

TERM LIMITS: HISTORY, DEMOCRACY AND CONSTITUTIONAL INTERPRETATION

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The Supreme Court's 1994 October Term produced a number of major constitutional decisions; decisions that were often, but not always, by the narrowest of majorities. The bulk of these five to four cases will require, as Justice Frankfurter once remarked, considerable "litigating elucidation" before the effect of each on the shape of our higher law can be ascertained with any degree of certainty.¹ This is hardly surprising. Important constitutional issues that sharply divide the Court may require the author of a majority opinion, if he or she is to maintain the majority, to negotiate with other justices about the language and scope of what is published. This can lead to an opinion that is relatively vague or purposely ambiguous.²

Some of the cases that seem to fit this category and will require "litigating elucidation," addressed redistricting and race,³ affirmative action,⁴ the limits on congressional power to regulate activities under the commerce clause,⁵ and the nature of permissible governmental support of religious activities.⁶

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1. See *Machinists v. Gonzalez*, 356 U.S. 617, 619 (1958).

2. See, e.g., JAMES A. SIMON, *THE CENTER HOLDS* (1995) (describing in detail the strategic considerations and negotiations among the Supreme Court justices in developing opinions); see also DAVID M. O'BRIEN, *STORM CENTER* (1986) (suggesting that as a tactical decision to preserve a doubtful majority, the assigning justice will often give the opinion to the justice most closely aligned with the dissent, providing a balanced, albeit ambiguous, opinion).

3. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (holding unconstitutional a racially motivated gerrymander).

4. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (holding that strict scrutiny will be applied to federal as well as state statutes employing racial classifications).

5. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Congress had exceeded its power under the commerce clause by criminalizing the possession of handguns within school zones).

6. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (holding that withholding funds from a student organization involved in printing a religious newspaper violated the First Amendment).

One five to four case,⁷ however, that will require no subsequent litigation to clarify its meaning involved the effort of Arkansas to limit the number of terms its representatives or senators may serve in the United States Congress. The Arkansas electorate, in 1992, had amended the state's constitution to deny certification as a candidate or a place on the ballot to any person seeking reelection who had been elected to two or more terms in the U.S. Senate or three or more terms in the House of Representatives. "Allowing individual States to adopt their own qualifications for congressional service," said the Court in *U.S. Term Limits, Inc. v. Thornton*,⁸ "would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended."⁹

Nothing could be clearer: State-imposed term limits are unconstitutional. I think this holding is correct, but for reasons that depart from those developed by the Court. Notice, however, that an amendment is necessary not only for term limits but for any other requirement, "not contained in the text of the Constitution,"¹⁰ that a state may wish to make a condition for election to Congress. "Today's decision," the dissent correctly reports, "also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent . . . , who are currently in prison . . . , or who have past vote-fraud convictions."¹¹ I believe the Constitution should be read to permit such disqualifications and others that do not offend the structure of our governing document, such as the requirement that a candidate for the House reside in the district she seeks to represent. The Court reaches its conclusions by misusing history (as does the dissent), by imagining federalism to be less complex than it is (as does the dissent), and by overemphasizing certain democratic principles and underemphasizing others (as does the dissent).

I hope in this essay to persuade you that these claims are correct and to use the issue of term limits to inspect some important questions of constitutional interpretation.¹²

7. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

8. *Id.* at 1845.

9. *Id.*

10. *Id.* at 1860-61 n.27.

11. *Id.* at 1909 (Thomas, J., dissenting).

12. The second issue in this case that this essay does not explore is whether Arkansas Amendment 73 is merely a ballot access restriction rather than an outright disqualification and whether this would be of constitutional significance. *Id.* at 1866-70.

I.

The text of the Constitution that directly addresses the qualifications for federal legislators is found in Article I. The first qualification reads: "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."¹³ Section three, clause three substitutes "Senator" for "Representative," raises the age to "thirty Years," and the citizenship requirement to nine.¹⁴ There are a few other provisions in the Constitution that impose additional qualifications.¹⁵ For example, Article I also states that you may not be a member of Congress while "holding any Office under the United States . . . ,"¹⁶ and Article VI bars any religious test for office.¹⁷ These provisions cast some, but not much, light on the central question of whether the qualifications clauses preclude the states from imposing additional requirements on would-be candidates for Congress. The qualifications clauses themselves cannot answer this question, for they say nothing about additional qualifications.

The question is one example of an old problem. If a provision in a document spells out certain requirements, restrictions, or conditions of various sorts, how can you tell, if the provision does not tell you, whether they are just examples of a class of requirements, are minimum restrictions, or exclusive conditions? Extrinsic evidence is necessary, and the best place to commence the search for extrinsic evidence is to consult other portions of the document whose specific provisions you want to understand. Lawyers who like Latin would say that the remaining text is being consulted to determine whether the maxim, *expressio unius est exclusio alterius*,¹⁸ is appropriately applied to the qualifications clauses.¹⁹

13. U.S. CONST. art. I, § 2, cl. 2.

14. *Id.* § 3, cl. 3.

15. *See Term Limits*, 115 S. Ct. at 1847 n.2 (disqualifying representatives and senators for conviction in impeachment proceedings or for engaging in an insurrection or rebellion against the Constitution).

16. U.S. CONST. art. I, § 6, cl. 2.

17. *Id.* art. VI, cl. 3.

18. BLACK'S LAW DICTIONARY 581 (6th ed. 1990) ("A maxim of statutory interpretation meaning the expression of one thing is the exclusion of another.").

19. *See Term Limits*, 115 S. Ct. at 1850 n.9 (where the majority posits an *expressio unius* argument suggesting the enumeration of certain qualifications in Article I precludes all others). *But see id.* at 1903 (where the dissent claims the majority's *expressio unius* argument cuts against the majority because Article VI's prohibition on state-imposed religious disqualifications suggests that other types of disqualifications are permissible).

Both the majority opinion, written by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg and Breyer, and the dissent of Justice Thomas, subscribed to by the Chief Justice and Justices O'Connor and Scalia, agree on the importance of the Tenth Amendment in this interpretive project. The last amendment in the Bill of Rights states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²⁰

The language of the Tenth Amendment does not seem to advance our inquiry. It merely restates the question in different terms. But the Court reasoned that the states cannot have any reserve power with respect to Congressional qualifications because they could not have had any power over the qualifications of candidates for Congress before there was a Congress; that is, before the Constitution was ratified. You cannot reserve a power you never possessed.²¹ While there is some authority for this position, the dissent does a reasonably effective job of distinguishing it, and, in effect, of claiming that the Court's interpretation is overly technical. For the dissent, it is not obvious that, when something new—the United States of America—was created, a power that could not have existed before may have been "reserved to the States respectively, or to the people."²² Indeed, the dissent firmly believes this happened. Nor is it obvious, as the Court recognized, that the states lack power even if its understanding of "reserved" is correct; the qualifications clauses, when properly interpreted, or other constitutional provisions, or the nature and structure of the Constitution as a whole, may bestow power on the states.

Both the Court and the dissent undertook their interpretive tasks by insisting upon overly abstract and therefore insufficiently realistic conceptions of American government. And both excavated in the partial and sometimes distorted documentary history of the framing and ratification for bits and pieces of evidence to support their highly abstract conceptions.

II.

Some of the conceptions are themselves familiar. The national Government is a government of delegated powers.²³ What has not been delegated or prohibited by the Constitution belongs to "the States

20. U.S. CONST. amend. X.

21. *Term Limits*, 115 S. Ct. at 1854, *relying on* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819).

22. *Term Limits*, 115 S. Ct. at 1878 (Thomas, J., dissenting).

23. *See* U.S. CONST. arts. I-III.

respectively, or to the people.”²⁴ And “all power stems from the consent of the people.”²⁵ So far this is unexceptional. But the dissent insists that “[t]he ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”²⁶

It is a little difficult to know what the dissent means given the Preamble to the Constitution.²⁷ Nonetheless, in the context of the times, the dissent’s explanation of the “Constitution’s authority” has a radical states’ rights ring to it. Given the jurisprudence of the Court’s 1994 Term, the congressional elections of 1994 and the potential for the results of that election to metastasize to the executive branch in 1996, it is easy to imagine that, before the millennium, the Reagan revolution will have succeeded.

Consider first the Court’s decision in *United States v. Lopez*.²⁸ For the first time in sixty years, the Court held that Congress had exceeded its power to legislate under the Commerce Clause.²⁹ The case involved the Gun-Free School Zones Act,³⁰ which made it a federal crime to possess a firearm on or near school grounds. To be sure, it is unclear how much the Court has cut back on the commerce power. But it is hard to deny that it has cut back.³¹ Moreover, it is interesting that the Court in *Lopez* consisted of the dissenters in *Term Limits* plus Justice Kennedy.

Consider second the 104th Congress. It seems determined, particularly in the House, to reduce the national Government and “return” power to the states; to undo, as best it can, the New Deal and its legacy.³² A President, a Congress, and a Court (with a new justice

24. U.S. CONST. amend. X.

25. *Term Limits*, 115 S. Ct. at 1875 (Thomas, J., dissenting).

26. *Id.*

27. The Preamble begins: “We the People of the *United States*” U.S. CONST. pmbl. (emphasis added).

28. 115 S. Ct. 1624 (1995).

29. *Id.* at 1634.

30. 18 U.S.C. § 922(q) (1995).

31. This is reflected in a few court of appeals and district court cases which have interpreted *Lopez* as restricting Congress’ power to regulate through the commerce clause. *See, e.g.*, *U.S. v. Denalli*, 73 F.3d 328 (11th Cir. 1996) (holding that arson against a private residence does not affect interstate commerce sufficiently to justify a conviction under a federal arson law).

32. *See* John Harwood, *Revolution II: Reagan-Era Veterans Are Now Determined to Revive ‘80s Policies*, WALL ST. J., Jan. 4, 1995, at A1 (explaining that the 104th Congress wants to reduce the size and scope of the federal government by “dismantling chunks of the federal edifice that Franklin Roosevelt began erecting” as part of the New

replacing one in the *Term Limits*' majority) all dedicated to a diminished national role and enhanced state power could work the most fundamental structural transformation in the relationship among governments and the people of the United States since the 1930s.³³

That the dissenting opinion in *Term Limits* is radical in its view of both state and national power emerges early. Consider this "first principle," as Justice Thomas calls it: "The Federal Government and the States . . . face different default rules: where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the states enjoy it."³⁴

Now, of course, we know that the word "necessary" in the Necessary and Proper Clause of the Constitution³⁵ does not mean "absolutely necessary" or "indispensable." *McCulloch v. Maryland* was clear on this.³⁶ Moreover, the dissent disputes a footnote in the Court's opinion stating in part that:

the Court has never treated the dissent's 'default rule' as absolute. In *McCulloch v. Maryland* . . . Chief Justice Marshall rejected the argument that the Constitution's silence on State power to tax federal instrumentalities requires that States have the power to do so. Under the dissent's unyielding approach, it would seem that *McCulloch* was wrongly decided.³⁷

Perhaps the Court goes too far. But the dissent's talk of "default rules," and its insistence that the very authority of the Constitution comes from the consent of the "people of each individual State, not the consent of the undifferentiated people of the Nation as a whole"³⁸ suggests that where the Constitution is silent, the presumption is strongly against federal power and strongly for state power. Indeed, the dissent speaks in terms of burdens: "[W]e must point to something in the Federal Constitution

Deal).

33. See, e.g., Walter Dean Burnham, *The Fourth American Republic?*, WALL ST. J., Oct. 16, 1995, at A14 (citing 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991)).

34. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1876 (Thomas, J., dissenting).

35. U.S. CONST. art I, § 8, cl. 18.

36. 17 U.S. (4 Wheat.) 316, 414-15 (1819).

37. *Term Limits*, 115 S. Ct. at 1851 n.12 (citations omitted).

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

that deprives the people of Arkansas of the power to enact [term limits]. . . . The majority disagrees that it bears this burden."³⁹

Indeed it does; for the Court the burden runs the other way. And this is not just because of the Court's understanding of "reserved" in the Tenth Amendment. It is also because of its understanding of Congress. Here the Court follows Justice Story in his *Commentaries*: "each Member of Congress is 'an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependant upon, nor controlled by, the states. . . . [They] owe their existence and functions to the united voice of the whole, not of a portion, of the people.'"⁴⁰ Surely there is considerable truth in this, but there is also considerable truth in the dissent's observation that "the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress."⁴¹ And it is also true that the representatives from each state give considerable attention to the parochial interests of the people of their state. Try to get elected from an important tobacco producing congressional district if you favor the FDA declaring nicotine an addictive drug.

At any rate, this much seems clear. Both the Court and the dissent approach the constitutionality of term limits with diametrically different presumptions. Each presumes a form of federalism that is more extreme than is warranted by the practices of our federal system. It also seems clear that the outcome in *Term Limits* is preordained if you accept the presumption of either side. How you interpret the Constitution often depends on your basic premises, and the provisions of the Constitution—in addition to the Tenth Amendment—that are relevant to the term limits question, are no exception.

III.

The Court, in support of its interpretation of the Tenth Amendment and the exclusivity of the qualifications clauses, refers to Article I: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"⁴² The Court reasons that this "gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State."⁴³ But it does not follow from

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

40. *Id.* at 1855 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)).

41. *Id.* at 1882 (Thomas, J., dissenting).

42. U.S. CONST. art. I, § 5, cl. 1.

43. *Term Limits*, 115 S. Ct. at 1855.

this, as the Court suggests it does, that state law cannot add qualifications. In making its judgment, the appropriate branch of Congress can apply state law. Indeed, as the dissent points out, "it generally is state law that determines what is necessary to win an election and whether any particular ballot is valid" ⁴⁴ Accordingly, "each House of Congress clearly must look to state law in judging the 'Elections' and 'Returns' of its Members."⁴⁵ If "Elections" and "Returns," why not "Qualifications?" As with every one of the Constitutional provisions recruited in support of its holding, the Court's answer depends on extrinsic evidence *e.g.*, other provisions, history, prior decisional law, and premises leading to a presumption based on a conception of American government. This conception is itself informed by the extrinsic evidence under investigation. So too with the dissent. This is appropriate. The problem is getting it right.

Consider some other sections of the Constitution relating to compensation and elections. Article I provides: "The 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."⁴⁶ Article I further provides that the "Electors [of the House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."⁴⁷ And Article I gives each state legislature regulatory authority over the "Times, Places and Manner" for holding Congressional elections; "[b]ut the Congress may . . . by Law make or alter such Regulations."⁴⁸

The Court reads these provisions as "intended [by the Framers] to minimize the possibility of state interference with federal elections."⁴⁹ Assuming that the Court is correct about the intention of the Framers and that their intention is controlling, it seems a leap for the Court to conclude, as it does, that "[i]n light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications."⁵⁰ Some qualifications, to be sure; but all qualifications? Term limitations? Why is the Court's approach all or nothing? Is it not clear that there are some qualifications that would "undermine" the national Government and some

44. *Id.* at 1897 (Thomas, J., dissenting).

45. *Id.*

46. U.S. CONST. art. I, § 6, cl. 1.

47. *Id.* § 2, cl. 1.

48. *Id.* § 4, cl. 1.

49. *Term Limits*, 115 S. Ct. at 1857.

50. *Id.* at 1858.

that would not?⁵¹ Indeed, is it not probable that the qualifications necessary to be an Elector “of the most numerous Branch of the State Legislature”⁵²—a matter that the Framers left to the states—would influence the de facto qualifications required by a successful candidate for Congress? Is it not reasonable to assume, even at the time of the founding, that electors were apt to prefer Congressmen who shared their economic interests and social perspectives?

The all or nothing approach of the Court⁵³ derives from some highly abstract propositions about American government *e.g.*, federalism and democratic principles, reinforced by the problematic use of snippets of historically questionable evidence. This is not the best way to decide an important constitutional case.

IV.

The Court declared that its absolute ban on state power vindicated three fundamental principles of representative democracy. The first two were important to the holding in *Powell v. McCormack*.⁵⁴ Adam Clayton Powell, who was elected to the 90th Congress from Harlem, was not seated because the House found that he had engaged in financial improprieties while a member of the 89th Congress. The Court held the House lacked “authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.”⁵⁵ The Court grounded this holding on history and the fundamental democratic principles that, “the people should

51. A requirement that a Congressman be from a certain profession could be thought to “undermine” the national Government. *See infra* notes 81-82 and accompanying text. But a requirement that a Congressman have no recorded vote fraud convictions would generally not be thought to “undermine” the national Government. *See Term Limits*, 115 S. Ct. at 1909 (Thomas, J., dissenting).

52. U.S. CONST. art I, § 2.

53. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (where the Court adopted a formalistic approach in striking down a one house legislative veto). In dissent Justice White objected: “our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. . . . This is the perspective from which we should approach . . . novel constitutional questions. . . .” *Id.* at 978 (White, J., dissenting). *See also* Kathleen Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995).

54. 395 U.S. 486 (1969) (Warren, C.J.).

55. *Id.* at 522 (emphasis omitted).

choose whom they please to govern them,"⁵⁶ and that, "an aspect of sovereignty is the right of the people to vote for whom they wish."⁵⁷

Well, yes, but what does it mean to say that "the people should choose whom they please to govern them?" It does mean that Adam Clayton Powell, who was chosen by the people in his congressional district, could not be denied his seat.⁵⁸ District lines, however, are often drawn by state legislatures to insure the election of the candidate of one party.⁵⁹ The people in that district who belong to another party do not have an opportunity to "choose whom they please to govern them."

Of course the majority rules and the people who vote for the losing candidate never choose whom they please to govern them. But, in a swing district, that is a direct consequence of majority rule. Everyone has an *opportunity* to choose whom she pleases. In a politically gerrymandered district, it is the direct consequence of the gerrymander. Once the district lines are drawn, no one in the wrong party has an opportunity to choose whom she pleases. Put another way, in a politically gerrymandered district a state imposed de facto qualification for election is membership in the right party.

Once this abstract democratic principle that, "the people should choose whom they please to govern them," is qualified, as it must be if it is to be realistic, it loses force as a strong argument against the power of a state to impose a less restrictive de jure qualification on congressional candidates.

The second fundamental principle of democracy, namely that "an aspect of sovereignty is the right of the people to vote for whom they wish,"⁶⁰ also needs some qualification. Yes, if the candidate you wish to vote for can get on the ballot. State law and party rules govern, and while the constitution affords substantial protection sometimes, as in New York's Republican presidential primary, the hurdles a would-be candidate

56. *Id.* at 541.

57. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1863 (discussing *Powell*, 395 U.S. 486).

58. *See Powell*, 395 U.S. at 522 (holding that expulsion power of Congress does not extend to exclude duly elected representatives who satisfy the constitutional qualifications for office).

59. This "political" gerrymandering has been accepted by the Court with little scrutiny. *See Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding political gerrymandering for state legislatures). *See also Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (where Chief Justice Burger, and Justices Rehnquist and O'Connor concurred in the Court's decision upholding an Indiana redistricting plan but insisted that political redistricting is non-justiciable).

60. *Term Limits*, 115 S. Ct. at 1863.

faces are very high indeed.⁶¹ But more important is the question whether or to what extent term limits compromise the principle that those who can vote should be able to vote for whom they wish.

If the people of a state amend the constitution of the state in order to impose term limits on candidates, they are exercising their sovereignty and deciding now that they do not wish to vote in the future for a certain class of potential candidates. This is a choice. It may be unwise, as I believe it is, but people are always choosing, and often unwisely, to bind their future. And deciding now whom not to vote for is a part of the process of deciding whom to vote for later. Perhaps the same thing can be said formally of laws relating to ballot access or political gerrymanders, but the connection to the electors' choice is usually much more attenuated. It is one thing to vote directly for term limitations; it is quite another to vote for representatives to a state legislature, who—among their many tasks—draw congressional district lines each decade and, from time to time, enact ballot access laws.

Finally, the Court reasons that state qualifications, unlike those imposed by the House in *Powell*, violate a third fundamental democratic principle: “that the right to choose representatives belongs not to the States, but to the people.”⁶² This is true. But the people do vote in the states; the states do impose de facto qualifications on candidates, and representatives do advance or protect state as well as national interests. The Court, however, insists that “[p]ermitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and national character that the Framers envisioned and sought to ensure.”⁶³ While some state qualifications could undermine the national character of

61. See *Rockefeller v. Powers*, Nos. 95-9189, 95-9213, and 95-9267 1995 WL 790831 (2d Cir. 1995) (rejecting an equal protection challenge to a ballot access restriction enacted by the New York Legislature by a candidate for the Republican primary). But see *Rockefeller v. Powers*, Nos. 96-7173, 1694 1996 WL 87475 (2d Cir. 1996) (affirming a First Amendment challenge that the exclusion of candidate Steve Forbes' delegates from the ballot of the 1996 Republican primary places substantial burdens on his candidacy). See also *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (holding that Illinois statute which required new political parties to obtain 25,000 signatures in order to be placed on the ballot in state elections and signatures of 5% of voters for offices of subdivisions of the state serves no compelling state interest and violates the Equal Protection Clause of the Fourteenth Amendment); *Bullock v. Carter*, 405 U.S. 134 (1972) (holding that Texas statute which assessed filing fee for prospective candidates, apportioned on the “importance, involvement and term of office” was violative of the Equal Protection Clause of the Fourteenth Amendment).

62. *Term Limits*, 115 S. Ct. at 1863.

63. *Id.* at 1864.

Congress, I fail to see why term limits do. Some states may have less experienced representatives than others, but that does not make the Congress less national in character. And I must confess that I do not know what, in this context, the Court means by "uniformity" unless it is just a statement of its conclusion: qualifications are restricted to those spelled out in the Constitution; to permit any additional state qualifications is not to have "uniform" qualifications. This, the Court tells us is what the "Framers envisioned and sought to ensure."⁶⁴ Do we know this with any certainty and, if we do, how much should it count?

V.

Both the Court and the dissent turned to the documentary record of the Constitutional Convention and the ratification debates in the states to demonstrate the intention of the Framers on the question before them. This is standard practice. It was followed extensively in *Powell*,⁶⁵ and the Court in *Term Limits* recounts at length the *Powell* "findings."⁶⁶ It tells us that they support the conclusion that qualifications for congressional candidates are fixed in the Constitution and cannot be supplemented either by Congress or the states.⁶⁷

There is sharp disagreement over the significance and appropriate use in constitutional interpretation of the Framers' intentions.⁶⁸ Most agree, however, that if we had a good understanding of what the Framers intended, that understanding would be helpful in establishing what the Framers believed the Constitution meant at the time it was adopted. The quest by lawyers and judges for a good understanding begins with the writings of historians who have illuminated the relevant English, colonial and revolutionary periods as well as the history of the founding itself. This is essential background, but it generally will not provide an investigator with a good understanding of the Framers' intentions about a specific matter such as the exclusivity of the Constitution's list of qualifications for congressional candidates. It seems logical then to turn to the documentary record of the Philadelphia convention and ratification

64. *Id.*

65. *Powell v. McCormack*, 395 U.S. 486 (1969).

66. *Term Limits*, 115 S. Ct. at 1848-53.

67. *Id.*

68. Compare ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-265 (1990) (suggesting that democracy is furthered by limiting the judiciary to an inquiry into original understanding, so as to allow the elected representatives to expand, modify or repeal existing, interpreted law) with RONALD DWORKIN, *LAW'S EMPIRE* 359-69 (1986) (noting that some judges believe that a fair opinion does not require interpreting the intentions of the framers).

debates in the states. But this logical move to the documentary record rests on the premise that the history is sufficiently complete to make it helpful and sufficiently truthful to make it reliable. Because this premise is questionable, conclusions drawn from the documentary record are suspect when they purport to answer so specific a question as that raised in *Term Limits*. The dissent accordingly is correct to reject the Court's reliance on the absence of evidence addressing state power over term limitations in the ratification debates—even though the restriction was well known at the time and written into the Articles of Confederation—"because the surviving records of those debates are fragmentary."⁶⁹

James H. Hutson has produced a persuasive monograph on this matter.⁷⁰ He writes that "[s]ome . . . newly discovered documents raise questions concerning the reliability of the principal printed sources of information about the drafting and ratification of the Constitution"⁷¹ Hutson's research suggests that apart from Madison's notes, which are radically incomplete, the standard sources for determining the Founders' intentions are highly unreliable evidence of what took place. Indeed, much of the documentary record apparently was manufactured subsequently for political purposes. Hutson issues this caveat about Convention records: "there are problems with most of them and . . . some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans."⁷² And, he adds, "[t]o recover original intent from these records may be an impossible hermeneutic assignment."⁷³ He asks: "If Convention records are not faithful accounts of what was said by the delegates in 1787 how can we know what they intended?"⁷⁴ If Hutson is right we often cannot know. Judges and lawyers, therefore, should be careful about their assertions.

But, of course, the *Federalist Papers* have a special role for these users of the documentary record. They are, as Paul Kahn has called

69. *Term Limits*, 115 S. Ct. at 1901 (Thomas, J., dissenting).

70. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986). In support, the dissent cited Hutson, who states that, "arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary. We have no records at all of the debates in several of the conventions." *Term Limits*, 115 S. Ct. at 1901.

71. Hutson, *supra* note 70, at 1.

72. *Id.* at 2.

73. *Id.*

74. *Id.*

them, "the foundational text of constitutional law . . ." ⁷⁵ and they are "simultaneously a part of a particular political debate [over ratification of the Constitution by the people of New York] and the presentation of a general theory on the nature of political order." ⁷⁶ In *Term Limits*, they are used as an aid to understanding whether the Framers intended states to have the power of adding qualifications for congressional office. The assumption is that if Publius said it the Framers intended it, particularly if Publius is Madison.

The Court examined *Federalist* 52 and 57, ⁷⁷ both written by Madison, and found support for a lack of any state power. ⁷⁸ The reading is plausible but, to my mind, overly broad. Consider *Federalist* 57. Publius is answering the Anti-Federalists' charge that the House of Representatives will be composed of "that class of citizens which will have least sympathy with the mass of the people, and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few." ⁷⁹ Publius argues that there is protection against this, namely, the electors and the objects of popular choice. ⁸⁰

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

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 qualification of wealth, or birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people. ⁸¹

75. PAUL KAHN, *LEGITIMACY AND HISTORY* (1992).

76. *Id.* at 13.

77. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1856-59 (1995).

78. *Id.*

79. *THE FEDERALIST* NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

80. *THE FEDERALIST* NO. 52, at 325-30 (James Madison) (Clinton Rossiter ed., 1961).

81. *THE FEDERALIST* NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

Madison, perhaps because of the dual nature of the *Federalist* enterprise, does not seem to have it quite right about the electors. If, in 1788, you had to own property to vote for your state representative, you probably were richer than your fellow citizen who, for lack of ownership, was denied the franchise. But the important point is that in both *Federalist* 57 and 52 it is plausible to read Madison as writing about qualifications imposed by the Constitution and limitations on additional state qualifications *to the extent* that they interfere with the functioning of the House of Representatives as a national legislative body representing the people.

In *Federalist* 52, he contrasts the electors with the objects of the peoples' choice.

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. [Madison then sets forth the qualifications in the Constitution, and continues.] Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.⁸²

The Constitution itself bars a religious test as a qualification and addresses "native or adoptive," as well as "young or old"; "poverty or wealth" tracks what Madison says about electors; and the requirement of a "particular profession" is a good example of a qualification that could interfere with the House as a national legislative body by rendering it unduly responsive in its deliberations to a particular faction.

VI.

But let us assume with the Court that the Framers intended to preclude the states from adding any qualifications to those constitutionally mandated. To what extent should this control constitutional interpretation today?

Reliance on the intention of the Framers is a tradition in American constitutional law.⁸³ In part this tradition may rest on the simple idea that the best way to understand an ambiguous text is to consult the author, or, if the author is no longer around, his notes and records. This approach would seem to make sense if you believe that the author retains

82. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

83. See *supra* notes 65-77 and accompanying text.

sovereignty over the published text. This is a much mooted question, here complicated by the fact that the author of the Constitution is a convention.⁸⁴ But I would prefer to put this question to one side because even if you believe in continued sovereignty there are problems. If the author does not *intend* that his notes and records be used by subsequent generations for interpretation, he has abandoned his sovereignty over the published text. He has not authorized the use of his notes and records for the interpretive purposes you wish to put them.

This does seem to be the way the Framers viewed things. H. Jefferson Powell has investigated the matter extensively. He tells us: "It is commonly assumed that the 'interpretive intention' of the Constitution's framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect."⁸⁵

Now of course you, in your quest for historical meaning, can disregard this understanding of the Framers, and historians most certainly should. But if you do so in an effort to make constitutional law, you are acting in a fashion unauthorized by the authors you are relying upon. Simply put, you are disregarding the intention of the Framers, and that is a paradoxical thing to do if you think that their intention is a source of fundamental law second only to constitutional text.

But here too the *Federalist* has a special status. This status does not derive from its authors' intention that their *Papers* be employed as an interpretive guide to the Constitution for lawyers and judges after ratification. If Powell is right, that would be an inappropriate use. There was, of course, the intention that the *Federalist Papers* serve as a commentary on the Constitution for convention delegates.⁸⁶ The status of the *Federalist Papers* stems rather from the perception we have of them as "a general theory of political order."⁸⁷

84. Compare Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (suggesting that the proper constitutional analysis begins with the text and the "contemporaneous understanding" of its framers' intentions) with Larry Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985) (noting that in adopting an "originalist" approach, there remains some confusion as to whether the intent of the drafters, or the intent of the ratifiers, which are often in conflict, control the interpretation).

85. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

86. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177, 1218 (1987).

87. See KAHN, *supra* note 75.

The claim of this general theory is itself necessarily general. The *Federalist Papers* should not be read as you would read a contract for the purchase and sale of goods. They are to be read as a reasoned argument attempting to persuade you of the proper structure of government, of the institutional relationships among governments and within the national government, and of the relationship between the people and the government they have formed. It is this conception of the *Federalist* that leads me to understand numbers 52 and 57 in the way that I have: State qualifications imposed on candidates are prohibited only to the extent that they interfere with the functioning of the House—and by extension the Senate—as a national legislative body representing the people.

The *Federalist* is consistent with my general approach to the problem raised in *Term Limits*. This approach to the question of a state's authority to impose qualifications on candidates is an application, in Charles Black's words, of structure and relationship in constitutional interpretation.⁸⁸ It has its roots in *McCulloch v. Maryland*.⁸⁹ Maryland's special tax on the National Bank would have interfered with the functioning of a federal institution. This was unconstitutional.⁹⁰ But it did not mean that Maryland was totally prohibited from acting: a nondiscriminatory property tax was constitutional. The issue was one of degree and effect. The scheme of our federalism mandated that the Bank be able to function in accordance with its charter and that the national purpose not be derailed by the state.⁹¹

The Constitution, of course, is Congress' charter. A state may not interfere with the functioning of Congress by imposing qualifications on candidates. But some qualifications that a state might impose would not have that effect. Does this mean that the dissent is correct, that term limits should have been held constitutional because they do not interfere with the functioning of Congress? The answer turns out to be no, but the reason is virtually ignored by the Court in *Term Limits*.

VII.

We have to ask ourselves what, in the structure of the Constitution, makes legislation legitimate and how a limitation on the number of terms a member of Congress may serve undermines that legitimacy. One way of thinking about this is to reflect on the constraints imposed by the

88. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

89. 17 U.S. (4 Wheat.) 316 (1819).

90. *Id.* at 395-96.

91. *Id.* As oft quoted, Marshall warned "A right to tax, without limit or control, is essentially a power to destroy." *Id.* at 391.

Constitution on *members* of Congress; constraints apart from those imposed on Congress itself, such as the enumeration in Article I of legislative powers, the separation of powers, the Bill of Rights, and the existence of judicial review. The constraint I have in mind is highlighted by considering the ubiquitous unease that constitutional theorists and partisan politicians both have with the practice of judicial review.⁹² Judicial review makes many anxious because they see it as undemocratic, as an exercise of power by judges who have not been elected and who are not electorally accountable. This anxiety would be much reduced if, in constitutional adjudication, we were able to draw a clear line between law application and law creation (this is not possible); if—and this is related but not the same—the Constitution required no interpretation (this is not possible); or if the justices were constrained by rules of extreme deference to the legislature (this is possible but would be at a painful cost).

In practice the Supreme Court has often engaged in robust judicial review. Consider the last forty plus years. The Warren Court worked its famous transformation of constitutional law.⁹³ Many of its decisions were either attacked or defended by theorists who felt compelled to address the justification for and practice of judicial review.⁹⁴ The central problem for many was the “counter majoritarian difficulty”:⁹⁵ laws, duly enacted by legislators elected by a majority of the people, and accountable to them, were struck down by judges elected by no one and accountable to no one, or at least not directly accountable to the people.

92. Classic statements of ubiquitous unease can be found in ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); LEARNED HAND, *THE BILL OF RIGHTS* (1958). Compare JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

93. See, e.g., *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (striking down the “Separate But Equal” doctrine in public schools); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding miscegenation statutes violate the Equal Protection Clause of Fourteenth Amendment); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding persons in police custody must be made aware of constitutional privilege against self-incrimination); *Baker v. Carr*, 369 U.S. 186 (1962) (holding voting district reapportionment presents a justiciable claim under the Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding equal protection clause requires one person one vote); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding the Exclusionary Rule applies to the states under the Due Process component of the Fourteenth Amendment).

94. *Brown v. Board of Educ.*, 349 U.S. 294 (1955), is the most prominent example of this and the debate about its constitutional correctness continues. Compare Michael J. Perry, *Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53 (1995) with Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. ILL. U. L.J. 93 (1995).

95. See BICKEL, *supra* note 92, at 16-23.

“Judicial legislation” cried politicians opposed to what the Court had done.⁹⁶ The justices were not applying the Constitution—whatever that means—they were voting their own preferences—whatever that means. And the same theoretical difficulties and political complaints permeate the debate over *Roe v. Wade*.⁹⁷

I believe there are ways to answer these concerns; I believe the Court was not legislating.⁹⁸ But the existence of these concerns reflect a basic truth: under our Constitution the power to legislate, to make laws binding on the people, generally should require that law-makers be elected by the people and remain electorally accountable to them.⁹⁹ It is in these ways that the Constitution attempts to constrain our representatives in order to insure that they do represent us.

Is this not the way we think about Congress? Are not election and electoral accountability vital to our understanding of the Constitution’s empowerment of Congress to legislate under Article I? And isn’t this the problem with term limits? Term limits would remove electoral

96. See *Text of 96 Congressmen’s Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (quoted in BICKEL, *supra* note 92, at 257). The signers of the Manifesto criticized the *Brown* decision and regarded it “as clear abuse of judicial power” which amounts to “a trend in the Federal judiciary undertaking to legislate.” *Id.*

97. 410 U.S. 113 (1973). For Congress’ reaction to *Roe*, see *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 94th Cong., 2d Sess. app. 641, 641, 646-47, 650 (1976) (statements of Rep. Abzug, Rep. Ichord, and Rep. Murphy). Rep. Ichord stated:

The Supreme Court has clearly in this decision—as it has done so many times in the past—usurped for itself the right to legislate. The Supreme Court has the specific responsibility of interpreting the Constitution and the legislative branch has the constitutional responsibility to make the laws. If the men who sit on the Supreme Court want to make laws, let them run for public office.

Id. at 646. See also John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that the Court’s decision in *Roe* was without Constitutional support and that such a decision should have been made by the Legislative branch).

98. See HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990).

99. George Washington advanced this position when he reasoned:

The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.

1 THE DEBATE ON THE CONSTITUTION 306-07 (Bernard Bailyn ed., 1990) (cited in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct 1842, 1180 n.26 (1995)).

accountability for two years in the case of a member of the House and six for a member of the Senate.

This is serious business because adequate substitute constraints on members of Congress often do not exist. The Twenty-second Amendment removes electoral accountability from a second term president and the presence of electoral accountability had been, and still is in the first term, an important check on that office. But the President of the United States is one of the most highly visible people in the world. The media keep him accountable. Most representatives and senators have low visibility.¹⁰⁰ How many of the one hundred senators can you name? How many representatives? Unless they are in the leadership, or chair an important committee, or are genuinely charismatic, they are not closely observed by the national press. And, in the absence of electoral politics, which by hypothesis are absent, I have my doubts about the adequacy of local coverage on issues that are not of particular local interest.

What this means is that the substitute for electoral accountability, as the ultimate check on members of Congress, would have to be replaced by a change in the incentives that motivate elected officials. They would have to become more public regarding. That this would happen is one of the claims made by advocates of term limits.¹⁰¹ It falls under the rubric of the "citizen politician," one who goes to Washington for a limited time and then returns to her community. This, advocates argue, makes an elected official more alert to community needs and desires. I see no reason to accept this argument. First, the citizen politician may become the Beltway insider; Washington may become more attractive than Hartford. She may never return home. Second, if she intends to return, her self-interest may be served by the help she gives to a small group within her constituency. And there is no reason to suppose that that group's interest is harmonious with the interests of the bulk of her electors who no longer have an opportunity to punish her. Moreover, on national issues that receive little local attention except when raised in the context of an election, there would seem to be no substitute for electoral accountability as a check on members of Congress.

This is not necessarily to say that, if there were substitute constraints, term limits should have been held constitutional. Nor is it to suggest that electoral accountability is working the way it should. Elections are

100. See Richard Morin, *Who's in Control? Many Don't Know or Care*, WASH. POST, Jan. 29, 1996, at A1 (finding that in a random survey, 54% of the people polled could not name both of their U.S. Senators and 67% could not name their U.S. Representative).

101. See generally GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992) (arguing that term limits are a step toward restoring Congress' competence and respect).

heavily influenced by money and the advantages of incumbency are enormous.¹⁰² Reform is necessary. Term limits attack the problem of incumbency by subverting electoral accountability. This is neither good constitutional law nor wise public policy. Campaign finance reform is vastly superior.¹⁰³ It is not, to be sure, a panacea,¹⁰⁴ but in politics and law nothing is.

102. See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994). This article explores the problems of the current congressional campaign finance system and proposes changes to achieve the reform needed. *Id.* at 1127. Wertheimer and Manes explore such changes as reasonable spending limits for congressional races, dramatic reductions in the flow of political action committees' contributions, closing of the loopholes that allow certain candidates to receive funding they normally would not be able to receive from other channels, and overhauling of the Federal Election Commission. *Id.*

103. See S. 1219, 104th Cong., 1st Sess. (1995); H.R. 2566, 104th Cong., 1st Sess. (1995). These comprehensive bills pose tough reform and promise real hope for campaign finance reform. See also *Statement of Common Cause President Ann McBride on Need for Passage of Tough Campaign Fin. Reform* (Common Cause, Wash., D.C.) Jan. 20, 1996.

104. The First Amendment limits the extent to which legislation can restrict the use of money for political campaigns. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

