ARTICLE I, SECTIONS TWO AND THREE — QUALIFICATIONS CLAUSES — THE CONSTITUTIONAL QUALIFICATIONS FOR CONGRESSIONAL SERVICE MAY NOT BE SUPPLEMENTED BY STATE LEGISLATION — *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

Joseph F. Accardo

I. INTRODUCTION

The Qualifications Clauses of the United States Constitution provide that individuals must meet certain age, citizenship, and residency requirements to be eligible for membership in the United States House of Representatives or Senate.[1] In addition, each house possesses the power to judge the "Qualifications of its own Members" pursuant to Article I, Section Five of the United States Constitution.[2]

Although congressional qualification disputes have not been confronted with any regularity, the United States Supreme Court's reasoning in *Powell v. McCormack*[3] indicates a reluctance to extend the Constitution's membership requirements. Prior to the *Powell* decision in 1969, judicial and non-judicial authorities almost universally believed that the Qualifications Clauses, along with a few other constitutional provisions, comprised the

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[1]Specific membership requirements are set forth for both the United States House of Representatives and Senate. Article I, § 2, cl. 3 of the United States Constitution provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Additionally, Article I, § 3, cl. 3 of the United States Constitution contains membership restrictions for the United States Senate: "No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

[2]Article I, § 5 of the United States Constitution provides, in pertinent part: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . . Each House may determine the rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 1, 2.

[3]395 U.S. 486 (1969). For a discussion of *Powell*, see *infra* notes 35-44 and accompanying text.

exclusive qualifications for House and Senate members.[4] This view was approved decisively by *Powell*.[5]

While the *Powell* decision restricts Congress's power to modify or add to the qualifications set forth in the Constitution, states have attempted to impose congressional qualifications beyond those enumerated in Article I.[6] The Tenth Amendment[7] to the United States Constitution is one of the argued justifications for exercising this type of state power.[8] A notable restriction on asserting a Tenth Amendment position is that any rights properly reserved to the states must be those which were within the States' pre-Tenth-Amendment "original powers," rather than rights later arising from the Constitution itself.[9]

Further, the Elections Clause[10] of the Constitution has been another potential source of state power to alter or add to these qualifications. The Elections Clause recognizes that state governments have the power to regulate elections, including the election of federal officials, provided that the state regulation comports with the federal right to vote and the right to be a

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[4]*See* Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL'Y 1, 4 (1994) (arguing that state-imposed term limits on United States Congress and Senate members add to qualifications specified by the Constitution and are, thus, void).

[5]*Id.*

[6]*See* Storer v. Brown, 415 U.S. 724 (1974) (upholding a state statute denying independent candidates the opportunity to appear on the general election ballot if the candidate was registered as a member of a political party during the year prior to the last primary election or voted in that primary election). For a discussion of *Storer*, see *infra* notes 45-48 and accompanying text.

[7]The Tenth Amendment to the federal Constitution provides: "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." U.S. CONST. amend. X.

[8]*See* Brief for the State Petitioner at 27-32, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (Nos. 93-1456 & 93-1828).

[9]*See infra* notes 76-78.

[10]U.S. CONST. art. I, § 4, cl. 1. The full text of this provision 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 Regulations, except as to the Places of chusing Senators." *Id.*

candidate.[11] In recent years, many states have overtly challenged the Qualifications Clauses by imposing term limits on members of Congress in their state.[12]

II. ARKANSAS' CONSTITUTIONAL VIOLATION: AMENDMENT 73

In 1995, the United States Supreme Court, by a five to four decision, refused to allow the State of Arkansas to impose qualifications, in addition to those in the federal Constitution, on members of Congress.[13] In U.S. Term Limits, Inc. v. Thornton, the Court found Amendment 73 to the

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[11]*See The Law of the Land: Can States Limit the Number of Terms Members of Congress May Serve?*, 1994-95 PREVIEW 142, 144. For example, Article I, § 2 does not provide for the requirement found in most states that United States Representatives must be elected from a state-drawn district. *Id.*

[12]For example, in 1990, Colorado voters approved an initiative to amend the state constitution to limit the terms of Colorado representatives in Congress: senators from Colorado were limited to two consecutive terms, while representatives could serve a maximum of six consecutive terms. *See* COLO. CONST. art. XVIII, § 9a(1) (stating that terms are considered consecutive under the Colorado term limit unless separated by four years).

In 1992, an additional thirteen states approved similar amendments limiting congressional terms for their representatives in Congress. *See* 50 CONG. Q. WKLY. REP. 3593-94 (November 7, 1992). Each of these states limited senatorial terms to two, but vary on the maximum number of terms permitted for Representative. *See* ARIZ. CONST. art. 7, § 8 (three terms); ARK. CONST. amend. LXXIII, § 2 (three terms); CAL. ELEC. CODE § 25003 (three terms); FLA. CONST. art. 6, § 4 (four terms); MICH. CONST. art. 2, § 10 (three terms); MO. CONST.. art. 3 § 45(a) (four terms, effective pending the adoption by half the states of term limits); MONT. CONST. art. 4 § 8 (three terms); N.D. CENT. CODE § 16.1-01-13 (six terms); OHIO CONST. art. V, § 8 (four terms); OR. CONST. art. 2, § 20 (three terms); S.D. CONST. art. 3, § 32 (six terms); WASH. REV. CODE ch. 29.68.016 (three terms); WYO. STAT. § 22-5-104 (three terms).

In 1994, Utah was the first state to enact term limits by its legislature rather than voter initiative. *See* UTAH CODE ANN. § 20A-10 -301. Like the Missouri provision, the Utah provision will not go into effect until 24 other states have established term limits. *Id.* Later that year, Oklahoma adopted a term limits measure, restricting Senators to two terms and Representatives to three terms. *See Synar Loses in Close Oklahoma Primary*, L.A. TIMES, Sept. 21, 1994, at A35.

[13]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

Arkansas State Constitution unconstitutional.[14] In reaching this decision, the majority relied on *Powell v. McCormack*,[15] reasoning that the power granted to each house of Congress to judge the "Qualifications of its own Members"[16] does not give it or the states power to alter or add to those "fixed" qualifications set forth in the Constitution,[17] nor to set additional qualifications as part of those original powers reserved to them by the Tenth Amendment.[18]

The majority explained that a state congressional term limits measure is unconstitutional when it has the effect of hindering a class of candidates and has the single purpose of indirectly creating additional qualifications.[19] Asserting that state-imposed congressional term limits would be such a fundamental change in the constitutional framework, the *Thornton* Court reasoned that term limits could be imposed only through proper constitutional amendment procedures.[20]

This casenote will examine the United States Supreme Court's decision in *Thornton*, primarily focusing on the Court's interpretation of the Qualifications Clauses in light of Arkansas's attempt to impose term limits on its congressional delegation. The issue of states' power to add congressional qualifications by imposing term limits has been debated heavily

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[14]*Id.*; *see also* ARK. CONST. amend. LXXIII. Amendment 73 effectively placed a three-term limit on Representatives and a two-term limit on Senators. *Id.* See *infra* note 25 for full text of amendment's section applicable to Arkansas Congressional Delegation.

[15]395 U.S. 486 (1969).

[16]*See* U.S. CONST. art. I, § 5, cl. 1. See *supra* note 2 outlining pertinent text.

[17]*Thornton*, 115 S. Ct. at 1852.

[18]*Id.* at 1854.

[19]*Id.* at 1867.

[20]*Id.* at 1871. Article V of the United States Constitution provides in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of ratification may be proposed by Congress . . . .

U.S. CONST. art. V.

in recent years.[21] It will be concluded in this casenote that the Framers intended qualifications for congressional membership to be exclusive, unalterable by either the states or Congress.

III. STATEMENT OF THE CASE

In the general election of November 3, 1992, the voters of Arkansas adopted Amendment 73 to the Arkansas state constitution.[22] Proposed as a "Term Limitation Amendment,"[23] Amendment 73 imposed limits on terms

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[21]For arguments in favor of state-imposed congressional term limits, see J. Richard Brown, Comment, *Coming to Terms with Congress: A Defense of Congressional Term Limits*, 22 CAP. U. L. REV. 1095 (1993); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 TEX. L. REV. 321 (1993); Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits of Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991); James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1 (1991); Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 ORE. L. REV. 561 (1994); Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321 (1993).

Alternatively, many commentators have maintained that state-imposed congressional term limits are unconstitutional. *See, e.g.*, Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992); Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569 (1991); Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1 (1992); Tiffanie Kovacevich, Comment, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 PAC. L. J. 1677, 1709-10 (1992); Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155 (1991); Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L. J. 1913 (1992); Lowenstein, *supra* note 4; Jonathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966 (1993); Richard A. West, Jr., *We The People: Limitations on Congressional Terms Are Unconstitutional Content-Determinative Regulations*, 46 RUTGERS L. REV. 1787 (1994).

[22]*Thornton*, 115 S. Ct. at 1845.

[23]*Id.* The amendment was clearly proposed as a means of limiting the terms of elected officials in the state, as evidenced by the amendment's preamble:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties

of service for various elected state officers.[24] The provision that initiated litigation, however, was Section Three of the amendment, which prohibited an otherwise eligible congressional candidate from appearing on the general election ballot if that individual had previously served a total of three terms in the House of Representatives or two terms in the Senate.[25]

On November 13, 1992, Bobbie Hill filed a complaint in the Circuit Court for Pulaski County, Arkansas, requesting a declaratory judgment that Section Three of Amendment 73 was "unconstitutional and void."[26] Subsequently, proponents of the amendment, Winston Bryant,[27] and U.S.

> 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. (quoting ARK. CONST. amend. LXXIII pmbl (emphasis added)).

[24]For example, § I of the amendment provides that no elected official in the executive branch of state government may serve more than a total of two 4-year terms. ARK. CONST. amend. LXXIII, § 1. Similarly, § II, referring to the legislative branch of the state government, provides that no member of the Arkansas House of Representatives may serve more than a total of two 4-year terms. ARK. CONST. amend. LXXIII, § 2.

[25]*Thornton*, 115 S. Ct. at 1845. § 3 of Amendment 73, the provision at issue in *Thornton*, applied to the Arkansas Congressional Delegation:

> (a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
> (b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

Id. (quoting ARK. CONST. amend. LXXIII, § 3).

[26]*Id.* at 1846. Hill filed the complaint on behalf of herself, similarly-situated Arkansas "citizens, residents, taxpayers and registered voters," and the League of Women Voters of Arkansas. *Id.* The complaint named as defendants then-Governor William Clinton, the Republican and Democratic parties of Arkansas, and other state officers. *Id.*

[27]Bryant, Attorney General of Arkansas, intervened in the suit on behalf of the state. *Id.*

Term Limits, Inc.,[28] intervened as third-party-defendants. The Arkansas Circuit Court, thereafter, held that Section Three of Amendment 73 violated Article I of the United States Constitution.[29]

The Arkansas Supreme Court granted certification, and affirmed the circuit court's holding in a five to two decision.[30] The three justice plurality reasoned that Amendment 73 was unconstitutionally restrictive because the states are not authorized "to change, add to, or diminish" the congressional service requirements set forth in the Qualifications Clauses.[31] The court further recognized that the excluded candidate's possibility of being elected as a write-in candidate was so minute that it could not diminish the amendment's unconstitutional intent.[32]

Winston Bryant, on behalf of the State of Arkansas, and U.S. Term Limits, Inc. petitioned for writs of *certiorari* to the United States Supreme

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[28]*See* Brief for Petitioners U.S. Term Limits, Inc., et al. at ii, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (Nos. 93-1456 & 93-1828).

[29]*Thornton*, 115 S. Ct. at 1846 (citing U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994) (Brown, J., plurality)).

[30]U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 351 (Ark. 1994) (Brown, J., plurality).

[31]*Id.* at 356 (Brown, J., plurality). Justice Robert L. Brown, the author of the opinion, asserted:

> If there is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state . . . . The uniformity in qualifications mandated in Article I provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by States would fly in the face of that order.

Id.

[32]*Id.* at 357 (Brown, J., plurality). Moreover, Justice Brown opined that the design and effect of the amendment was to disqualify congressional incumbents, rejecting the argument that the amendment was merely a "ballot access" measure. *Id.* at 356-57 (Brown, J., plurality). In separate opinions, Justices Dudley and Gerald P. Brown concurred that Amendment 73 was unconstitutional. *Id.* at 275 (Dudley, J., concurring); *Id.* at 287 (Brown, J., concurring). Justice Hays, one of the two dissenting justices, expressed that the text and history of the Qualifications Clauses indicated no restriction of the states' power to impose additional qualifications on congressional candidates. *Id.* at 367 (Hayes, J., dissenting).

Court.[33] Noting the importance of the issues in dispute, the Court granted *certiorari*.[34]

IV. THE SUPREME COURT'S PRIOR TREATMENT OF THE QUALIFICATIONS CLAUSES

Before *Thornton*, the decision in *Powell v. McCormack*[35] represented the only United States Supreme Court ruling on the constitutionality of imposing additional qualifications for congressional eligibility.[36] Unlike *Thornton*, which addressed state-imposed qualifications, *Powell* concerned itself with congressional qualifications added by Congress.[37]

After being re-elected to the United States House of Representatives in 1966, Adam Clayton Powell was investigated by Congress for engaging in alleged misconduct as Committee Chairman during his prior term.[38] After extensive debate, the House adopted House Resolution 278,[39] which excluded Powell from membership in the House and proclaimed his seat vacant.[40]

Subsequently, Powell and several voters from his electoral district filed suit, alleging that the House Resolution violated Article I, Section Two, which sets forth the exclusive qualifications for congressional membership.[41] The *Powell* Court, per Chief Justice Warren, ultimately accepted Powell's contention, concluding that Congress had no "authority to exclude any

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

[34]114 S. Ct. 2703 (1994). The Court consolidated *U.S. Term Limits, Inc. v. Thornton* and *Bryant v. Hill* into one case for argument. *Id.*

[35]395 U.S. 486 (1969).

[36]*Id.* at 518-548.

[37]*Id.*

[38]*Id.* at 489-90. Thereafter, a Select Committee of Congress was appointed to determine his eligibility to take his seat. *Id.* at 490.

[39]H.R. 278, 90th Cong., 1st Sess. (1967).

[40]Powell v. McCormack, 395 U.S. 486, 493 (1969). The Committee found that Powell had wrongfully diverted House funds for his own use, and that he had falsely reported foreign currency expenditures. *Id.* at 492.

[41]*Id.* at 493.

person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[42] While the Supreme Court has never ruled on the issue of state-imposed congressional eligibility requirements,[43] many lower courts have held that states lack such power.[44]

Additionally, in *Storer v. Brown*,[45] the Supreme Court confronted an election provision that it believed not to be an additional qualification.[46] The *Storer* Court faced a constitutional challenge to sections of the California Elections Code that regulated the procedures by which both independent and party-affiliated candidates could obtain ballot positions in general elections.[47] The majority in *Storer*, per Justice White, rejected the contention that the challenged provisions of the code created additional qualifications.[48]

While *Powell* and *Storer* confronted disputes concerning the Qualifications Clauses, the United States Supreme Court, before *Thornton*, had never discussed specifically the imposition of congressional term limits. The only courts to rule on the issue have found term limits to be

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[42]*Id.* at 522.

[43]State and lower federal courts, however, have concluded that *Powell* resolved the issue of Congress's power to impose additional qualifications. U.S. Term Limits, Inc., v. Thornton, 115 S. Ct. 1842 (1995); *see, e.g.*, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994); Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983); Stumpf v. Lau, 839 P.2d 120, 122 (Nev. 1992).

[44]*See infra* note 74 and accompanying text.

[45]415 U.S. 724 (1974).

[46]*Id.*

[47]*Id.* The provision required that candidates affiliated with qualified political parties win a primary election, and required independents to timely file nomination papers signed by a minimum of 5 percent of the total vote cast in the previous general election. *Id.* at 726-27. The Code further denied ballot position to independents who had voted in the most previous primary election or who had registered affiliation with a qualified party within the last year. *Id.* at 726.

[48]*Id.* at 746 n.16. In finding this line of argument to be "wholly without merit," the *Storer* Court noted that petitioners "would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election." *Id.*

unconstitutional because they add to the Qualifications Clauses.[49]

V. *U.S. TERM LIMITS, INC. V. THORNTON*: CONSTITUTIONAL QUALIFICATIONS FOR MEMBERSHIP IN UNITED STATES CONGRESS ARE EXCLUSIVE AND MAY NOT BE SUPPLEMENTED

A. THE COURT'S RELIANCE ON *POWELL V. MCCORMACK*

Justice Stevens, delivering the opinion of the Court,[50] prefaced the majority opinion by recognizing the significance of *Powell v. McCormack*,[51] and noted *Powell's* thorough examination of the history and meaning of the Qualifications Clauses.[52] Accordingly, the majority discussed the important issues raised in *Powell*, and initiated an extended discussion on the history relied on by the Court arriving at the *Powell* holding.[53]

While acknowledging that the Constitutional Convention debates were inconclusive,[54] Justice Stevens recognized *Powell's* reliance on "relevant historical materials" in determining the intent of the Framers and concluding that Congress lacks power to alter the fixed qualifications set forth in the Constitution.[55] The majority first reviewed the *Powell* Court's assertion that before the Constitutional Convention, English precedent stood for the proposition that the qualifications of members to serve in Parliament were

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[49]*See, e.g.*, Thorsted v. Gregoire, 841 F. Supp. 1068 (W.D. Wash. 1994); U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994); Stumpf v. Lau, 839 P.2d 120 (Nev. 1992).

[50]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995). Justice Stevens delivered the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. *Id.* at 1845. Justice Kennedy filed a concurring opinion. *Id.* at 1872. Justice Thomas wrote for the dissent, in which Chief Justice Rehnquist and Justices O'Connor and Scalia joined. *Id.* at 1875.

[51]395 U.S. 486 (1969). For a discussion of *Powell*, see *supra* notes 35-42 and accompanying text.

[52]*Thornton*, 115 S. Ct. at 1844 (citing *Powell*, 395 U.S. at 486).

[53]*Id.* at 1847-52 (citing *Powell*, 395 U.S. at 486).

[54]*Id.* at 1848 (citing *Powell*, 395 U.S. at 532).

[55]*Id.* (quoting *Powell*, 395 U.S. at 522).

unalterable.[56]

Justice Stevens then recounted *Powell's* contention that the Convention debates indicate that the Framers' intented that the qualifications in the Constitution to be exclusive.[57] The majority in *Thornton* attached particular significance to James Madison's cautionary language during the Convention debates concerning the dangers of allowing Congress the power to add property qualifications.[58] Therein, Gouvernor Morris had suggested a modification of the property requirement proposal, indicating that Congress should have unchallenged power to add qualifications.[59] While focusing on arguments for each position, Justice Stevens found it particularly significant that the Convention rejected both of these proposals.[60]

The Court then recognized the *Powell* Court's position that the post-Convention debates verify the Framers' acceptance of exclusive and unchangeable congressional qualifications.[61] Indeed, *Powell* attached special

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[56]*Id.*

[57]*Id.* at 1849 (citing *Powell*, 395 U.S. at 533-34).

[58]*Id.* Madison believed that the power to add such a property qualification would create:

> [A]n improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction.

Powell, 395 U.S. at 533-34 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 249, 250 (Max Farrand ed., 1911) ([hereinafter RECORDS OF THE CONVENTION]).

[59]*Powell*, 395 U.S. at 535 (citing 2 RECORDS OF THE CONVENTION, *supra* note 58, at 250). In response to Morris's proposal, Hugh Williamson of North Carolina expressed concern, stating "that if a majority of the legislature should happen to be composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body." *Id.*

[60]*Thornton*, 115 S. Ct. at 1849.

[61]*Id.* (citing *Powell*, 395 U.S. at 539).

importance to Alexander Hamilton's express and unambiguous reliance on the unalterability of these qualifications.[62] The *Powell* majority concluded its historical examination by observing that, during the first one hundred years after the Convention, Congress limited its power to those qualifications in Article I.[63] Justice Stevens agreed with the historical analysis and interpretation in *Powell*, recognizing that the Framers intended these qualifications to be fixed.[64]

The Court next reviewed *Powell's* examination of democratic principals in relationship to the Qualifications Clauses.[65] In *Powell*, Chief Justice Warren resounded Alexander Hamiliton's belief that allowing congressional imposition of any additional qualifications would conflict with the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"[66]

The *Powell* Court incorporated this rationale into the concept that every individual has the opportunity to be elected.[67] In setting forth this democratic principle of freedom to choose, the Court in *Powell* further

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[62]*Id.* In response to the antifederalist claim that the Constitution favored the rich and well-born, Hamilton wrote:

> [T]here is no method of securing to the rich the preferences apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. . . . *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*

Powell, 395 U.S. at 539 (quoting THE FEDERALIST NO. 60 at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added) [hereinafter THE FEDERALIST].

[63]*Thornton*, 115 S. Ct. at 1850 (citing *Powell*, 395 U.S. at 542).

[64]*Id.*

[65]*Id.*

[66]*Powell*, 395 U.S. at 547 (quoting 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (J. Elliot ed., 1863) [hereinafter ELLIOT'S DEBATES]).

[67]*Thornton*, 115 S. Ct. at 1850 (citing *Powell*, 395 U.S. at 540). James Madison described this opportunity in *The Federalist*, explaining that it was available to everyone, "whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Powell*, 395 U.S. at 540 n.74 (quoting THE FEDERALIST No. 52, at 326 (James Madison)). Thus, the opportunity of each individual to rule and be ruled can not be infringed. Levy, *supra* note 21, at 1923.

stressed not only that sovereignty is vested in the citizens, but it also confers on the people the guarantee to elect freely their representatives to the Federal Government.[68] In concluding its discussion of *Powell*, the *Thornton* Court asserted that the question of whether Congress could add to the Qualifications Clauses was integral to the *Powell* holding, and not a narrow issue as argued by the petitioners.[69]

B. THE TENTH AMENDMENT AND THE ISSUE OF RESERVED POWERS

The Court in *Thornton* next addressed petitioners' contention that, given their view that the Constitution does not expressly prohibit the states from imposing additional qualifications, the reserved powers principle of the Tenth Amendment[70] allows the states to add such qualifications.[71] Justice Stevens pointed out that the petitioners were unable to submit any cases approving of a state's power to add congressional qualifications, while numerous courts have determined that states lack such power.[72] Moreover,

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[68]*Thornton*, 115 S. Ct. at 1851 (citing *Powell*, 395 U.S. at 541). The *Powell* Court cited several authorities to demonstrate the Framers' understanding of popular sovereignty and the freedom to choose in relation to the idea of fixed qualifications. *Powell*, 395 U.S. at 540-43. For example, before the New York State Convention, Alexander Hamilton stressed: "The true principle of a republic is, that people should choose whom they please to govern them. . . . This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." *Id.* at 540-41 (quoting 2 ELLIOT'S DEBATES, *supra* note 66, at 257). Additionally, the *Powell* Court noted that those "restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.'" *Id.* at 543 (quoting 17 ANNALS OF CONG. 874 (1807)).

[69]*Thornton*, 115 S. Ct. at 1851 (citing *Powell*, 395 U.S. at 540). Justice Stevens noted several cases after the *Powell* decision which underscore the idea that the Qualifications Clauses are fixed. *Id.* at 1851-52. For example, in *Nixon v. United States*, the Supreme Court specifically confirmed *Powell's* rationale, affirming that the qualifications for congressional membership are of "a precise, limited nature" and "*unalterable by the legislature*, . . ." *Id.* at 1851 (quoting Nixon v. United States, 113 S. Ct. 732, 740 (1993) (emphasis added)).

[70]See *supra* note 7 for full text of the Tenth Amendment.

[71]*Thornton*, 115 S. Ct. at 1852.

[72]*Id.* Justice Stevens cites several cases asserting this idea. *Id.* at 1852-53; *see, e.g.*, Dillon v. Fiorina, 340 F. Supp. 1295, 1297-98 (N.D. Fla. 1970); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992); In re Opinion of Judges, 116 N.W.2d 233, 234 (S.D. 1962); Danielson v. Fitzsimmons, 44 N.W.2d 484, 486 (Minn. 1950); State *ex rel.* Jognson v.

commentators before *Powell* were similarly unanimous,[73] and, after *Powell*, courts have specifically struck down state-imposed qualifications that limit terms of congressional service.[74]

Predictably, the Court in *Thornton* did not accept the petitioners' Tenth Amendment claim.[75] The majority prefaced its rejection of this argument by asserting that the power to add congressional qualifications is not reserved by the states through the Tenth Amendment because it is not within the scope of the states' "original powers."[76] Clarifying the petitioners' misconception

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Crane, 197 P.2d 864 (Wyo. 1948); Buckingham v. State, 35 A.2d 903, 905 (Del. 1944); Stockton v. McFarland, 106 P.2d 328, 330 (Ariz. 1940); Ekwall v. Stadelman, 30 P.2d 1037 (Or. 1934); Chandler v. Howell, 175 P. 569 (Wash. 1918).

[73]*Thornton*, 115 S. Ct. at 1853. Joseph Story, whose view concerning the exclusivity of congressional qualifications proved to be influential, expressed that each member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (1833). Story believed that the language of the Qualifications Clauses requires that no other qualifications may be added: "From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." *Id.* at § 624. Some commentators have expressed that Story was overstating this implication in the language. *See, e.g.*, Lowenstein, *supra* note 4, at 9.

Story's position on qualifications was followed by other nineteenth century constitutional scholars, including James Kent, who believed that "[T]he objections to the existence of any such [state] power [are] . . . too palpable and weighty to admit of any discussion." *Thornton*, 115 S. Ct. at 1853 (quoting 1 JAMES KENT COMMENTARIES ON AMERICAN LAW 228 n.a (3d ed. 1836)). Additionally, Thomas Cooley wrote that, "[t]he Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state constitutions and laws can neither add to nor take away from them." *Id.* (quoting THOMAS COOLEY, THE GENERAL PRINCIPALS OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 268 (2d ed. 1891)). Both Kent's and Cooley's analyses gained recognition; however, the most persuasive arguments in support of Story's position were developed in the twentieth century. *See* Lowenstein, *supra* note 4, at 12.

[74]*Thornton*, 115 S. Ct. at 1853. *See, e.g.*, Thorsted v. Gregoire, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994); *Stumpf*, 839 P.2d at 123.

[75]*Thornton*, 115 S. Ct. at 1853-54.

[76]*Id.* at 1854. Nonetheless, as Justice Stevens noted, "[E]ven if the States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications." *Id.*

of the amendment,[77] Justice Stevens explained that reserved state powers are only those which the Constitution has not specifically delegated to the Federal Government.[78]

The Justice noted that once the foundation of the Federalist system was established by the Constitution, it became increasingly clear that a national government had been created to directly serve the people of the United States.[79] Echoing this idea, the majority noted that in a national government representatives owe allegiance not to the people of one state, but to the entire nation.[80] In developing this idea, Justice Stevens pointed to the

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[77]Justice Stevens pointed out what the Court considered a basic premise, that the amendment can only "reserve" that which existed "before." *Thornton*, 115 S. Ct. at 1854. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819), Chief Justice Marshall, on the subject of whether states have a Tenth Amendment right to tax corporations chartered by Congress, stressed that "an original right to tax [such federal entities] never existed, and the question of whether it has been surrendered cannot arise." *Id.* at 210.

[78]*Thornton*, 115 S. Ct. at 1854. The Court noted Chief Justice Marshall's language in *Sturges v. Crownshield*:

> [I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, *except* so far as they may be abridged by that instrument.

Id. (quoting Sturges v. Crownshield, 17 U.S (4 Wheat.) 70, 102 (1819) (emphasis added)); *see also* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549 (1995) ("The States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.").

[79]*Thornton*, 115 S. Ct. at 1855. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The Constitution . . . permitt[ed] direct contact between the National Government and the individual citizen.").

[80]*Thornton*, 115 S. Ct. at 1855. Comparing the national responsibility of Representatives and Senators to that of the President, the Court believed that the Constitution reflects the Framers' general agreement with the view subsequently articulated by Joseph Story, who wrote that states "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president." *See* STORY, *supra* note 73, at § 627.

language of Article I, Section Five[81] and asserted that "[t]he text of the Constitution . . . gives the representatives of *all the people* the final say in judging the qualifications of the representatives of *any one State*."[82]

C. THE PRECLUSION OF STATE POWER

Justice Stevens next reiterated that, even if the states possessed some control over congressional qualifications as part of their original powers, historical materials and the "basic principles of our democratic system" indicate that states are prohibited from adding to the exclusive qualifications in Article I.[83] Accordingly, the Court studied the history of the Constitutional Convention and Ratification Debates and concluded that the states lack the power to impose restrictions such as Amendment 73.[84]

The majority first examined the views of James Madison, specifically his writings in *The Federalist*.[85] While acknowledging the states' power to determine the qualifications for its electors,[86] Madison explicitly contrasted

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[81]Article I, § 5 provides, in part: "*Each House* shall be the judge of the Elections, Returns and Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1 (emphasis added).

[82]*Thornton,* 115 S. Ct. at 1855 (emphasis added). Additionally, the salary provisions set forth in Article I, § 6, providing that Representatives' salaries be paid out of the United States Treasury, further reflect that Congress owes its allegiance to the people rather than the states. *Id.*

In examining federal congressional elections, the Court further detailed the Article I, § 2, power given to the states to regulate the "Times, Places, and Manners" of elections, as well as the Article II, § 1 power to appoint electors. *Id.* Justice Stevens noted that "in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution." *Id.* at 1856. The Supreme Court previously has ruled that the Constitution, rather than expanding the states' power in the electoral process, limits it to the extent delegated in the Constitution's text. *See, e.g.*, United States v. Classic, 313 U.S. 299, 315 (1941).

[83]*Thornton*, 115 S. Ct. at 1856.

[84]*Id.*

[85]*Id.*

[86]The only constitutional restriction placed on the states in determining its electors is the requirement that qualifications for federal and state electors be uniform. *Id.* at 1857. Article I states: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State

this authority with the lack of state power over the qualifications of the elected.[87] Displaying the importance of *The Federalist* writings, Justice Stevens then examined specific constitutional provisions to demonstrate the Framers' intent that states lack the power to add to the Qualifications Clauses.[88] The majority recognized the Framers' fear that the states' diverse interests would undermine the national government, and justified the adoption of constitutional provisions intended to diminish the possibility of state interference with national elections.[89]

Justice Stevens explained that Article I, Section Two,[90] prevents discrimination against federal electors by requiring that qualifications for federal and state electors be the same.[91] Further illustrating the states' lack of power to add to congressional qualifications, the Court pointed to Article I, Section Four,[92] which affords the states power to regulate the "Times, Places and Manner of holding Elections," but simultaneously guards against state abuse by giving Congress the power to "by Law make or alter such Regulations."[93] The Framers' concerns regarding state power are similarly

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Legislature." U.S. CONST. art. I, § 2, cl. 1.

[87]*Thornton*, 115 S. Ct. at 1856. Madison noted: "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention." THE FEDERALIST NO. 52, at 325 (James Madison).

[88]*Thornton*, 115 S. Ct. at 1857.

[89]*Id.*

[90]See *supra* note 81 for pertinent text of Article I, § 2, cl. 1.

[91]*Thornton*, 115 S. Ct. at 1857. As Madison warned, allowing states the power to impose different qualifications for state and federal electors would necessarily render the Federal Government more dependent on the states rather than the people. *Id.*; *see also* THE FEDERALIST No. 52, at 326 (James Madison).

[92]See *supra* note 10 for full text of Article I, § 4, cl. 1.

[93]*Thornton*, 115 S. Ct. at 1857. Justice Stevens asserted that the states' potential abuse of this power was the Framers' chief concern. *Id.* The Court pointed to Hamilton's notion that giving the states the exclusive power to regulate elections for federal office "would leave the existence of the Union entirely at their mercy." *Id.* at 1857-58 (quoting THE FEDERALIST No. 59, at 363 (Alexander Hamilton). Hamilton's fear was amplified by Gouvenor Morris, who suggested the possibility that states could make false election returns and then not provide for new elections. *Thornton*, 115 S. Ct. at 1857 (citing 2 RECORDS OF THE CONVENTION, *supra* note 58, at 241).

reflected in the Convention's ultimate agreement to allow Congress the power to set its own compensation.[94]

Given these concerns expressed by the Framers, Justice Stevens concluded that the Framers never intended that the states should have the power to enact legislation such as Amendment 73.[95] The Framers' intent to give the federal government the power to set congressional qualifications is further evidenced by the language in Article I, Section Five, Clause One.[96] The majority explained that because this provision grants "[e]ach house" the authority to judge the qualifications of its own members, a *federal* tribunal has the ultimate authority to consider the qualifications of a congressional member.[97]

The majority solidified its position by pointing out that the ratification debates contained no declarations of state power in setting qualifications.[98] While the question of whether to incorporate term limits, or "rotation," was a significant source of controversy, the Constitution submitted for ratification included no such provision.[99] The Federalists nonetheless maintained that

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[94]*Id.* at 1858. Article I, § 6 provides in part that "Senators and Representatives shall receive a compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." U.S. CONST. art. I, § 6, cl. 1. Federalists, such as James Madison and George Mason, voiced these concerns due to fears of improper dependence upon the states and the states' power to reduce the provision to exceedingly low points. *Thornton*, 115 S. Ct. at 1858. The Framers' earlier decision to reject a proposal which would allow states to call back their own representatives indicates these same concerns. *Id.* at 1858 n.20.

[95]*Thornton*, 115 S. Ct. at 1858.

[96]*Id.* at 1859. See *supra* note 2 for pertinent text of Article I, § 5, cl. 1.

[97]*Thornton*, 115 S. Ct. at 1859. This view comports with the idea that such qualifications are fixed in the Constitution, and therefore are unalterable by the states. *Id.* The Court explained that federal questions such as congressional qualifications should accordingly be answered by federal tribunals because rights dependent on federal law "should be the same everywhere" and "their construction should be uniform." *Id.* (quoting Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 632 (1875)).

[98]*Id.*

[99]*Id.* Opponents of ratification believed that the absence of a rotation requirement would perpetuate the members' tenure in office, leading to a loss in dependence and a disassociation with the people. *Id.* at n.23; *see also* 2 ELLIOT'S DEBATES, *supra* note 66, at 309-10. A proposal including rotation for House members submitted at the Convention was defeated unanimously. *Thornton*, 115 S. Ct. at 1859 n.22; *see also* 1 RECORDS OF THE CONVENTION, *supra* note 58, at 217.

a rotation provision ultimately would deprive the people of their freedom to choose.[100] Irrespective of which argument was more persuasive, the Court found it compelling that the ratification debates contain no statements that the draft constitution should allow states to require rotation for their congressional representatives.[101]

Justice Stevens then moved on to look at Congress's experience with state-imposed congressional qualifications subsequent to the ratification debates, and again determined that states lack power in this area.[102] In 1807, Congress first confronted this issue when the eligibility of William McCreery, a Representative from Maryland, was challenged because he allegedly failed to satisfy a state-imposed residency requirement.[103]

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[100]*Thornton*, 115 S. Ct. at 1860. For example, Robert Livingston argued: "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism." *Id.* (quoting 2 ELLIOT'S DEBATES, *supra* note 66, at 292-93).

[101]*Id.* at 1860. Moreover, several statements made by proponents of rotation reveal the common understanding that the Constitution would not allow for rotation: "We are deprived of annual elections, have no rotation, and cannot recall our members." 2 ELLIOT'S DEBATES, *supra* note 66, at 62 (Mass., Kingsley).

[102]*Thornton*, 115 S. Ct. at 1861.

[103]*Id.* (citing Powell v. McCormack, 395 U.S. 486, 542 (1969)). In recommending that McCreery be seated, the House Committee of Elections reasoned:

> [Q]ualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules.

Powell, 395 U.S. at 542 (1969) (quoting 17 ANNALS OF CONG. 871 (1807)). The Chairman of the House Committee on Elections explained these principles during the ensuing debate:

> The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them.

Powell, 395 U.S. at 542-43 (quoting 17 ANNALS OF CONG. 872 (1807)). The House, however, did not in its entirety vote on the Committee report, choosing to vote only on

McCreery was ultimately seated,[104] apparently confirming the belief of commentators at that time that states have no power to add qualifications.[105]

Continuing the discussion regarding this lack of state power, Justice Stevens next examined fundamental democratic principles, specifically, those recognized in *Powell*.[106] Particularly significant to the *Powell* Court was the egalitarian ideal that eligibility for election to Congress should be open to everyone.[107] Similar to the Court in *Powell*, the *Thornton* majority recognized that the imposition of additional qualifications, whether by Congress or the states, compromises this egalitarian ideal.[108]

Justice Stevens further stated that both state and congressionally-imposed qualifications violate the second critical idea set forth in *Powell*:

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whether McCreery was entitled to his seat. *Thornton*, 115 S. Ct at 1861 (citing 17 ANNALS OF CONG. 1238 (1807)).

[104]The resolution entitling McCreery to his seat was passed by a vote of 89-18. *See* 17 ANNALS OF CONG. 1238 (1807).

[105]*Thornton*, 115 S. Ct. at 1861. For instance, in reference to the McCreery debates, one commentator stated: "By the decision in this case, [and that in another contested election], *it seems to have been settled* that the States have not a right to require qualifications from members, different from, or in addition to, those prescribed by the constitution." *Id.* at 1862 (quoting CASES OF CONTESTED ELECTIONS IN CONGRESS 171 (M. Clarke & D. Hall eds., 1834 (emphasis in original)). Justice Stevens concluded by noting that the *Powell* Court viewed the seating of McCreery as the House's acknowledgment that congressional qualifications are fixed. *Id.* at 1862.

The Senate has also been faced with state-imposed qualifications challenging the eligibility its members and, in each instance, has reaffirmed the exclusivity of the Constitution's qualifications and voted to seat the challenged member. *Id.* (citations omitted).

[106]*Id.*

[107]*Thornton*, 115 S. Ct. at 1862. *Powell* recognized that this egalitarian principle provided a critical foundation for the structure of the Constitution, as its theme was prevalent throughout the constitutional debates. *Id.* For instance, James Madison wrote:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualifications of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

Id. at 1862 (quoting THE FEDERALIST NO. 57, at 351 (James Madison)).

[108]*Id.* at 1863.

"the people should choose whom they please to govern them."[109] State-imposed qualifications, such as Amendment 73, further compromise the fundamental principle that Congress is not a confederation of separate sovereign nations, but rather an entire body comprised of representatives of a single people.[110] The majority concluded that giving this type of power to individual states would ultimately create a patchwork of state qualifications, undermining the consistency and the national composition that the Framers visualized and sought to ensure.[111]

In maintaining that states possess this power, the petitioner, U.S. Term Limits, Inc., argued that the states' practice following the Constitution's ratification indicated that the states understood these qualifications to be non-exclusive.[112] While at the time of the Convention most states imposed property requirements upon their legislatures, the majority indicated that only the State of Virginia placed such restrictions on members of Congress.[113] When doubt surfaced regarding the constitutionality of the provision, the property qualification was replaced fifteen years later with a provision stipulating that representatives be only "qualified according to the constitution of the United States."[114]

Justice Stevens next addressed the states' practice specifically regarding

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[109]*Id.* at 1862 (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).

[110]*Id.* at 1863. The Framers considered this principle critical in their discussion of qualifications. *Id.* at 1864. For example, Morris stated that in the House, "*the people at large*, not the *States*, are represented." *Id.* (quoting 2 RECORDS OF THE CONVENTION, *supra* note 58, at 217 (emphasis in original)).

[111]*Thornton,* 115 S. Ct. at 1864. The Court found significant Chief Justice Marshall's language in *McCulloch v. Maryland:*

> Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States. They are given by all, for the benefit of all — and upon theory should by subjected to that government only which belongs to all.

Id. (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 209 (1819)).

[112]*Id.* at 1864.

[113]*Id.* at 1864-65. The Virginia provision required that a representative be, inter alia, a "freeholder." *Id.*

[114]*Id.* at 1865 (quoting 1813 Va.Acts, ch. 23, § 2).

term limits.[115] The Court found significant that, while states sought to impose specific property qualifications and term limits on their own state officers,[116] no state attempted to place such restrictions on its federal representatives.[117]

While Sections One and Two of Arkansas Amendment 73 expressly barred long-term state legislators from running for office, Section Three merely prohibited federal Senators and Representatives from being certified as candidates and disallowed their names from appearing on the ballot.[118] Thus, under Amendment 73 Arkansas candidates for federal congressional office could run as write-in candidates, and could serve if elected.[119] Noting this distinction, the petitioners argued that only a legal bar to congressional service created an impermissible qualification, keeping Amendment 73 consistent with the Constitution.[120]

As a means of minimizing the restrictive effect of Amendment 73, the petitioners, U.S. Term Limits, Inc., supported their interpretation of the amendment with language from *Storer v. Brown*.[121] U.S. Term Limits, Inc. maintained that under *Storer*, the language of Amendment 73 was

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[115]*Id.* The Court noted that the Articles of Confederation contained a term limit provision which stipulated that "no person shall be capable of being a delegate for more than three years in any term of six years." *Id.* at n.36 (citations omitted).

[116]The Court, however, reiterated that only Virginia imposed property qualifications on its congressional candidates, despite the variety of property, religious, and other qualifications set forth in many state constitutions. *Id.* at 1866 n.41.

[117]*Id.* at 1866. The petitioners contended that the imposition by several states of district residency requirements and congressional nominating processes justified the states' belief that they could supplement the congressional membership qualifications of the Constitution. *Id.* The majority, however, was unpersuaded by this argument. *Id.* at 1866 n.41. Justice Stevens maintained that the establishment of a nominating process "is no more setting a qualification for office than is creating a primary," and that the states' imposition of district residency requirements was likely done as an analog to the Article I state residency requirements. *Id.*

[118]*See* ARK. CONST. amend. 73, LXXIII. For a more complete discussion of Amendment 73, see *supra* note 25.

[119]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1867 (1995).

[120]*Id.*

[121]*Id.* (citing Storer v. Brown, 415 U.S. 724 (1974)). For a discussion of *Storer*, see *supra* notes 45-48 and accompanying text.

constitutional.[122]

Addressing this contention, the majority explained that the Court did not need to decide whether petitioners' understanding of qualifications was correct because, even if it was, Amendment 73 was still unconstitutional.[123] Justice Stevens stressed that Amendment 73 was Arkansas's indirect attempt to accomplish what the Constitution prohibited it from achieving directly,[124] and could not be construed as anything but a means of preventing the election of incumbents.[125]

Accordingly, the majority was not persuaded by the petitioners' argument that, since Amendment 73 did not prohibit write-in campaigns, candidates restricted from the ballot still maintained a real opportunity for victory.[126] The Court noted that all of the relevant findings concerning write-in candidacies suggested that "there is nothing more than a faint glimmer of possibility that the excluded candidate will win."[127] Justice

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[122]*Thornton*, 115 S. Ct. at 1867.

[123]*Id.*

[124]*Id.* The Court recalled its previous opinions which barred indirect or sophisticated measures of infringing on constitutional protections. *Id.* (citing Harman v. Forssenius, 380 U.S. 528, 540 (1965); Smith v. Allwright, 321 U.S. 649, 664 (1944); Lane v. Wilson, 307 U.S. 268, 275 (1939)).

Justice Dudley of the Arkansas Supreme Court, writing for the plurality, also recognized Amendment 73 as an indirect attempt to circumvent the Constitution, terming the amendment as an "'effort to dress eligibility to stand for Congress in ballot access clothing" because "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.'" *Id.* (quoting U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (Ark. 1994)).

[125]*Id.* at 1867-68. The Court found compelling the preamble to Amendment 73, which expressly stated that the amendment limits terms of elected officials. *Id.* at 1868. See *supra* note 23 for full text of preamble.

[126]*Thornton*, 115 S. Ct. at 1868. Petitioners noted that this possibility for write-in election especially holds true for an entrenched incumbent. *Id.*

[127]*Id.* The Court reviewed data submitted to the Arkansas Supreme Court, indicating that only one in over 1,300 Senate elections since 1913 had resulted with victory for a write-in candidate, while only five write-in candidates for the House had won in over 20,000 House elections since 1900. *Id.* at 1868 n.43. Additionally, the majority noted prior United States Supreme Court cases which have suggested the minimal chances of write-in candidates. *Id.* at 1868 n.45 (noting that "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot" (quoting Lubin v. Panish, 415 U.S. 709, 719 (1974)) (citing Burdick v. Takushi, 504 U.S. 428, 437 n.7 (1992))); Anderson v.

Stevens explained that, even if incumbents may occasionally win re-election as write-in candidates, Amendment 73 still unconstitutionally handicapped a class of candidates by purposely and obviously evading the requirements of the Qualifications Clauses.[128]

The Court additionally did not accept the petitioners' assertion that Amendment 73 was a permissible exercise of state power to regulate the "manner" of elections under the Elections Clause.[129] The majority considered Amendment 73 to be inconsistent with the Framers' view that the Elections Clause should provide states the authority to create procedural regulations, not the power to exclude groups of candidates from federal office.[130] Similarly, the Court's prior cases interpreting state power pursuant to the Elections Clause reflected the Framers' understanding. [131]

Celebrezze, 460 U.S. 780, 799 n.26 (1983); United States v. Classic, 313 U.S. 299, 313 (1941)).

[128]*Id.* at 1868. The Court noted that permitting states to evade the Qualifications Clauses in this manner "trivializes the basic principles of our democracy that underlie those Clauses." *Id.*

[129]*Id.* at 1868-69. See *supra* note 10 for full text of Elections Clause.

[130]*Thornton,* 115 S. Ct. at 1869. The Constitutional Convention debates illustrate the Framers' intent regarding the Elections Clause. *Id.* For instance, James Madison exhibited the procedural aspect of the Elections Clause by noting that it covered "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district." *Id.* (quoting 2 RECORDS OF THE CONVENTION, *supra* note 58, at 240). Similarly, in The Federalist No. 60, Alexander Hamilton expressly distinguished the general authority to set qualifications from the limited power under the Elections Clause, noting that:

> [T]here is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.

Id. (quoting THE FEDERALIST No. 60, at 371 (emphasis in original)).

[131]*Id.* at 1869. For example, the Supreme Court has previously explained that, "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights." *Id.* at 1870 (quoting Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986)).

The Court, however, also noted its previous approval of state regulations designed to ensure that elections are fair, honest, and organized. *Id.* (citing Storer v. Brown, 415

Justice Stevens asserted that the provisions held to be constitutional in *Storer* and other Election Clause cases were distinguishable from Amendment 73.[132] The provisions at issue in these previous Election Clause cases served the states' interest in preserving the integrity and order of the election process.[133] The majority found that, unlike Amendment 73, these provisions did not evade the Constitution's prohibition against imposing supplementary qualifications for congressional service, and did not exclude candidates from the ballot without regard to the candidates' electoral support.[134]

Justice Stevens concluded by clarifying that the majority's opinion did not seek to decide the merits of adopting congressional term limits.[135] The Justice emphasized that any such change, if considered, must come from the amendment procedures in Article Five,[136] not through Congress or any individual state.[137] Rather, the scope of the opinion reflected the majority's belief that by allowing several states to adopt congressional term limits, the Court would be contradicting the Framers' intent.[138] Members of Congress, while chosen by separate states, become members of a national government when elected and are, thus, servants of the people of the United States.[139] Accordingly, the *Thornton* majority viewed Arkansas's Amendment 73 as a threat against the constitutional structure envisioned by the Framers.[140]

U.S. 724, 731 (1974) (recognizing the "States' strong interest in maintaining the integrity of the political process by preventing interparty raiding")); *see also* Burdick v. Takushi, 504 U.S. 428 (1992); Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[132]*Thornton,* 115 S. Ct. at 1870.

[133]*Id.*

[134]*Id.*

[135]*Id.* at 1871.

[136]See *supra* note 20 for pertinent text of Article V.

[137]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1871 (1995).

[138]*Id.*

[139]*Id.*

[140]*Id.*

D. JUSTICE KENNEDY EXAMINES FUNDAMENTAL PRINCIPLES OF FEDERALISM IN FINDING AMENDMENT 73 UNCONSTITUTIONAL

Justice Kennedy, concurring in the judgment of the majority, wrote separately to explain why Arkansas's Amendment 73 disparages the "republican character of the National Government."[141] Departing from the question of whether the Qualifications Clauses were exclusive, Justice Kennedy believed that Amendment 73 violated the fundamental principles of federalism.[142]

Justice Kennedy first discussed the origins of the federalist form of government created by the Constitution.[143] The Justice emphasized that the unique dual form of government grants the citizens both state and federal capacities, each protected from encroachment by the other.[144] More importantly, noted Justice Kennedy, the Framers of the Constitution developed a republican form of government whose power was derived from the people.[145] The concurring Justice, however, noted that while states retain their separate political identities, the national government must be operated without interference from the separate states.[146]

Notwithstanding the states' constitutionally guaranteed powers in the

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[141]*Id.* at 1872 (Kennedy, J., concurring).

[142]*Id.*

[143]*Id.*

[144]*Id.*

[145]*Id.* Justice Kennedy found significant the Court's language in *McCulloch v. Maryland*, where Justice Marshall noted that, "The government of the Union . . . is . . . emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly upon them, and for their benefit." *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 199 (1819)).

[146]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1873 (1995) (Kennedy, J., concurring). Justice Kennedy again pointed to Justice Marshall's language in *McCulloch*, which rejected the notion that states could interfere with federal powers: "This was not intended by the American people. They did not design to make their government dependent on the States." *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 211).

election process,[147] Justice Kennedy reasoned that nothing in the *Federalist Papers* or the Constitution allows the states to interfere with the selection of federal representatives.[148] While the Constitution allows the states to set the qualifications of federal electors,[149] these electors perform a federal function and exercise a federal right when they vote.[150]

Justice Kennedy concluded the concurrence by pointing out that, if a majority of Arkansas voters selected a successful congressional candidate, Amendment 73 would preclude them from exercising that same right in the future.[151] This burden, along with the amendment's overall infringement on the relationship between United States citizens and the Federal Government, was excessive enough for Justice Kennedy to characterize it as unconstitutional.[152]

E. JUSTICE THOMAS CONTENDS THAT THE FEDERAL CONSTITUTION CONTAINS NOTHING TO PROHIBIT THE STATE OF ARKANSAS FROM ASSERTING ITS "RESERVED POWERS" UNDER THE TENTH AMENDMENT

In an emphatic three-part dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, criticized the majority's

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[147]For instance, Article I, § 2, cl. 3 provides for the use of state boundaries in fixing the size of congressional delegations. U.S. CONST., art. 1, § 2, cl. 3. Article I also ensures that individual states have a minimum of one representative, and grants states specific powers over the times, places, and manner of federal elections. U.S. CONST., art. 1, § 4. cl. 1.

Article II, § 2, cl. 3 provides that when the President is elected by the House of Representatives, each state's delegations have one vote. U.S. CONST., art. 2, § 2, cl. 3. Additionally, Article II allows states to appoint electors for the President. U.S. CONST., art. 2, § 1, cl. 2.

[148]*Thornton*, 115 S. Ct. at 1873 (Kennedy, J., concurring). Justice Kennedy considered the selection of legislators as "the most basic relation between the National Government and its citizens." *Id.*

[149]*See* U.S. CONST. art. I, § 2, cl. 1.

[150]*Thornton*, 115 S. Ct. at 1873 (Kennedy, J., concurring); *see also* United States v. Classic, 313 U.S. 299 (1941); Ex Parte Yarbrough, 110 U.S. 651 (1884).

[151]*Thornton*, 115 S. Ct. at 1874 (Kennedy, J., concurring).

[152]*Id.* at 1875 (Kennedy, J., concurring).

reading of the Qualifications Clauses.[153] The dissent maintained that the Constitution contains no provision precluding states from prescribing eligibility requirements for its congressional candidates.[154]

The dissent argued that the majority misunderstood the Tenth Amendment concept of "reserved powers."[155] Justice Thomas explained that the principle of "reserved powers" allows the people of each state, rather than the nation as a whole, to be the ultimate source of the Constitution's authority.[156] The Justice found that the Tenth Amendment's reservation of powers to the "[s]tates respectively, or to the people" plainly indicates that any powers not specified in the federal Constitution can be freely exercised by the individual states.[157] Thus, the dissent believed that, absent a specific provision in the Federal Constitution invalidating it, Amendment 73 could not be struck down.[158]

The dissent then criticized the majority's understanding that the Tenth Amendment does not allow states to "reserve" those powers which they did not control at the time of the Constitution's ratification.[159] Justice Thomas asserted that the majority, in relying on *McCulloch v. Maryland*[160] to reach

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[153]*Id.* (Thomas, J., dissenting).

[154]*Id.* Justice Thomas prefaced the dissenting opinion by noting that, where the Constitution is silent on an issue, it cannot bar action by the states or the people. *Id.*

[155]*Id.* See *supra* note 7 for full text of Tenth Amendment.

[156]*Thornton*, 115 S. Ct. at 1875 (Thomas, J., dissenting). Justice Thomas found significant James Madison's notion that the Constitution's authority rests in "the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." *Id.* at 1875-76 (Thomas, J., dissenting) (quoting THE FEDERALIST NO. 39 at 243) (James Madison)).

[157]*Id.* at 1876 (Thomas, J., dissenting). The dissent interpreted the Tenth Amendment's phrase "the people" to also refer to the states individually rather than the nation as a whole, citing several provisions in the Constitution which specifically allow for "state" action. *Id.* at 1876-77 (Thomas, J., dissenting). Consequently, the dissenting Justice asserted that, "The Constitution simply does not recognize *any* mechanism for action by the undifferentiated people of the Nation." *Id.* at 1877 (Thomas, J., dissenting) (emphasis added).

[158]*Id.*

[159]*Id.* at 1878 (Thomas, J., dissenting).

[160]17 U.S. (4 Wheat.) 159 (1819).

this conclusion, misinterpreted Justice Marshall's Tenth Amendment analysis.[161] The dissenting Justice maintained that, even under *McCulloch*, powers not set forth in the Constitution were "reserved" to the states, and pointed out Justice Marshall's observation in *McCulloch* that particular disputes concerning federal versus state power "depend on a fair construction of the whole [Constitution]."[162] The Justice expressed that *McCulloch* was really a question of federal law overtaking state law, rather than the question of whether Maryland "reserved" the power to tax before the ratification of the Constitution.[163]

The dissent in *Thornton* considered Joseph Story's 1833 constitutional law treatise as the majority's only true support for its Tenth Amendment view.[164] While acknowledging Story's scholarship and accomplishments, Justice Thomas noted that he was not a member of the founding generation, and that his work merely represented his own understanding of the Constitution.[165]

In maintaining the concept of state power, the dissent next distinguished what it believed were two separate concepts: the selection of congressional representatives and the body they form once elected.[166] Justice Thomas explained: "[The people] form a national body beyond the control of the individual States until the next election. But the selection of representatives in Congress is indisputably an act of the people of each State, not some abstract people of the Nation as a whole."[167] Thus, when the people of a

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[161]*Thornton*, 115 S.Ct. at 1879 (Thomas, J., dissenting).

[162]*Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 200).

[163]*Id.* at 1880 (Thomas, J., dissenting). The significant concept relied on in *McCulloch*, Justice Thomas insisted, was the Supremacy Clause of Article VI, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land." *Id.* at 1879 (Thomas, J., dissenting) (quoting U.S. CONST. art VI).

[164]*Id.* at 1880 (Thomas, J., dissenting); *see also* STORY, *supra* note 73, at §§ 623-28.

[165]*Thornton*, 115 S. Ct. at 1880 (Thomas, J., dissenting). Justice Thomas further noted that in several instances the Supreme Court has deemed Story's views to be more nationalistic than authorized by the Constitution. *Id.* (citations omitted).

[166]*Id.* at 1881 (Thomas, J., dissenting).

[167]*Id.* In setting forth this distinction between selection and assembly, the dissent pointed to Article I, § 2, which provides that members of the House are chosen "by the People of the several States." *Id.* (quoting U.S. CONST. art. I, § 2, cl. 1).

particular state pick their congressional representatives, they act as the people of their state, not as agents for people of the United States.[168] The dissent explained the that the election process creates a "direct link" between the representatives from each state and that state's people, not between the people and the nation as urged by the majority.[169]

Justice Thomas was unpersuaded by the majority's reasoning that, among other reasons, states should be precluded from setting qualifications for its congressional members simply because they cannot do so for the office of President.[170] While the individual states have no "reserved" power to set presidential qualifications, the dissent noted that states do set qualifications for its presidential electors — the delegates that an individual state selects to represent it in the electoral college that ultimately selects the President.[171] In maintaining that this power to set qualifications for presidential electors is not enumerated in the Constitution but ultimately "reserved" to the states,[172] Justice Thomas criticized the majority for its failure to grasp the scope of the Tenth Amendment.[173]

Further, the dissent differed with the Court's interpretation of the "Times, Places, and Manners" Clause of Article I.[174] While the majority

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[168]*Id.* The dissent found the Court's language in *In re Green* to be significant:

> Although [Presidential] electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States then are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.

Id. (quoting In re Green, 134 U.S. 377, 379 (1890)).

[169]*Id.* at 1882 (Thomas, J., dissenting).

[170]*Id.*

[171]*Id.* at 1883 (Thomas, J., dissenting). States may establish qualifications for its delegates to the electoral college, provided that those qualifications are consistent with other constitutional provisions, namely the First and Fourteenth Amendments. *Id.* (citing Williams v. Rhodes, 393 U.S. 23, 29 (1968); McPherson v. Blacker, 146 U.S. 1 (1892)).

[172]Article II, § 1, however, allows the state legislatures to specify the "manner" in which states can appoint presidential electors. U.S. CONST. art. II, § 1, cl. 3.

[173]U.S. Term Limits, Inc., v. Thornton, 115 S. Ct. 1842, 1883 (1995) (Thomas, J., dissenting).

[174]*Id.* at 1883; *see also supra* note 10 (outlining the full text of Article I, § 4).

read the provision as a power granted to the states, the dissent viewed it as a duty imposed on the states, completely independent of any "reserved" powers.[175] Justice Thomas asserted that the intent of the "Times, Places, and Manners" Clause was to expressly ensure that states held congressional elections in the first place.[176] The dissent similarly noted that the language in Article Two, Section One,[177] indicated by the majority as a power granted to the states, imposes an additional obligation on the states, and has no relationship with congressional elections.[178]

The dissent next turned to the majority's interpretation of the Qualifications Clauses.[179] Justice Thomas asserted that the Qualifications Clauses, rather than being exclusive as urged by the majority, merely establish the minimum qualifications necessary for congressional service.[180] While acknowledging that the Qualifications Clauses prohibit individual states from eliminating all congressional eligibility requirements, the dissent believed this purpose would not be frustrated by allowing states to require

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[175]*Thornton*, 115 S. Ct. at 1883 (Thomas, J., dissenting).

[176]*Id.* In support of this point, the dissent cited a summary of John Jay's speech at the New York ratification convention:

> Suppose that, by design or accident, the states should *neglect to appoint representatives*; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have the power, by law, to support the government, and prevent the dissolution of the Union. "[Jay] believed this was the design of the federal Convention."

Id. (quoting 2 ELLIOT'S DEBATES, *supra* note 66, at 326).

[177]Article II, § 1 provides in pertinent part: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in Congress." U.S. CONST. art II, § 1, cl. 2.

[178]*Thornton*, 115 S. Ct. at 1884 (Thomas, J., dissenting).

[179]*Id.* at 1885 (Thomas, J., dissenting).

[180]*Id.* at 1886 (Thomas, J., dissenting). The dissent again attacked the majority's reliance on Joseph Story's understanding of fixed qualifications, noting that the Qualifications Clauses only impose nationwide requirements independent of requirements that states may allow. *Id.*

additional qualifications.[181]

Justice Thomas was neither persuaded by the majority's contention that Amendment 73 would create a patchwork of state qualifications.[182] The dissent reminded that, from the time of the framing until some years thereafter, the Qualifications Clauses' citizenship requirements incorporated citizenship laws that varied from state to state.[183] The dissenting Justice asserted that even if the Qualifications Clauses had incorporated uniform requirements, the majority incorrectly suggested that the Constitution requires uniformity.[184]

While agreeing with the majority's conclusion that Congress may not impose qualifications on its own members, the dissent did not believe this fact could prove the exclusivity of the Qualifications Clauses.[185] Justice

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[181]*Id.* at 1886-87 (Thomas, J., dissenting). Justice Thomas suggested that other states could legitimately complain about Amendment 73 only if the amendment violated either the age, citizenship, or residency requirements of the Qualifications Clauses. *Id.* at 1887 (Thomas, J., dissenting). For example, the clauses would be violated if the people of Arkansas decided to send a six-year old to Congress in a particular election. *Id.*

[182]*Id.* The dissent saw no difference in allowing individual states to choose their own representatives and allowing them to set additional qualifications. *Id.*

[183]*Id.* at 1888 (Thomas, J. dissenting). The dissent asserted that while Article I, § 8, gave Congress the power to "establish an uniform Rule of Naturalization . . . throughout the United States," Congress was not obligated to do so and the Framers certainly expected states' individual laws to be in effect unless Congress acted. *Id.* (quoting U.S. CONST. art I, § 8, cl. 4); *cf.* Sturges v. Crownshield, 17 U.S. (4 Wheat.) 70 (1819) (interpreting Congress's power to establish uniform bankruptcy law, the other element of § 8, cl. 4).

[184]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct., 1842, 1888 (1995) (Thomas, J., dissenting). The dissent found particularly significant the language of Thomas Jefferson:

> [The Constitution] does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.

Id. at 1888-89 (Thomas, J., dissenting) (quoting Letter to Joseph C. Cabell (Jan. 31, 1814), in 14 WRITINGS OF THOMAS JEFFERSON at 82-83 (A. Lipscomb ed., 1904)).

[185]*Id.* at 1889 (Thomas, J., dissenting). The dissenting Justice conceded that the Constitution affirmatively grants neither Congress nor the states this power. *Id.* While Congress may not act in the absence of such a grant, deciding whether states may act in

Thomas believed that the critical question in *Powell*[186] was whether the Constitution conferred a qualification-setting power, not whether this power was taken away by the Qualifications Clauses, as urged by the majority.[187] The dissent viewed the *Powell* decision simply as a refusal to allow Congress the power to prescribe additional qualifications beyond those granted in the Constitution.[188] The fact that the Constitution does not grant a qualification-setting power to Congress, the dissent argued, does not imply that the Framers wanted to bar its exercise from the states.[189]

The dissent further believed the majority's opinion mischaracterized the concept of democratic principles.[190] While the Framers may have relied on democratic principles in disallowing Congressional qualification-setting powers, Justice Thomas argued that the Framers did not deny the states this power.[191] The invocation of democratic principles to strike down Amendment 73 seemed particularly difficult to the dissent, as Amendment 73 remained completely within the control of Arkansas's citizens.[192]

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this manner required a different legal analysis for the dissent. *Id.*

[186]395 U.S. 486 (1969). For a more detailed discussion of the majority's understanding of *Powell v. McCormack*, see *supra* notes 51-69.

[187]*Thornton*, 115 S. Ct. at 1889. (Thomas, J., dissenting). As the dissent points out, the *Powell* Court described the issue before it as "what power the Constitution confers upon the House through Art. I, § 5." *Id.* (quoting *Powell*, 486 U.S. at 519).

[188]*Id.* at 1889-90 (Thomas, J., dissenting).

[189]*Id.* at 1890 (Thomas, J., dissenting).

[190]*Id.*

[191]*Id.* The dissent noted the majority's failure to explain why democratic principles preclude states from imposing additional qualifications. *Id.* at 1890-91 (Thomas, J., dissenting).

[192]*Id.* at 1891 (Thomas, J., dissenting). Justice Thomas stated that if the people of Arkansas wanted to repeal Amendment 73, they could do so by simple majority vote. *Id.* The dissent responded to the majority's view that eligibility restrictions are inherently democratic, noting "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . [is] an authority that lies at the heart of representative government." *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 463 (1991)). Thus, Justice Thomas viewed Amendment 73 as not violating the principle that "the people should choose whom they please to govern them." *Id.* at 1893 (Thomas, J., dissenting); *see also* 2 ELLIOT'S DEBATES, *supra* note 66, at 257 (referring to Alexander Hamilton's comments at the New York convention).

The dissent went even further to assert that the Constitution would not preclude states from authorizing their state legislatures to prescribe qualifications for their federal representatives.[193] Justice Thomas believed that this scenario would be consistent with the Framers' scheme because the people would always be free to amend their state constitutions.[194] In sum, the dissent believed that the majority never truly explained why it considered Amendment 73 a violation of the "democratic principles" underlying the Constitution.[195]

Justice Thomas next asserted that the historical evidence relied on by the majority was inadequate to warrant the majority's conclusion.[196] The dissent posited that the evidence surrounding the Constitutional Convention, as the majority conceded, did not establish the Framers' intent to keep the qualifications fixed, but only demonstrates that the Framers did not intend for Congress to have this power.[197] Additionally, none of the Constitutional provisions set forth by the majority, Justice Thomas continued, indicated that states lacked the power to add qualifications.[198] Specifically, the dissent disagreed with the majority's reading of the Compensation Clauses.[199] The dissenting Justice found the Compensation Clause to be irrelevant to the issue of qualifications.[200] Like the Qualifications Clauses, the salary provision

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[193]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1893 (1995) (Thomas, J., dissenting).

[194]*Id.* The dissent noted that, in the past, state legislatures have determined whether state governments could abridge the freedoms of speech and press, persecute those with unfavorable religious beliefs, and seized property without allowing just compensation. *Id.*

[195]*Id.* at 1893-94 (Thomas, J., dissenting).

[196]*Id.* at 1894 (Thomas, J., dissenting).

[197]*Id.* The dissent added that the only evidence directly related to the issue of congressional qualifications was draft documents from the Committee of Detail, a five-member body responsible for drafting a Constitution to reflect decisions that had been reached during the Convention. *Id.* at 1895 (Thomas, J., dissenting). The dissent found significant the Committee's deletion of an exclusivity provision in its original Qualifications Clause for the House. *Id.*

[198]*Id.* at 1896 (Thomas, J., dissenting).

[199]*Id.* (citing U.S. CONST art. I, § 6, cl. 1).

[200]*Id.*

was simply another way of protecting Congress's competence.[201]

The majority's evaluation of each House's power to judge the "Elections, Returns and Qualifications of its own members"[202] did not convince the dissent that state law could never provide standards for considering a member's eligibility.[203] As each House necessarily must look to state law in assessing the "elections" and "returns" of its members,[204] the dissent considered logical Congress's reliance on state law in judging "qualifications."[205]

The dissent next revisited its discussion regarding the majority's reliance on the "Times, Places, and Manners" Clause[206] in finding Amendment 73 unconstitutional.[207] In examining comments made at the ratification conventions, Justice Thomas concluded that Congress's power to make or alter state election procedures primarily served as a coordination function, rather than a grant of congressional power over qualifications.[208] The dissenting Justice noted that allowing states to set congressional qualifications would not deprive Congress from nullifying state laws that

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[201]*Id.* While the Framers may have believed that state powers over salary would have been inconsistent with the idea of a national legislature, Justice Thomas stressed that this concern did not exist regarding state power over initial eligibility requirements. *Id.*

[202]*See* U.S. CONST. art. I, § 5.

[203]U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1897 (1995) (Thomas, J., dissenting).

[204]The dissent noted that state law usually determines what is necessary to win an election and judge ballot validity. *Id.*

[205]*Id.* As the dissent mentioned previously, the Framers reserved framing all questions of citizenship to the individual states' laws. *See supra* note 183 and accompanying text.

[206]*See* U.S. CONST. art. 1, § 4, cl. 1.

[207]*Thornton*, 115 S. Ct. at 1898 (Thomas, J., dissenting).

[208]*Id.* The dissent believed Congress's power under this provision was to provide the states with the ability to coordinate elections and basic election laws. *Id.* For instance, at the Virginia convention, George Nicholas stated that if regulation of the time of congressional elections had been left solely to the states, "'there might have been as many times of choosing as there are States,' and 'such intervals might lapse between the first and last election, as to prevent there being a sufficient number to form a House.'" *Id.* (quoting 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 920 (J. Kaminski & G. Saladino eds., 1990)).

impose impossible qualifications.[209]

While accepting that the ratification debates did not include any affirmative declarations that states could supplement the constitutional qualifications, the dissent noted the debates did not contain any definitive statement that states were prohibited from doing so.[210] Justice Thomas further was not convinced by the majority's reading of *The Federalist No. 52*,[211] finding nothing in its text expressly precluding states from adding qualifications.[212] The dissent argued that qualifications for state legislatures at the time of ratification were actually less demanding than the eventual qualifications set out in the Constitution, dismissing the majority's idea that excessive state qualifications requirements influenced the framers to thereafter deny the states such power.[213]

Justice Thomas next addressed state practice regarding the addition of qualifications immediately after the Constitution's ratification.[214] Five

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[209]*Thornton*, 115 S. Ct. at 1899-1900 (Thomas, J., dissenting). In discussing impossible qualifications, Justice Thomas was referring to state laws that might disqualify *everyone* from service in the House. *Id.* at 1900 (Thomas, J., dissenting). In such an instance, Congress would not only have the power, but the duty, to find the state law unconstitutional. *Id.*

[210]*Id.* at 1900-01 (Thomas, J., dissenting). Justice Thomas emphasized that, at the time of the convention, the Articles of Confederation allowed Congress no power to set qualifications, but states could prescribe eligibility requirements for their congressional delegates. *Id.* at 1901 (Thomas, J., dissenting). The dissent expressed overall doubt in arguments relying on the absence of recorded debate. *Id.*

[211]*See* THE FEDERALIST NO. 52, at 326 (James Madison).

[212]*Thornton*, 115 S. Ct. at 1901 (Thomas, J., dissenting). Madison wrote that the states defined congressional qualifications "less carefully and properly" than they defined voter qualifications. *See* THE FEDERALIST NO. 52 at 26 (James Madison). Justice Thomas viewed Madison's comments to mean that the existing state qualifications, void of age, citizenship, or residency requirements, were insufficient to safeguard Congress's ability. *Thornton*, 115 S. Ct. at 1902 (Thomas, J., dissenting). To the dissent, this did not imply that the Framers intended to altogether prohibit states from setting qualifications. *Id.*

[213]*Thorton*, 115 S. Ct. 1902 (Thomas, J., dissenting). The dissent added that at the time of the framing, no state required its lower house members to be older than 21, and only two required members of the upper house to be 30. *Id.* (citing N.H. CONST. of 1784, Pt. II in 4 Thorpe 2460; S.C. CONST. of 1778, Art. XII, in 6 Thorpe 3250). Justice Thomas proposed that the Framers' disapproval of state property and religious qualification requirements actually *suggests* that other state qualifications are permissible. *Thornton*, 115 S. Ct. at 1903 (Thomas, J., dissenting); *see also* Rotunda, *supra* note 21, at 574.

[214]*Thornton*, 115 S. Ct. at 1903 (Thomas, J., dissenting).

states supplemented the constitutional qualifications in their initial election laws, and the dissent viewed the surviving records to indicate that these state legislatures considered and rejected the majority's interpretation of the Qualifications Clauses.[215] The dissenting Justice further explained that the failure of states to impose term limits on its federal representatives was a result disfavored on policy grounds, not lack of state power as urged by the majority.[216] Regarding congressional property qualifications, the dissent asserted that most states did not adopt them, probably because they seemed unnecessary.[217]

The dissent also found the majority's and the *Powell* Court's discussion regarding the 1807 House debate over whether to seat Maryland's William McCreery misleading.[218] Justice Thomas believed that the McCreery episode merely indicated a deep division in Congress at the time as to whether McCreery should be seated.[219]

Justice Thomas suggested that Amendment 73 did not strictly limit terms.[220] Rather, the amendment allowed incumbents to run for reelection by write-in votes.[221] Accordingly, the dissent found the majority's analysis

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[215]*Id.* For instance, the first Virginia election law imposed a property qualification for Virginia's federal Representatives in the House, and five of the seven states dividing themselves into districts for House elections required that Representatives reside in the district that elected them. *Id.* at 1903-05 (Thomas, J., dissenting) (citations omitted).

[216]*Id.* at 1906 (Thomas, J., dissenting). Justice Thomas noted the reason for this disfavor was that the benefits of term limits at this time were not as strong as today: the advantages of incumbency were much fewer before than now; and turnover in office was quite regular. *Id.*

[217]*Id.* at 1907 n.37 (Thomas, J., dissenting). The Justice noted that the failure of most states to add property qualifications did not suggest their belief that the Qualifications Clauses were exclusive. *Id.*

[218]*Id.* at 1908. The dissent noted that while the initial committee report recommended McCreery be seated because states had no authority to supplement the constitutional qualifications, a large majority of the House voted to alter the report. *Id.* (citing 17 ANNALS OF CONG. at 950 (1807)). The revised report did not include the constitutional issue, and focused entirely on whether McCreery satisfied the state residency requirement. *Id.* at 1908 (Thomas, J., dissenting) (citing 17 ANNALS OF CONG. at 1059-61).

[219]*Id.* at 1909 (Thomas, J., dissenting).

[220]*Id.*

[221]*Id.*

of the slight chances of write-in success to be unpersuasive.[222] In a related argument, the dissent believed that the majority's view of the amendment's intent should have no bearing on Qualifications Clauses analysis.[223] The dissenting Justice concluded by noting that laws which allegedly have the design and effect of hindering a particular group of candidates, such as Amendment 73, have historically been reviewed under the First and Fourteenth Amendments, not the Qualifications Clauses.[224]

VI. CONCLUSION

The Supreme Court in *Thornton* appears to have provided the foundation for future Qualifications Clauses questions. Future state attempts to impose additional qualifications on eligibility for congressional membership, whether in the form of term limits or otherwise, will likely be struck down as unconstitutional. *Thornton* also solidifies the *Powell* Court's view that Congress has no power to impose additional qualifications on its

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[222]*Id.* at 1909-10. The dissent cited the findings of political science professor James S. Fay, who told the Arkansas Supreme Court that "Most write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification." *Id.* at 1910 (Thomas, J., dissenting) (citations omitted). Professor Fay indicated that a well-funded or well-known write-in candidate, such as an incumbent, could quite possibly win an election. *Id.* The dissenting Justice, in suggesting the chances of write-in success were slim, noted that the majority relied on language of a mere plurality opinion of the Arkansas Supreme Court, signed by only three of the seven Justices who ruled on the case below. *Id.* at 1910 (Thomas, J., dissenting) (citing U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 364 (Ark. 1994) (Dudley, J., concurring in part and dissenting in part)).

[223]*Id.* at 1911 (Thomas, J., dissenting). While the majority suggested that the amendment's intent was to expressly disqualify congressional incumbents, the dissent asserted that the true effect of Amendment 73 was to level the playing field amongst incumbents and their challengers. *Id.* Thus, Justice Thomas established the overwhelming degree of success among incumbent candidates in congressional elections, and offered that the amendment's intent may be to reduce this high advantage. *Id.* at 1912 (Thomas, J., dissenting).

[224]*Id.* at 1913 (Thomas, J., dissenting); *see, e.g.*, Moore v. McCartney, 425 U.S. 946 (1976) (dismissing an appeal on the ground that term limits of state legislators did not even create a substantial federal question for First and Fourteenth Amendment purposes). The dissent indicated that such review under Qualifications Clauses analysis would create a whole new arena for the courts. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1913 (1995) (Thomas, J., dissenting).

own members.[225] In addition to its reliance on *Powell*, Justice Stevens found compelling the Framer's language regarding qualifications during the ratification debates, as well as the scholarly materials written following the ratification.[226] The Court noted that these historical materials revealed a great deal about states' power to add qualifications.[227]

Furthermore, the *Thornton* Court was not compelled by the petitioners' claim that the Tenth Amendment reserves this power to the states.[228] The majority noted numerous state court decisions which have struck down state-imposed term limits because states lack such power.[229] More significantly, the Court suggested that states cannot reserve those powers which were not within their "original" powers before the Constitution's ratification.[230] Justice Stevens further maintained that the "basic principles of our democratic system" indicate that states are prohibited from enacting measures such as Amendment 73.[231]

In dissent, Justice Thomas argued that the majority had misinterpreted the meaning of "reserved powers": the dissent urged that the concept of "reserved powers" allows the people of each state, not the nation as a whole, to be the definitive source of the Constitution's strength.[232] The dissenting Justice further believed that states derived this power to add qualifications pursuant to the "Times, Places, and Manners" Clause of Article I.[233] Independent of these provisions, the dissent considered the majority's reading of the Qualifications Clauses to be inaccurate given the language in the post-ratification materials.[234]

The majority makes plausible arguments supporting its interpretation

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[225]*See supra* notes 51-69 and accompanying text.

[226]*See supra* notes 50-140 and accompanying text.

[227]*Id.*

[228]*See supra* notes 70-82 and accompanying text.

[229]*See supra* note 74.

[230]*See supra* notes 78-84 and accompanying text.

[231]*See supra* notes 83-111 and accompanying text.

[232]*See supra* notes 156-58 and accompanying text.

[233]*See supra* notes 174-78 and accompanying text.

[234]*See supra* notes 179-205 and accompanying text.

of the Qualifications Clauses, the Tenth Amendment, and related materials. However, Justice Kennedy's concurrence most rationally supports the suggestion that Amendment 73 is unconstitutional.[235] Regardless of the unconstitutional consequences of Amendment 73 under the Qualifications Clauses, Justice Kennedy asserted that the amendment interfered with the "national government" concept envisioned by the Framers.[236]

Justice Thomas failed to recognize the consequences of allowing an individual state the power to set eligibility qualifications for its representatives in Congress. While Representatives and Senators from a certain state are considered representatives for their state in federal government, they ultimately decide on federal matters which will affect the entire nation. With the Court's decision in *Thornton*, the people of a particular state will not have to rely on Arkansas's determination of whether national lawmakers should be penalized for length of service in office.

This possibility amplifies the majority's fear that measures such as Amendment 73 would create a national "patchwork of state qualifications." Amendment 73 only serves to punish incumbents without regard to quality of civil service. The Court's ruling in *Thornton* does not infringe on the right to vote: if the voters of Arkansas believe that their congressional representatives have worn out their welcome, the people could simply vote for other candidates.

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[235]*See supra* notes 141-52.

[236]*Id.*