand, in the words of Chief Justice Marshall, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." *Sturges v. Crowninshield* (1819). The text of the Tenth Amendment delineates this principle:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

On the other hand, as Justice Story observed, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them." Simply put, "no state can say, that it has reserved, what it never possessed."

To be persuasive, petitioner's argument that Article VIII is a valid exercise of the State's reserved power to give binding instructions to its representatives would have to overcome three hurdles. First, the historical precedents on which she relies for the proposition that the States have such a reserved power are distinguishable. Second, there is countervailing historical evidence. Third, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the State's power to regulate the manner of holding elections for Senators and Representatives. Only a brief comment on the first two points is necessary.

**...[T]he First Congress rejected a proposal to insert a right of the people "to instruct their representatives"** into what would become the First Amendment. The fact that the proposal was made suggests that its proponents thought it necessary, and the fact that it was rejected by a vote of 41 to 10 suggests that we should give weight to the views of those who opposed the proposal. **It was their view that binding instructions would undermine an essential attribute of Congress by eviscerating the deliberative nature of that National Assembly**. See, e.g., (remarks of Rep. Sherman) ("When the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation; all that a man would have to do, would be to produce his instructions, and lay them on the table, and let them speak for him"). As a result, **James Madison**, then a Representative from Virginia, **concluded that a right to issue binding instructions would "run the risk of losing the whole system."** (remarks of Rep. Clymer) (proposed right to give binding instructions was "a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments").

In any event, even assuming the existence of the reserved right that petitioner asserts (and that Article VIII falls within its ambit), the question remains whether the State may use ballots for congressional elections as a means of giving its instructions binding force.

The federal offices at stake "arise from the Constitution itself." *U.S. Term Limits*. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States."... Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." **Art. I, §4, cl. 1.** No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

With respect to the Elections Clause, petitioner argues that Article VIII "merely regulates the manner in which elections are held by disclosing information about congressional candidates." As such, petitioner concludes, Article VIII is a valid exercise of Missouri's delegated power.

We disagree...As we made clear in *U.S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue **procedural regulations**, and **not as a source of power to dictate electoral outcomes**, to favor or disfavor a class of candidates, or to evade important constitutional restraints." Article VIII is not a procedural regulation. It does not regulate the time [or place] of elections...; nor, we believe, does it regulate the **manner** of elections..., for in our commonsense view that term encompasses matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." In short, Article VIII is not among "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," ensuring that elections are "fair and honest," and that "some sort of order, rather than chaos, is to accompany the democratic process."

Rather, Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal...As noted, the state provision does not just "instruct" each member of Missouri's congressional delegation to promote in certain ways the passage of the specified term limits amendment. It also attaches a concrete consequence to noncompliance -- the printing of the statement "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" by the candidate's name on all primary and general election ballots. Likewise, a non-incumbent candidate who does not pledge to follow the instruction receives the ballot designation "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."

In describing the two labels, the courts below have employed terms such as "pejorative," "negative," "derogatory," "intentionally intimidating," "particularly harmful," "politically damaging," "a serious sanction," "a penalty," and "official denunciation." The general counsel to petitioner's office, no less, has denominated the labels as "**the Scarlet Letter**." We agree with the sense of these descriptions. They convey the substantial political risk the ballot labels impose on current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth

in Article VIII for passing its term limits amendment. Although petitioner now claims that the labels "merely" inform Missouri voters about a candidate's compliance with Article VIII, she has acknowledged under oath that the ballot designations would handicap candidates for the United States Congress. To us, that is exactly the intended effect of Article VIII.

Indeed, it seems clear that the adverse labels handicap candidates "at the most crucial stage in the election process -- **the instant before the vote is cast**." At the same time, "by directing the citizen's attention to the single consideration" of the candidates' fidelity to term limits, the labels imply that the issue "is an important -- perhaps paramount -- consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot" against candidates branded as unfaithful. While the precise damage the labels may exact on candidates is disputed between the parties, the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office. Thus, far from regulating the procedural mechanisms of elections, **Article VIII attempts to "dictate electoral outcomes." Such "regulation" of congressional elections simply is not authorized by the Elections Clause.** Accordingly, the judgment of the Court of Appeals is affirmed.

**CONCURRENCE:** Justice Kennedy...**The Court does not say the States are disabled from requesting specific action from Congress or from expressing their concerns to it**...[T]he mechanism the State seeks to employ here goes well beyond this prerogative...

**The dispositive principle in this case is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government.** The principle is that **Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside.** The Constitution was ratified by Conventions in the several States, not by the States themselves, U.S. Const., Art. VII, a historical fact and a constitutional imperative which underscore the proposition that the Constitution was **ordained and established by the people of the United States**. **The idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office**...As noted in the concurring opinion in *Thornton*, "nothing in the Constitution or The Federalist Papers...supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." Yet that is just what Missouri seeks to do through its law -- to wield the power granted to it by the Elections Clause to handicap those who seek federal office by affixing pejorative labels next to their names on the ballot if they do not pledge to support the State's preferred position on a certain issue. **Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it...**Here the State attempts to intrude upon the relationship between the people and their congressional delegates by seeking to control or confine the discretion of those delegates, and the interference is not permissible...

**CONCURRENCE:** Chief Justice Rehnquist/O'Connor...Missouri's Article VIII violates the First

Amendment...right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State...

In *Anderson v. Martin* (1964), we held a Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection Clause. In describing the effect of such a designation, the Court said: "By directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important -- perhaps paramount -- consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." So, too, here the State has chosen one and only one issue to comment on the position of the candidates. During the campaign, they may debate tax reform, Social Security, national security, and a host of other issues; but when it comes to the ballot on which one or the other of them is chosen, the State is saying that the issue of term limits is paramount...**"Government may not select which issues are worth discussing or debating."**

If other Missouri officials feel strongly about the need for term limits, they are free to urge rejection of candidates who do not share their view and refuse to "take the pledge." **Such candidates are able to respond to that sort of speech with speech of their own.** But the State itself may not skew the ballot listings in this way without violating the First Amendment.