CONSTITUTIONAL LAW—QUALIFICATIONS CLAUSE-IMPOSITION OF ADDITIONAL QUALIFICATIONS BY ARKANSAS CONSTITUTIONAL AMENDMENT THAT DENIED CONGRESSIONAL CANDIDATES THE RIGHT TO APPEAR ON THE GENERAL ELECTION BALLOT IF THEY SERVED MORE THAN THREE TERMS IN THE HOUSE OF REPRESENTATIVES OR TWO TERMS IN THE SENATE VIOLATED THE QUALIFICATIONS CLAUSES—*U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

The debate on the qualifications of members of Congress was advanced by Edmund Randolph[1] in the Virginia Resolutions[2] at the Constitutional Convention.[3] With respect to congressional qualifications, Governor Randolph first proposed that an age requirement[4] should be imposed on the members of the federal legislature.[5] The Plan also called for the limitation of congressional service of members of the first and second legislative branches.[6]

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[1] 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1765-1895 293-94 (1970). Randolph was then governor of Virginia. 1 *id.* at 294. He was previously the State's first Attorney General, had held a seat in the United States Congress, served as the United States' first Attorney General, as well as the second Secretary of State of the United States. 1 *id.*

[2] THE VIRGINIA RESOLUTIONS PRESENTED TO THE CONSTITUTIONAL CONVENTION ON MAY 29, 1787 (1787), *reprinted in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 22-24 (Michael Kammen ed., 1986) [hereinafter VIRGINIA RESOLUTIONS]. The Plan was generally referred to as the Large State Plan. *Id.* at 22. The Virginia Resolution was both the first plan to be introduced at the Convention and the proposal most comparable to the ratified Constitution. *Id.* The Plan contemplated a national system of government rather than a mere revision of the Articles of Confederation. *Id.* at 22-23. Randolph presented the Plan, which Virginia's delegates drafted prior to the Convention, on May 29, 1787. *Id.* at 22.

[3] 1 THORPE, *supra* note 1, at 309-11. The initial purpose of the Convention was to alter the Articles of Confederation to remedy the various problems that faced the states. 1 *id.* at 305. The Convention's authority only went as far as submitting their suggestions to Congress, which would then be considered by each individual state legislature. 1 *id.* at 306. The states were not bound by the Convention, pursuant to their declaration of sovereignty in the Articles of Confederation and their common understanding that the authority of the federal government was limited. 1 *id.* at 307.

[4] VIRGINIA RESOLUTIONS, *supra* note 2, at 23. Randolph did not prescribe an actual age at this time, but rather left the provision blank. *Id.*

[5] Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321, 350 (1992); *see also* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 31 (Norton paperback ed. 1987). On June 12, 1787, the Convention rejected the age requirement. MADISON, *supra*, at 106, 107. The Plan also required an undisclosed age qualification for the Senate. *Id.* at 31. The age requirement for the Senate was determined to be 30 after the Convention cast its initial votes. *Id.* at 115.

[6] Safranek, *supra* note 5, at 350. The first and second legislative branches are now the House of Representatives and the Senate, respectively. *Id.* The term limit provision for the first branch (the House of Representatives) was first changed to "incapa-

These proposals set the stage for further debate at the Convention and were subsequently considered by other plans.[7]

In addition, the Convention considered other qualifications such as property and wealth.[8] Many delegates, however, expressed concern over both the needless preclusion of qualified candidates[9] and the numerosity of qualifications.[10] As a result, the Convention

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ble of reelection for one year," then subsequently abandoned altogether. MADISON, *supra* note 5, at 109; Safranek, *supra* note 5, at 350.

7 Safranek, *supra* note 5, at 351.

8 *Id.* On July 26, 1774, George Mason motioned to consider the addition of property as a qualification and to eliminate those who were indebted to the United States government. MADISON, *supra* note 5, at 370, 372. Mr. Mason suggested the latter because those who owed the government money might use their office to circumvent their debts by passing laws advantageous to themselves. *Id.* at 372. He then suggested that the Convention adopt the qualifications used by Great Britain. *Id.* at 373.

Governor Morris opined that eliminating those who owed debts to the government was improper. *Id.* Morris reasoned that those who owed money had unsettled accounts mostly due to the fault of the government. *Id.* Further, Morris responded to Madison's suggestion that those who received public funds and failed to account for them should be excluded. *Id.* Morris illustrated the evil in adopting Madison's standard:

> The Proposed regulation would enable the [Government] to exclude particular persons from office as long as they pleased[.] He mentioned the case of the Commander in Chief's presenting his account for secret services, which he said was so moderate that every one was astonished at it; and so simple that no doubt could arise on it. Yet had the Auditor been disposed to delay the settlement, how easily might he have effected it, [and] how cruel [would] it be in such a case to keep a distinguished [and] meritorious Citizen under a temporary disability [and] disfranchisement.

Id. at 373-74.

Madison affirmed Mr. Mason's suggestion to employ the qualifications used by Great Britain. *Id.* at 373. However, Madison thought that the qualifications should be remodeled to include that qualification to which Morris objected. *Id.* Madison defended the inclusion of a qualification that excluded those who received public funds and did not account for them based on past cases of men seeking legislative seats with baleful intentions to cloak their financial improprieties. *Id.*

Madison also addressed the inclusion of property as a qualification. *Id.* at 375. The requirement of a small amount of property would be of no moment, Madison pointed out, while a criterion of a substantial amount would disqualify legitimate candidates. *Id.* Further, many wealthy people, namely those engaged in commercial and manufacturing enterprises, did not hold their wealth in the form of property. *Id.*

Nevertheless, at the end of the day, the Convention determined

> [t]hat it be an instruction to the committee, to whom were referred the proceedings of the convention for the establishment of a national government, to receive a clause or clauses, requiring certain qualifications of property and citizenship, in the United States for . . . the members of both branches of the legislature of the United States.

Id. at 384-85.

9 *See supra* note 8 (discussing the concerns of Madison and Morris in imposing qualifications that would preclude the service of talented citizens).

10 Safranek, *supra* note 5, at 351. Regarding a recitation of the proposed qualifica-

resolved to only adopt qualifications of age, residency and citizenship.[11] These qualifications were expressly incorporated into the Constitution at the Convention, giving birth to the Qualifications Clauses.[12]

In a recent decision interpreting the scope of the Qualifications Clauses, *U.S. Term Limits, Inc. v. Thornton*,[13] the United States Supreme Court examined the validity of an amendment to the Constitution of the State of Arkansas imposing term limits on their federal legislators.[14] The *Thornton* Court, relying on the rationale of the Supreme Court's previous decision in *Powell v. McCormack*[15], affirmed the decision of the Arkansas Supreme Court[16] and held

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tions, Mr. John Dickinson opined that "[i]t was impossible to make a compleat [*sic*] one, and a partial one [would] by implication tie up the hands of the Legislature from supplying the omissions." MADISON, *supra* note 5, at 374.

11 Safranek, *supra* note 5, at 351. The Convention's list of qualifications for the House of Representatives stated:

> Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.

MADISON, *supra* note 5, at 386. The Convention's final qualifications for the Senate paralleled the House requirements, stating that:

> Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the State for which he shall be chosen.

Id. at 387.

12 Safranek, *supra* note 5, at 352. The Qualifications Clause for the House of Representatives, in its finalized form, states that:

> No Person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. CONST. art. I, § 2, cl. 2. Similarly, the Clause governing the qualifications for Senate service require:

> 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.

13 115 S. Ct. 1842 (1995).

14 *Id.* at 1845. The grant of certiorari in *Thornton* allowed the Court to consider, for the first time, the issue of whether the Qualifications Clauses were textually finite or whether the Tenth Amendment reserved some power to the states to add or alter the qualifications of its federal representatives. *See id.* at 1847, 1852 (reviewing the historical context of term limits and contrasting prior Supreme Court jurisprudence with the distinct issue presented in *Thornton*).

15 395 U.S. 486 (1969).

16 U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349 (Ark. 1994).

that Amendment 73 of the Arkansas Constitution[17] was an improper expansion of the Qualifications Clauses.[18]

The genesis of *Thornton* began when respondent, Bobbie Hill, filed a complaint in the Circuit Court for Pulaski County, Arkansas.[19] The complaint sought a judicial determination that Section 3 of Amendment 73 violated the Federal Constitution.[20] The circuit court agreed with respondent and held that Section 3 of the Term Limit Amendment violated the Qualifications Clauses of the United States Constitution because the Clauses contained a finite list of congressional qualifications.[21]

In a 5 to 2 decision, the Supreme Court of Arkansas upheld

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17 *Thornton*, 115 S. Ct. at 1845. The voting citizens of Arkansas ratified Amendment 73 at the general election on November 3, 1992. *Id.* The proposed amendment, titled "Term Limitation Amendment," provides that:

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

Id.

The term limits imposed by Amendment 73 affected three categories of elected representatives. *Id.* First, Section 1 restricts elected officials in the state executive branch to two four-year terms. *Id.* at 1845-46. Next, Section 2 limits the terms of state representatives to three two-year terms and state senators to two four-year terms. *Id.* at 1846. Finally, Section 3, the provision in question in the case *sub judice*, limits the terms of the Arkansas Congressional Delegation as follows:

> (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.
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> (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.

Amendment 73 also provided that its effective date was January 1, 1993 and was self-executing. *Id.*

18 *Id.* at 1871.

19 *Id.* at 1846. The complaint was also filed on behalf of the League of Women Voters of Arkansas and "similarly situated Arkansas 'citizens, residents, taxpayers and registered voters.'" *Id.*

20 *Id.* Defendants named by Hill included both the Democratic and Republican Parties of Arkansas, President (then Governor) Clinton, and various state officials. *Id.* Several parties intervened as defendants including petitioners U.S. Term Limits, Inc. and Arkansas Attorney General Winston Bryant. *Id.*

21 *Id.*

the lower court's judgment.[22] A plurality of the court reasoned that Section 3 of the Amendment was constitutionally infirm because the states lacked power to alter the qualifications set forth in the Federal Constitution.[23]

The Supreme Court of the United States granted certiorari[24] to resolve two distinct issues.[25] First, the Court sought to determine whether states could add qualifications in addition to those already found in the text of the Federal Constitution.[26] Second, the Court examined whether, if the addition of such qualifications were found to be constitutionally impermissible, Amendment 73's construction as a restriction to ballot access had constitutional implications.[27] Adopting the rationale of the Arkansas Supreme Court's plurality decision, the Court held that Section 3 of the Amendment violated Article I of the Federal Constitution.[28]

Previously, several state courts had considered the constitutionality of varying state-imposed qualifications.[29] In *State ex rel. Chavez v. Evans*,[30] the New Mexico Supreme Court confronted the

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22 *Hill*, 872 S.W.2d at 357.

23 *Id.* at 356-57. Justice Brown, writing for the plurality, couched his opinion in fundamental constitutional reasoning:

> 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 state would fly in the face of that order.

Id. at 356.

The plurality also dismissed petitioners' contention that § 3 of the Amendment simply restricted federal representatives' access to the general election ballot. *Id.* at 356, 357. Rather, the court noted, § 3 impermissibly burdened federal congressional incumbents from seeking additional terms. *Id.* at 357. Justice Brown further criticized petitioner's argument insofar as its proposition that federal delegates could run as write-in candidates did not have the wherewithal to withstand constitutional assault. *Id.*

In addition, two justices concurred with the result of the plurality. *Id.* at 361.

Finally, two members of the court found that Amendment 73 did not violate the United States Constitution. *Id.* at 361, 363. Justice Hays' dissent argued that because the Constitution did not expressly limit the states from adding additional qualifications to its federal representatives, Amendment 73 was a valid exercise of the power reserved to the states. *Id.* at 367. In contrast, Special Chief Justice Cracraft's dissent proffered that § 3 was merely a permissible ballot restriction measure that did not even invoke inspection of the Qualifications Clauses. *Id.* at 368.

24 U.S. Term Limits, Inc. v. Thornton, 114 S. Ct. 2703 (1994).

25 *Thornton*, 115 S. Ct. at 1847.

26 *Id.*

27 *Id.*

28 *Id.* at 1845, 1871.

29 *Id.* at 1852-53.

30 446 P.2d 445 (N.M. 1968).

constitutionality of a New Mexico statute[31] that required candidates for the United States House of Representatives to be residents of the district to which they sought election.[32] In a *per curiam* opinion, the New Mexico Supreme Court found that the Qualifications Clause[33] invalidated the state statute.[34] In so holding, the court deferred to the well-settled principle that the qualifications set forth in Article I of the Federal Constitution were exclusive.[35] Thus, the court concluded, petitioners should have been certified to run for Congress irrespective of their failure to meet state-imposed district residency requirements.[36]

In a 1950 decision, the Court of Appeals of Maryland interpreted the Qualifications Clauses in a similar manner.[37] In *Shub v. Simpson*, the court decided whether an oath of loyalty imposed by state statute applied to candidates running for the United States Congress.[38] The petitioner, a congressional hopeful,[39] maintained that the state oath requirement[40] impermissibly imposed an addi-

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31 *Id.* at 448. According to the court, the statute required that "[e]ach candidate for the office of representative in Congress shall be a resident and qualified elector of the district in which he seeks office." *Id.*

32 *Id.* Two of the petitioners in the case, William Higgs and Wilfredo Ernest Sedillo, were congressional candidates of the People's Constitutional Party from Districts 1 and 2, respectively. *Id.* Sedillo conceded that he was a resident and registered candidate of District 1. *Id.* Higgs admitted that on the day of election, he would not be a qualified representative in the State of New Mexico. *Id.* Also, Higgs acknowledged that although he had recently moved to the State, he planned on keeping his New Mexico residency and would be a resident on the date of the election. *Id.*

Petitioners contended that the Qualifications Clause, Article I. § 2, cl. 2, was the exclusive source of criteria that a candidate for the United States House of Representatives had to meet. *Id.* Therefore, Higgs and Sedillo argued, the additional qualifications of district residency and qualified residency imposed by the state statute were invalid. *Id.*

33 U.S. CONST. Art. I, § 2, cl. 2. For the text of the aforementioned constitutional provision, see *supra* note 12.

34 *Chavez*, 446 P.2d at 448.

35 *Id.*

36 *Id.*

37 Shub v. Simpson, 76 A.2d 332, 340 (Md. 1950).

38 *Id.* at 335. The court determined that the other petitioners, Marshall Jones and Sam Fox, had moot cases because they subsequently made their affidavits in compliance with the state-imposed qualification rather than take appeal. *Id.* However, the oath requirement applied to Shub because he was a candidate to a state, rather than a federal, office. *Id.*

39 *Id.* at 334. Thelma Gerende was a nominated member of the Progressive Party for the Second Congressional District. *Id.* at 334-35.

40 *See id.* at 335 (discussing the Maryland Subversive Activities Act of 1949). The Subversive Activities Act of 1949 provided, in relevant part:

> No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of

tional qualification to those already contained in the Federal Constitution.[41] Writing for the majority, Chief Judge Marbury found that the oath of loyalty requirement did not apply to federal candidates to Congress.[42] The court concluded that although candidates to the Federal Congress may be required to conform to state election laws, those laws were invalid when they conflicted with the Federal Constitution.[43]

In *State ex rel. Eaton v. Schmahl*,[44] the Minnesota Supreme Court decided whether a candidate for the United States Senate could be excluded from the ballot because he had been convicted of a felony.[45] The court, in a *per curiam* opinion, determined that the state provisions precluding the federal senatorial candidate's[46] name from appearing on the general election ballot did not apply to candidates seeking federal office.[47] The court reasoned that the state legislature did not have the power to alter the federal qualifications of Congress prescribed in the Federal Constitution.[48]

In another case, *State ex rel. Sundfor v. Thorson*,[49] the North Dakota Supreme Court considered whether a state prohibition, which disqualified candidates who lost in the primary election from run-

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> nomination required by the foregoing Article 33, an affidavit that he or she is not a subversive person as defined in this article. . . . No certificate of nomination shall be received for filing by any board of supervisors of elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid.

MD. CODE ANN. art. 85A, § 15 (1951).

41 *Shub*, 76 A.2d at 335.

42 *Id.* at 340. The court determined that Article I, § 2, cl. 2 set forth the only qualifications that a House candidate must meet to be eligible to appear on the State ballot. *Id.* Further, the court noted that Congress is the sole judge of the qualifications for its members pursuant to Article I, § 5. *Id.* Finally, the court noted, Article VI of the United States Constitution contained its own oath provision that petitioner, once elected, would have to take before assuming office. *Id.*

43 *Id.*

44 167 N.W. 481 (Minn. 1918).

45 *Id.* at 481.

46 *Id.* The instant action was instituted to prevent the secretary of state from placing James A. Peterson's name on the general election ballot in June of 1918. *Id.*

47 *Id.* After he filed his affidavit of candidacy, Peterson was convicted in a Minnesota federal court of an unspecified felony. *Id.* Pursuant to the judgment of the court, Peterson was sentenced to serve time for several years. *Id.* A state constitutional provision rendered him ineligible to serve in federal office if elected. *Id.*

48 *Id.* The court held that the provisions of the state constitution had no bearing on Peterson because the qualifications of a United States Senator were prescribed by the Federal Constitution. *Id.* It did not matter, the court noted, that the state election mechanism's purpose was to further the election of federal officers. *Id.*

49 6 N.W.2d 89 (N.D. 1942).

ning in the general election ballot, was a qualification or merely a regulation under the Federal Constitution.[50] In *Sundfor*, the respondent[51] maintained that the provision[52] unconstitutionally precluded the congressional candidate[53] from appearing on the general election ballot.[54] Writing for the court, Justice Nuessle first stated that if the provision at issue were a qualification, rather than a mere regulation, then the provision could not stand.[55] Based upon the plain language of the statute, the court found that it was clearly a qualification; thus, the United States Constitution prevented the state from precluding a candidate who lost in a primary election from lawfully seeking a congressional seat in the general election.[56]

Finally, the Oklahoma Supreme Court explored the issue of whether a citizen could seek contemporaneous election to the United States Senate and to the office of justice to a state supreme court in *Riley v. Cordell*.[57] In *Riley*, the candidate defended his ability to seek both offices on the theory that the finite list of qualifications found in the United States Constitution did not preclude him from doing so.[58] The court, based upon the interpretation of the relevant state statute,[59] held that an individual could not endeavor

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50 *Id.* at 89-90.

51 *Id.* at 89, 90. The respondent in the case at bar was Herman Thorson, Secretary of the State of North Dakota. *Id.* at 89. The Attorney General, Sundfor, instituted this action to prevent respondent from certifying a congressional candidate's name who lost in the primary election. *Id.*

52 *Id.* at 90. As quoted by the court, North Dakota's Session Laws of 1939, chapter 141, provided "[t]hat any person who was a candidate for nomination for office at any primary election in any year and who was defeated for said office shall not be eligible as a candidate for the same office at the ensuing general election." *Id.*

53 *Id.* Charles R. Robertson originally sought candidacy as a member of the Republican Party in the primary election on June 30, 1942. *Id.* at 90. After losing in the primary, Robertson then tried to gain a seat in the United States House of Representatives by running as an independent candidate. *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 92.

57 Riley v. Cordell, 194 P.2d 857, 858 (Okla. 1948). In a strikingly similar case decided eight years prior to *Riley*, the Supreme Court of Arizona had considered whether a superior court judge could simultaneously run for the United States Senate. Stockton v. McFarland, 106 P.2d 328, 328, 329 (Ariz. 1940). The plaintiff, a Senatorial candidate campaigning in opposition to McFarland, complained that the Arizona Constitution prohibited state judges from seeking additional offices. *Id.* at 328, 329. In finding the constitutional provision invalid, the court noted that the proposition that the Federal Constitution prescribed a fixed set of congressional qualifications bordered on the doctrinal. *Id.* at 330.

58 *Riley*, 194 P.2d at 859.

59 *Id.* Despite the court's decision to interpret its own state statute, the *per curiam* opinion acknowledged Riley's Qualifications Clause contention. *Id.* The court, as

to run for two offices at the same time.[60]

In the spirit of the recent struggle to come to grips with a working concept of federalism,[61] the United States Supreme Court recently considered whether states have the power to alter the qualifications of their federal delegates in *U.S. Term Limits, Inc. v. Thornton*.[62] Specifically, the Court determined whether Section 3 of Amendment 73 of the Arkansas Constitution impermissibly added eligibility requirements to its federal congressional incumbents in violation of the Qualifications Clauses.[63]

Justice Stevens, writing for the majority,[64] declared that the finite nature of the Qualifications Clauses precluded the states from altering the requirements for their representatives in the United States Congress.[65] The Court began its opinion by declaring that Amendment 73 violated the Federal Constitution.[66] State-imposed confinements such as Amendment 73, the Justice observed, were contrary to the egalitarian principles espoused by the Framers of the United States Constitution.[67] The majority then further stated that in order for the states to impose additional qualifications on

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well as the respondent, conceded that Article I, § 3 of the Federal Constitution did not permit the states to add qualifications to their federal delegates. *Id.* However, the court held that Riley was eligible to run for the Senate but was precluded from seeking election to the bench. *Id.* at 861-62.

60 *Id.* at 861. The court reasoned that the two offices were incompatible; if they could not be simultaneously held, then neither could they be simultaneously sought. *Id.*

61 The Court has recently become embroiled in a fundamental versus liberal interpretation of the Constitution, starting with the landmark case *United States v. Lopez*. United States v. Lopez, 115 S. Ct. 1624 (1995).

62 115 S. Ct. 1842 (1995).

63 *Id.* at 1847. Justice Stevens pointed out that the term "Qualifications Clause" referred to other constitutional provisions in addition to Article I, § 2, cl. 2 and § 3, cl. 3. *Id.* at 1847 n.2. For example, Article I, § 3, cl. 7 permits the removal of any federal officer convicted through an impeachment proceeding. *Id.* Next, Article I, § 6, cl. 2 prohibits a person holding an office of the United States from simultaneously holding membership in either the United States House of Representatives or Senate. *Id.* In addition, § 3 of Amendment XIV precludes from office any person who previously took an office of the United States and engaged in "'insurrection or rebellion'" against the United States. *Id.* Further, the Guarantee Clause of Article IV and the oath provision of Article VI, cl. 3 are considered qualifications as well. *Id.*

The Justice also noted that the Court would not determine whether the aforementioned constitutional provisions comprise qualifications because the issues in the case *sub judice* did not require that resolution. *Id.*

64 *Id.* at 1845. Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens in the majority opinion. *Id.*

65 *Id.* at 1854, 1866.

66 *Id.* at 1845.

67 *Id.* The Court observed that the proposition that the people had the power to elect whom they chose to represent them stemmed from fundamental democratic principles. *Id.* Further, the Justice noted, disparate treatment of congressional repre-

their federal delegates, they would have to do so by federal constitutional amendment.[68]

After a synopsis of *Thornton*'s procedural history,[69] the Court articulated two distinct issues that needed resolution in order to assess the validity of Amendment 73.[70] Justice Stevens stated that the first issue was whether states could add qualifications to those already found in the text of the Federal Constitution.[71] The second issue, the majority asserted, was whether construing Amendment 73 as a restriction to ballot access had constitutional implications, assuming that the addition of qualifications by the states was constitutionally impermissible.[72] The Court concluded that the determination of whether states could impose additional qualifications on their federal representatives hinged upon the resolution of the issue considered in a prior Supreme Court decision, *Powell v. McCormack*.[73] The Justice consequently grounded the Court's reasoning on whether the Constitution empowered Congress to judge the criteria of its own members.[74]

The Justice then began a detailed analysis of the reasoning in *Powell*.[75] The majority examined the *Powell* Court's reliance on history and considered the experiences of both the British Parlia-

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sentatives by the several states by the imposition of varied qualifications would upset the federal legislative unity that the Framers contemplated. *Id.*

68 *Id.*

69 *Id.* at 1845-47. For a discussion of the procedural history of *Thornton*, see *supra* notes 14-28 and accompanying text.

70 *Thornton*, 115 S. Ct. at 1847.

71 *Id.*

72 *Id.*

73 *Id.* (citing Powell v. McCormack, 395 U.S. 486, 489 (1969)).

74 *Id.*

75 *Id.* Justice Stevens posited that because the *Powell* Court thoroughly examined the historical background of the Qualifications Clauses, that analysis was crucial to resolve the issue in the instant case. *Id.* at 1848.

First, the Court described the issue in *Powell*. *Id.* In November of 1966, a New York district elected Adam Clayton Powell to the 90th Congress. *Id.* After his election, Powell faced charges by fellow members of congress that he had engaged in improprietous conduct while in office during the 89th Congress. *Id.* Subsequently, a congressional committee found that although Powell met the qualifications of age and residence set forth in the Constitution, his diversion of funds and filing of false financial statements was unbecoming of a congressman. *Id.* As a result, the committee excluded Powell as a member of the House and announced that his seat was vacant. *Id.* Consequently, Powell and several voters from his district sought a judicial determination of whether Congress' actions invalidating his election was constitutionally impermissible in violation of the Qualifications Clause. *Id.* Powell reasoned that Article I, § 2, cl. 2 contained a finite list of qualifications for membership in the House of Representatives. *Id.* The *Powell* Court held that Congress did not have the power to exclude any person properly elected who otherwise satisfied the requirements set forth in the text of the United States Constitution. *Id.*

ment[76] and the Framers.[77] Furthermore, the Justice found that the *Powell* Court relied on democratic principles to determine whether Congress could impose qualifications on its own members.[78] The majority also looked to *Powell*'s holding to determine its applica-

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76 *Id.* Justice Stevens began the *Thornton* majority's analysis of the history of congressional qualifications by revisiting the *Powell* Court's examination of the experiences of the British Parliament. *Id.* Specifically, the *Powell* majority had focused on the situation of John Wilkes. *Id.* at 1848-49.

The Court explained that Wilkes, while serving in Parliament in 1763, published a critical opinion on a peace treaty that England signed with France. *Id.* at 1848. Wilkes was arrested and sentenced to 22 months in prison. *Id.* The House of Commons subsequently ousted him for libelous publication. *Id.* Despite the efforts of Parliament, the people continued to elect Wilkes. *Id.* Parliament, however, refused to validate his seat. *Id.* The House of Commons eventually voted to rescind its prior resolutions that prevented Wilkes from taking his seat. *Id.* The House reasoned that the previously adopted measures acted contrary to the rights of the people who elected him. *Id.* Justice Stevens concluded in *Thornton* that the Framers considered the Wilkes experience to mean that qualifications for members of Parliament were fixed and established by the law of the land. *Id.*

77 *Id.* at 1849. The Justice noted that the *Powell* Court began its analysis of the Framers' debates with the premise that, based on the experiences of John Wilkes, the Founding Fathers intended that the qualifications of the federal legislature contained in the Constitution be finite. *Id.*

Justice Stevens commented that the *Powell* Court found that the debate surrounding Congress' power to impose a property requirement evidenced the Framers' intent to fix the qualifications of Congress. *Id.* James Madison argued, the Justice observed, that the power to impose property qualifications would give Congress an improper ability to avoid constitutional requirements. *Id.* Justice Stevens continued by repeating Madison's explanation that "'[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect.'" *Id.*

The Justice also noted that the Framers soundly defeated the proposition by Governor Morris that Congress should have carte blanche power to add qualifications of its members. *Id.* The consensus among the Framers, Justice Stevens pointed out, was that a certain class of people might gain control of the legislature and perpetuate the membership of its own kind by the addition of qualifications. *Id.*

In addition, Justice Stevens noted that the post-Convention ratification debates evidenced the Framers' intent that the qualifications of Congress be exclusive. *Id.* For example, the Justice observed, Alexander Hamilton addressed the concern of the Antifederalists that the Constitution was partial to the wealthy:

> The truth is that there 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. . . . *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.*

THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST]; *see also Thornton*, 115 S. Ct. at 1849 (quoting Hamilton's analysis). Thus, the Justice concluded, the significant historical evidence revealed the Framers' intent that the qualifications of members of the federal legislature be fixed. *Thornton*, 115 S. Ct. at 1850.

78 *Id.* First, Justice Stevens noted that the *Powell* Court championed the egalitarian

tion to Congress' power to add qualifications.[79]

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tenet "'that the people should choose whom they please to govern them.'" *Id.* The Justice then advanced that two principles supported this broad tenet. *Id.*

The first principle, the Court stated, was that everyone could enjoy the opportunity to be chosen as a representative by the people. *Id.* Madison addressed this democratic tenet, the Court pointed out, when he stated that "'under these reasonable limitations [enumerated in the proposed Constitution], 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.'" THE FEDERALIST NO. 52, at 326 (James Madison); *see also Thornton*, 115 S. Ct. at 1850 (quoting Madison's analysis). In addition, the Justice pointed out, Wilson Carey Nicholas defended the democratic character of the Constitution, saying that it attended to the concern that all should have the opportunity to be federal legislators by limiting their qualifications to age and residence. *Thornton*, 115 S. Ct. at 1850-51.

The Justice next addressed the *Powell* Court's acknowledgement that sovereignty belongs to the people who, because of their sovereignty, enjoy the right to select their federal electors. *Id.* at 1850. Robert Livingston, the Court pointed out, championed this principle: "'[T]he people are the best judges who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights.'" 2 DEBATES ON THE ADOPTION OF THE CONSTITUTION, at 292-93 (J. Elliot ed., 1863) [hereinafter ELLIOT'S DEBATES]; *see also Thornton*, 115 S. Ct. at 1851 (quoting Livingston's analysis). Alexander Hamilton also supported this principle:

> The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

2 ELLIOT'S DEBATES, at 257; see also *Thornton*, 115 S.Ct. at 1851 (quoting Hamilton's analysis).

Thus, Justice Stevens concluded that *Powell* stood for two propositions. *Thornton*, 115 S.Ct. at 1851. The Justice first stated that from a historical perspective, the Framers intended to fix the qualifications of Congress in the constitutional text. *Id.* Second, the Court noted, the first conclusion is supported by the egalitarian principle that the people have the fundamental right to choose their representatives. *Id.* (citing *Powell*, 395 U.S. at 547).

[79] *Id.* at 1851-52. The Court noted that the holding in *Powell*, that Congress could not exclude one of its own members based on Article I, § 5, was not analogous to the issue of whether Congress could impose additional qualifications. *Id.* at 1851. The Justice proffered that the *Powell* holding did not necessitate such a limited reading. *Id.*

A broader interpretation of *Powell*, as noted by the majority, was evidenced by the decision reached in *Nixon v. United States*. *Id.* (citing Nixon v. United States, 506 U.S. 224 (1993)). The *Nixon* Court, after stating that the requirements found in Article I, § 2 were exclusive and outside the scope of Congressional power to change, explicated that:

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

Nixon, 506 U.S. at 237.

In *Thornton*, Justice Stevens concluded that the holding of *Powell*—that Congress

The holding in *Powell*, Justice Stevens acknowledged, did not control whether the states could alter the textual requirements found in Article I.[80] The Court, before considering petitioners' argument that *Powell* did not prohibit the imposition of additional qualifications on federal legislators, cited a multitude of jurisprudence that supported the position that states were powerless to do so.[81]

The Justice then considered petitioners' position that because the Constitution is silent on state-imposed qualifications, Amendment 73 is permissible as a valid use of the reserved powers held by the states.[82] This opinion, the Court posited, was invalid for two reasons.[83] First, the majority stated that the states never had the ability to alter the qualifications of their federal legislators.[84] Therefore, Justice Stevens continued, the Tenth Amendment did not reserve that power to the states.[85] Second, the Court advanced,

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cannot alter the qualifications of its own members because they are constitutionally finite—remained on firm ground. *Thornton*, 115 S. Ct. at 1852.

80 *Thornton*, 115 S. Ct. at 1852.

81 *Id.* at 1852-53. The Court stressed that petitioners did not cite to a single case in which a court found the imposition of qualifications on federal legislators by states permissible. *Id.* at 1852. Justice Stevens further noted that commentators before *Powell* were likewise in accord with the rationale of the courts. *Id.* at 1853.

82 *Id.*

83 *Id.* at 1853-54.

84 *Id.* at 1854. The Court posited that, contrary to petitioners' assertion, the Tenth Amendment only reserved powers that the states originally possessed. *Id.* Because the states did not have the power to add qualifications initially, the Justice explicated, the Tenth Amendment did not have the ability to reserve that right. *Id.* The Court noted that Justice Story had recognized that "'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'" 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858) [hereinafter STORY].

85 *Id.* The Court explained that Chief Justice Marshall, in *McCulloch v. Maryland*, supported the position that states could only reserve powers that they had originally. *Id.* (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). The *McCulloch* Court rejected the contention that because the Constitution was silent on the subject of a state's ability to tax, the states reserved that power. *McCulloch*, 17 U.S. (4 Wheat.) at 430. The *McCulloch* Court reasoned that the power of the states to reserve the right to tax was never invoked because it never possessed that ability. *Id.*

Next, Justice Stevens pointed out that the states did not possess the power to set congressional qualifications prior to the ratification of the Constitution. *Thornton*, 115 S. Ct. at 1855. The Court noted that the Framers contemplated a uniform state alliance in which the federal officers answered not to the people of their resident states, but to the people of the several states. *Id.* The Justice then analogized the election of members of Congress to that of the President. *Id.* Quoting Justice Story, the Court reasoned that the states had no more right to set the requirements of members of Congress than they had for the President because they were both federal officers. *Id.*

Further, the Court cited to several Constitutional provisions, which evidenced the

assuming that the states had some original power to alter congressional qualifications, the Founding Fathers divested the states of that ability by including a finite list of requirements in the Constitution.[86]

The Justice pointed out that several sources not discussed in *Powell* evidenced the preclusion of state power to alter qualifications.[87] The first piece of evidence, the Court observed, came from the Constitutional Convention debates.[88] Next, the majority cited

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states' inability to assert reserved powers where none existed before. *Id.* First, the Justice observed, Article I, § 5, cl. 1 gives the representatives of the people of the several states the ability to determine the criteria for membership from any one state. *Id.* Next, the Court continued, Article I, § 6 provides that federal law dictates congressional salaries, which are paid out of the United States Treasury, rather than the states. *Id.* Thus, Justice Stevens determined that the federal representatives owed their loyalty to the people of the Nation, rather than to the citizens of their resident state. *Id.* Finally, Article I, § 4, cl. 1 and Article II, § 1, cl. 2 indicate that when the Framers intended the states to exercise power in an area they did not originally possess, the Founding Fathers specifically delegated that authority to the individual states. *Id.* at 1855-56.

86 *Id.* at 1856.

87 *Id.*

88 *Id.* at 1856-60. The majority first observed that Madison confronted the issue of qualifications of members of the House of Representatives in the Federalist No. 52. *Id.* at 1856. Madison pointed out, the Court noted, that the Constitution limited the states' ability to determine the qualifications of its congressional delegates insofar as the criteria had to be synonymous with those of its state representatives. *Id.* However, the Justice observed, Madison cautioned that the states were constitutionally precluded from determining the standards of those already elected. *Id.* The majority determined that the Federalist No. 57, also evidenced Madison's conviction that states could not control the criteria of its federal representatives by preventing the imposition of extraneous qualifications, which would "fetter the judgment or disappoint the inclination of the people." *Id.* at 1857 (citing THE FEDERALIST No. 57 (James Madison)).

The Justice found further evidence in constitutional provisions discussed at the Convention debates that states did not have the authority to impose qualifications. *Id.* First, the Court looked to the constitutional provisions that regulated federal elections. *Id.* Article I, § 2, cl. 1, Justice Stevens noted, prevents states from discriminating against their congressional representatives by requiring states to impose the same qualifications on their federal and state electors. *Id.* Next, the Court continued that Article I, § 4, cl. 1 checks the ability of the states to govern the "Times, Places and Manner of holding Elections" by granting Congress the power to change the state laws. *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1).

The Justice next examined the implications of the congressional salary provision. *Id.* at 1858. Madison contended, the Court continued, that placing the power to determine the salaries of federal electors in the hands of the states would lead to inappropriate dependence by Congress on the individual states. *Id.* The majority concluded, despite the dissent's position to the contrary, that "it is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office." *Id.*

Further, the Justice considered Article I, § 5, cl. 1. *Id.* at 1859. The Court

to congressional experience as an indication of the states' inability to enact qualifications.[89] Further, the Court looked to democratic principles for additional evidence.[90] The Justice finally determined that state practices of assessing congressional eligibility were not persuasive.[91]

The majority subsequently rejected petitioners' position that Amendment 73 was constitutionally valid because it did not add

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pointed out that this provision gave Congress the authority to determine the criteria of its own members, which was consonant with the understanding that the Constitution contained a finite list of congressional qualifications. *Id.* It was inconsistent, the majority observed, to then say that the states could change those requirements. *Id.*

Finally, the Court found that the dearth of evidence from the Constitutional Convention that no one advocated the view that states could add qualifications lent further support to the majority's contention. *Id.* During the debates, the Justice noted, Robert Livingston addressed the proposal to add rotation as a requirement: "[t]he 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.* at 1860. Thus, the Court concluded,

> [I]f it had been assumed that states could add qualifications, that assumption would have provided the basis for a powerful rebuttal to the arguments being advanced. The failure of intelligent and experienced advocates to utilize this argument must reflect a general agreement that its premise was unsound, and that the power to add qualifications was one that the Constitution denied the States.

Id.

89 *Id.* at 1861. The majority recognized that Congress had historically limited its ability to scrutinize the criteria of its members by looking to those qualifications fixed in the Constitution. *Id.* Specifically, the Justice observed, Congress' experience with William McCreery lent support to the absence of state power to add qualifications. *Id.* Congress found, the Court continued, that a state-imposed residency requirement, which made McCreery ineligible for his congressional seat by state standards, was invalid because the finite nature of qualifications in the Constitution precluded the states from legislating in that area. *Id.*

90 *Id.* at 1862-64. First, Justice Stevens began, the ideal espoused by the Framers that people of all merit were eligible for federal election to the Congress evidenced that the ability of states to alter qualifications of their federal delegates would run contrary to the intent of the Founding Fathers. *Id.* at 1862-63. Next, the Court continued, a feature of the people's sovereignty was that they could vote for candidates of their own choice. *Id.* at 1863. Further, the majority advanced, the imposition of state qualifications was contrary to a third egalitarian tenet: that the people enjoy the right to select their federal representatives, not the states. *Id.* Finally, the Justice observed, the imposition of varied qualifications did not correspond to the Framers' vision of a uniform national legislature. *Id.* at 1864.

91 *Id.* at 1864-66. Petitioners argued, Justice Stevens observed, that state practice after ratification of the Constitution indicated that the states possessed the ability to add qualifications. *Id.* at 1864. The Court disagreed, however, reasoning that state practice was not a reliable yardstick to measure constitutional compliance. *Id.* Further, the Justice indicated that no court had ever upheld the imposition of state qualifications on federal representatives. *Id.* Finally, the majority concluded that despite extensive support, none of the states tried to impose additional criteria on their congressional representatives. *Id.* at 1866.

qualifications.[92] In addition, the Justice dismissed petitioners' argument that Section 3 of the Amendment was merely a restriction on the "Times, Places, and Manner of Holding Elections."[93] The Court also addressed the dissent's contention that the Federal Constitution did not prohibit the Arkansas measure.[94]

Last, Justice Stevens considered the constitutional implications of rotation.[95] The Court held that the addition of this power to the

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92 *Id.* at 1866-71. The petitioners advocated the position, the majority observed, that the amendment was valid because it did not preclude congressional incumbents from reelection as write-in candidates and therefore was not an absolute bar to reelection. *Id.* at 1867. The Justice dismissed the petitioners' narrow interpretation of *Storer v. Brown*, 415 U.S. 724 (1974), noting that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied." *Id.* (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)). The majority further reiterated that "[t]he Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections." *Id.* (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)). The Court continued that Amendment 73 attempted to alter qualifications that it could not constitutionally do otherwise. *Id.*

93 *Id.* at 1867, 1868-69 (citing U.S. CONST. art. I, § 4, cl. 1). A necessary result of petitioners' contention, the majority pointed out, was that Congress also had the ability to create legislation similar to Amendment 73. *Id.* at 1869 (citing Smiley v. Holm, 285 U.S. 355, 366-367 (1932) and U.S. CONST. art. I, § 4, cl. 1). This result, Justice Stevens posited, would have been untenable to the Framers, and therefore could not stand. *Id.* Further, the Court advanced that petitioners' expansive view of the Elections Clause did not comport with the intent of the Founding Fathers. *Id.* The Elections Clause, the Justice noted, was meant to provide the states procedural power, not the ability to ban certain people from congressional service. *Id.*

94 *Id.* at 1870-71. The Justice recognized that the dissent disagreed with the Court on two issues. *Id.* First, the majority observed, the dissent questioned whether Amendment 73 actually created a qualification. *Id.* at 1871. Second, the Court noted that the dissent read the Amendment's intent to "'level the playing field'" rather than alter the qualifications set forth in the Constitution. *Id.* (quoting *Thornton*, 115 S. Ct. at 1911 (Thomas, J., dissenting)). As to the former, Justice Stevens explained that the position that incumbents can run on a write-in basis ignores the reality that Amendment 73 circumvents the constitutional protection afforded to congressional incumbents by Article I. *Id.* As to the latter, the majority proffered, the argument that § 3 of the Arkansas Amendment levels the playing field falls flat in the face of its sole purpose to hamper the efforts of federal incumbents to achieve reelection. *Id.*

95 *Id.* The Court noted that the Framers had previously considered and rejected the addition of rotation to the Constitution. *Id.* However, the Antifederalists voiced concern over the failure to include rotation as a constitutional provision:

> Indeed, all the offices of the federal government, including the president, were perpetually eligible for reelection. Rotation in office, a "truly republican institution," had been abandoned, making the Senate, some feared, "a fixed and unchangeable body of men" and the president "a king for life, like a king of Poland." The members of the upper house of the legislature were so closely allied with the executive in so many important matters that they would become his "counsellors and partners in crime." Together the president and Senate held all the executive and two-thirds of the legislative power, in treaty-making they possessed the whole legislative power, and jointly they appointed all the civil and military officers. It was, as Richard Henry Lee remarked, "a

states "would effect a fundamental change in the constitutional framework."[96] A radical change such as the one contemplated by petitioners, the majority posited, could only be accomplished through constitutional amendment pursuant to Article V.[97]

In conclusion, the Supreme Court stated that Arkansas' imposition of term limits on its federal representatives to Congress was

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> most formidable combination of power" that could only unbalance the Constitution. Beside the president and Senate, the House of Representatives, the supposed "democratic branch" of the government, seemed but a "mere shred or rag" of the people's power, hardly a match for the monarchical and aristocratic branches. "What have you been contending for these ten years past?" the Antifederalists asked. "Liberty! What is liberty? The power of governing yourselves. If you adopt this Constitution, have you this power? No: you give it into the hands of a set of men who live one thousand miles distant from you." Secure in their ten-mile square these men could easily become as dangerous as the court of George III once was, for "Congress will be vested with more extensive powers than ever Great Britain exercised over us; too great . . . to intrust with any class of men, let their talents or virtues be ever so conspicuous, even though composed of such exalted, amiable characters as the great Washington." The elimination of annual elections, rotation, and recall, together with the extensive powers given to Congress, would make "the federal rulers . . . masters, and not servants."

GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 521-22 (1969).

Several state constitutions implemented the concept of rotation with respect to elected officials for fear of constraints on liberty and freedom. *Id.* at 140. Specifically,

> "[a] long continuance in the first executive departments of power or trust is dangerous to liberty," declared the Maryland Constitution, echoing the sentiments of American Whigs; "a rotation, therefore, in those departments is one of the best securities of permanent freedom." In Virginia and Maryland, for example, a person elected governor for three successive years was then ineligible for reelection for four years. For some rabid Whigs even this degree of rotation was not sufficient. Charles Lee, who was a kind of American archetype of the Pure Whig, considered himself "so extremely democratical" that he believed the Virginia Constitution defective because the eligibility of the governor for three successive years furnished him "an opportunity of acquiring a very dangerous influence," and even worse, it enabled "a man who is fond of office and has his eye upon re-election" to court "favour and popularity at the expense of his duty." Mandatory rotation of office and prohibitions on reelection could even be regarded by some Americans and enlightened foreigners as important constitutional devices for compelling mobility in a deferential society where men too often felt obliged to reelect their rulers for fear of dishonoring them.

Id.

96 *Thornton*, 115 S. Ct. at 1871. Justice Stevens commented that the need for national uniformity of qualifications for the federal legislature led to the adoption of fixed qualifications in the constitution. *Id.* That decision complied with the Framers' understanding that once the people of the individual states chose their congressional representatives, those representatives answered to the people of the several states. *Id.*

97 *Id.*

constitutionally amiss.[98] The majority reasoned that the states did not possess any preconstitutional powers to control qualifications so as to invoke a Tenth Amendment shield.[99] Moreover, the Court determined, even if the states did enjoy some original ability to alter qualifications of their state representatives to Congress, the Qualifications Clauses evidenced the Framers' intent to usurp that authority.[100]

In a concurring opinion, Justice Kennedy explained why the dissent's reasoning ran counter to basic tenets of federalism.[101] First, the Justice contended, the legitimacy of the federal government was derived from the people responsible for its formation.[102] Next, the Justice continued that United States citizens had dual identities: federal and state.[103] In addition, Justice Kennedy proffered, the people controlled the United States Government free from state impediments.[104] Thus, the Justice articulated that states did not have the power to interfere with the right of citizens to select their congressional representatives.[105] Finally, Justice Kennedy observed, Amendment 73's purported purpose, to give the

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98 *Id.* at 1853-54.

99 *Id.* at 1854.

100 *Id.*

101 *Id.* at 1872 (Kennedy, J., concurring).

102 *Id.* The Justice explained that the nature of the government even prior to the ratification of the Constitution was republican. *Id.* As John Jay opined, Justice Kennedy observed, the people of the United States had a federal identity and enjoyed the same rights and privileges as fellow citizens in different states. *Id.* Further, the Justice continued that the notion of nationalism continued once the people installed the Constitution as the supreme law of the land. *Id.*

103 *Id.* The Justice identified the duplicity of a national system of government by articulating that:

> Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

Id.

104 *Id.* at 1873 (Kennedy, J., concurring). The Justice opined that *McCulloch v. Maryland* stood for the proposition that the federal government acted legitimately in the scope of its own power without state intrusion. *Id.* (citing *McCulloch*, 17 U.S. (4 Wheat.) at 430, 432).

105 *Id.* The Justice explained that just because the people voted in their states, it did not follow that their congressional representatives derived their legitimacy from state law. *Id.* (citing Ex Parte Yarbrough, 110 U.S. 651, 663-64 (1884)). Further, Justice Kennedy noted, the right of citizens to elect their congressmen stemmed from

people enhanced control of the Federal Government, did not render it impervious to constitutional scrutiny.[106]

In a dissenting opinion, Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, declared that no constitutional provision prevented the states from imposing additional qualifications on their federal representatives.[107] This was based upon the premise, the Justice reminded, that constitutional silence did not proscribe state action.[108] The Justice proffered that the will of the people in their capacity as state citizens, not as United States citizens, legitimized the Constitution.[109] Therefore, Justice Thomas opined that Amendment 73 could only be invalidated if there was a constitutional provision that denied the state the right to add to the qualifications of federal delegates.[110]

The dissent began by observing that the majority incorrectly read the Tenth Amendment to disallow states from exercising powers that they did not enjoy prior to ratification of the Constitution.[111] Furthermore, Justice Thomas contended, the majority wrongly concluded that if the states or their citizens had any re-

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the Constitution and was protected from state and other interferences. *Id.* (citing United States v. Classic, 313 U.S. 299, 315 (1941)).

106 *Id.* at 1875 (Kennedy, J., concurring). The Justice concluded that the issue was not whether the Arkansas amendment effected a stronger hold on the national government for the people, but whether the Amendment derived its authority legitimately from a constitutional standpoint. *Id.*

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

108 *Id.*

109 *Id.* The Justice explained that the individual states, not the nation as a whole, were responsible for the Constitution's ratification. *Id.* With respect to the Tenth Amendment, the Justice noted, "the people" referred to the people of the states rather than the people of the nation because the Constitution did not provide a means by which the collective people of the nation could exercise power. *Id.* at 1876-77 (Thomas, J., dissenting).

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

111 *Id.* at 1877-80 (Thomas, J., dissenting). The Justice posited that the majority's understanding of reserved powers was incorrect because it did not imply that the people to whom the powers were reserved enjoyed that power previously. *Id.* at 1878 (Thomas, J., dissenting). The Tenth Amendment was designed, the Justice opined, to allow the people of the individual states to act in areas that the Constitution did not specifically reserve to the Federal Government, irrespective of whether the states had that ability prior to the Constitution's ratification. *Id.* Further, the Justice noted that the majority focused on the wrong issue. *Id.* at 1879 (Thomas, J., dissenting). Justice Thomas opined that the issue was not whether state independence inherent in the Tenth Amendment prevented congressional authority in light of its apparent legitimacy evidenced by Article I, but whether Article I prohibited the states from adding qualifications to their federal electors. *Id.*

In addition, the dissent advanced, the majority's reliance on *McCulloch* to support the idea that states could act in only those areas in which it lawfully acted prior to enactment of the Constitution was misplaced. *Id.* The Justice opined that the limited discussion in *McCulloch* devoted to the Tenth Amendment simply said that whatever

served power to alter the qualifications of their congressional representatives, then this was not in accord with the concept of national sovereignty.[112] The Justice noted that the majority misconstrued the intent of the Framers in assigning the states authority over the election of federal representatives.[113] The Qualifications Clauses, Justice Thomas continued, did not restrict the states from adding qualifications to their federal representatives in Congress.[114]

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powers the states did not confer to the federal government by way of the Constitution were reserved to the states. *Id.*

Also, the Justice continued, the only legitimate authority the majority cited in support of its Tenth Amendment interpretation was Joseph Story's treatise. *Id.* at 1880 (Thomas, J., dissenting). The dissent pointed out, however, that the Court had previously determined that Justice Story's interpretation of the Constitution granted too much power to the Federal Government. *Id.*

112 *Id.* at 1881 (Thomas, J., dissenting). The Justice observed that the majority arrived at this conclusion based on two reasons. *Id.* First, the Justice noted, the majority advanced that because Congress was a creature of the national government, federal electors owed their primary duties to the people of the nation rather than to their state constituents. *Id.* Next, Justice Thomas continued, the majority believed that because a congressional representative's responsibilities were national in character, it was not proper to let one state determine the qualifications of that representative. *Id.* The Justice contended, however, that the selection of federal electors was a distinct action of the people of the individual states, not the undivided mass of people that comprised the nation. *Id.*

The concurring opinion, the Justice observed, did not accept the dissent's reasoning because the Constitution grants states the right to choose their congressional representatives. *Id.* However, Justice Thomas advanced, a grant of power to the states by the Constitution did not mean that the states exerted federal authority when they chose their federal delegates. *Id.*

Next, the Justice opined that the congressional salary provision advanced by the majority did not necessitate the finding that states could not select their federal electors. *Id.* at 1882 (Thomas, J., dissenting). Further, it was of no constitutional moment, the Justice contended, that an individual state could not prescribe the qualifications of the President because neither could a state set qualifications for a neighboring state's congressional delegate. *Id.* This fact, the Justice observed, did not imply that states could not impose qualifications for their own representatives. *Id.*

113 *Id.* at 1883 (Thomas, J., dissenting). The Justice noted that Article I, § 4 was the only constitutional provision that the majority could rely on. *Id.* Nevertheless, Justice Thomas opined, the Framers' intent in including the Times, Places and Manners Clause was to ensure that the states did not cause federal elections to cease. *Id.*

In addition, the Justice observed, the majority's interpretation of Article II, § 1, cl. 2 did not lend support to their argument. *Id.* at 1884 (Thomas, J., dissenting). Justice Thomas noted that the Clause had nothing to do with congressional elections and that it merely provided for the electoral college. *Id.*

114 *Id.* at 1885 (Thomas, J., dissenting). The dissenting Justice opined that the Qualifications Clauses were merely a listing of the minimum criteria that the Framers thought each congressional representative should possess. *Id.* The Clauses, the Justice advanced, only limited state power insofar as states could not alter the age, citizenship, and residency requirements of their federal electors. *Id.* Justice Thomas stated that the majority's reliance on historical evidence did not import a meaning beyond what the plain text of the Clauses set forth. *Id.*

The Justice then criticized the majority's position that based upon the maxim *expressio unius est exclusio alterius*,[115] the Qualifications Clauses were exclusive.[116] Also, the Justice observed, the majority's use of egalitarian principles did not support the view that states or their citizens cannot alter the qualifications of their federal representatives.[117]

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115 BLACKS LAW DICTIONARY 581 (6th ed. 1990). The phrase is defined as:

> A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

Id.

116 *Thornton*, 115 S. Ct. at 1886-87 (Thomas, J., dissenting). The Justice explained that the addition of qualifications by the states did not interfere with the provisions' intended purpose to guarantee that congressional representatives met certain minimum standards. *Id.* This conclusion, the Justice maintained, was "buttressed by our reluctance to read constitutional provisions to preclude state power by negative implication." *Id.* at 1887 (Thomas, J., dissenting). Further evidence that cautioned the use of negative implication to curb state authority was found in Article I, § 10, the Justice pointed out, which precluded states from acting in various areas. *Id.* Thus, Justice Thomas deduced that if the Framers intended the Qualifications Clauses to be an exclusive list, the Founding Fathers would have included an express provision that precluded state action. *Id.*

The majority's contention that the Framers intended uniform qualifications for Congress, the Justice advanced, was without foundation. *Id.* at 1888 (Thomas, J., dissenting). As Thomas Jefferson observed,

> [h]ad the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications. . . . But it 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 nonresident 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.

14 WRITINGS OF THOMAS JEFFERSON 82-83 (A. Lipscomb ed., 1904); *see also Thornton*, 115 S. Ct. at 1888-89 (Thomas, J., dissenting) (quoting Jefferson's analysis).

117 *Thornton*, 115 S. Ct. at 1889-94 (Thomas, J., dissenting). The Justice opined that the democratic principles set forth by the majority did not necessitate a finding that states were powerless to impose qualifications on members of Congress. *Id.* at 1889 (Thomas, J., dissenting). Rather, Justice Thomas stated, the majority's analysis leads merely to the following conclusions: 1) the Founding Fathers did not want the Constitution to prescribe multiple limitations on congressional membership; and 2) the Framers wanted to preclude Congress from altering the qualifications of its own members. *Id.*

Further, the dissent noted that Justice Stevens incorrectly analogized Congress' power to add qualifications and the states' ability to do the same.[118] First, the Justice opined, a comparison of the original and final drafts of the Constitution evidenced the Framers' intent to make the qualifications for both the House and Senate nonexclusive.[119] Justice Thomas next observed that the majority's reliance on other constitutional provisions did not support the position that states or their citizens could not add qualifications.[120] Third, the Justice noted, the evidence the majority relied on from the ratification period did not support the contention that Amendment 73 is constitutionally impermissible in violation of the Qualifications Clauses.[121] In addition, the dissent commented that state

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The Justice also proffered that Congress did not have the power to add requirements to its own members because the Constitution did not expressly grant the Federal Legislature that power, not because the Qualifications Clauses precluded it from doing so. *Id.* However, it did not follow that the Framers intended to prohibit the states from adding criteria to their federal representatives, the dissenting Justice observed. *Id.* at 1890 (Thomas, J., dissenting). Also, the Justice noted, there was nothing undemocratic about the citizens of a state who decided to curtail the spectrum of candidates by their own initiative because their actions did not violate the tenet that "the people should choose whom they please to govern them." *Id.* at 1891 (Thomas, J., dissenting).

Even if one accepted the premise that Article I precluded state legislatures from adding qualifications, Justice Thomas further opined, it did not necessitate finding that the citizens of the state were likewise prohibited. *Id.* at 1893 (Thomas, J., dissenting).

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

119 *Id.* at 1895 (Thomas, J., dissenting). The Justice opined that the evidence pointed to a distinct choice by the Framers that the qualifications for neither the House and the Senate be fixed. *Id.* In addition, the dissent advanced, the majority's contention that the lack of an exclusivity condition in the draft of the Senate Qualifications Clause was due to the Senate's election by the state legislature, conflicted with the majority's *expressio unius* rationale. *Id.* at 1895-96 (Thomas, J., dissenting).

120 *Id.* at 1896-1900 (Thomas, J., dissenting). First, the dissent argued that Article I, § 6, cl. 1 was simply a means by which the Framers sought to ensure a competent federal legislature. *Id.* at 1896 (Thomas, J., dissenting). The Justice next observed that the legislative history of Article I, § 2, cl. 2 did not provide a basis for the majority's assertion that the Clause protected congressional representatives from discrimination. *Id.* Third, Justice Thomas continued, the notion that the Framers included Article I, § 5 in contemplation that Congress would use state law to determine a representative's eligibility was plausible. *Id.* at 1897-98 (Thomas, J., dissenting). Finally, Justice Thomas concluded, Article I, § 4, cl. 1's "make or alter" standard did not preclude the states from adding qualifications but served the purpose of ensuring that states would hold elections. *Id.* at 1898 (Thomas, J., dissenting).

121 *Id.* at 1900-03 (Thomas, J., dissenting). Justice Thomas first noted that while the evidence offered by the majority on the ratification debates did not contain proof that the states could add qualifications, neither did it contain evidence that the states could not. *Id.* at 1900-01 (Thomas, J., dissenting). Further, the dissent did not interpret Madison's argument in the Federalist No. 52 to impose a check on the states' authority to add qualifications to congressional representatives. *Id.* at 1901 (Thomas, J., dissenting).

practice during the post-ratification period defeated the majority's position that the Framers intended the Qualifications Clauses to be finite.[122] Actions taken by Congress regarding whether to validate the seat of a candidate who violated state law, the Justice finally contended, did not support the invalidation of the Arkansas amendment.[123]

Lastly, Justice Thomas proffered, Amendment 73 did not disqualify incumbents from seeking reelection because they could do so as write-in candidates.[124] Therefore, the Justice concluded that the Arkansas amendment did not violate the Qualifications Clauses insofar as the criteria set forth in the Constitution for congressional membership were not exclusive.[125]

In a classic battle between conservatives and liberals,[126] the *Thornton* Court returned to its old ways of "playing fast and loose with the constitution."[127] *Thornton* came shortly after the Court's decision in *United States v. Lopez*,[128] in which the Court experienced a magnificent atavism to a time when the judicial branch interpreted the Constitution in a fundamental manner.[129] *Thornton*'s majority expressly contradicted the spirit of the *Lopez* holding by interpreting the Constitution to say something that it does not affirmatively declare: that states cannot add qualifications to their

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122 *Id.* at 1903-08 (Thomas, J., dissenting). The dissent advanced that several states added the qualification that in addition to the state residency requirement their congressional representatives also had to reside in the districts from which the people elected them. *Id.* at 1903 (Thomas, J., dissenting). Also, the Justice continued, the majority failed to explain the significance of a provision adopted in several states that required the federal delegates to have resided in their respective districts for at least one year. *Id.* at 1905 (Thomas, J., dissenting).

123 *Id.* at 1908-09 (Thomas, J., dissenting). The Justice opined that the actions of Congress had little probative value in determining whether states could add qualifications or not. *Id.* at 1908 (Thomas, J., dissenting).

124 *Id.* at 1909 (Thomas, J., dissenting). The dissent posited that evidence offered to the Arkansas Supreme Court showed that write-in candidates who were well funded and recognized by the public were successful in winning votes. *Id.* at 1910 (Thomas, J., dissenting). Justice Thomas also noted that one of the primary reasons that the citizens of Arkansas had adopted Amendment 73 was to remove the advantage incumbents had over nonincumbents so as to "level the playing field." *Id.* at 1911 (Thomas, J., dissenting).

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

126 Ted Gest, *Term Limits: Detour Ahead*, U.S. NEWS & WORLD REP. June 5, 1995, at 11, 11. The author described a national movement to impose term limits on federal legislators as a political battle between liberals and conservatives both in Congress and the Court. *Id.*

127 Roberts v. State, 458 P.2d 340, 353 (Alaska 1969).

128 115 S. Ct. 1624 (1995).

129 *See generally* United States v. Lopez, 115 S. Ct. at 1642-51 (Thomas, J., concurring).

federal delegates.[130] Justice Thomas imparted constitutionally sound advice when the Justice cautioned that the Court should be reluctant "to read constitutional provisions to preclude state power by negative implication."[131]

What the *Thornton* majority failed to realize was that the Framers had a limited federal government in mind. The Founding Fathers drafted the Qualifications Clauses as a floor rather than a ceiling, to assure that candidates for Congress met some minimum standards of competence. The fear of an overpowered federal government[132] led the Framers to leave to the states any additional qualifications rather than nationalize a multitude of congressional standards. The citizens of this country do not need a constitutional amendment to impose term limits because the Constitution has no affirmative barriers to do so.

In *United States v. Lopez*, the Court boldly went where no United States Supreme Court in fifty-eight years dared to go. In *U.S. Term Limits, Inc. v. Thornton*, the majority once again returned to a loose interpretation of the Constitution that the Founding Fa-

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130 *Thornton*, 115 S. Ct. at 1845. Several commentators have made the case for the constitutionality of state-imposed term limits. *See, e.g.*, Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitation*, 20 HOFSTRA L. REV. 341 (1991) (observing that the Framers did not demonstrate their intent to preclude the state imposition of term limits on members of the federal legislature just because the Constitution is silent on that issue); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991) (noting that there is no constitutional provision that precludes state assessment of congressional term limits); Safranek, *supra* note 5 (opining that the courts should leave the term limit decision for the states and Congress to resolve and federal legislators can seek redress from their constituents). *But see* Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POLICY 1 (1994) (stating that term limits are unconstitutional to the extent that they impermissibly add qualifications to an already finite list); Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. L. REV. 1 (1992) (declaring that the proper procedure to install federal term limits is through Constitutional amendment).

131 *Thornton*, 115 S. Ct. at 1887 (Thomas, J., dissenting).

132 One commentator pointed out that the recent United States Supreme Court cases *Thornton*, *Lopez*, and *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), indicate that "the United States [is] about to undergo a significant transformation of the legal relationship between the national government and the states[ ]." Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 643-44 (1996). *See also* Timothy M. Phelps, *Judicial Revolution; Recent Cases Slant Towards States*, NEWSWEEK, May 29, 1995, at A13 (observing that there were "revolutionary states-rights movements within the court"); Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (noting that "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation"); John G. Kester, *The Bipolar Supreme Court*, WALL ST. J., May 31, 1995, at A17 (opining that "(t)he court of 1995 mirrors the court of 1935, with the politics reversed").

thers would have found untenable. Consequently, the Court must carefully forge a path of jurisprudence to attain the limited central government that federalism embodies.

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