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Why Can't a Chicken Vote For Colonel Sanders? U.S. Term Limits, Inc. v. Thornton and the Constitutionality of Term Limits

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Why Can't a Chicken Vote For Colonel Sanders? *U.S. Term Limits, Inc. v. Thornton* and the Constitutionality of Term Limits

I. INTRODUCTION

Representative Bob Ingils of South Carolina once said that "asking Congress to vote for term limits is a bit like asking chickens to vote for Colonel Sanders."[1] Although the Representative's quote speaks only of congressionally imposed limits, his words are just as applicable to term limits imposed by voters. In the current political arena, where the power to bring money back to a legislator's home district is proportionate to his or her seniority,[2] voters adopting term limits for their own representatives seem to be committing the political suicide described by Representative Ingils. Nevertheless, voters from more than twenty states have done just that, enacting term limits on their federal representatives in Congress.[3]

These voters took action because they were frustrated with the "cycle of incumbency" of the current system.[4] In this cycle, a resource-rich incumbent[5] discourages others from running, and potential contributors

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1. Holly Idelson, *Constitutional Amendment: Ruling Pressures Congress to Address Term Limits*, CONG. Q. WKLY. REP., May 31, 1995, at 1479, 1482.

2. Ronald D. Rotunda, Speech, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 563-66 (1994).

3. Kathleen Sullivan, Comment, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 78 (1995). Twenty-two states have term limits for their members of Congress, and 21 of these were passed by ballot initiative. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1909 (1995) (Thomas, J., dissenting). *See, e.g.*, COLO. CONST. art. XVIII, § 9(a) (limiting U.S. Senators to two consecutive terms and Representatives to six consecutive terms); MICH. CONST. art. II, § 10 (preventing U.S. Representatives from serving three times in 12 years and U.S. Senators from serving more than twice in 24 years); WYO. STAT. § 22-5-104 (1977 & Supp. 1993) (denying acceptance of nomination petitions from anyone serving as U.S. Senator for 12 or more years in a 24-year period or as U.S. Representative for six or more years in any 12-year period).

4. Blair T. O'Connor, *Want to Limit Congressional Terms? Vote for "None of the Above,"* 29 VAL. U. L. REV. 361, 363-64 n.10 (1994).

5. These resources include a federally funded campaign staff, use of the franking privilege, use of a photography and recording studio, free television coverage (cable

and volunteers give those who do run little support in light of what they see as a losing candidacy.[6] Voters at the polls then inevitably reelect the incumbent, either because the incumbent runs unopposed, or because they view the other candidate as a weak "sacrificial lamb," put on the ballot merely as a place-holder by the opposing party.[7] Term limits cut off this incumbency cycle and express the electorate's annoyance with entrenched incumbents who "paralyze congressional will," "frustrate change," and pass only "'special interest legislation,' operating 'to the detriment of [the] state.'"[8]

In *U.S. Term Limits, Inc. v. Thornton*,[9] the Supreme Court faced the question of whether it was within the power of state voters to vent their frustration through term limits. Although sympathizing with the voters, the Court held that states lack the power to enact term limits under the Tenth Amendment and that term limits improperly impose a qualification for Congress in addition to those the majority deemed exclusive under Article I, Section 2 of the Constitution.[10]

Part II of this Note examines the historic interpretation of the Qualifications Clauses, the Court's reaction to ballot access cases,[11] and the application of the Tenth Amendment.[12] Parts III and IV summarize the facts of the case and the majority, concurring, and dissenting opinions of *U.S. Term Limits*.[13] Part V contains a critical analysis of the majori-

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telecast of floor debates), the ability to give out government benefits to district voters, and campaign financing laws that are structured in their favor by encouraging donations from large PACs and special interest groups to incumbents. *See* 2 U.S.C. §§ 61-1, 72(a), 332 (federally funded staff); 39 U.S.C. § 3210 (franking privilege); *U.S. Term Limits*, 115 S. Ct. at 1911 (Thomas, J., dissenting) (use of government photo and recording studio, federally funded staff); Brief for Petitioners U.S. Term Limits, Inc. at 19-20 & n.25, *U.S. Term Limits* (Nos. 93-1456, 93-1828) (television coverage); O'Connor, *supra* note 4, at 371-72 (use of government benefits and campaign financing laws).

6. O'Connor, *supra* note 4, at 363-64 n.10.

7. *Id.* In 1988, more members of Congress left office because of death than because they lost at the polls. Dwayne A. Vance, Comment, *State Imposed Congressional Term Limits: What Would the Framers of the Constitution Say?* 1994 B.Y.U. L. REV. 429, 439 (citing William Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 HARV. J.L. & PUB. POL'Y 95, 97 (1993)).

8. Mark Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1134 (1994) (brackets in original) (quoting Preamble-Laws 1993, ch. 1, *reprinted in* WASH. REV. CODE § 43.01.015 (1993) (Initiative Measure No. 573 approved Nov. 3, 1992)).

9. 115 S. Ct. 1842 (1995).

10. *Id.* at 1856, 1871.

11. A ballot access case arises when a state statute or constitutional amendment burdens a candidate's attempt to have his name put on the ballot. *Id.* at 1913 (Thomas, J., dissenting).

12. *See infra* notes 18-82 and accompanying text.

13. *See infra* notes 83-185 and accompanying text. Justice Stevens wrote the ma-

ty opinion.[14] Part VI discusses whether the decision completely forecloses a state's power to cut off the "incumbency cycle."[15] Part VI also considers the impact that the decision will have on numerous state statutes currently in force that, although not term limits, if examined under the majority's holding, will be declared unconstitutional.[16] This Note concludes by emphasizing the lack of dichotomy between what the voters of Arkansas tried to accomplish and the reasoning behind the Court's decision preventing them.[17]

II. HISTORY

The majority and dissenting opinions in *U.S. Term Limits* discussed three main areas of law relevant to determining the constitutionality of the Arkansas amendment: the Qualifications Clauses;[18] the Times, Places and Manner Clause as applied in ballot access cases;[19] and the Tenth Amendment.[20] This section of the Note examines each of these areas in turn, pointing out the Court's position and interpretation of these provisions prior to its decision in *U.S. Term Limits*.

A. The Qualifications Clauses

Article I, Section 2 of the United States Constitution reads: "No person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected be an Inhabitant of that State in which he be chosen."[21] Article I, Section 3 contains a similar provision for senators, but sets the minimum age at thirty years and the citizenship

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jority opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. *U.S. Term Limits*, 115 S. Ct. at 1845. Justice Kennedy filed a concurring opinion. *Id.* at 1872 (Kennedy, J., concurring). Justice Thomas wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.* at 1875 (Thomas, J., dissenting).

14. *See infra* notes 186-242 and accompanying text.

15. *See infra* notes 243-52 and accompanying text.

16. *See infra* notes 253-64 and accompanying text.

17. *See infra* notes 265-73 and accompanying text.

18. U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *see infra* notes 21-48 and accompanying text.

19. U.S. CONST. art. I, § 4, cl. 5; *see infra* notes 49-72 and accompanying text.

20. U.S. CONST. amend. X; *see infra* notes 73-82 and accompanying text.

21. U.S. CONST. art. I, § 2, cl. 2.

requirement at nine years.[22] Although these Qualifications Clauses prescribe minimum qualifications for Congress members, they are not expressly exclusive, and thus, the question arises whether the Framers intended the federal or state government to have the power to supplement them.[23]

The first time a person's qualifications for Congress beyond those enumerated in the Constitution arose as an issue post-ratification was in an incident never presented to the Supreme Court. After losing to two-time Maryland incumbent William McCreery for a seat in the United States House of Representatives in 1807, Joshua Barney challenged McCreery's eligibility for membership based on an 1802 Maryland statute.[24] The statute required at least one of the representatives from McCreery's district to live in Baltimore City, and McCreery had moved outside the city in 1803.[25] A House Committee on Elections issued a report stating the Maryland law was "contrary to the Constitution of the United States" because it added a qualification for congressional membership beyond those enumerated in the Constitution.[26] The report created so much controversy in the House that the members sent it back to the Committee, which then held hearings on McCreery's residence.[27] The second report sent to Congress read, McCreery, "having the greatest number of votes, and being duly qualified, agreeably to the Constitution of the United States, is entitled to his seat in this House."[28] The report still appeared to some members to decide that Maryland did not have the power to add qualifications, and after long debate, the House approved an amendment stating only that McCreery was "entitled to his seat in the House."[29]

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22. U.S. CONST. art. I, § 3, cl. 3.

23. *See* Daniel H. Lowenstein, *Are Congressional Term Limits Constitutional?* 18 HARV. J.L. & PUB. POL'Y 1, 9 (1994). Lowenstein criticizes several scholarly theories supporting the constitutionality of congressional term limits, including the idea that by classifying the limits as a "manner" of elections, states are free to regulate through limits under the Times, Places and Manner Clause of the Constitution, and also the theory that the states' power to adopt term limits can be implied from other express powers granted to the states in the Constitution. *Id.* at 25-29, 34-56.

24. Roderick M. Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 123 (1991). Hills cites several sources for his retelling, including 7 ANNALS OF CONG. 1232 (1807), ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 414 (1907), and DIGEST OF CONTESTED ELECTION CASES 167 (M. St. Clair Clarke & David A. Hall eds., Washington, Gales, and Seaton 1834) (hereinafter CLARKE & HALL). Hills, *supra*, at 125 nn.110-13.

25. Hills, *supra* note 24, at 123.

26. *Id.* at 124.

27. *Id.*

28. *Id.* (citing CLARKE & HALL, *supra* note 24, at 169-71).

29. *Id.* (citing CLARKE & HALL, *supra* note 24, at 169-71); *see also* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1908-09 (1995) (Thomas, J., dissenting) (explain-

Before *U.S. Term Limits*, the Court had decided very few cases involving the Qualifications Clauses. *Powell v. McCormack*[30] was an exception, and presented the Court with an opportunity to examine the Clauses. Adam Clayton Powell was a member-elect of the House of Representatives who had served during the previous term.[31] During the previous congressional session, a House special subcommittee concluded that Powell misappropriated government funds, but the subcommittee took no formal action against him.[32] When the new Congress gathered to take the oath of office, Powell was asked to step aside, and the members who were sworn and seated subsequently appointed a Select Committee to determine Powell's eligibility.[33] Powell refused to attend any of the Committee's hearings, maintaining that he would give information only in relation to his age, citizenship, and residency—the qualifications contained in the Constitution.[34] The Committee nevertheless issued a report stating that although Powell had used government money inappropriately, he met the three requirements of the Qualifications Clauses, and therefore recommended that he be sworn and seated, but censured, deprived of seniority, and fined.[35] The House passed most of

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ing the nature of the debates surrounding the Committee report). A similar incident occurred in 1856 when members of the majority Douglasite party challenged the election of Illinois Judge Lyman Trumbell for Senator. Hills, *supra* note 24, at 128-29. An Illinois statute forbade state judges from running for federal office during their term on the bench, and although Trumbell resigned his position prior to running, the Douglasites contended his "term" was not yet over. *Id.* at 129. Trumbell was eventually seated, but it remained unclear if he was seated because Congress felt the state could not add these qualifications, or if Congress merely felt the Illinois Legislature, in electing Trumbell (the election preceded direct election of senators), interpreted its own constitution as allowing his election. *Id.* at 130. The case has not been cited as precedent for interpretation of the Qualifications Clauses very often because it was seen more as a partisan move by the Douglasites rather than any substantive debate on the power of a state to add qualifications. *Id.* at 131. The Trumbell incident seems even less authoritative in light of the Court's decision in Clements v. Fashing, 457 U.S. 957 (1982), which upheld a state's right to require state judges to resign in order to run for U.S. Senate or House of Representatives.

30. 395 U.S. 486 (1969).

31. *Id.* at 489.

32. *Id.* at 490.

33. *Id.*

34. *Id.* at 491; *see* U.S. CONST. art. I, § 2, cl. 2 (enumerating qualifications for House members).

35. *Powell*, 395 U.S. at 492.

the report's recommendations, but added an overriding amendment stating that Powell be excluded from the House and his seat declared vacant.[36]

The controversy eventually reached the Supreme Court, where the Justices were forced to look at the Qualifications Clauses in deciding whether the case presented a non-justiciable political question.[37] The respondents, arguing on behalf of the House, contended that Article I, Section 5 of the Constitution[38] "textually committed" the power to judge the qualifications of House members to Congress, and thus the decision was not reviewable by the Court.[39] The majority agreed that the Constitution granted this power to the House, but disagreed with the respondents as to its extent.[40] The Court found the Constitution limited the textual commitment of power to judging a House member's "qualifications" as set forth in Article I, Section 2: age, citizenship, and residency.[41]

In reaching this conclusion, the Court interpreted the Constitution using historical evidence. The analysis began by looking at precedents from England and the Colonies prior to the Constitutional Convention.[42] The Court rejected the idea that these incidents supported the theory that Congress could control the qualifications of its own members.[43] The majority then analyzed the Convention debates and concluded that although subject to other interpretations, the debates ultimately stood for the proposition that the qualifications contained in the Constitution could not be varied by either branch of Congress.[44] The

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36. *Id.* at 492-93.

37. *Id.* at 495, 519. The Court also addressed the issues of mootness, immunity under the Speech and Debate Clauses of the Constitution, the power of the House to exclude a member, and subject matter jurisdiction. *Id.* at 495.

38. Article I, § 5 provides, in pertinent part: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its Members . . . ." U.S. CONST. art. I, § 5.

39. *Powell*, 395 U.S. at 519-20.

40. *Id.* at 548.

41. *Id.* All parties agreed that Congress could use the power to "expel" a member after he was seated for reasons outside the Qualifications Clauses. *Id.* at 507; *see* U.S. Const. art. I, § 5, cl. 2 (granting Congress the power to expel a member with a two-thirds vote).

42. *Powell*, 395 U.S. at 522-31.

43. *Id.* at 528. The majority of the Court's analysis discussed John Wilkes, a member of the English House of Commons who was excluded because of libel against the State, but later vindicated and allowed to be seated because the qualifications of members were "'not occasional but fixed.'" *Id.* at 527-28 (quoting 16 PARL. HIST. ENG. 589, 590 (1769)). This incident became a rallying cry for American colonists at the time of the Convention, who saw Wilkes as a symbol of liberty. *Id.* at 530-31.

44. *Id.* at 532. The Court pointed to the Convention's rejection of a provision that would have allowed the Legislature to add a property requirement for members, as

final piece of historical evidence the *Powell* Court examined was post-ratification interpretation of the Constitution by Congress itself. The Court discussed the McCreery incident[45] in addition to several other attempts by Congress to exclude members for reasons outside the Qualifications Clauses[46] and concluded that these events were too inconsistent to be of precedential value.[47]

Based on the conclusions the Court could draw from the historical evidence and the belief that "[a] fundamental principle of our representative democracy is . . . 'that the people should choose whom they please to govern them,'" the Court concluded that although Congress could "expel" a member for disorderly behavior after he was seated, they could not use this power to exclude a duly elected member by adding qualifications to those enumerated in the Qualifications Clauses.[48]

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well as to the Framers' understanding during the state ratification conventions that the "qualifications for members of Congress had been fixed in the Constitution." *Id.* at 533-36, 540-41. The Court followed the line of reasoning used by James Madison when he argued against the property provision: "'Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction.'" *Id.* at 534 (alteration in original) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 249-50 (Max Farrand ed., rev. ed. 1966)) (hereinafter FARRAND).

45. *See supra* notes 24-29 and accompanying text (describing McCreery incident). Unfortunately, the *Powell* Court's retelling of the McCreery event failed to state that Congress had rejected the report which found McCreery was ineligible because the Qualifications Clauses were exclusive. *See Powell*, 395 U.S. at 543; *see also U.S. Term Limits*, 115 S. Ct. at 1908 (1995) (Thomas, J., dissenting) (noting the *Powell* Court's erroneous reporting of the incident).

46. These reasons included criminal behavior and aiding confederate soldiers. *Id.* at 544-46.

47. *Id.*

48. *Id.* at 547-48 (quoting Alexander Hamilton, 2 DEBATES ON THE FEDERAL CONSTITUTION 257 (J. Elliot ed., 2d ed. 1876)) (hereinafter DEBATES); *see also* Nixon v. United States, 113 S. Ct. 732, 740 (1993). In *Nixon*, the Court stated:

> Our conclusion in *Powell* was based on the fixed meaning of "[q]ualifications" set forth in Art. I, § 2. The claim by the House that its power to "be the Judge of the Elections, Returns and Qualifications of its own Members" . . . was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership.

113 S. Ct. at 740.

B. *Ballot Access/Times, Places and Manner Cases*

The Qualifications Clauses have never been the standard for the Court when considering cases where a congressional candidate has been denied access to the ballot *prior to the election*, as in *U.S. Term Limits, Inc. v. Thornton*.[49] In *Storer v. Brown*,[50] the Court considered a California statute requiring that independent candidates—as a prerequisite to placing their names on the ballot for the current election—disaffiliate from a qualified political party for at least one year and file a petition signed by a designated percentage of voters from the last general election.[51] Two of the petitioners were candidates for Congress who were registered as Democrats within the year prior to the election and were thus ineligible under the statute to run.[52] The candidates challenged the statute based on the First Amendment[53] and the Equal Protection Clause of the Fourteenth Amendment.[54]

The Court rejected their argument, noting that the State's interest in both the "unrestrained factionalism [that] may do significant damage to the fabric of government" and the "stability of its political system" outweighed the candidates' burden of having to make a decision early enough to disaffiliate as a party member in order to run as an independent.[55] The Court noted that the appellants' argument that the statute established an additional qualification in violation of the Qualifications

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49. *See U.S. Term Limits*, 115 S. Ct. at 1913 (Thomas, J., dissenting).

50. 415 U.S. 724 (1974).

51. *Id.* at 726-27.

52. *Id.* at 727-28. The Court discussed the claims of two other petitioners challenging the statute, candidates for President and Vice President, independently from those of the congressional candidates because the former did not earn a place on the ballot due to the statute's signature requirement. *Id.* at 728.

53. The First Amendment provides, in pertinent part: "The Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble . . . ." U.S. CONST. amend. I.

54. *Storer*, 415 U.S. at 727. The Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

55. *Storer*, 415 U.S. at 736. The Court cited to the Times, Places and Manner Clause of Article I, § 4, cl. 1, as the State's authority to enact the provision. *Id.* at 729-30. The Clause reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulation, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1. The majority further stated that "[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest." *Storer*, 415 U.S. at 730.

Clauses was "wholly without merit,"[56] and the candidates "may nevertheless resort to the write-in alternative provided by California law."[57]

Later ballot restriction cases followed the same course. In *Anderson v. Celebreeze*,[58] a candidate for President challenged an Ohio statute requiring independents wanting to appear on the ballot to file the necessary nomination petitions in March, six months before the general election.[59] The Court stated that the proper inquiry in ballot access cases is "whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"[60] This analysis begins, the Justices explained, with examining the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments," which is then weighed against not only the strength and legitimacy of the interests that the state puts forth as justification for the regulation, but also the "extent . . . [these] interests make it necessary to burden the plaintiff's rights."[61] In *Anderson*, the Court struck the statute down because the burden on independent candidates, as opposed to that on partisan candidates given the same filing deadline, outweighed the State's interest in voter education, equal treatment, and political stability.[62] As the Court noted, "'[s]ometimes the

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56. *Storer*, 415 U.S. at 746 n.16.

57. *Id.* at 736 n.7.

58. 460 U.S. 780 (1983).

59. *Id.* at 783. Although the *Anderson* case involved a candidate for President, the statute applied to all candidates in Ohio, excluding the governor and lieutenant governor, but including Congress members. *See id.*

60. *Id.* at 793 (quoting Clements v. Fashing, 457 U.S. 957, 964 (1982) (plurality opinion) (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974))).

61. *Id.* at 789. The Court based its "conclusions directly on the First and Fourteenth Amendments and [did] not engage in a separate Equal Protection Clause analysis." *Id.* at 787 n.7. Instead, the Court relied on earlier cases, such as Williams v. Rhodes, 393 U.S. 23 (1968), discussed *infra* notes 68-72, which "identified the First and Fourteenth Amendment rights implicated by restrictions . . . and . . . considered the degree to which the State's restrictions further legitimate state interests." *Anderson*, 460 U.S. at 787 n.7. Although the *Anderson* Court used a due process analysis, and not an Equal Protection analysis, other ballot access cases have used the two "interchangeably." *Id.* at 789; *see* Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 89 n.2 (1994).

62. *Anderson*, 460 U.S. at 796, 799, 806. The Court reasoned that Ohio did not need to establish as early a filing date for independents to ensure voters could adequately get to know the independent candidates because the introduction of modern media into campaigns made candidate knowledge more easily accessible. *Id.* at 797-98. Furthermore, treating independent and partisan candidates equally for the purpos-

grossest discrimination can lie in treating things that are different as though they were exactly alike.'"[63]

In *Burdick v. Takushi*,[64] the Court faced a suit brought by a registered voter claiming that Hawaii's complete ban on write-in voting violated his First Amendment rights. Stating that "'the rights of voters and the rights of candidates do not lend themselves to neat separation,'"[65] the Court used the standard set forth in *Anderson* to evaluate the Hawaii statute, even though the claim involved voting rights and not a candidate's ballot access.[66] The Court concluded that the State's inter-

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es of declaring their candidacy created "materially different" burdens and was not justified for independents, who were not running in the party primary in June and thus would not even have an opportunity for voters to see their name on a ballot until November. *Id.* at 799-800. Finally, the Court addressed the interest advanced by the State in preventing the limited number of loyal party workers from being drawn to independent candidacies, which the State contended would result in the factionalism the *Storer* case sought to prevent. *Id.* at 802-03. The Court stated that the interest upheld in *Storer*, however, did not allow a political party to "invoke the powers of the State to assure monolithic control over its own members and supporters." *Id.* at 803.

63. *Id.* at 801 (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)) (brackets in original). In *Jenness*, the petitioner asked the Court to invalidate a Georgia statute requiring candidates not participating in a political party primary to file petitions containing signatures of at least 5% of the total number of registered voters in the past election for the candidate's office, along with a filing fee equal to 5% of the salary of office the candidate seeks, in order to appear on the general election ballot. *Jenness*, 403 U.S. at 432. The Court upheld the restriction against claims of violations of the First and Fourteenth Amendments, stating that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Id.* at 439. In comparison to restrictions on ballot access that the Court had not allowed in the past, the Georgia law allowed "[a]nyone who wishes, and who is otherwise eligible," to be a candidate for any office in the state, either through the write-in procedure, or via the one prescribed by the Georgia statute. *Id.* at 438.

64. 504 U.S. 428 (1992).

65. *Id.* at 438 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972))

66. *Id.* at 439; *see supra* notes 58-63 and accompanying text (discussing *Anderson* test). The *Burdick* decision also seemed to answer the unsettled question of the proper standard of review for ballot access cases. *See* Zywicki, *supra* note 61, at 116. In one of the earliest ballot access cases, the Court used a "strict scrutiny" standard. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968). Yet, the Court later suggested that application of this standard should be limited primarily to cases involving classifications based either on wealth or those involving discrimination against minor political parties. Clements v. Fashing, 457 U.S. 957, 964-66 (1982) (plurality opinion). Under the *Burdick* rationale, however, the "rigorousness" of the inquiry of the state election law under the test set forth in *Anderson* "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. A strict scrutiny analysis, requiring the regulation to be "'narrowly drawn to advance a state interest of compelling importance,'" is used if the burden on rights is "severe." *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)). On the other hand, if the election law "imposes only 'reasonable, nondiscriminatory restrictions' upon

est in avoiding "party raiding" (using blocks of voters by one party to unfairly affect the primary of another party), avoiding factionalism, and its need to narrow the field of candidates for the general election outweighed the slight burden the restriction put on candidates and voters who were not able to cast write-in ballots.[67]

The Court has not always upheld state restrictions on ballot access. In *Williams v. Rhodes*,[68] the Court examined several Ohio election laws that eliminated write-in balloting, mandated candidates show nomination by a "political party," and required independent candidates wanting to appear on the ballot to file petitions with signatures of at least fifteen percent of those voting in the last gubernatorial election.[69] A political party, as defined by Ohio law, had to go through an elaborate state-wide procedure to qualify under the statute.[70] The Court struck down the "totality of the Ohio restrictive laws" because they "impose[d] a burden on voting and associational rights which . . . is an invidious discrimination, in violation of the Equal Protection Clause."[71]

First and Fourteenth Amendment rights," a rational basis standard is used, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). In *Burdick*, the Court applied the less stringent rational basis test. *Id.* Although the Supreme Court never explicitly stated the standard it used in either *Anderson* or *Storer*, discussed *supra* notes 50-63 and accompanying text, its language implied that a strict scrutiny standard applied. *See* Anderson v. Celebrezze, 460 U.S. 780, 805 (1983) ("[T]he early filing deadline [regulation] is not *precisely drawn* . . . .") (emphasis added); Storer v. Brown, 415 U.S. 724, 736 (1974) ("We also consider that interest as not only permissible, but *compelling* . . . ." (emphasis added). For an excellent discussion of the confusion surrounding the standards used by the Court in ballot access cases, see Zywicki, *supra* note 61, at 107-16.

67. *Burdick*, 504 U.S. at 437, 439. The Court reasoned that a Hawaiian candidate had other reasonable means of qualifying to have his name put on the ballot; for example, he or she could gather the sensible number of signatures required by the State and then file nominating papers. *Id.* at 438. Furthermore, the Court rejected the petitioner's argument that he had a right to cast a protest vote for Donald Duck, for elections were not meant to be a "generalized" means for voters to vent "'pique or personal quarrel[s].'" *Id.* (quoting *Storer*, 415 U.S. at 735) (brackets in original).

68. 393 U.S. 23 (1968).

69. *Id.* at 26, 34.

70. *Id.* at 26. To qualify, the statute required that the party participate in the state primary election process by electing several members of the party to positions on a state central committee and as delegates to a national convention. *Id.* at 25 n.1. To appear on this primary ballot, a candidate needed to (1) prove that he had not voted in any other party primary during the past four years, and (2) file petitions of endorsement signed by voters not voting in any past election. *Id.*

71. *Id.* at 34. The Court used the "strict scrutiny" standard, discussed *supra* note

The Court rejected the State's argument that the State had an interest in promoting a two-party system because "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms," and furthermore the Ohio laws did not just favor the two particular parties, but gave them a "complete monopoly."[72]

C. *The Tenth Amendment*

The Tenth Amendment to the United States Constitution states: "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."[73] These sovereign powers of the states, as described by James Madison, "'are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.'"[74] According to the Court, under the Tenth Amendment the states "'retai[n] a significant measure of sovereign authority' . . . to the extent the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[75]

Like the Qualifications Clauses, before *U.S. Term Limits* the Court had never invoked the Tenth Amendment to restrict a state's power to control elections. Instead, the Court cited the Tenth Amendment as the authority for the states' power to put qualifications on their own officers and to control their own elections. In *Gregory v. Ashcroft*,[76] the Court upheld a Missouri Constitution provision requiring state judges to retire at age seventy.[77] The decision cited a line of cases that the majority stated represented "the authority of the people of the States to determine the qualifications of their most important government officials. . . . It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under

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66, requiring a compelling state interest to justify the regulation. *Williams*, 393 U.S. at 31.

72. *Id.* at 31-32. The Court also struck down several other interests put forth by the State, including preventing voter confusion and ensuring the winner was the majority vote-getter, because the interests did not justify the "very severe restrictions on . . . rights which Ohio has imposed." *Id.* at 32.

73. U.S. CONST. amend. X.

74. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

75. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

76. 501 U.S. 452 (1991).

77. *Id.* at 470.

which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'"[78]

From this line of precedent, a line of governmental authority can be drawn. At the federal level, Congress may not alter the qualifications for its members, but it may alter the times, places, and manner of their election.[79] At the state level, a state may alter the qualifications of its state officers, and may regulate the times, places, and manner of the election of both its federal and state officers.[80] Furthermore, in exercising its powers, a state may place burdens on the constitutional rights of both voters and candidates, so long as the burden does not outweigh the legitimate state interest justifying the burden.[81] Yet these conclusions left open the question presented in *U.S. Term Limits*: Whether a state has the power to impose term limits on its federal officers either through altering their qualifications or by regulating congressional elections.[82]

III. FACTS OF THE CASE

In November of 1993, by almost a sixty percent majority, the voters of Arkansas approved Amendment 73 to their state constitution.[83] Amendment 73 provided quasi-term limits for both state and federal elected officials—although a federal incumbent's name could not appear on the ballot, he could win re-election as a write-in candidate.[84] The initiative's preamble included a statement that the people of Arkansas

78. *Id.* at 463 (quoting U.S. CONST. art. IV, § 4). The case decided that state judges were not within the protection afforded by the Federal Age Discrimination Act, and furthermore, that the Missouri mandatory retirement proviso did not violate the Equal Protection Clause. *Id.* at 473. Twenty states have similarly used the Tenth Amendment power to put term limits on their state executive officers, and 34 have also put limits on state legislators. Brief for the State Petitioner at 24, *U.S. Term Limits* (Nos. 93-1456, 93-1828); *see* Oregon v. Mitchell, 400 U.S. 112, 134-35 (1970) (stating "Our judgments also save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them."); Maloney v. McCartney, 223 S.E.2d 607 (W. Va.) (holding state constitutional provision limiting governor to two consecutive terms constitutional), *appeal dismissed*, 425 U.S. 946 (1976).

79. *See supra* notes 24-48 and accompanying text.

80. *See supra* notes 49-78 and accompanying text.

81. *See supra* notes 49-78 and accompanying text.

82. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1847 (1995).

83. *Id.* at 1875 (Thomas, J., dissenting).

84. *Id.* at 1845-46.

believed their incumbent elected officials had become "preoccupied with reelection" and thus had "ignore[d] their duties as representatives."[85] The limits prevented members of the House of Representatives already serving three terms, and members of the Senate having served two terms, from having their names appear on the ballot.[86] Ten days after the amendment passed, Bobbie Hill, on behalf of the people of Arkansas and the League of Women Voters, filed suit asking for a declaratory judgment that the section dealing with federal officials was unconstitutional.[87] The suit named several state officials and the state divisions of the Republican and Democratic parties as defendants.[88] The State's Attorney General intervened in support of the named defendants, as did various other proponents of the amendment including the petitioner, a political group promoting term limits.[89] After the circuit court issued a ruling that the section violated Article I of the United States Constitution,[90] the defendants appealed to the Arkansas Supreme Court, which affirmed the lower court decision.[91] A plurality of the Arkansas high court concluded that the Qualifications Clauses were exclusive, and that allowing a state to add its own requirements for membership would undermine the uniformity that was the "tenor and fabric" of congressional representation.[92] Furthermore, the plurality did

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85. *Id.* at 1845. The full preamble read:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

Id.

86. *Id.* at 1845-46. The amendment also prevented any service in the same office by a state executive after two four-year terms, by a state representative after three two-year terms, and by a state senator after two four-year terms. *Id.* The Arkansas Supreme Court severed the provision regarding federal officers from the rest of the amendment and upheld the constitutionality of the term limits on state officials. U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 359 (Ark. 1994), *aff'd sub nom. U.S. Term Limits*, 115 S. Ct. at 1842. Only the federal provision was before the United States Supreme Court in *U.S. Term Limits*. *U.S. Term Limits*, 115 S. Ct. at 1846.

87. *U.S. Term Limits*, 115 S. Ct. at 1846.

88. *Id.*

89. *Id.*

90. *See supra* notes 21-22 and accompanying text (giving text of Article I).

91. *U.S. Term Limits*, 115 S. Ct. at 1846. The Arkansas Supreme Court was divided 5-2 over the constitutionality of the amendment. U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 361 (Ark. 1994), *aff'd sub nom. U.S. Term Limits*, 115 S. Ct. at 1842.

92. *U.S. Term Limits*, 872 S.W.2d at 356. The court based its decision on the "inconclusive" yet helpful historical evidence surrounding the clauses and on the United States Supreme Court's reasoning in *Powell*. *Id.* at 355-56 (citing Powell v.

not accept that the term limits were merely a ballot access provision and thus within the power of Arkansas to enact under the Time, Place and Manner Clause.[93] The court reasoned that "the intent and the effect" of the amendment was to completely disqualify an incumbent from service, and that even though a candidate could run as a write-in, the possibilities of winning were "glimmers of opportunity . . . so faint . . . they cannot salvage Amendment 73 from constitutional attack."[94] Two justices dissented, one finding that the clauses were not exclusive (therefore Arkansas retained the authority to supplement them) and the other reasoning that the term limit provision did not even implicate the Clauses because it was a permissible ballot access restriction and not a qualification.[95] The State of Arkansas and the intervenors both petitioned for writ of certiorari, which the United States Supreme Court consolidated and granted.[96]

IV. SUMMARY OF THE OPINION

A. *Justice Stevens and the Majority's Opinion*

Justice Stevens began the majority opinion by defining the two issues presented by *U.S. Term Limits*: whether the Constitution prohibits the states from adding to the Qualifications Clauses, and if so, whether Arkansas Amendment 73 was instead a permissible ballot restriction.[97] To help answer these questions, the majority revisited the Court's decision in *Powell v. McCormack*.[98] The majority found that *Powell* not only had decided whether Congress had the power to *exclude* a member, but also answered an underlying issue—i.e., whether Congress lacked the power to *alter* the Qualifications Clauses.[99] In reaching this conclu-

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McCormack, 395 U.S. 486, 539 (1969)); *see also supra* notes 30-48 and accompanying text (discussing *Powell*).

93. *U.S. Term Limits*, 872 S.W.2d at 356-57; *see also supra* note 55 (quoting text of the Clause).

94. *U.S. Term Limits*, 872 S.W.2d at 357.

95. *Id.* at 367 (Hays, J., concurring in part and dissenting in part); *id.* at 368 (Cracroft, C.J., concurring in part and dissenting in part). Two other justices wrote concurring opinions. *Id.* at 361 (Brown, J., concurring in part and dissenting in part); *id.* at 363 (Dudley, J., concurring in part and dissenting in part).

96. *U.S. Term Limits*, 115 S. Ct. at 1847.

97. *Id.*

98. 395 U.S. 486 (1969).

99. *U.S. Term Limits*, 115 S. Ct. at 1847, 1851. The majority noted that state and federal courts have also cited *Powell* for the principle that Congress has no power to

sion, the Court first examined the historical authority upon which *Powell* relied, which the *U.S. Term Limits* Court felt evidenced the Framers' intent for the clauses to be exclusive.[100] The majority placed special emphasis on Alexander Hamilton's words during the post-Convention ratification debates: "The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the Legislature."[101] Furthermore, the Court found that allowing Congress to alter its own qualifications would undermine the second basis for the decision in *Powell*: the "'fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"[102]

The majority acknowledged, however, that although the holding in *Powell* established that *Congress* did not have the power to alter the Qualifications Clauses, *Powell* did not specifically address the issue before the Court in *U.S. Term Limits*: whether the *states* could alter the Clauses.[103] The majority, therefore, went on to address the petitioners' argument that the Tenth Amendment "require[s] that States be allowed to add such qualifications."[104] The Court rejected this argument on two grounds: First, the power to alter the qualifications was not an "original power" that the states could have reserved under the Tenth Amendment; and second, even if it had been reserved, the Framers divested the states of this power by making the Qualifications Clauses exclusive.[105]

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alter the qualifications for its membership. *Id.* at 1852-53.

100. *Id.* at 1845-50; *see also supra* notes 42-47 and accompanying text (discussing *Powell*'s historical analysis).

101. *U.S. Term Limits*, 115 S. Ct. at 1849 (quoting *Powell*, 395 U.S. at 539 (quoting THE FEDERALIST No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

102. *Id.* at 1850 (quoting *Powell*, 395 U.S. at 547 (quoting Alexander Hamilton, *in* DEBATES, *supra* note 48, at 257)) (internal quotation marks omitted). This principle embodies two fundamental ideas regarding federal representation. First, the "door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* (quoting *Powell*, 395 U.S. at 540 n.74 (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961))). Second, people are "vested" with a sovereignty that gives them the right to "choose freely their representatives to the National Government." *Id.* at 1851.

103. *Id.* at 1852. The petitioners argued that the holding in *Powell* was limited to which qualifications Congress could use in excluding a member. *Id.* at 1851. The majority rejected this argument, stating, "[o]ur conclusion that Congress may not alter or add to the qualifications . . . was integral to our . . . outcome." *Id.* The Court also noted there was "striking unanimity" among the lower courts that *Powell* also precluded states from adding qualifications. *Id.* at 1852.

104. *Id.* at 1852.

105. *Id.* at 1853-54.

1. The Source of the Power: The Tenth Amendment

The majority addressed the meaning of the word "reserved" when used in the Tenth Amendment to describe the powers of the states and concluded these reserved powers are those "which existed before" the Constitution.[106] In this instance, the power to add qualifications for congressional membership could not have existed before the Constitution, because it was the document itself that established the United States Congress—the Framers intended to "'create an entirely new National Government,'" embodied in "a uniform national system, rejecting the notion that the Nation was a collection of States and instead creating a direct link between the national government and the people of the United States."[107] Furthermore, if the states retained any power in regard to the selection of federal representatives, there would be no reason to delegate to them the duty to hold elections under the Times, Places, and Manner Clause.[108]

Thus, because the Tenth Amendment allows states to exercise only those powers that existed before the Constitution, and that are not divested by the Constitution, the power to add qualifications was not reserved to the states.[109]

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106. *Id.* at 1854. The evidence cited by the majority for this proposition included Justice Story's opinion that "the states can exercise no powers whatsoever, which exclusively spring out of the national government, which the constitution does not delegate to them," *id.* (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed., 1858)), and the opinion of the Court in *McCulloch v. Maryland*, denying the states the right to tax federal banks, because there was no "'original right' to tax such federal entities." *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819)).

107. *Id.* at 1855 (citing Wesberry v. Sanders, 376 U.S. 1, 10 (1964)). This conclusion was based on Justice Story's argument that just like the President, members of Congress owed their allegiance to the nation as a whole, not to the individual states, and thus the states retain no more right to prescribe congressional qualifications than presidential qualifications. *Id.* The majority also pointed to three textual provisions of the Constitution—the power to set congressional salaries at the national (not state) level, the power of the national legislature (not each state) to vote as a whole on the qualifications of its members under Article I, § 5, Clause 1, and the power of the federal government to alter the state's election laws under the Times, Places, and Manner Clause—as evidence that the Framers intended a federal government with a direct link to the people. *Id.*

108. *Id.* at 1855.

109. *Id.* at 1854.

2. The Preclusion of State Power: The Exclusivity of The Qualifications Clauses

Not only did the majority preclude the Arkansas Amendment by finding that the Tenth Amendment denies the states a reserved power to impose term limits, but the majority also invalidated the imposition of term limits on an alternative ground: the exclusivity of the Qualifications Clauses.[110] The Court based this conclusion on events at the Constitutional Convention and during the ratification debates, congressional experience, democratic principles, and state practice.[111] In examining historical evidence from the Convention and its surrounding debates, the majority pointed to both the Framers' statements showing they feared putting the national government at the mercy of the states and the textual provisions the Framers inserted into the Constitution to prevent this state control.[112] The lack of discussion about the power of states to add qualifications during both the Convention and subsequent debates, and the Convention's rejection of a rotation requirement, further persuaded the majority that the Clauses precluded state alteration.[113] In looking at events in Congress itself, the majority pointed to the McCreery incident[114] and to the Court's decision in *Powell*[115] as confirmation of their exclusivity argument.[116] The majority also found support in the democratic principles recognized in *Powell*.[117] Not only

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110. *Id.* at 1856.

111. *Id.* at 1856-66.

112. *Id.* at 1856-60. For example, during the Convention, James Madison, in reference to the power of the states to set the qualifications of voters in federal elections, but not those of candidates, noted: "'The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible to uniformity, have been very properly considered and regulated by the convention.'" *Id.* at 1856 (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)). The Framers then gave Congress the ability to alter state election laws under the Times, Places and Manner Clause, vested the power to set congressional salaries at the national level, and gave the authority to judge the qualifications of members to each House as a whole (not to the individual state from which the member was elected). *Id.* at 1857-59.

113. *Id.* at 1859. The majority believed the ability of the states to add qualifications would have been used as an argument to appease anti-federalists who wanted more power given to the states. *Id.* at 1860.

114. *See supra* notes 24-29 and accompanying text (discussing McCreery incident).

115. *See supra* notes 30-48 and accompanying text (discussing *Powell* case).

116. *U.S. Term Limits*, 115 S. Ct. at 1861. The majority also noted that even before *Powell*, many viewed the seating of McCreery as establishing that the Qualifications Clauses were exclusive. *Id.* at 1862. The majority also acknowledged, however, that "the precedential value of congressional exclusion cases is 'quite limited.'" *Id.* (quoting Powell v. McCormack, 395 U.S. 486, 546 (1969)) (internal quotation marks omitted).

117. *Id.* at 1862.

did the Arkansas term limits violate the twin ideals embodied in the reasoning of *Powell*, that "'the people should choose whom they please to govern them,'" and that election to Congress should be "open to people of all merit," but because imposed at the state level, the limits also violated the principle that the right to elect representatives lies with the people and not with the states.[118] In the opinion of the majority, the Framers wanted a "Federal Government directly responsible to the people . . . chosen . . . not by the States, but by the people."[119] The individual citizens of the nation would grant power to the federal government which was to be exercised directly on them without interference from the states.[120] The majority ended their analysis of historical evidence by examining the practice of the states following ratification.[121] Although discounting the reliability of state practice as an indicator of constitutionality, the majority noted that after ratification, several states amended their constitutions to remove property requirements for federal candidates and that no state sought to impose term limits on their federal representatives, presumably because the states understood that they could not alter congressional qualifications.[122]

"In sum, the available historical and textual evidence, read in light of the basic principles of democracy . . . reveal[ed] . . . neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."[123]

3. The Times, Places and Manner Clause

Although the majority rejected the idea that Arkansas could alter the Qualifications Clauses by imposing term limits, the petitioners also contended the amendment was a permissible ballot access restriction

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118. *Id.* (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).

119. *Id.* at 1863.

120. *Id.* Allowing each state to impose individual qualifications would undermine the uniformity of the national body and "sever the direct link that the Framers found so critical." *Id.* at 1864.

121. *Id.* at 1864.

122. *Id.* at 1864-66. This was particularly persuasive for the majority because prior to ratification of the Constitution, the states operated under the Articles of Confederation which contained a provision limiting terms for national representatives. *Id.* at 1865. Because many members of the Convention unsuccessfully sought a similar rotation requirement in the Constitution, they would have done so at the state level if they thought it was within their power. *Id.* at 1865-66.

123. *Id.* at 1866.

under the Times, Places and Manner Clause[124] because it was not an absolute limit, but instead allowed for write-in incumbent candidacies.[125] The Court, on the other hand, did not agree with this narrow definition of the term "qualification."[126] They contrasted the quasi-term limit imposed under Amendment 73 with the ballot restriction that the Court upheld in *Storer v. Brown*.[127] Unlike in *Storer*, the Arkansas term limit amendment indirectly attempted to do what the Constitution forbids, adding a qualification, because the possibility of a candidate winning a write-in campaign was "a faint glimmer."[128] Furthermore, the Times, Places and Manner Clause allows states to regulate the procedure of elections, not the substantive qualifications of candidates.[129] The restrictions in *Storer* "served the state interest in protecting the integrity and regularity of the election process" and excluded candidates on the basis of support in the electoral process, both factors of which were independent from the constitutional prohibition on adding qualifications.[130]

Thus, although term limits "provide for the infusion of fresh ideas," and "decrease the likelihood that representatives will lose touch with their constituents," Arkansas Amendment 73 could not stand because "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."[131]

B. Justice Kennedy's Concurrence

Justice Kennedy joined in the opinion of the Court, but filed a concurring opinion to reiterate that state-imposed term limits "run counter to the fundamental principles of federalism."[132] Justice Kennedy argued that the legitimacy of the national government stems from the act of the people, not of the states, in creating it.[133] Thus, the people have a national "political identity . . . independent of . . . their identity as a citizen of the State of their residence."[134] A state may not invade this

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124. U.S. CONST. art. I, § 4, cl. 1; *see supra* note 55 (quoting text of clause).
125. *U.S. Term Limits*, 115 S. Ct. at 1866-71.
126. *Id.* at 1867.
127. *Id.*; *see also supra* notes 50-57 and accompanying text (discussing *Storer*).
128. *U.S. Term Limits*, 115 S. Ct. at 1868.
129. *Id.* at 1870.
130. *Id.* The majority also noted that if the term limit was allowed as a "manner" of elections under the Clause, Congress had the ability to alter the limit, and, as the Court decided in *Powell*, Congress may not alter its own qualifications. *Id.* at 1869.
131. *Id.* at 1871.
132. *Id.* at 1872 (Kennedy, J., concurring).
133. *Id.* (Kennedy, J., concurring).
134. *Id.* (Kennedy, J., concurring). Justice Kennedy rejected the argument that be-

realm of sovereign national identity, just as the federal government may not "intrude[] upon [the] matters reserved to the States."[135] The sovereign sphere of national citizenship includes the right to vote for federal representation, and the Arkansas amendment "intrudes upon this federal domain . . . exceed[ing] the boundaries of the Constitution."[136]

C. Justice Thomas' Dissent

For Justice Thomas and his fellow dissenters, the issue presented by *U.S. Term Limits* could be answered by looking at the text of the Constitution which is "simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people."[137]

1. The Tenth Amendment

The dissent took issue with the majority's interpretation of the term "reserved" as used in the Tenth Amendment to describe the powers of the states.[138] The dissent examined "first principles" of American government to refute the majority's conclusion that Arkansas did not have the power to impose term limits, and found three faults with the majority's reasoning.[139]

First, "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[140] The Tenth

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cause the Constitution was ratified on a state-by-state basis, the people can only delegate power through these states. *Id.* at 1873 (Kennedy, J., concurring). This ratification procedure was just the most convenient. *See id.* (Kennedy, J., concurring).

135. *Id.* at 1873 (Kennedy, J., concurring) (citing United States v. Lopez, 115 S. Ct. 1624 (1995)). Justice Kennedy also relied on the *In re Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), which expressed the idea that federal rights "stem from sources other than the States." *U.S. Term Limits*, 115 S. Ct. at 1874 (Kennedy, J., concurring).

136. *U.S. Term Limits*, 115 S. Ct. at 1875 (Kennedy, J., concurring).

137. *Id.* (Thomas, J., dissenting). Chief Justice Rehnquist and Justices O'Connor and Scalia joined in the dissenting opinion. *Id.* (Thomas, J., dissenting). The dissenters reasoned that if the Constitution does not deny a power to the states to act, and it does not exclusively give the power to the federal government, then the states need not point to any affirmative grant in order to act. *Id.* (Thomas, J., dissenting).

138. *Id.* (Thomas, J., dissenting).

139. *Id.* (Thomas, J., dissenting).

140. *Id.* (Thomas, J., dissenting). This source of the Constitution's authority was evi-

Amendment's phrase "powers . . . reserved to the States respectively, or to the people," makes no differentiation between the states and the people, and thus it is left to the people of each state, not the citizens of the nation as a whole, to determine the powers that the people retain and those which can be exercised by their state government.[141] Therefore, the sovereignty embodied in the Constitution follows state boundaries, and does not, as the majority argued, erase them.[142] Furthermore, the dissenters disagreed with the majority's view that a state can exercise a Tenth Amendment "reserved power" only if the state held the power before ratification of the Constitution.[143] The dissent returned to the authority relied upon by the majority in support of its position, and noted this authority dealt with "an entirely different issue: the extent to which principles of state sovereignty implicit in our federal system curtail Congress' authority to exercise its enumerated powers."[144]

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denced by the state-by-state ratification procedure, the words of the Constitution itself ("We the People of the United *States*"), and the fact that the individual states themselves gave up certain powers to the federal government in ratifying the Constitution. *Id.* at 1875-76 (Thomas, J., dissenting) (emphasis added).

141. *Id.* at 1876 (Thomas, J., dissenting). The dissenters noted that the Constitution provides no "mechanism" for the exercise of such a unified voice, for amendments are to be ratified state-by-state, the President is elected from an electoral college chosen at the state level, and if no Presidential candidate receives a majority of electoral college votes, each state is given one vote in determining the winner when the election is thrown to the House of Representatives. *Id.* at 1876-77 (Thomas, J., dissenting).

142. *Id.* at 1877 (Thomas, J., dissenting).

143. *Id.* at 1878 (Thomas, J., dissenting). Justice Thomas called such a limitation on state power "enormous and untenable." *Id.* at 1877 (Thomas, J., dissenting); *see also supra* notes 106-09 and accompanying text (summarizing majority's Tenth Amendment argument).

144. *U.S. Term Limits*, 115 S. Ct. at 1878 (Thomas, J., dissenting). According to the dissent, the issue in *U.S. Term Limits* was not whether the Tenth Amendment barred congressional action, but whether Article I barred state action. *Id.* at 1878-79 (Thomas, J., dissenting) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) and New York v. United States, 112 S. Ct. 2408 (1992)). The dissent also examined the majority's reliance on McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and concluded that the *McCulloch* Court based its decision on the Supremacy Clause, and not the proposition that a state could not possess a power it did not have prior to the ratification of the Constitution. *U.S. Term Limits*, 115 S. Ct. at 1879-80 (Thomas, J., dissenting). The dissent discounted the majority's only other line of authority, Justice Story, because he was not a Founding Father, and his interpretation was written half a century after the Constitution's ratification. *Id.* at 1880. (Thomas, J., dissenting). The majority rebutted this argument by pointing out that because it felt *McCulloch* relied on the idea of original powers as being those of the states before the Constitution, the *McCulloch* decision gave credibility to Justice Story's interpretation of reserved powers. *Id.* at 1854.

The second concept disputed by the dissent was the majority's understanding that it would "be inconsistent with the notion of 'national sovereignty' for the States . . . to have any reserved powers over the selection of Member of Congress."[145] The dissenters did not accept the insistence of the majority and concurrence that members of Congress owe their primary allegiance to the people of the nation as a whole, and pointed to the text of the Constitution, which provides that members are to be "chosen 'by the People of the several *States*,'" as support.[146] The dissent agreed that the Framers wanted "to create a 'direct link' between" the people and the federal government, but noted "the link was between the Representatives from each State and the people of that State."[147]

Third, the dissenters questioned the majority's contention that if the states retained power under the Tenth Amendment over the selection of their representatives, then the Times, Places, and Manner Clause was irrelevant.[148] The dissenters responded that the Clause was not meaningless because it imposed a duty to hold elections, instead of relying solely on a state's reserved power to do so.[149] Thus, the Clause provid-

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145. *Id.* at 1881. (Thomas, J., dissenting); *see also supra* note 106 and accompanying text (summarizing majority's sovereignty argument).

146. *U.S. Term Limits*, 115 S. Ct. at 1881 (Thomas, J., dissenting) (quoting U.S. CONST. art. 1, § 2, cl. 1) (emphasis added). The dissent further disagreed with the concurring opinion's reliance on the conclusion that when voters exercise their right to vote for federal representation, they are acting as citizens of the United States and not of the state where they reside. *Id.* at 1881-82 (Thomas, J., dissenting). As previously pointed out by the dissent, the Constitution called for a state-centered congressional election procedure and did not provide a mechanism for the exercise of electoral action by an undifferentiated people. *Id.* at 1882 (Thomas, J., dissenting); *see also supra* note 141.

147. *U.S. Term Limits*, 115 S. Ct. at 1882 (Thomas, J., dissenting). For the dissenters, this meant that the people of one state have no say over whom the people of another state send to Congress. *Id.* (Thomas, J., dissenting). As for the evidence relied upon by the majority, the fact that congressional salaries were set at the national level only shows that a state's powers may not extend beyond the selection of its representatives. *Id.* (Thomas, J., dissenting). In addition, although, as the majority stated, individual states cannot impose qualifications on the President, the dissent argued this only added to its understanding that a state may not influence the officers elected from another state, for the President is an officer of all the states. *Id.* (Thomas, J., dissenting); *see also supra* note 106 (examining the evidence cited by the majority in reaching its conclusion).

148. *Id.* at 1883 (Thomas, J., dissenting); *see also supra* note 107 and accompanying text (discussing the majority's interpretation of the Times, Places and Manner Clause).

149. *U.S. Term Limits*, 115 S. Ct. at 1883 (Thomas, J., dissenting).

ed insurance for the Framers who feared that the states would neglect to hold elections, leaving the federal government at the mercy of these states.[150]

2. The Qualifications Clauses

After having established that "the people of Arkansas do enjoy 'reserved' powers over the selection of their representatives in Congress," the dissenters then turned to refuting the majority's alternative basis for invalidating the term limit amendment: the Qualifications Clauses are exclusive and therefore create an independent constitutional ban on a state's power to supplement them.[151]

a. Minimum Requirements

Instead of establishing exclusive qualifications for members of Congress, the dissent argued that the Qualifications Clauses established only "minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet."[152] Although the Framers included some qualifications and not others, this does not mean that the Constitution bars the states from adopting additional qualifications later; at the very most, this listing implies only that there could be no additional *nationwide* qualifications.[153] The dissenters reasoned that the Qualifications Clauses were intended to ensure states would not send "immature, disloyal, or unknowledgable representatives to Congress," thereby jeopardizing the interests of other states.[154] When vot-

150. *Id.* (Thomas, J., dissenting). Likewise, the dissent noted that Article I, § 2, Clause 1 of the Constitution states that the qualifications of electors for members of the House of Representatives will be the same as those for the most numerous branch of that state's legislature, and the Court has interpreted this clause to mean that although qualifications for congressional electors cannot be more stringent than a state standard, they may be less so. *Id.* at 1884 (Thomas, J., dissenting). If this is true, then a state has some powers over congressional selection which were not expressly granted; therefore, they must have been "reserved" under the Tenth Amendment, despite not existing before the Constitution itself. *Id.* (Thomas, J., dissenting).

151. *Id.* at 1884-85 (Thomas, J., dissenting).

152. *Id.* at 1885 (Thomas, J., dissenting).

153. *Id.* at 1886 (Thomas, J., dissenting). This rejected theory rested on "the maxim *expressio unius est exclusio alterius*" ("the inclusion of one thing is the exclusion of another") and had been applied to the phrasing of the Qualifications Clauses by Joseph Story. *Id.* at 1886 (Thomas, J., dissenting); *id.* at 1850 n.9 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (1833)). The dissent noted that the Constitution does make express prohibitions on state power in Article I, § 10, thus using the *expressio unius* maxim makes little sense with respect to state power. *Id.* at 1887 (Thomas, J., dissenting).

154. *Id.* at 1886 (Thomas, J., dissenting). The majority answered the dissent by

ers of an individual state enact additional qualifications for their representatives, they have done nothing to frustrate this purpose.[155] The dissenters explained that the Framers could not have intended what the majority referred to as a "uniform . . . national character" of qualifications, because not only did the Framers provide for a state-centered system of elections, but at the time of ratification, the national citizenship requirement was a function of state law.[156]

b. Democratic Principles

The dissenters also disagreed with the majority's finding that the Arkansas amendment violated democratic principles of the Framers.[157] The dissent reasoned that the democratic intent of the Framers underlying the Qualifications Clauses was to prevent Congress, not the states, from imposing its own qualifications.[158] Thus, the issue in *Powell* was not whether the Clauses are exclusive, but whether the Constitution granted the House the power to judge its members on the basis of qualifications beyond those enumerated in the Constitution.[159] Allowing federal representatives to set their own qualifications would let them

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asking "why the people of the Nation lack a comparable interest in *allowing* every State to send mature, loyal, and knowledgeable representatives to Congress." *Id.* at 1864 n.32 (emphasis added).

155. *Id.* at 1886 (Thomas, J., dissenting).

156. *Id.* at 1887-88 (Thomas, J., dissenting). The citizenship laws of each state relied on different criteria, and thus, even at the time enacted, the three qualifications set out in the Qualifications Clauses varied from state to state. *Id.* at 1888 (Thomas, J., dissenting). The dissenters also noted that Thomas Jefferson believed that the Constitution did not "'prohibit to the State the power of declaring . . . disqualifications which its particular circumstances may call for . . . . Of course, then, by the tenth amendment, the power is reserved to the State.'" *Id.* at 1888-89 (Thomas, J., dissenting) (quoting Thomas Jefferson, LETTER TO JOSEPH CABELL (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON 82-83 (A. Lipscomb ed., 1904)). The majority responded by offering Jefferson's owns words that a state's power to alter qualifications of its members in Congress was "'one of the doubtful questions on which honest men may differ.'" *Id.* at 1860 n.24 (quoting Jefferson, *supra* at 83).

157. *Id.* at 1889 (Thomas, J., dissenting).

158. *Id.* (Thomas, J., dissenting).

159. *Id.* (Thomas, J., dissenting). "The reason for Congress' incapacity is not that the Qualifications Clauses deprive Congress of the authority to set qualifications, but rather that nothing in the Constitution grants Congress this power." *Id.* (Thomas, J., dissenting). Although the federal government is one of enumerated powers that must look for an affirmative grant of power in order to act, the states are not bound in such a manner and therefore need not find this affirmative grant of power to act. *Id.* (Thomas, J., dissenting).

"perpetuate themselves" in office and would allow states to collaborate within Congress to pass federal legislation preventing another state from electing their "preferred candidate," two problems not present when qualifications are set at the state level.[160]

The dissenters agreed with the majority, that *Powell* relied on Alexander Hamilton's belief that the "people should choose whom they please to govern them," but in their opinion, the voters of Arkansas had chosen to exclude incumbents from their field of candidates.[161] The dissenters also agreed that *Powell* embodied the egalitarian principle that "the opportunity to be elected [is] open to all," but noted that congressional candidacy is not a personal right, especially if voters have decided not to elect that candidate.[162]

Finally, until the passing of the Seventeenth Amendment which calls for direct elections, United States Senators were elected from state legislatures free to use any qualifications prescribed by that state body.[163] The fact that the people of Arkansas—not the state legislature—enacted the term limits furthered the dissent's argument that the Arkansas amendment did not violate any democratic principles.[164]

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160. *Id.* at 1890 (Thomas, J., dissenting).

161. *Id.* at 1891 (Thomas, J., dissenting) (quoting Hamilton, in DEBATES, *supra* note 48, at 257).

162. *Id.* (Thomas, J., dissenting). If this were true, a candidate who lost the primary could have the right to appear on the ballot in the general election. *Id.* (Thomas, J., dissenting). The statements of James Madison that the "'door . . . [to congressional election] . . . is open to merit of every description,'" merely reflected that the Constitution itself did not place undue burdens on candidacy. *Id.* (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)). The majority countered this by calling the dissent's interpretation "implausible," when viewed in the context of Madison's entire statement, which related to the reasonableness of limitations on candidates for federal office in relation to those that the states impose on electors. *Id.* at 1857 n.18; *see supra* note 102 and accompanying text (explaining the majority's position).

163. *U.S. Term Limits*, 115 S. Ct. at 1892 (Thomas, J., dissenting). "If there is no reason to believe that the . . . Constitution barred state legislatures from adopting prospective rules to narrow their choices for Senator, then there is also no reason to believe that it barred the people of the States . . . ." *Id.* at 1893 (Thomas, J., dissenting).

164. *Id.* at 1893 (Thomas, J., dissenting). The dissenters also noted that it was inappropriate to use democratic principles to preclude the Arkansas amendment when it remained entirely within the control of the Arkansas voters to repeal the amendment, just as they had enacted it. *Id.* at 1890 (Thomas, J., dissenting). The majority stated, however, that it could point to "no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly." *Id.* at 1858 n.19.

c. History

Despite the majority's assertions to the contrary, the dissenters maintained that not only were state-imposed qualifications consistent with democratic principles, but also that these qualifications were supported by historical evidence.[165]

Just as they reasoned in their interpretation of the Tenth Amendment, the dissenters again asserted that the Court's decision in *Powell v. McCormack* did not relate to the question now facing the Court.[166] Instead, *Powell* established that Congress could not alter its own qualifications, "highlight[ing] the weakness of the majority's evidence that the States and the people of the States also lack this power."[167] Congress did not have the power to impose additional qualifications because that power was left up to the states.[168]

The dissent also disagreed with the majority's interpretation of the ratification debates and the Framers' rationale underlying specific provisions of the Constitution.[169] Although the majority placed little weight on the views of the Committee of Detail charged with drafting the Constitution, the dissent found the Committee's specific deletion of an exclusivity provision from the Qualifications Clause for the lower House of Congress persuasive evidence that the Clauses were not intended to be exclusive.[170] Furthermore, none of the constitutional "provisions cited by the majority is inconsistent with state power to add qualifications for congressional office," because even if the majority's interpretation "were correct, the most that one could infer is that the Framers

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165. *Id.* at 1894 (Thomas, J., dissenting).

166. *Id.* (Thomas, J., dissenting).

167. *Id.* at 1894-95 (Thomas, J., dissenting). For example, *Powell* relied heavily on Alexander Hamilton's statement that congressional qualifications "'are defined and fixed in the Constitution, and are unalterable by the legislature.'" *Id.* at 1895 n.18 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). In the dissenters' opinion, Hamilton only referred to qualifications being fixed in relation to the lack of the national legislature's power to alter them. *Id.* (Thomas, J., dissenting).

168. *Id.* at 1895 n.18 (Thomas, J., dissenting). The majority argued that *Powell* never mentioned this "default rule," and furthermore, the Court has never treated the concept of a default rule as absolute. *Id.* at 1851 n.12.

169. *Id.* at 1895-96 (Thomas, J., dissenting).

170. *Id.* at 1895 (Thomas, J., dissenting). Yet the majority found this point to be "irrelevant" because the Framers, wanting to further reduce the "barriers that would exclude the most able citizens from service in the National government," excluded the provision. *Id.* at 1860 n.27.

did not want *state legislatures* to be able to prescribe qualifications."[171]

d. The Ratification Period

The dissenters found unconvincing the majority's reliance on the lack of an affirmative statement in the ratification debate records that the states were free to add qualifications.[172] The records showed neither

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171. *Id.* at 1896 (Thomas, J., dissenting) (emphasis added). The provision setting federal representatives' salaries at the national level evidenced the Framers' intent to prevent a state's improper influence on its representatives after the election, such as withholding their salary in order to force them to vote in a particular manner. *Id.* (Thomas, J., dissenting). Furthermore, not permitting states, under the Electors Clause, to raise voter requirements in House of Representative elections above those needed to vote in elections for members of the state's highest legislature, was merely a "natural concomitant of one of the Framers' most famous decisions" to allow electors of each state, and not the state legislature, to vote for Representatives. *Id.* at 1896-97 (Thomas, J., dissenting). Although under Article I, § 5, each House is to be the judge of the elections, returns and qualifications of its members, that does not mean, as the majority contended, that Congress could not use state laws as the standard for deciding eligibility. *Id.* at 1897 (Thomas, J., dissenting). After all, state law determined which ballots were considered "valid," and furthermore, the term "qualifications" may only refer to the ability to judge the three qualifications set forth in the Qualifications Clauses, and not those imposed by states. *Id.* (Thomas, J., dissenting). Finally, although the majority argued that because the Times, Places and Manner Clause empowered Congress to make or alter state election procedures, the Framers could not have intended to allow states to add substantive qualifications that would not be subject to this congressional override, the dissenters instead viewed the override as allowed only in instances where the Framers "trusted" Congress more than the states. *Id.* at 1898 (Thomas, J., dissenting). Although the Framers trusted Congress to provide for procedural laws ensuring their own existence through elections, they did not trust Congress to set its own qualifications, and thus they would not have given it override powers in this area. *Id.* (Thomas, J., dissenting). If a state ever set its qualifications for membership so high that no candidate could meet such requirements (in effect failing to hold an election), not only did the Constitution provide remedial procedures when congressional vacancies occur, but furthermore a state could not impose unconstitutional qualifications. *Id.* at 1899-900 (Thomas, J., dissenting). Just as these provisions showed that the Framers did not fear that a state could effectively destroy congressional elections, the Framers were even less likely to fear that the people of a state would act to totally disenfranchise themselves. *See id.* at 1900 n.22 (Thomas, J., dissenting). The majority called this distinction between the actions of the people of a state and those of the state's legislature "untenable." *Id.* at 1858 n.19; *see also supra* note 164 (discussing the reasoning behind the majority's conclusion). Furthermore, the majority argued that the dissent's reading of these provisions revealed, and actually understated, the Framers' distrust of the states with regard to elections, and thus further supported the majority's argument that the Framers intended the qualifications to be exclusive. *U.S. Term Limits*, 115 S. Ct. at 1859 n.21.

172. *U.S. Term Limits*, 115 S. Ct. at 1900 (Thomas, J., dissenting); *see also supra* note 113 and accompanying text (explaining the majority's argument).

an affirmative statement permitting the states to supplement the qualifications, nor statements prohibiting the states from altering the enumerated qualifications.[173] Furthermore, at the time of the ratification, several states imposed religious qualifications on their state legislators, and thus in order to prevent the states from imposing similar religious, but not other, qualifications on their federal representatives, the Framers included in Article VI the statement that "no religious Test shall ever be required as a Qualification to any Office or pubic trust under the United States."[174]

e. State Practice

The dissenters then turned their attention to state practice following ratification. They found persuasive several pieces of evidence showing that the states did not believe the Clauses were exclusive: the addition by Virginia of a property requirement for its Congress members, the adoption by seven states of district elections, and the imposition by five states of district residency requirements (three of which were durational).[175] As to the majority's argument that if the Constitution had truly empowered states to enact further qualifications, then the states would have imposed rotation requirements, the dissent argued that the circum-

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173. *U.S. Term Limits*, 115 S. Ct. at 1901 (Thomas, J., dissenting). The dissenters argued the inverse of the majority's reasoning: if the Constitution was "understood to deprive the States of this significant power, one might well have expected its opponent to seize on this point in arguing against ratification." *Id.* (Thomas, J., dissenting). In this discussion of the ratification period, the dissenters also pointed to the words of James Madison relied on by the majority. *Id.* at 1901-02 (Thomas, J., dissenting); *see supra* note 112 (quoting Madison's words).

174. *U.S. Term Limits*, 115 S. Ct. at 1902-03 (Thomas, J., dissenting) (quoting U.S. CONST. art VI). This provision cut against the majority's *expressio unius* maxim argument, because if the Constitution expressly prohibited religious qualifications, it must not prohibit other qualifications. *Id.* at 1903 (Thomas, J., dissenting); *see also supra* note 153 (explaining the majority's *expressio unius* maxim argument).

175. *U.S. Term Limits*, 115 S. Ct. at 1903-04 (Thomas, J., dissenting). Furthermore, the state legislative debates surrounding the enactment of these requirements indicated that the states questioned their ability to add qualifications and, deciding in the affirmative, passed the provisions. *Id.* at 1904-05 (Thomas, J., dissenting). The majority found these provisions unconvincing, asserting that more states would have adopted property qualifications if they thought it was permitted under the Constitution. *Id.* at 1866 n.41; *see also infra* note 177 and accompanying text. In addition, the majority argued that the states imposing district requirements felt these requirements were merely an "analog" to the residency requirement contained in the Clauses. *U.S. Term Limits*, 115 S. Ct. at 1866 n.41.

stances at the time of the Constitution's framing did not give rise to a need for term limits, because the advantages of incumbency were minimal, and a term limit would prevent keeping good legislators in office.[176] Moreover, several other factors may have contributed to more states' failure to impose property requirements, including that states deemed it unnecessary given the minimal likelihood that a "pauper" could be elected to the House, or that because the states lacked a general understanding of their ability to impose such requirements, they wanted to "stay away from difficult constitutional questions" that may have temporarily deprived them of representation in Congress.[177]

f. Congressional Experience

The dissent concluded its analysis of historical evidence by emphasizing that congressional actions were too erratic to be of much precedential value, and that those cited by the majority were "misleading."[178] In particular, the dissent presented evidence showing the inaccuracy of the McCreery incident as reported in *Powell v. McCormack*, upon which the majority heavily relied.[179]

Consequently, because the dissent found unpersuasive the historical evidence that the Framers intended the Clauses to be exclusive, and

176. *U.S. Term Limits*, 115 S. Ct. at 1906 (Thomas, J., dissenting). The dissent supported this argument by noting that although states could impose their own term limits under the Articles of Confederation, only four states adopted limits, and only Pennsylvania's limit differed from the one actually contained in the Articles. *Id.* (Thomas, J., dissenting). The majority countered that several states rejected a rotation requirement amendment to the Constitution at their own ratification conventions. *Id.* at 1859-60. Yet, as the dissenters pointed out, save for one of these, all involved only term limits on the office of President. *Id.* at 1906 (Thomas, J., dissenting). This, in turn, supported the dissent's position that states thought it unnecessary to propose an amendment for term limits on members of Congress, because they believed that they retained the power to add qualifications for their Congress members, but not for the President. *Id.* at 1907 (Thomas, J., dissenting).

177. *Id.* at 1907-08 n.37 (Thomas, J., dissenting). The majority noted that this actually undercut the dissent's argument, because if the states questioned their ability to impose additional qualifications, it is even less likely that the Framers did not intend for the Clauses to be exclusive. *Id.* at 1866 n.41.

178. *Id.* at 1908 (Thomas, J., dissenting).

179. *Id.* (Thomas, J., dissenting). The *Powell* Court failed to recognize that Congress rejected passing the resolutions which stated that McCreery was eligible to be seated because he was qualified under the Constitution, despite the additional qualifications that Maryland sought to impose. *Id.* (Thomas, J., dissenting); *see also supra* notes 24-29 and accompanying text (discussing the McCreery incident).

because the express text of the Constitution did not prohibit states from imposing additional qualifications, the people of Arkansas held the power to impose term limits.[180]

3. Amendment 73 was not a "Qualification"

The dissenters also disagreed with the majority's conclusion that the quasi-term limits imposed by the Arkansas voters were the equivalent of absolute term limits that created additional qualifications.[181] An incumbent could still be elected as a write-in candidate, and the possibilities of this were much greater than the majority believed.[182] Furthermore, the Arkansas voters did not necessarily intend to impose term limits as an additional qualification, but rather intended to "level the playing field" between incumbents and candidates running without the benefits available to sitting Congress members.[183] The dissent found the majority's definition of a qualification as a "handicap" on a class of candidates too broad and additionally argued that the definition called into question previous Court decisions involving such candidate handicaps evaluated under the First and Fourteenth Amendments rather than under the Qualifications Clauses.[184] The dissenters would not have

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180. *U.S. Term Limits*, 115 S. Ct. at 1909 (Thomas, J., dissenting).

181. *Id.* (Thomas, J., dissenting). The majority felt this finding was irrelevant to its holding, because the amendment nonetheless had the "likely effect of handicapping a class of candidates and ha[d] the sole purpose of creating additional qualifications indirectly." *Id.* at 1871.

182. *Id.* at 1909-10 (Thomas, J., dissenting). For example, in 1992, Independent Ross Perot won the Democratic presidential primary in North Dakota precisely because he was well known and well funded, characteristics similar to those of an incumbent. *Id.* at 1910 (Thomas, J., dissenting). The dissent also stated that the majority relied too heavily on the plurality opinion of the Arkansas Supreme Court in concluding that the quasi-term limits were equivalent to absolute limits. *Id.* (Thomas, J., dissenting). The majority disagreed, noting that a majority of the Arkansas justices, although not all joining in the plurality opinion, found that the limit made re-election for incumbents a virtual impossibility. *Id.* at 1868 n.44.

183. *Id.* at 1911 (Thomas, J., dissenting). The dissent listed the numerous advantages an incumbent wields by virtue of holding federal office. *Id.* (Thomas, J., dissenting); *see supra* note 5 (listing these advantages). Contrary to the majority's conclusion, the dissent argued that not only do the words "term limits" contained in the amendment's preamble refer only to the absolute limits on state officials also contained in the amendment, but that the intent of thousands of individuals in voting for the amendment was extremely difficult to ascertain. *U.S. Term Limits*, 115 S. Ct. at 1911 (Thomas, J., dissenting). The majority called the dissent's suggestion that the voters intended a leveling effect "unpersuasive." *Id.* at 1871.

184. *U.S. Term Limits*, 115 S. Ct. at 1912-13 (Thomas, J., dissenting). For example,

drawn such a broad implication from the Qualifications Clauses, but instead would have "read the . . . Clauses to do no more than what they say."[185]

V. ANALYSIS

A. *The Tenth Amendment*

Although the Court's interpretation of the Tenth Amendment has never been clear,[186] in a recent expression of its interpretation the Court stated that generally applicable federal regulation of the states would not constitute an invasion of the states' reserved powers under the Tenth Amendment because states must rely on the federal political system in order to preserve their interests.[187] In this earlier decision, the Court explicitly relied on the states' involvement in federal elections as justification for its holding.[188] Yet, in *U.S. Term Limits*, the Court ignored this rationale thereby modifying its earlier holding; its decision now leaves the states without power over whom is sent into the federal political system to protect their interests.[189]

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the majority's expansive holding presumably also invalidated state statutes disqualifying candidates who are mentally incompetent, imprisoned, or ineligible to vote. *Id.* at 1909 (Thomas, J., dissenting). The dissent further noted that not only cases involving ballot access, but also campaign financing and redistricting, may now also be subject to this handicap standard. *Id.* at 1913 (Thomas, J., dissenting).

185. *Id.* at 1914 (Thomas, J., dissenting).

186. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2420 (1992) ("The Court's jurisprudence in this area has traveled an unsteady path."); Joshua Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913, 1934 (1992) ("The precise scope and application of the Tenth Amendment remains an unsettled area of constitutional law.").

187. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 533 (1985). *But see* New York v. United States, 112 S. Ct. 2408, 2435 (1992) (holding federal regulation not valid if the regulation is not generally applicable and requires states to adopt legislation).

188. *Garcia*, 469 U.S. at 550-52. The *Garcia* Court reasoned that the Framers deliberately involved the states in federal elections, e.g., in setting the qualifications of electors and in electing Senators from the state legislatures, in order to ensure the states a role in the federal government, for "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Id.* at 550-51. The *Garcia* Court further maintained that the states' interests were better protected by these "procedural safeguards . . . than by judicially created limitations on federal power." *Id.* at 552.

189. *See U.S. Term Limits*, 115 S. Ct. at 1854 (holding that a state may exercise no power that it did not possess before creation of the Constitution and, because Congress did not exist before the Constitution, the state has no power over the qualifications of its members); *see also* Hills, *supra* note 24, at 135-37 (arguing that in light of *Garcia*, the Court should not limit a state's right to prescribe qualifications for its federal representatives in Congress). As Hills noted, "the state's political machinery

Furthermore, the Court has stated that the Tenth Amendment grants the states the right to "determine the qualifications of their most important government officials," and this right lies at the "heart of a representative government."[190] Although the Court stated this in relation to a state setting qualifications for its own officials, if the right is central to a "representative government," it is unclear why the Court did not apply the same rationale at the federal level.[191]

As noted in the History section of this Note, the Court has never used the Tenth Amendment as a limitation on a state's powers.[192] Although the federal government's authority stems from the powers enumerated in the Constitution, under the Tenth Amendment a state looks to its own state constitution to determine its powers.[193] The determination is not absolute, however, for the "Tenth Amendment reserves to the states powers not prohibited by the Constitution. Whether or not states have the power under the Tenth Amendment to impose term limitations depends on the interpretation of the Qualifications Clause[s]."[194] The Court, on the other hand, made an affirmative statement about the powers a state may exercise under the Tenth Amendment,[195] when it could

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(including state constitutional provisions that limit federal terms) provide[s] a means by which the less wealthy or well-organized groups can participate in government." *Id.* at 136 n.164 (citing Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 392).

190. Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (holding that a state has power to set qualifications for state officers). The *Gregory* Court noted that the federalist structure of the United States government ensures "a decentralized government that is more sensitive to the diverse needs of a heterogeneous society" and a government "more responsive" to these needs. *Id.* at 468. Ironically, this is exactly what the Arkansas voters were trying to accomplish under the Tenth Amendment with term limits. *See infra* notes 218-23 and accompanying text (discussing the intent of the Arkansas voters).

191. *See U.S. Term Limits*, 115 S. Ct. at 1891 (Thomas, J., dissenting).

192. *See supra* notes 76-78 and accompanying text (discussing the history surrounding the Tenth Amendment). *But see U.S. Term Limits*, 115 S. Ct. at 1854 (contending that the Court decided McCulloch v. Maryland, U.S. (4 Wheat.) 316 (1819), on the rationale that the power to tax a federal bank was not an original power existing before the Constitution, and thus could not be exercised by the states).

193. *See* Rotunda, *supra* note 2, at 576-77 n.56. The Arkansas measure was an amendment to the state constitution.

194. Julia C. Wommack, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1372 (1993) (arguing that, although constitutional, the goals of term limits could best be met by another method).

195. *See U.S. Term Limits*, 115 S. Ct. at 1854 (ruling that a power must have existed before the Constitution to be exercised by a state under the Tenth Amendment).

have limited its holding by ruling that the Constitution denies the power of the states to enact term limits because the Qualifications Clauses are exclusive. Not only did the Arkansas Supreme Court limit its decision to holding that the Qualifications Clauses are exclusive, thus precluding the term limits,[196] but the traditional rule is that the Court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[197]

B. The Qualifications Clauses

Even assuming that the majority's rationale provides support for its holding that the Framers intended the Qualifications Clauses to be exclusive,[198] the rationale does not conflict with the term limit amendment passed in Arkansas. The majority stated that the Framers wanted to ensure every person would have a chance to be elected, and thus, the Framers left "'the door to this part of the federal government . . . open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.'"[199] Unfortunately, seated House and Senate members, through the power of incumbency, have closed this door, especially with respect to the clause "without regard to poverty or wealth."[200] Furthermore, although the majority relied heavily on the Framers' rejection of a term limit or rotation amendment for the Constitution,[201] during the 18th and 19th centuries, term limits were not needed to ensure that the "door" to election would remain open because voluntary rotation was the tradition.[202] In addition, term limits

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196. U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (Ark. 1994), *aff'd sub nom. U.S. Term Limits*, 115 S. Ct. at 1842.

197. Liverpool S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885); *see also* Jean v. Nelson 472 U.S. 846, 854 (1985) (reiterating that the Court should not decide constitutional issues "unnecessarily"). *But see* John P. Frantz, Note, *Federal Preclusion of State-Imposed Congressional Term Limits:* U.S. Term Limits, Inc. v. Thornton, 19 HARV. J.L. & PUB. POL'Y 174, 186-87 (arguing that the *U.S. Term Limits* Court should have limited its holding to the Tenth Amendment issue thereby avoiding the *Qualifications Clauses* issue).

198. "[T]he fact of the matter is that the historical understanding of the Qualifications Clauses of Article I is far from clear." Rotunda, *supra* note 2, at 574. "The orginalist position regarding the exclusivity of the Qualifications clauses is, therefore, one of doubt." Hills, *supra* note 24, at 132.

199. *U.S. Term Limits*, 115 S. Ct. at 1857 (quoting THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)).

200. *See supra* note 5 (listing examples of incumbents' "base wealth").

201. *See U.S. Term Limits*, 115 S. Ct. at 1867-68.

202. During the Civil War era, for example, less than 2% of the members of the House served more than 12 years. Brief for the State Petitioner at 19, *U.S. Term Limits* (Nos. 93-1456, 93-1828). In addition, the Framers specifically limited House

have actually been shown to infuse *more* ethnic minorities and women into office.[203]

The Court's stated philosophy on elections is that elections should not "freeze[] the status quo . . . but recognize[] the potential fluidity of American political life."[204] Yet the political status quo freezes when the door to federal office is closed by the incumbent "ins" able to exclude the political "outs."[205] For example, in 1973 the Court upheld the Hatch Act, a law prohibiting federal employees from running for office or taking an active role in campaigns, in order to prevent these incumbent parties from entrenching themselves and excluding others.[206]

The majority also argued that the Framers intended the Qualifications Clauses to be exclusive to ensure that Congress remains a uniform body; otherwise, the "diverse interests of the States would undermine the National Legislature," and leave the federal government at the mercy of the states.[207] As an example of the Framers' intent to remove state influence over the federal government, the majority noted that individual states may not set congressional salaries, and thus are pre-

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terms to two years in order "to allow them ample time to master the duties of their offices . . . yet prevent them from losing an intimate sympathy with the people." *Id.* (quoting THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961)). For a complete discussion of the lack of need for term limits at the time of ratification, see JAMES K. COYNE & JON H. FUND, CLEANING HOUSE 88, 112-13 (1992) and Killenbeck & Sheppard, *supra* note 8, at 1137-43.

203. *See* Rotunda, *supra* note 2, at 567 n.20; Madeleine Kunin, *Give Everyone a Turn at the Game Term Limits*, L.A. TIMES, Sept. 13, 1991, at B7 (arguing that term limits open the political process to more minorities).

204. Jenness v. Fortson, 403 U.S. 431, 439 (1971).

205. Hills, *supra* note 24, at 138.

206. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 565-66 (1973) (holding that the party in power should be prevented "from using the thousands . . . of federal employees, paid for at public expense, to man its political structure and political campaigns"); *see also* Hills, *supra* note 24, at 146-47 (arguing that term limits are consistent with the *United States Civil Service Commission* rationale).

207. *U.S. Term Limits*, 115 S. Ct. at 1857. The majority did not acknowledge that although the body itself may be uniform, states may set their own qualifications for those eligible to vote for members of this body, thereby creating a "patchwork of state qualifications" for voters, if not for the federal representatives they elect. *See id.* at 1864; *see also* Frantz, *supra* note 197, at 186 (arguing that Alexander Hamilton himself did not "disput[e] state power to set qualifications for those 'who may be elected'" when he spoke of state power to set qualifications for voters); Rotunda, *supra* note 2, at 579 n.64 (discussing the ability of the states to set voter qualifications).

vented from lowering salaries to a level that would "'keep out of offices the men most capable of executing the functions of them.'"[208] Nonetheless, as noted previously, the Court indicated in an earlier decision that a state's only protection of its sovereign interests is the federal political process.[209] By allowing members of Congress to use federal resources to keep themselves in office, and thus possibly keeping out the most capable women and men from these offices, the Court left the *states* at the mercy of the *federal* government.

Both the majority and dissent acknowledged that the Framers feared that the states would fail to hold congressional elections, and therefore create another route by which to leave the federal government at the states' mercy.[210] The majority, however, wrongly believed that unless the Qualifications Clauses were exclusive, the states could achieve the same result by holding elections, but setting qualifications so high no one could meet the qualifications.[211] Yet, a term limit is not a qualification in this sense, because a state can neither disqualify all viable candidates through limiting terms,[212] nor impose an unconstitutional qualification.[213]

Finally, the Court stated that the most important reason for its holding the Clauses exclusive was that allowing states to impose term limits under the Qualifications Clauses would undermine the democratic ideal, "'the people should choose whom they please to govern them,'" that the Framers sought to protect.[214] If term limits violate a fundamental democratic principle, then the Court cannot justify term limits a state imposes on its own officials, despite the fact that such limits have survived constitutional attack.[215] Moreover, the Arkansas voters themselves enacted Amendment 73, and although the *U.S. Term Limits* majority discounted this as affecting the constitutionality of the amendment, in a previous decision the Court upheld a Missouri voter-enacted

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208. *U.S. Term Limits*, 115 S. Ct. at 1858 (quoting Nathaniel Gorham, *in* 1 FARRAND, *supra* note 44, at 216).

209. *See supra* notes 187-88 (discussing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 533 (1985)).

210. *U.S. Term Limits*, 115 S. Ct. at 1858, 1883 (Thomas, J., dissenting).

211. *Id.* at 1858.

212. *See* Vance, *supra* note 7, at 445.

213. *U.S. Term Limits*, 115 S. Ct. at 1900 (Thomas, J., dissenting).

214. *Id.* at 1862 (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969) (quoting James Madison, *in* DEBATES, *supra* note 48, at 257)) (internal quotation marks omitted).

215. *See* Brief for the State Petitioner at 24, *U.S. Term Limits* (Nos. 93-1456, 93-1828); *see also supra* note 78 and *infra* note 220 and accompanying text (discussing judicial treatment of state term limits). Only 12 states do not impose term limits of some sort on their own officials. Brief for the State Petitioner at 24, *U.S. Term Limits* (Nos. 93-1456, 93-1828).

requirement, stating, "[i]n this case, we are dealing not merely with governmental action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects the . . . citizens of Missouri who voted for it."[216] Additionally, it can be argued that the Arkansas term limit amendment, enacted by a ballot initiative, was merely a democratic election before the election, with the voters electing not to choose an incumbent.[217]

C. The Times, Places and Manner Clause

The *U.S. Term Limits* Court also reasoned that the Arkansas amendment could not be considered an allowable regulation of elections under the Times, Places, and Manner Clause, because it could not be "seriously contended" that the intent of the Amendment was anything other than "dress[ing] eligibility to stand for Congress in ballot access clothing."[218] The majority based this finding on the amendment's preamble, which explicitly stated that it was designed to limit terms, thereby creating a qualification not contained in the Qualifications Clauses.[219] Yet, term limit amendments in other states have preambles evidencing voters' intent "to assure that members of the United States Congress . . . are *representative* of and responsive to . . . *citizens*."[220] The Constitution itself calls a House member a "Representative,"[221] and the Qualifications Clauses require both House and Senate members to be citizens of the state where they are chosen.[222] Thus, the intent of any term limit amendment could be to ensure that federal representatives meet these qualifications.[223] Because the Court decided that the

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216. Gregory v. Ashcroft, 501 U.S. 452, 471 (1991).

217. Hills, *supra* note 24, at 138-39 (discussing the "election before the election" theory).

218. *U.S. Term Limits*, 115 S. Ct. at 1867.

219. *Id.* at 1867-68.

220. COLO. CONST. art. XVIII, § 9(a) (emphasis added).

221. U.S. CONST. art I, § 2.

222. *See supra* notes 21-22 and accompanying text.

223. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that states must protect their interests not through the Tenth Amendment, but through the federal political process). It should be noted that a vocal three member dissent in the *Garcia* case stated that one of the reasons they believed that the standard adopted by the majority was unworkable was because of political changes over the past 30 years making members of Congress less "representative" of their constituents. *Id.* at 565 n.9 (Powell, J., dissenting); *see also* Hills, *supra* note 24, at 136-38 (arguing that congressional term limits provide a "safeguard" ensuring that members

Arkansas term limit amendment was not the type of restriction permitted under the Times, Places and Manner Clause, it never even considered the usual test for ballot access cases under the First and Fourteenth Amendments—weighing the burden placed on the candidate against the interest of the state.[224]

The majority also stated that if term limits were a manner of regulating elections, then Congress would have the power, under Article I, to make or alter the limits, which is contrary to *Powell*'s holding that Congress did not have the power to set its own qualifications.[225] If term limits are a *manner* of regulating elections under the Times, Places, and Manner Clause, however, then they are not a *qualification* under the Qualifications Clauses. Although *Powell* said Congress could not set its own qualifications, Congress does retain the right to alter the manner of its elections.[226]

Voters enacted Amendment 73 in an election and as the majority stated, "'[t]he power over the manner only enables . . . [the states] to

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of Congress meet the state residency requirement contained in the Constitution). The Framers themselves felt the residency requirement was essential, reasoning that if a representative did not live in the area in which he represented, he could not have an accurate understanding of the area's concerns. *Id.* at 151 n.166.

224. *See* Killenbeck & Sheppard, *supra* note 8, at 1127 n.15 (stating the Court may never reach the First Amendment analysis for congressional term limits in *U.S. Term Limits* if the case is decided on other constitutional grounds, such as the Qualifications Clauses); *supra* notes 49-72 and accompanying text (explaining the weighing of the "interests versus the burden" test and the history surrounding the test). Although the Supreme Court has never applied the balancing test to term limits, even to those imposed on state and local officials, lower courts deciding challenges to such limits have found the benefit to the "over-all health of the body politic" outweighs the burden on officials disqualified from running under the limits. *See* Maloney v. McCartney, 223 S.E.2d 607, 611 (W. Va.), *appeal dismissed*, 425 U.S. 946 (1976); *see also* Miyazawa v. Cincinnati, 825 F. Supp. 816, 822 (S.D. Ohio 1993) (holding term limits on city officials consistent with the First and Fourteenth Amendments), *aff'd*, 45 F.3d 126 (6th Cir. 1995); Legislature of California v. Eu, 816 P.2d 1309 (Cal. 1991) (holding that state constitutional amendment limiting state elected legislative officials survived the *Anderson* balancing test), *cert. denied*, 503 U.S. 119 (1992); Maddox v. Fortson, 172 S.E.2d 595 (Ga.) (holding that Georgia's term limit for its governor was consistent with the First and Fourteenth Amendments), *cert. denied*, 397 U.S. 149 (1970). For a full discussion of how quasi-term limits would be treated under the balancing test, see Sean R. Sullivan, Comment, *A Term Limit By Any Other Name?: The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress*, 56 U. PITT. L. REV. 845, 873-879 (1995). Ironically, the lower court in *U.S. Term Limits* upheld the absolute term limit that Amendment 73 placed on state-elected officials, which was not challenged in the U.S. Supreme Court. *See* U.S. Term Limits v. Hill, 872 S.W.2d 349, 360 (Ark. 1994), *aff'd sub nom. U.S. Term Limits*, 115 S. Ct. at 1842.

225. *U.S. Term Limits*, 115 S. Ct. at 1869.

226. *See id.*

determine how these electors shall elect—whether by ballot, or by vote, or by any other way.'"[227] The majority did not recognize that Arkansas voters merely exercised a manner of holding elections when they determined incumbents could not appear on the ballot.[228]

As for the majority's reliance on historical evidence, it acknowledged, but discounted, that when the First Congress met, several states had additional requirements on their federal representatives.[229] Nevertheless, the majority failed to note that the First Congress did not exercise its power to alter these qualifications, and thus, this Congress must have either believed that it had no power to alter them (thus the Clauses are not exclusive), or that the Times, Places and Manner Clause permitted them.[230]

Finally, the majority attempted to distinguish between procedural restrictions that the Court allowed under the Clauses in *Storer v. Brown*,[231] and substantive regulations, such as term limits, which are not allowed.[232] In doing so, they explicitly reaffirmed the notion that states are free to adopt "'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'"[233] First, as to protecting the integrity of elections, the Court at one point cited to Amendment 73's preamble,[234] which in addition to the "term limit" language that the majority focused upon, also stated

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227. *Id.* (quoting John Steele at the North Carolina ratification convention, *in* 4 DEBATES, *supra* note 48, at 71).

228. *See supra* notes 216-17 and accompanying text (discussing the effect of voters themselves enacting Amendment 73 on the amendment's validity).

229. *U.S. Term Limits*, 115 S. Ct. at 1865-66 (noting that several states required Congress members to be property holders, and several other states imposed district residency requirements); *see also supra* notes 121-22, 175-77 and accompanying text (summarizing the majority's opinion on the additional requirements).

230. *See* Brief for the State Petitioner at 43-44, *U.S. Term Limits* (Nos. 93-1456, 93-1828). Furthermore, as of the date of the *U.S. Term Limits* decision, many of the then-present state congressional term limit measures had been in force for over two years, and Congress had done nothing to alter these limits. *See* Petitioner's Reply Brief at 10, *U.S. Term Limits* (Nos. 93-1456, 93-1828).

231. 415 U.S. 724 (1974). For a complete discussion of *Storer*, see *supra* notes 50-57 and accompanying text.

232. *U.S. Term Limits*, 115 S. Ct. at 1869-70. It is interesting to note that Antifederalists at the Constitutional Convention did not feel the Clause was limited to procedural matters, and instead felt it extended to substantive matters also. Hills, *supra* note 24, at 151 n.46.

233. *U.S. Term Limits*, 115 S. Ct. at 1870 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

234. *Id.* at 1868.

that "'[e]ntrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers.'"[235] These very words show that Arkansas voters no longer have faith in, nor believe in, the integrity of the electoral process.[236] Second, as to protecting the reliability of elections, incumbents have a remarkable number of government sponsored resources at their disposal,[237] and "[e]lections in which one side is heavily subsidized by the government are poor indicators of actual popularity."[238] Furthermore, term limits protect the residency requirement, an enumerated qualification of the Clauses.[239]

In fact, the only difference that the majority cited between the requirement in *Storer* and the Arkansas amendment was that the *Storer* requirement did not exclude candidates "without reference to the candidate's support in the election process."[240] Yet, as explained above, the term limits of Amendment 73 were enacted by a majority vote, thereby excluding candidates based on the support of incumbents in the election process.[241] The majority employed circular reasoning, fumbling that the requirement in *Storer* was not a qualification because it was procedural, and that it was procedural because it was not a qualification.[242]

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235. *Id.* at 1845 (quoting Arkansas Amendment 73).

236. *See* Killenbeck & Sheppard, *supra* note 8, at 1133-34 (discussing how the language of term limit amendments, including the Arkansas amendment, shows the lack of faith voters have in the current election system). Killenbeck and Sheppard believe term limits are actually a procedural regulation, much like a district residency requirement, and not a substantive regulation. *Id.* at 1158-64.

237. *See supra* note 5 (listing incumbents' government resources); *see also U.S. Term Limits*, 115 S. Ct. at 1911 (Thomas, J., dissenting) (discussing the electoral advantages of incumbency).

238. Hills, *supra* note 24, at 147.

239. *Id.* at 137-38; *see also supra* notes 220-23 and accompanying text (arguing that term limits enforce the residency and "Representative" requirements in the Constitution).

240. *U.S. Term Limits*, 115 S. Ct. at 1870.

241. *See supra* notes 216-17, 227-28 and accompanying text (discussing voters' right to decide how to elect officials).

242. *U.S. Term Limits*, 115 S. Ct. at 1870. Indeed, the distinction is largely "one of semantics." Vance, *supra* note 7, at 446. It is interesting to note that although over half of the oral arguments during *U.S. Term Limits* centered on the difference between a qualification and an allowable procedural restriction, *see* Official Transcript of Oral Argument at 4-6, 8, 11-13, 16-18, 20-22, 24, *U.S. Term Limits* (Nos. 93-1456, 93-1828), *available in* 1994 WESTLAW 714634, only four pages of the majority's 24-page opinion dealt with the possibility that the Arkansas amendment could be a procedural restriction. *See U.S. Term Limits*, 115 S. Ct. at 1866-70. During the oral argument, even the Respondents seemed confused as to the definition of a qualification. At one point, the Respondents said the Arkansas amendment was not a qualification

VI. IMPACT

The majority's ruling in *U.S. Term Limits* will not only impact the status of term limits, but the validity of other state election laws, and other areas of the law and government.

A. The Status of Term Limits

The majority's holding immediately invalidates congressional term limit amendments and statutes enacted prior to *U.S. Term Limits*.[243] Nevertheless, several of these amendments contain provisions stating that if term limits are found to be unconstitutional, it is the duty of every incumbent congressional candidate to keep these voter-enacted term limits in mind when making the decision to run again.[244]

Colorado voters enacted a "term limit" amendment significantly different than the one invalidated by the court in *U.S. Term Limits*.[245] Thus, the question arises whether it, too, requires a constitutional amendment to remain valid.[246] Although the Colorado amendment more closely resembles the "resign to run" statutes previously upheld by the Court,[247] the majority's reliance on the preamble of the Arkan-

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or a ballot restriction, but rather "a third something-or-other," and at another point claimed the amendment was a qualification because it was a "burden placed on a Candidate for Congress based upon conduct that has not occurred during the [present] election cycle." Official Transcript of Oral Argument at 17, 20 *U.S. Term Limits* (Nos. 93-1456, 93-1828), *available in* 1994 WESTLAW 714634. Nonetheless, in response to questioning from the Court, the Respondents conceded the amendment was not a qualification. *Id.* at 17-18.

243. *See supra* note 3 and accompanying text (giving examples of these various term limit statutes). As the majority stated, "allowing the several States to adopt term limits . . . would effect a fundamental change in the constitutional framework. Any such change must come . . . through the Amendment procedures set forth in Article V." *U.S. Term Limits*, 115 S. Ct. at 1871.

244. *See, e.g.*, MICH. CONST. art. II, § 10 ("The people of Michigan declare that . . . their intention is that federal officials elected from Michigan will continue voluntarily to observe the wishes of the people as stated in this section, in the event any provision of this section is held invalid."). Yet, what may really matter is if voters keep these limits in mind when an incumbent does not give deference to the amendment and still chooses to run.

245. COLO. CONST. art. XVIII, § 9(a)(1).

246. The Colorado amendment prohibits United States Senators from serving more than two *consecutive* terms, and United States representatives from serving six *consecutive* terms. *Id.* A term is consecutive if it is less then four years after a previous term. *Id.*

247. *See* Clements v. Fashing, 457 U.S. 957, 967 (1982) (plurality opinion) (declaring

sas amendment and the importance placed on the Framers' rejection of rotation for members of Congress indicate the Colorado measure will meet the same fate.[248]

Besides manipulating, as did Colorado, the technical operation of the term limit amendment itself, states could try another approach to term limits by legislating the definition of a state "resident" and exclude those, like Congress members, who spend more than six months of the year out of the state.[249]

As the majority stated, the only sure way to enact valid term limits would be by constitutional amendment, but unfortunately, a term limit amendment failed to receive the necessary votes for ratification in Congress just months before the Court decided *U.S. Term Limits*.[250] Along these lines, another possibility would be a less stringent (and therefore maybe more popular) amendment, granting the states the power to individually decide whether to adopt term limits.[251]

At a lower level, states with constitutions containing qualifications clauses for their state representatives and executives which are worded

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the requirement that state justices of the peace serve out their terms before appearing on the ballot, which amounts to a two-year waiting period, a "de minimis" burden on candidacy). Both the Colorado and *Clements* enactments required a waiting period, instead of a complete ban, before candidates could appear on the ballot or serve in office. Hills, *supra* note 24, at 148-49. The majority expressly stated the *Clements* decision is still valid after *U.S. Term Limits*. *U.S. Term Limits*, 115 S. Ct. at 1870 n.48.

248. *U.S. Term Limits*, 115 S. Ct. at 1859, 1867-68. Unfortunately for Colorado voters, the measure uses the words "limitations on terms," similar to the language of the Arkansas amendment. COLO. CONST. art. XVIII, § 9(a)(1); *see also supra* note 220 and accompanying text (discussing the preamble to the Colorado amendment).

249. Senator Hank Brown, a Republican from Colorado, has already proposed such a bill on the federal level. Holly Idelson, *Constitutional Amendment: Ruling Pressures Congress to Address Term Limits*, CONG. Q. WKLY. REP., May 31, 1995, at 1479, 1482. The Qualifications Clauses already contain a state residency requirement, U.S. CONST. art. I, §§ 2, 3, and if passed at the state level, the federal government must yield to the states' definition of "resident." *See U.S. Term Limits*, 115 S. Ct. at 1888 (Thomas, J., dissenting) (discussing James Madison's statement, prior to national legislation of naturalization, that state law must be used to determine whether or not a Congressman-elect was indeed a "citizen"); *see also* Martson v. Lewis, 410 U.S. 679 (1973) (upholding Arizona statute mandating 50-day residency requirement for voters). *But see* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating Tennessee state law requiring voters to be residents for one year).

250. Paul Barrett & Gerald Seib, *Term Limits Are Set Back By High Court*, WALL ST. J., May 23, 1995, at A3. Although receiving an absolute majority, the amendment failed by 61 votes to get the two-thirds majority needed for submission to the states of constitutional amendments. *Id.*

251. *See* Adreil Bettelheim, *Term Limit Idea Originated in Colorado*, DENVER POST, March 30, 1995, at A17 (noting that one Senator contemplated introducing a bill giving states this right).

similarly to those in the United States Constitution now risk their state term limits being declared unconstitutional under the *state's* constitution.[252]

B. Other State Election Laws

The Court's holding will also impact state election laws beyond those only involving term limits because the majority held that *any* law handicapping a class of candidates "that has the sole purpose of creating additional qualifications indirectly" will be unconstitutional.[253] As noted by the dissent, it is unclear if this standard replaces the First and Fourteenth Amendment standards, or simply adds a new standard, for evaluating state statutes involving congressional candidates.[254] Several states currently have laws disqualifying, and thus under the majority's reasoning, handicapping, candidates who are mentally incompetent, have been convicted of voter fraud, are in jail, or are ineligible to vote.[255] The question revolves around what the Court will now define

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252. *See, e.g.*, Bradley Tilt, *Recent Legislative Developments in Utah Law*, 1994 UTAH L. REV. 1571, 1619-20 (1994) (arguing that if the Court struck down the Arkansas amendment, Utah's term limits on state officials would face similar challenge in state courts). Tilt suggests the Utah courts would find the qualifications clauses in Utah's constitution exclusive based on their past use of the maxim *expressio unius est exclusio alterius* ("the inclusion of one thing implies the exclusion of another") argument, discussed *supra* note 153. *See* Tilt, *supra*, at 1619 n.43.

253. *U.S. Term Limits*, 115 S. Ct. at 1871.

254. *See id.* at 1913 (Thomas, J., dissenting). The dissent also questioned whether these cases would withstand the "handicap" standard of the majority. *Id.* (Thomas, J., dissenting); *see also* Lowenstein, *supra* note 23, at 59-60 (maintaining that if the Court struck down quasi-term limits as a "qualification" this would confuse the definition of a "qualification"); Sullivan, *supra* note 224, at 867-68 (arguing that if the Court adopted a broad definition of qualification, one which would include quasi-term limits, it would create an "unmanageable standard" for review of state election laws); *supra* notes 49-78 and accompanying text (discussing previous standards used by the Court in determining the constitutionality of state election laws).

255. *See, e.g.*, FLA. STAT. § 97.041(1)(a) (1991) (disqualifying candidates found to be mentally incompetent); GA. CODE ANN. §§ 21-2-5, 21-2-8 (1993 & Supp. 1995) (disqualifying candidates convicted of voter fraud); ILL. COMP. STAT. ANN. ch. 10, § 5/3-5 (West 1993 & Supp. 1995) (disqualifying persons currently in prison from voting); R.I. GEN. LAWS § 17-14-1.2 (1988) (allowing only those "qualified to vote" to be candidates). Yet, when similar measures in other states have been challenged in the past, the lower courts have invalidated them using a Qualifications Clauses argument. *See U.S. Term Limits*, 115 S. Ct. at 1852-53 (listing similar state restrictions that have been struck down by lower courts on Qualifications Clauses arguments); Brief for Respondent Congressman Ray Thornton at 19-20, *U.S. Term Limits* (Nos. 93-1456, 93-1828)

as a "qualification" handicapping a class of candidates versus what is a procedure or "manner of elections" handicapping a class of candidates.[256]

C. *Other Areas of the Law and Government*

As noted in the Analysis section, the Court made an affirmative statement regarding states' power, beyond their ability to alter a Congress member's qualifications, under the Tenth Amendment.[257] The actual impact of this statement is uncertain—the majority argued it simply articulated a previously understood concept, but as evidenced by the closeness of the decision, this is far from clear.[258] Indeed, the decision could mean a nominee's views concerning the Tenth Amendment and states' rights may become the litmus test for confirmation as a Supreme Court Justice.[259]

The decision leaves states wondering what powers they retain, at a time when not just the states, but the voters and the federal government, are questioning the expansive nature of federal power in enacting federal programs.[260] Many of these programs involve "strings-attached legislation, which promises money to the states on condition that they do certain things, or unfunded mandates, which require state programs but provide no money to pay for them."[261] Under the majority's expansive Tenth Amendment holding, it is questionable if states will have the ability to challenge such legislation.[262]

(listing federal circuit and state court decisions striking down such provisions when challenged under the Qualifications Clauses).

256. *See supra* notes 127-30 (discussing majority's definition of a procedural versus substantive qualification).

257. *See supra* notes 106-09 and accompanying text (discussing majority's Tenth Amendment holding).

258. The four Justices dissented because they felt "the majority fundamentally misunderst[ood] the notion of 'reserved' powers." *U.S. Term Limits*, 115 S. Ct. at 1875 (Thomas, J., dissenting). *But see* William H. Freivogel, *Term Limits Ruling Rekindles States' Rights Debate*, PITTS. POST-GAZETTE, May 28, 1995, at A10 ("'It's obviously a very important case but in terms of its consequences, it is not a very important one.'") (quoting University of California at Berkeley law professor Jesse Choper).

259. Linda Greenhouse, *Term Limits Ruling Another Step In Constitution Debate*, MORNING NEWS TRIB. (Tacoma, Wa.), May 28, 1995, at D1.

260. *See, e.g.*, Holly Idelson, *Constitutional Amendment: States' Rights Loses in Close Vote*, CONG. Q. WKLY. REP., May 31, 1995, at 1480 (explaining that "[t]he case reached the high court at a time when Congress is re-examining the balance of power between Washington and state capitals"); *see also* Frantz, *supra* note 197, at 187-88 (stating that "the Court's decision in *U.S. Term Limits* will remain as damaging precedent in future cases concerning the scope of the Federal Government's power").

261. Aaron Epstein, *High Court Shifting Toward States' Rights*, L.A. DAILY NEWS, May 28, 1995, at N1, N15.

262. *See, e.g.*, Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995);

The decision also creates uncertainty as to what defines a democratic principle when voters adopt a measure through a seemingly democratic process and the Court then declares the process undemocratic.[263] Moreover, to voters not well-versed in the history of the Constitution, the Court's decision seems to oppose fundamental beliefs underlying the American political process.[264]

VII. CONCLUSION

The Court's holding in *U.S. Term Limits* that states may not impose term limits on federal representatives[265] hardly seems earth shattering. It is the means the Court used to come to this conclusion that makes the decision notable.

Both the majority and the dissenters relied heavily upon historical evidence to support their reasoning. Yet, the closeness of the decision shows that the historical evidence is "inconclusive," and thus another standard should have been used to determine the constitutionality of the Arkansas amendment.[266]

The majority of the Court felt otherwise and reached three conclusions based upon its interpretation of the historical evidence. First, states do not have the power under the Tenth Amendment to enact congressional term limits.[267] Second, the Arkansas term limits imposed a qualification barred by the exclusivity of the Qualifications Clauses

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Association of Community Orgs. for Reform Now v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995). In these cases, both courts cited *U.S. Term Limits* to support their reasoning that states must abide by the terms of the "Motor Voter Act" passed by Congress. The Act requires states to register voters when they apply for a driver's license, but provides no funds for this process.

263. *See supra* notes 216-17, 227-28, 241 and accompanying text (discussing the effect of voters enacting the amendment through elections as opposed to the government enacting the amendment through legislation.).

264. *See* Levy, *supra* note 186, at 1916 (noting that recent opinion surveys found over 70% "of the American people believe term limits would improve the political system") (footnote omitted).

265. *U.S. Term Limits*, 115 S. Ct. at 1871.

266. *See* Killenbeck & Sheppard, *supra* note 8, at 1127-28 (discussing overall relevance of historical evidence surrounding the framing of the Constitution); *see also supra* note 186 (discussing history of Tenth Amendment jurisprudence). As this Note has pointed out, the reasoning of the majority in *U.S. Term Limits* and of the Court in prior decisions actually supports what the voters were trying to accomplish with Amendment 73. *See supra* notes 198-242 and accompanying text.

267. *See supra* notes 106-09 and accompanying text.

contained in Article I of the Constitution.[268] Finally, the majority felt term limits could not survive as a regulation of congressional elections under the Times, Places, and Manner Clause.[269]

The effect of the holding goes beyond merely invalidating term limits imposed by states on their federal representatives.[270] Not only does the language used by the Court make any attempt to circumvent the Court's reasoning practically impossible, but the rationale may also call into question the validity of term limits imposed by states on their own state representatives.[271] Furthermore, states must now fear having election laws unrelated to term limits invalidated under the majority's new handicapping standard for evaluating these statutes.[272] The decision may also have serious implications for states trying to free themselves from economically burdensome federal programs; namely, the Court's narrow Tenth Amendment interpretation may have left states with limited avenues of redress.[273]

Finally, unfortunately for voters and the political process itself, the majority's reasoning and ultimate decision leaves chickens unable to vote for Colonel Sanders, and challengers without the powerful tool of term limits to use against incumbents.

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268. *See supra* notes 110-23 and accompanying text.
269. *See supra* notes 124-31 and accompanying text.
270. *See supra* notes 252-64 and accompanying text.
271. *See supra* note 252 and accompanying text.
272. *See supra* notes 253-56 and accompanying text.
273. *See supra* notes 257-62 and accompanying text.