ARTICLES

ARE CONGRESSIONAL TERM LIMITS CONSTITUTIONAL?

DANIEL HAYS LOWENSTEIN*

I. INTRODUCTION 2
II. ORTHODOXY 8
A. *The Qualifications Set Forth in the Constitution are Exclusive* 8
1. A Problem of Interpretation 9
2. The History of the Qualifications Clauses 12
3. *Powell v. McCormack* 19
B. *Term Limits Constitute Qualifications Within the Constitutional Prohibition* 21
1. Election Procedures 22
2. Conditions of Candidacy 24
3. Are Term Limits Qualifications? 25
III. HETERODOXY 29
A. *Safranek's Reliance on the "Times, Places and Manner" Clause* 30
B. *Hills' Attempt to Avoid the "Times, Places and Manner" Clause* 33
1. Is there an affirmative basis outside Article I, § 4 for finding power in the states to add qualifications? 34
a. The argument from control of the suffrage 35
b. The argument from the people's power to choose representatives 37
2. Do the Qualifications Clauses permit state constitutions to create new qualifications? ... 42

* Professor of Law, University of California, Los Angeles. An earlier version of this article was presented at the annual meetings of the American Political Science Association, Washington, D.C., on September 4, 1993. I am grateful to the two discussants on that occasion, Walter Dellinger and Nelson Polsby, for their comments, and also to Michael Berman, Bruce Cain, Ken Karst, Morgan Kousser, Gary Schwartz, Steve Shiffrin, John Shockley, and Richard Winger. Finally, I thank UCLA law student Stacy Weinstein and the UCLA law library staff for their valuable research assistance. After this article was written, I co-authored an amicus brief filed by the California Democratic Party and others supporting the Respondents in *U.S. Term Limits v. Thornton*, the Arkansas term limits case now pending in the Supreme Court.

a. The Framers did not intend for the states to have power to create qualifications 46
b. The historical record is bereft of support for Hills' position 48
c. Any notion that the exclusive effect of the Qualifications Clauses is restricted to Congress and does not apply to states or state constitutions is inconsistent with the language of the Constitution 50
d. Hills' position is anachronistic 53
IV. EVASION 57
A. *The Qualifications Clauses* 58
B. *Equal Protection and the First Amendment* 62
C. *Associational Rights of Parties* 68
V. CONCLUSION 72

"The question . . . is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

— *Marbury v. Madison*[1]

I. INTRODUCTION

In 1990, Colorado voters approved an initiative measure amending their state's constitution to limit the terms of Colorado representatives in Congress to two consecutive terms for Senators and six consecutive terms for Representatives.[2] In 1992, an additional twelve states approved initiatives limiting congressional terms, and a thirteenth, Missouri, approved a measure that becomes effective if and when half the states have adopted similar limits.[3] In 1994, Utah became the first state in which the state

1. 5 U.S. (1 Cranch) 137, 176 (1803).

2. COLO. CONST. art. XVIII, § 9a(1). Terms are regarded as consecutive under the Colorado limit unless they are separated by at least four years.

3. 50 Cong. Q. Wkly. Rep. 3593-94 (November 7, 1992). The number of terms referred to in the following list is the maximum number of terms permitted for Representatives. In each case, Senators are limited to two terms. The limits vary considerably on matters such as whether they are "life-long" or of limited duration; whether they apply to consecutive terms or a stated number of terms or years of service within a specified period; the way they treat partial terms; and so on.

Arizona: ARIZ. CONST. art. 7, § 8. Three terms.

Arkansas: ARK. CONST. amend. LXXIII, § 2. Three terms.

California: CAL. ELEC. CODE § 25003. Three terms.

Florida: FLA. CONST. art. 6, § 4. Four terms.

legislature enacted congressional term limits, though like Missouri's, Utah's term limits are conditional upon enactment in a sufficient number of other states.[4] All these measures limit Senators to two terms and Representatives to from three to six terms.

During the same short period, numerous initiatives imposing term limits on state and local officials have been approved, in some cases as part of the same measures imposing congressional term limits. Although state and local term limits may be challenged as violative of federal constitutional rights, especially under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the prospects for such challenges are not bright, and we shall not be concerned with them here.[5]

Congressional term limits stand on much thinner ice because they are vulnerable to challenge based on the Qualifications

---

Michigan: MICH. CONST. art. 2, § 10. Three terms.

Missouri: MO. CONST. art. 3, § 45(a). Four terms. As mentioned in the text, this provision is not effective until half the states adopt congressional term limits.

Montana: MONT. CONST. art. 4, § 8. Three terms.

North Dakota: N.D. CENT. CODE § 16.1-01-13. Six terms. The limit is a combined one for Senate and House, and goes into effect after an individual has served a total of twelve years in Congress. A "back-up" provision, § 16.1-01-13.1, which goes into effect only if the "life-long" feature of the primary section is ruled unconstitutional, removes the disqualification effected by the limit after a two-year period.

Ohio: OHIO CONST. art. V, § 8. Four terms.

Oregon: OR. CONST. art. 2, § 20. Three terms.

South Dakota: S.D. CONST. art. 3, § 32. Six terms.

Washington: WASH. REV. CODE ch. 29.68.016. Three terms.

Wyoming: WYO. STAT. § 22-5-104. Three terms.

An initiative measure to the same effect was approved in Nebraska in 1992, but was later nullified on the ground that it had not received sufficient signatures and therefore should not have been placed on the ballot. *See* Duggan v. Beermann, 515 N.W.2d 788 (1994). Just before this article went to press, Oklahoma voters adopted a term limits measure, restricting Senators to two terms and Representatives to three terms. *See Synar Loses in Close Oklahoma Primary*, L.A. TIMES, Sept. 21, 1994, at A35.

4. See UTAH CODE ANN. § 20A-10-301. Section 5 of the bill enacted by the Utah legislature provides that the congressional term limits do not go into effect until the Office of Legislative Research and General Counsel determines that at least 24 states have established such limits.

5. For rejection of such challenges, see, e.g., Legislature of California v. Eu, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S.Ct. 1292 (1992); U.S. Term Limits v. Hill, 872 S.W.2d 349, 316 Ark. 251 (1994), *cert. granted*, 114 S.Ct. 2703 (1994).

Challenges are also possible under state constitutional provisions, on the ground that the particular measure is either beyond the scope of the initiative process or substantively invalid. However, such challenges to date have enjoyed little success. In *Eu*, challenges under the California single-subject rule and under the rule that prevents the initiative from being used for constitutional "revisions" as opposed to "amendments" were rejected. *Eu*, 816 P.2d 1309. In *Hill*, a challenge on the ground that the initiative contained no enacting clause was rejected. 872 S.W.2d at 353. In *Opinion of the Justices*, the Maine Supreme Judicial Court rejected a contention that the qualifications set forth in the state constitution for certain offices were exclusive, in which case they would have barred a proposed statutory initiative adding term limits to these offices. 623 A.2d 1258 (Me. 1993).

Clauses of the United States Constitution.[6] Prior to 1968, it was almost universally agreed by judicial and non-judicial authorities that these clauses, together with a few other provisions elsewhere in the Constitution, constituted the exclusive qualifications for members of the House and Senate. This view was authoritatively approved in 1968 by the Supreme Court in *Powell v. McCormack*.[7] Because term limits purport to add qualifications to those specified by the Constitution, they are void.[8]

This orthodox view is elaborated in Part II of this paper. Although several recent articles, some of excellent quality, have argued that congressional term limits are unconstitutional,[9] Part I will scrutinize the debates at the Philadelphia Constitutional Convention in greater detail than has hitherto appeared in connection with this constitutional controversy. Part II will show that the states are prohibited from adding to the qualifications set

6. U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (Senate).

This article does not consider the possibility, recently put forth by Anthony E. Gay, Comment, Congressional Term Limits: Good Government or Minority Vote Dilution?, 141 U. PENN. L. REV. 2311 (1993), that congressional term limits violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988).

7. 395 U.S. 486 (1969).

8. The only courts to rule on the issue to date have agreed. The first reported opinion was Stumpf v. Lau, in which the Nevada Supreme Court ruled a congressional term limit proposal off the ballot. 839 P.2d 120 (Nev. 1992). Among other reasons, the court rejected the proposal because it met the standard, established by Nevada law, of "palpably" violating the United States Constitution. *Id.* at 123. Washington and Arkansas courts have also ruled that congressional term limits are unconstitutional. *See* Thorsted v. Gregoire, 841 F.Supp. 1068 (W.D.Wash. 1994); U.S. Term Limits v. Hill, 872 S.W.2d 349 (Ark. 1994).

In the Nevada case, two judges dissented because although they "entertain[ed] serious doubts respecting the constitutional validity" of a congressional term limits initiative, their doubts did not attain "that measure of certitude which would permit [them] to conclude confidently that the initiative is plainly and palpably unconstitutional." *Stumpf*, 839 P.2d at 126 (Nev. 1992) (Steffens, J., dissenting). Thus, the only judge to date who has voted to uphold congressional term limits is Justice Hays in the Arkansas case. *Hill*, 872 S.W.2d at 365-66 (Hays, J., dissenting). Another member of the Arkansas Supreme Court, Justice Cracraft, would have upheld the Arkansas provisions, not on the ground that congressional term limits are constitutional, but because they were what this article refers to as "quasi-term limits," or ballot-access restrictions, which Justice Cracraft thought were constitutional. *Id.* at 367-68.

9. See Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992); Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569 (1991); Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1 (1992); Tiffanie Kovacevich, Comment, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 PAC. L. J. 1677, 1709-10 (1992); Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON L. REV. 155 (1991); Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L. J. 1913 (1992); Jonathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966 (1993).

forth in the Constitution and that term limits are qualifications within the constitutional prohibition.

Supporters and opponents of congressional term limits agree about one thing: that profound change may occur in the way the legislative branch of the federal government operates, whether for better or for worse. Such high stakes are sufficient warrant for the attempt in Part II to refine the constitutional analysis of term limits. However, the primary impetus for this article is that little or no response has yet been made to the efforts of supporters of term limits to get around the constitutional obstacle that separates them from their goal. These efforts are of two types: attempts by scholarly commentators to rebut the orthodox view of the Qualifications Clauses, and attempts by those who draft term limit proposals to evade the Qualifications Clauses.

Given the intense political support for term limits and the various academic incentives that encourage challenging conventional wisdom wherever it may be found, it is both predictable and fitting that a number of young writers, Neil Gorsuch and Michael Guzman,[10] Roderick Hills, Jr.,[11] and Stephen Safranek,[12] should have come forward with vigorous and original defenses of state-enacted congressional term limits.[13] On the other hand,

10. Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341 (1991).

11. Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991). In *Stumpf*, the dissenting judges, for whom the unconstitutionality of congressional term limits was not sufficiently plain and palpable to justify removing an initiative proposal from the Nevada ballot, cited Hills' article several times. 839 P.2d at 129-30.

An additional defense of the constitutionality of congressional term limits appears in Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 TEX. L. REV. 865 (1993). Since DeCarli's argument is little more than a variation on Hills', I shall deal with it in passing at appropriate places.

12. Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321 (1993).

13. An additional published defense of the constitutionality of congressional term limits is contained in excerpts from briefs by Cleta Deatherage Mitchell, filed in a Florida lawsuit concerning the constitutionality of Florida's term limit provisions. LIMITING LEGISLATIVE TERMS 252-53, 257-61 (Gerald Benjamin & Michael J. Malbin, eds., 1992). Since Mitchell's argument makes virtually no reference to the Qualifications Clauses, it can hardly be taken seriously. In fairness to Mitchell, only excerpts are set forth in the Benjamin & Malbin volume, and I have not consulted the original briefs. For Mitchell's policy arguments in favor of congressional term limits, see Cleta Deatherage Mitchell, *Limiting Congressional Terms: A Return to Fundamental Democracy*, 7 J.L. & POL. 733 (1991).

Another defender of term limits argues that amending the Constitution to allow a single four-year term for Representatives and a single eight-year term for Senators would advance the general purposes of the Framers of the Constitution under modern circumstances. *See* James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL L. REV. 1 (1991). Otteson does not argue that term limits can be imposed without a constitutional amendment. *See*

there is little glory in defending conventional wisdom. A writer with a different set of qualities is wanted here: unimaginative, unambitious, middle-aged, and tenured. I have heard the call!

Part III of this article, then, attempts to demonstrate that for all the intelligence and zeal that Hills and Safranek have brought to their task of attempting to show that states may add to the qualifications of members of Congress, their arguments have no merit. Gorsuch and Guzman take a different tack from Hills and Safranek, conceding—at least for the sake of argument—that states may not impose qualifications on candidates for Congress beyond those stated in the Constitution,[14] but contending that term limits are not qualifications within the constitutional ban. For the sake of convenience in exposition, Gorsuch and Guzman's arguments are taken up in Part II(B).

Many of the proponents of congressional term limit initiatives have understood—as Parts II and III of this paper attempt to demonstrate—that their proposals are unlikely to withstand constitutional scrutiny. Some have responded with the wistful hope that if the limits are struck down, their federal representatives "will continue voluntarily to observe the wishes of the people" as reflected in the unconstitutional provisions.[15] Others, less wistfully, have sought to evade the Qualifications Clauses by preventing candidates who have exceeded the limits from having their names placed on the ballot rather than declaring them ineligible to be elected. Since such candidates, at least theoretically, could be elected by write-in votes, proponents hope the restriction will not be regarded as a "qualification" for constitutional purposes.

Part IV of this paper argues that such ballot access restrictions, or "quasi-term limits" as I shall call them, probably should not survive scrutiny under the Qualifications Clauses. Even if they do,

---

id. at 35 n.162. For a response to Otteson's general argument, see Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL L. REV. 37 (1991).

Recently, a new defense of congressional term limits appeared. *See* Dwayne A. Vance, Comment, *State-Imposed Congressional Term Limits: What Would the Framers of the Constitution Say?*, 1994 B.Y.U. L. REV. 429 (1994). Vance assumes on the basis of almost no analysis that the text and history of the Constitution leave open the question of whether the states may impose term limits. He then assumes the Framers, if they were alive today, would accept in its entirety the ideology of the modern term limits movement; dismisses contrary views expressed by the Framers as not serious; and concludes that state-imposed term limits should be upheld. If this strikes you as an uncommonly odd way to proceed, reading Vance's Comment is unlikely to change your mind.

14. *See* Gorsuch & Guzman, *supra* note 10, at 354 n.60.

15. This language appears in the Colorado, Michigan, and Missouri initiatives. *See* COLO. CONST. art. XVIII, § 9a(a)(3); MICH. CONST. art. II, § 10; MO. CONST. art. III, § 45(a)(2).

they certainly violate associational and equal protection rights of voters and associational rights of political parties. Previous writers seem to have assumed that if direct restrictions on a candidate's eligibility, or "absolute term limits," do not violate the First Amendment or the Equal Protection Clause, then neither should less restrictive quasi-term limits. Though initially plausible, this assumption is fallacious, because states have far more leeway under the Constitution to establish qualifications for office than to seek to manipulate the results of electoral contests between candidates who *are* qualified.[16]

Before turning to the substantive constitutional arguments, it is worth pointing out one respect in which challenges to congressional term limits differ from much constitutional litigation. When state action is challenged as a denial of due process, equal protection, or First Amendment rights, some form of balancing test is ordinarily applied.[17] Much constitutional jurisprudence in the last three or four decades has been preoccupied with the "level of review" to be applied in particular cases, by which is meant the degree of justification the state must offer if the infringement of individual rights is to be permitted.[18] When balancing occurs, inevitably the wisdom of the challenged policy is considered.

The question considered in this article is of a different nature. If term limits establish a qualification for Congress that states are not authorized to enact, then they are unconstitutional, no matter how compelling the arguments for such limits may be.[19] Contrariwise, if states are permitted to add qualifications to those set forth in the Constitution, or if term limits do not constitute the type of qualification that is forbidden, then the states may adopt term limits, no matter how disastrous some of us may believe

16. The provisions adopted in Arizona, Arkansas, California, Florida, Montana, North Dakota, Washington, and Wyoming are quasi-term limits, while those adopted in Colorado, Michigan, Missouri, Ohio, Oregon, South Dakota and Utah are absolute. For citations, *see supra* note 4.

17. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (constitutionally mandated procedures for terminating disability benefits are determined by a balancing test).

18. *See, e.g.*, Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1982) (level of review under First Amendment is determined by reference to whether speech took place in public or non-public forum).

19. Gorsuch and Guzman, who attempt to defend the constitutionality of congressional term limits, acknowledge this point. *See* Gorsuch & Guzman, *supra* note 10, at 363-64.

them to be.[20] To be sure, when a quasi-term limit is challenged as violating the Equal Protection Clause or the First Amendment, a balancing test will be applied. But what the state must justify in such a case is not a term limit but the omission of qualified candidates from the ballot.

No one would be surprised to learn there was a statistical correlation between belief in term limits as policy and belief in their constitutionality.[21] Nevertheless, it will be possible in this article to set aside the heated policy debate on term limits.[22]

II. ORTHODOXY

A. *The qualifications set forth in the Constitution are exclusive*

The Constitution explicitly sets forth three qualifications for members of the House of Representatives:

> 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.[23]

Qualifications for Senators are stated in virtually identical language, except that the minimum age is thirty and the period of citizenship is nine years.[24] A few additional qualifications of less general scope are contained elsewhere in the Constitution, such as a provision permitting disqualification from holding federal office, presumably including congressional office, as a permissible punishment in impeachment cases;[25] and a provision barring from Congress persons who, after taking an oath to support the Constitution, engage in insurrection.[26]

---

20. As we shall see, there is a modicum of balancing required to determine whether certain forms of regulation constitute "qualifications" barred by the Constitution. This balancing employs a very limited set of criteria, having nothing to do with the policy debate on term limits.

21. This is not to say that most opponents of term limits believe they are unconstitutional while most supporters believe they are valid. To the contrary, most supporters and opponents alike probably accept the conventional wisdom, which is that state and local term limits are constitutionally valid but congressional term limits are not. On the other hand, probably close to 100 percent of those who depart from the conventional wisdom do so in the direction of their political views on term limits.

22. For a range of views, *see* LIMITING LEGISLATIVE TERMS, *supra*, note 13.

23. U.S. CONST. art. I, § 2, cl. 2.

24. U.S. CONST., art. I, § 3, cl. 3.

25. U.S. CONST. art. I, § 3, cl. 7.

26. U.S. CONST. amend. XIV, § 3. Congress is authorized to waive this restriction by two-thirds vote.

P. Allan Dionisopolous argued that because there were qualifications outside the Qualifications Clauses, earlier scholars had been wrong to conclude that the Qualifications

1. *A Problem of Interpretation*

The Constitution, while it establishes certain qualifications for members of Congress, is silent as to whether additional qualifications may be imposed. The crucial question of interpretation is whether these qualifications represent a minimal set of criteria to which others may be added, or whether they are a complete statement of qualifications, to which either addition or subtraction would require an amendment to the Constitution.

Joseph Story, whose view that the constitutional qualifications are exclusive proved to be influential, relied in part on an assumption that the language enumerating certain qualifications virtually requires the implication that no others may be added:

> From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.[27]

Story was overstating the case. In legal language, as in ordinary English, an enumeration of the sort contained in the Qualifica-

---

Clauses were intended to be exclusive. *See,* P. Allen Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases,* 17 J. PUB. L. 103, 111-15 (1968). The point is of little consequence, for the question is not whether the Qualifications Clauses provide the exclusive qualifications for Congress, but whether the Constitution does. The fact that the Constitution contains a few exotic qualifications in sections focused on other questions, such as the permissible punishments in impeachment cases, does not support Dionisopolous' ultimate contention that Congress is authorized to create new qualifications. In any event, to avoid possible misunderstanding, when this article refers in general to the Qualifications Clauses, it is intended to include not only the two major clauses but all the qualifications for Congress contained in the Constitution.

Dionisopolous made a similar but even stranger argument based on the Constitutional provision that "no religious test shall ever be required as a qualification to any office or public trust under the United States." U.S. CONST. art. IV, cl. 3. Dionisopolous contends that the prohibition of religious tests for Congress suggests the permissibility of non-religious tests. Dionisopoulos, *supra* at 117-19. What this overlooks is that the religious test provision is not directed particularly at Congress, but at all federal officials. Assuming that there is a negative implication in the Qualifications Clauses, that is, that their provisions are exclusive, Dionisopolous is correct to point out that insofar as the religious test provision applies to Congress, it is redundant. But the redundancy does not cast doubt on the negative implication. To have made an exception in the religious test clause for members of Congress would not simply have eliminated a redundancy but would have created confusion and the possible implication that a religious test could be applied to Congress.

Dionisopolous' argument regarding the constitutional qualifications appearing outside the Qualifications Clauses is responded to in greater detail by Levy, *supra* note 9, at 1932-33. Further, Dionisopolous' arguments were considered and rejected by the Court in *Powell v. McCormack* when it concluded that Congress is not permitted to add to the qualifications stated in the Constitution. 395 U.S. 486, 542 n.78 (1968). This does not in itself prove that Dionisopolous was wrong, but it does mean that his article cannot be regarded as presenting new information or ideas that would provide a reason for reconsidering *Powell.*

27. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 624 (1833).

tions Clauses *may* imply exclusivity, but this is not always the case.[28]

It is worth considering a homely example, for although the point is elementary for the interpretation of legal texts,[29] it will be helpful later on to be very clear as to the precise nature of the ambiguity created by the Qualifications Clauses. Suppose, then, that I am having lunch with my son and that each of us knows that there are both apples and ice cream in the kitchen. If I say to my son, "You may have an apple for dessert," I may well mean and my son may well understand that an apple is all he may have—that is, that he may not have any ice cream. My statement will be interpreted as an exclusive listing of permissible desserts. However, if I say, "You may have some ice cream for dessert," I probably intend no such exclusivity. If my son prefers to eat an apple, he will be violating no injunction of mine. My statements are grammatically ambiguous in a way similar to the ambiguity of the enumeration of certain qualifications for members of Congress in the Constitution. The ambiguity of my statements is demonstrated by the fact that their grammatical structures are identical, and that from the language alone, it is impossible to know whether an exclusive listing is intended. As the example shows, however, the context may make it possible to resolve the ambiguity with confidence.[30]

Whether or not the Qualifications Clauses are exclusive is not, then, a question that can be answered by parsing the language of the Constitution. Story himself, despite the passage quoted above, seems to have recognized this point, for he based his interpretation in part on the belief that the Constitution made more sense and would be more secure if the Qualifications Clauses were given an exclusive interpretation.

---

28. It has not proved invariably to be the case even in the limited context of qualifications clauses in constitutions, as the qualifications for public office in several state constitutions have been held to be non-exclusive. A term limits initiative for state officials recently was ruled to be constitutional because the qualifications set forth in the Maine constitution were held to be non-exclusive. Opinion of the Justices, 623 A.2d 1258 (Me. 1993). For other cases holding that qualifications for state or local office may be added to those set forth in state constitutions. *See also* Boughton v. Price, 215 P.2d 286 (Idaho, 1950); State ex rel. Southerland v. Johnson, 138 A. 280 (Del. 1927); Darrow v. People ex rel. Norris, 8 P. 661, 663-64 (Colo. 1885).

29. *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 641-42 (1988).

30. The contextual assumption is that my son understands that either because of health concerns or persistent parental fussiness, my usual policy is that he can eat an apple whenever he likes, but that ice cream is, as Gershwin would have said, a sometime thing.

> It has been justly observed, that under the reasonable qualifications established by the 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 any particular profession of religious faith.[31]

Story went on to point to the dangers that would arise if states were permitted to add to the qualifications set forth in the Constitution.

> If a state legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those provided by the constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the Union. The legislature of one state may require, that none but a Deist, a Catholic, a Protestant, a Calvinist, or a Universalist, shall be a representative. The legislature of another state may require, that none shall be a representative but a planter, a farmer, a mechanic, or a manufacturer. It may exclude merchants, and divines, and physicians, and lawyers. Another legislature may require a high monied qualification, a freehold of great value, or personal estate of great amount. Another legislature may require, that the party shall have been born, and always lived in the state or district; or that he shall be an inhabitant of a particular town or city, free of a corporation, or eldest son. In short, there is no end to the varieties of qualification, which, without insisting upon extravagant cases, may be imagined.[32]

Story's view was followed by the other nineteenth century constitutional law treatise-writers, including Kent[33] and Cooley[34], but the most persuasive arguments in support of Story's interpreta-

---

31. *See* STORY, *supra* note 27, at § 622. Story gives a reference to THE FEDERALIST No. 52 (James Madison). For Madison's language that Story was paraphrasing, see *infra*, text accompanying note 67.

32. *Id.* at § 623.

33. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 215 (1st ed., 1826). In his original edition, Kent wrote as follows:

> Several of the state constitutions have prescribed the same, or higher qualifications, as to property in the elected, than the electors, and some of them have required a religious test. But the constitution of the United States requires no evidence of property in the representative, nor any declaration of religious belief. He is only required to be a citizen of the competent age, and free from any undue bias or dependence by not holding any office under the United States.

Id.

In the first edition to appear after the publication of Story's treatise, Kent inserted this statement in a footnote:

> The question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the constitution of the United States, is examined by Mr. Justice Story's *Commentaries*. . . . But the objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion.

tion, based on the history of the adoption and ratification of the Constitution, were developed in the twentieth century.

2. *The History of the Qualifications Clauses*

In his history of the formation of the Constitution, Charles Warren agreed with Story and the other nineteenth century treatise writers that the Qualifications Clauses are exclusive, but his account differed from theirs in two respects.[35] First, whereas Story, in particular, had emphasized the inability of states to impose additional qualifications, Warren's emphasis was on the inability of Congress to do so.[36] No doubt the reason for this shift is that by 1928, when Warren's book was published, state courts were recognizing that states were unable to create new qualifications.[37] In contrast, the House and Senate had occasionally asserted the claimed power to exclude elected candidates who satisfied all the constitutional qualifications.[38]

The second difference between Warren's treatment and that of the earlier writers is that although Warren wrote that the minimal qualifications provided "a striking example of liberal and democratic views . . . in contrast to the conservative provisions in the State Constitutions,"[39] his argument for exclusivity was not grounded on such policy or ideological grounds but on history, particularly the events at the constitutional convention. The

---

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 228 (3d ed., 1836). This sequence casts doubt on Safranek's suggestion, that Story is a "crucial source" for those who believe the Qualifications Clauses are exclusive. *See* Safranek, *supra* note 12, at 359. Kent apparently regarded the exclusivity as so obvious that he did not find it necessary to make the point explicit until prompted to do so by Story's discussion. What is very important, though not quite crucial, is not the view of any one scholar but the virtual unanimity among those who published their views from the time of the adoption of the Constitution to the time of *Powell*.

34. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (1st ed., 1880). Cooley wrote in his treatise that:

> [t]he Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state constitutions and laws can neither add to nor take away from them.

Id. at 257. The same conclusion was put forth in a once-standard treatise on American election law, GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS 244-45 (4th ed. 1897).

35. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 412-26 (1928).

36. *Id.* at 419-24.

37. *See, e.g.*, State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918) (state could not disqualify a candidate for Congress because he had been convicted of a felony); State ex rel. Chandler v. Howell, 175 P. 569 (Wash. 1918) (state provision making judge ineligible to run for Congress until the end of his term of office was ruled unconstitutional).

38. *See generally Powell*, 395 U.S. at 544-46.

39. WARREN, *supra* note 35, at 412.

Supreme Court later could not "completely agree" that the intention to create exclusive qualifications was as unequivocal as Warren's account might suggest,[40] but the Court agreed that on balance the history did support Warren's conclusion.[41] Let us look, then, at the historical evidence, with emphasis on the Philadelphia convention, to see whether those who framed the Constitution appear to have regarded the Qualifications Clauses as exclusive or nonexclusive.

On May 29, 1787, Edmund Randolph of Virginia introduced a resolution calling for a two-house national legislature with an unspecified age qualification for each house and a provision that members of the first house—later to be called the House of Representatives—would be ineligible to run for reelection and would be subject to recall.[42] Two weeks later, on June 12, the convention, acting as a committee of the whole, deleted the rotation and recall provisions[43] and specified that the age minimum for the second branch—the Senate—would be thirty.[44]

---

40. *Powell*, 395 U.S. at 532.

41. *Id.*

42. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20 (1966).

43. *Id.* at 217. Eid and Kolbe argue at length that the deletion of the rotation provision reflected a purposive decision by the delegates to bar term limits rather than simply a decision to omit any mention of the subject. *See* Eid and Kolbe, *supra* note 9, at 12-22. Gorsuch & Guzman argue the contrary. *See* Gorsush & Guzman, *supra* note 10, at 344-53. Eid and Kolbe seem to me to have the better of this argument, because Gorsuch and Guzman's major contention, that "most of the Framers did not think a rotation scheme was necessary to guard against perpetual incumbents," *id.* at 351, is not inconsistent with the conclusion that they therefore intended to exclude term limits from the constitutional system.

However, Eid and Kolbe's argument, even if accepted, has only indirect relevance to the question whether state-imposed term limits are unconstitutional. If the qualifications stated in the Constitution are exclusive, then term limits are ruled out the same as all other additional qualifications, regardless of whether the Framers specifically intended to exclude them. Alternatively, if the qualifications stated are not exclusive, then there is nothing in the text of the Constitution that prevents the imposition of term limits, whatever the views of the Framers may have been on the rotation question. Eid and Kolbe's evidence is indirectly relevant, because if they are correct that the Framers believed they had made a conscious decision to bar the imposition of term limits, despite not having inserted any specific language to that effect, then they must have been assuming that by deleting any mention of rotation, they were ruling it out—in other words, they must have assumed that the qualifications set forth in the Constitution were exclusive.

For their part, Gorsuch and Guzman acknowledge that the debate on the Framers' specific intent on term limits, however it might be resolved, is far from decisive. Having argued that the Framers did not intend to preclude term limits, they ask "whether the Constitution itself presents any barriers." *Id.* at 353.

44. 1 FARRAND, *supra* note 42, at 211. Also on June 12, the age minimum for the House was deleted. *See id.* at 210. It was soon restored, with the blank filled in as twenty-five, on June 22. *See id.* at 370.

On June 26, George Mason of Virginia proposed that Senators be subject to a property qualification,[45] and a month later the convention's instructions to the Committee of Detail called for inclusion of a property qualification for the President, federal judges, and members of both houses of Congress.[46] During the debate on this question,[47] only the remarks of John Dickinson of Delaware had a bearing on the question of exclusivity of the constitutional qualifications. Dickinson was against a "recital of qualifications" because "it was impossible to make a compleat one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions."[48] In one sense, Dickinson's comment supports exclusivity, because it shows that he recognized that the enumeration of some qualifications would create a negative implication for the ability to add others. On the other hand, the fact that he did not object to the age qualification may suggest that he believed the latter would create no negative implication. Given the early stage of the debates and the fact that the draft of the Constitution had not yet been given a clear overall shape, Dickinson's comment probably should receive little weight in either side of the scales.

The Committee of Detail presented its report to the convention on August 6.[49] It contained two sections resembling the final Qualifications Clauses that eventually appeared in the Constitution, except that the minimum citizenship periods were three years for members of the House and four years for Senators.[50]

---

45. *Id.* at 428.

46. *Id.* at 116-17 (July 26, 1787).

47. *See id.* at 121-25.

48. *Id.* at 123. Somewhat inconsistently, Dickinson went on to argue rather vigorously on the merits against property qualifications. Thus, his argument against setting up some qualifications with the effect of precluding others may have been a tactical one, aimed at delegates who might not agree with him on the merits. Other possibilities include that he opposed property qualifications but wanted the door to be open for other types of qualifications to be added; that Madison too severely abridged Dickinson's argument; or simply that Dickinson's thinking was muddled.

49. 2 FARRAND, *supra* note 42, at 177-89.

50. Article IV, § 2, of the Committee of Detail's report read:

> Every member of the House of Representatives shall be of the age of twenty five years at least: shall have been a citizen of 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.

Id. at 178. The Senate provision appeared in Art. V, § 3, and is almost identical except for the age minimum of thirty and the citizenship minimum of four years. *Id.* at 179.

In *Powell*, the respondents argued that the change from the affirmative statements in the draft of the Committee of Detail to the negative language drafted by the Committee of Style and contained in the final version of the Constitution ("No person shall be a Representative [Senator] who shall not have . . .") suggested an intention to avoid a nega-

The convention changed these periods to seven and nine, respectively.[51]

It is worthy of note that a "Draft Sketch" of the Constitution that had been prepared by Edmund Randolph as a working document in connection with the work of the Committee of Detail, introduced the qualifications clauses with the words, "The qualifications of delegates [senators] shall be . . ."[52] The negative implication created by this language is stronger than that of either the language reported by the Committee of Detail or the final language that appeared in the Constitution. One cannot absolutely rule out the possibility that Randolph purposively changed this language to avoid the negative implication. This is unlikely, however, because if that was his intention there is no apparent reason for replacing it with language that is still susceptible to the negative implication, though not as unequivocally. A far more reasonable interpretation is that Randolph regarded the language of his rough draft and the language reported by the Committee of Detail as equivalent. Therefore, the "Draft Sketch" constitutes significant evidence in favor of an interpretation of the Qualifications Clauses as exclusive.

In addition to the age, citizenship and residency provisions, and in response to the instructions it had received, the Committee's report included a section authorizing Congress to set property qualifications for its own members.[53] It is the debate on this section, which occurred on August 10, 1787,[54] that has the greatest significance for our purposes.

Charles Pinckney of South Carolina began the debate by proposing that specific property requirements be inserted, rather

---

tive implication of exclusivity. *See Powell*, 395 U.S. at 537-39. The Court cited historical evidence to the contrary and also pointed to the understanding that the Committee of Style was not to make substantive changes. *Id.* It may be added that neither as a matter of verbal logic nor of connotation is the negative implication of the language drafted by the Committee of Detail any stronger or weaker than the final language drafted by the Committee of Style.

51. *See* 2 FARRAND, *supra* note 42, at 216 (August 8, 1787) (House of Representatives); *id.* at 235-39 (August 9, 1787) (Senate).

52. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 184 (James H. Hutson, ed., 1987) (§ I.3.a.5, House of Representatives), 186 (§ I.4.b.3, Senate).

53. Art. VI, § 2, of the Committee of Detail's report provided: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." *Id.* at 179.

54. *Id.* at 248-51.

than delegating the setting of requirements to Congress.[55] After some debate, according to James Madison, Pinckney's motion "was rejected by so general a *no*, that the States were not called."[56] Madison then argued for deleting the section entirely, because authorizing Congress to set property qualifications would vest

> an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of a weaker faction.[57]

Madison's speech and the ensuing debate show that the question of whether there should be discretion to add qualifications to those set forth in the Constitution was regarded by many of the delegates as one of considerable importance. However, not everyone agreed with Madison as to how it should be resolved.[58] Thus, Gouverneur Morris of Pennsylvania moved to *expand* Congress' power to set qualifications by deleting the words, "with regard to property" from the Committee of Detail's report.[59] If this motion had passed, Congress would have been authorized to set any qualifications, with no limit of subject matter. Hugh Williamson of North Carolina and Madison spoke against Morris' motion, which was then defeated by a vote of four states to seven.[60] Debate continued on whether or not the authorization limited to

55. *Id.* at 248-49.

56. *Id.* at 249 (emphasis in original).

57. *Id.* at 249-50.

58. Oliver Ellsworth of Connecticut followed Madison's speech with a statement that he did not consider the power to set qualifications for Congress a dangerous one. *Id.* at 250.

59. *Id.*

60. *Id.*

property qualifications should remain.[61] The final reported remarks were by James Wilson of Pennsylvania, who supported Madison's view that the authorization should be stricken, but for different reasons:

> A uniform rule would probably be never fixed by the Legislature. [A]nd this particular power would constructively exclude every other power of regulating qualifications.[62]

The vote followed, and by three states in favor to seven against, the authorization section was rejected.[63]

Wilson's remarks immediately prior to this vote undeniably constitute a modicum of evidence against the exclusivity of the Qualifications Clauses.[64] Wilson argued against the property qualification authorization because it would "constructively exclude" other power to set qualifications. It would seem to follow (a) that it would be a good thing for the power to add qualifications to exist, and (b) that removal of the property qualification authorization would assure that such a power did exist. Either Wilson had forgotten about the Qualifications Clauses or he did not believe they carried a negative implication.[65]

Wilson's remarks are greatly outweighed by the formal actions of the convention on August 10. The convention rejected *both* the Committee of Detail's proposal that Congress be given authority to set property qualifications *and* Morris' proposal that Congress be given authority to set any kind of qualifications. The strenuous debate on this subject proves beyond doubt that the delegates believed they were debating matters of substance and

---

61. John Rutledge of South Carolina proposed that qualifications for members of Congress should be treated like qualifications for voters, that is, they should be the same as those for the state legislatures. Apparently this proposal had no support, for it was neither seconded nor voted on. *Id.* at 251.

62. *Id.* at 251.

63. *Id.* The only significant discussion of the Qualifications Clauses after August 10 occurred on August 13, when the convention debated and rejected proposals to change the durational citizenship qualification. *Id.* at 268-69. This debate had no bearing on the question of exclusivity.

64. It could be that Wilson's remarks provided the reason for the comment in *Powell* that the debates at the convention are subject to a non-exclusive interpretation of the Qualifications Clauses. 395 U.S. at 532. If not, I have no idea on what the comment was predicated. The Court did not refer to Wilson's remarks in the *Powell* opinion, but neither did it cite anything else that occurred at the debates that would cast doubt on the exclusivity interpretation.

65. Wilson's remarks are partially similar to those of Dickinson on July 26. *See supra*, note 49 and accompanying text. However, Wilson's remarks constitute more substantial evidence against the exclusivity of the Qualifications Clauses than Dickinson's because when Wilson spoke, the Constitution was close to its final form, so that any delegate's ability to think of negative implications that did or did not exist was greatly enhanced.

not mere questions of surplus language. If the delegates to the convention did not assume that the qualifications stated in the Constitution were exclusive, then their defeat of Morris' motion would have been meaningless. The *only* way to give substantive meaning to the August 10 actions of the convention is to interpret the Qualifications Clauses as exclusive.

The post-convention debates on ratification tend to confirm that the Qualifications Clauses were generally understood to be exclusive. Both Madison and Alexander Hamilton expressed this view in *The Federalist Papers.* In *Federalist No. 52,* Madison wrote:

> The qualifications of the elected, being less carefully and properly defined by the State constitutions [than the qualifications of electors], and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. [Madison gives a summary of the two Qualifications Clauses.] 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 of religious faith.[66]

Unless it was understood that the qualifications in the Constitution were maximums as well as minimums, Madison's praise of the convention's regulation of qualifications as keeping the door open would be unjustified.[67] Hamilton was even more explicit in *Federalist No. 60:*

> The qualifications of the persons who may choose or be chosen. . ., are defined and fixed in the Constitution, and are unalterable by the legislature.[68]

As we shall see in Part III,[69] antifederalists would have been strenuously opposed to a discretionary power to add new qualifications for members of the national legislature. The fact that there were almost no antifederalist attacks on the Constitution on this

66. THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

67. Madison repeated his theme in *Federalist No. 57:*

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

THE FEDERALIST No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961). As we have seen, Madison had taken a similar position at the constitutional convention. *See* text accompanying note 57, *supra.*

68. THE FEDERALIST No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

69. *See infra,* notes 127-29 and accompanying text.

ground[70] is substantial evidence that the opponents of the Constitution shared the view of supporters such as Madison and Hamilton that the Qualifications Clauses were exclusive.

3. *Powell v. McCormack*

A large number of state and lower federal courts have considered whether the Qualifications Clauses are exclusive. Without exception, they have answered in the affirmative.[71] As of 1968, nearly all commentators outside Congress had expressed the same conclusion.[72] As we have just seen, there is, at the very least, substantial historical support for this widespread agreement. In *Powell v. McCormack*,[73] the Supreme Court authoritatively agreed.

In *Powell* the House voted to exclude Adam Clayton Powell, who had been duly elected and who admittedly satisfied all the qualifications set forth in the Constitution, on the ground that he had engaged in various forms of misconduct.[74] One of the contentions of the House of Representatives in the Supreme Court was that the case was not justiciable.[75] Under the criteria for justiciability that the Court had set forth in *Baker v. Carr*,[76] the Court had to determine whether there was a "textually demonstrable constitutional commitment of the issue" to the House of Representatives.[77] The House claimed that such a commitment existed in Art. I, § 5, which makes each house "the judge of the elections, returns and qualifications of its own members."[78] If, as Powell contended, the qualifications set forth in the Constitution were exclusive, then the commitment contained in Art. I, § 5 would be limited to judging whether those specified qualifications were met, as was admittedly the case with Powell. If the qualifications set forth in the Constitution were non-exclusive, then, indeed, Art. I, § 5 would constitute a commitment to the

70. For a reference to what may be the only exception, *see* note 128, *infra*.

71. *See infra* notes 170-72 and accompanying text.

72. Dionisopolous, *supra* note 26, was the conspicuous exception. For conflicting views among members of Congress, compare *id.*, at 103 (view of Rep. Ford supporting the authority of Congress to impose additional qualifications), with *id.*, at 107 (opposing view of Rep. Celler).

73. 395 U.S. 486 (1968).

74. *Id.* at 490.

75. *Id.* at 517.

76. 369 U.S. 186, 217 (1962).

77. 395 U.S. at 519.

78. U.S. CONST. art. I, § 5.

House of the question whether Powell should be seated.[79] Relying primarily on historical evidence, the Court resolved the verbal ambiguity of the Qualifications Clauses in favor of exclusivity by ruling that the House had no authority to exclude a person who had been elected and who met all the qualifications expressly prescribed in the Constitution.[80]

The "relevant historical materials" whose examination Chief Justice Warren, writing for the Court, said led to this conclusion, included British precedents, especially the notorious case of John Wilkes. This case established the principle that the legislature could rely only on recognized, standing qualifications for excluding duly elected members.[81] They also included the debates at the constitutional convention[82] and the ratification debates.[83] These materials demonstrated

79. Because the Court thus linked the scope of the House's power in Art. I, § 5 to the more general question of the exclusivity of the qualifications set forth in the Constitution, *Powell*'s reasoning cannot be limited to the narrower question whether a single chamber can refuse to seat an elected individual on ad hoc grounds. Perhaps the Court could have decided *Powell* on such a narrow ground, but it did not choose to do so.

80. 395 U.S. at 521-22.

81. *Id.* at 522-531.

82. *Id.* at 532-40.

83. *Id.* at 540-41. The Court also discussed the interpretation of the Qualifications Clauses in Congress since the time of ratification. *Id.* at 541-47. In the William McCreery case, the House of Representatives seated a member whose election allegedly violated a Maryland statute requiring that at least one member chosen from a particular two-member district be a resident of the City of Baltimore. *Barney v. McCreery, in* CASES OF CONTESTED ELECTIONS IN CONGRESS 167 (Clarke & Hall, eds., 1834). Hills, *supra* note 11, at 123-28, devotes considerable space to attacking the "widely held belief," *id.* at 123, that this case established a precedent that the states could not add qualifications for Congress. As he argues, although the committee report expressed the view that the qualifications set forth in the Constitution were exclusive, Clarke & Hall, *supra* at 167, there was opposition to this view in the floor debates, and the ultimate resolution in favor of seating McCreery was equivocal. The majority of the House finally insisted on language that could not be interpreted as resolving the constitutional question one way or the other. *See id.* at 215-17, 220-21 (reporting debate on a series of proposed amendments, resulting in a final resolution neutral on the constitutional question).

The McCreery case is by no means an essential part of the case in favor of the exclusivity of the qualifications set forth in the Constitution. Thus, in *Hellmann v. Collier*, the Maryland Court of Appeals held that the Qualifications Clauses preclude a state requirement that Representatives reside in the districts from which they are elected. 141 A.2d 908 (Md.App. 1958). In its opinion, the court interpreted the McCreery case in the same way Hills does, and therefore regarded it as "not furnish[ing] much assistance." *Id.* at 911.

Nor did the *Powell* Court miss the difference between the committee report in McCreery and the floor debate. After quoting the committee report, the Court noted that the floor debate "tended to center on the more narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution." 395 U.S. at 543. Corwin interprets the somewhat obscure words, "more narrow," to suggest that the Court regarded the states' inability to add qualifications as even clearer than that of the houses of Congress. *See* Corwin, *supra* note 9, at 582. In any event, *Powell* placed little weight on the congressional precedents. *See* 395 U.S. at 546-47.

> the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution.[84]

Furthermore, the *Powell* Court did not regard this conclusion as a historical happenstance. An important principle of American government was at stake.

> Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'... As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel.[85]

It is true that in *Powell*, the issue presented was whether the House of Representatives could add to the constitutional qualifications, and therefore the Court had no occasion to rule specifically on whether states could do so. Nevertheless, the basis for resolving *Powell* was the interpretation of the Constitution as setting forth the exclusive qualifications for serving in Congress. The qualifications were "fixed in the Constitution."[86] The same negative implication that bars Congress from adding qualifications to the ones included in the Constitution bars the states as well. As we shall see in Part II, this simple conclusion is firm enough to withstand even the most ingenious assaults.

B. *Term limits constitute qualifications within the constitutional prohibition*

The question remains, what restrictions on eligibility for membership in Congress constitute qualifications? The fact that I am over thirty years of age, have been a citizen of the United States for more than nine years, and am an inhabitant of California does not, in itself, give me a claim to one of California's seats in the Senate. Case law recognizes two types of restrictions that states may impose without violating the principle that the qualifications set forth in the Constitution are exclusive.

---

84. 395 U.S. at 540.
85. *Id.* at 547.
86. *Id.* at 540.

1. *Election procedures*

One constitutional qualification for service in Congress is so basic that it is not often cited as a qualification at all: one must be elected.[87] The Constitution empowers state legislatures to prescribe the "times, places and manner" of holding congressional elections, subject to control by Congress.[88] Election regulations and procedures may have the effect of eliminating some candidates at various stages. Indeed, that is likely to be their intent, so that at the final stage the voters are provided with a small enough number of candidates that their selection represents a majority or, at a minimum, a substantial plurality preference. Election laws may also require candidates, as a condition of appearing on the ballot or having their votes counted, to comply with reasonable procedures that are deemed necessary for efficient and honest administration of the election. Such regulations, so long as they are reasonable and have as their purpose the facilitation rather than the frustration of the voters' ability to choose the representative they prefer, should be regarded as regulations of "times, places and manner" of elections, not as qualifications for office separate from the basic qualification of being elected.

Though some early cases failed to recognize these principles,[89] they were established by the Supreme Court in *Storer v. Brown.*[90] In *Storer,* the Court upheld a California statute prohibiting independent candidates from appearing on the general election ballot if they had been registered as affiliated with a political

87. U.S. CONST. art. I, § 2, cl. 1 (House of Representatives); U.S. CONST. amend. XVII, § 1 (Senate). Admittedly, the requirement of being elected is not typically thought of as a "qualification." In Public Citizen v. Miller, one court referred to the "truism that a state may exclude a candidate who receives fewer votes than an opposing candidate from obtaining the office that he sought." Public Citizen v. Miller, 813 F.Supp. 821, 833 (N.D.Ga. 1993) (upholding the constitutionality of a majority run-off requirement in Senate elections). While the court called this requirement a "truism" rather than a "qualification," it did refer to it in the negative as a "disqualifier" applicable to a candidate who did not receive a majority of the votes. *Id.*

88. U.S. CONST. art. I, § 4, cl. 1.

89. *See* State v. Russell, 8 Ohio Nisi Prius Rep. 54 (1900) (campaign spending limits could not be enforced by state against congressional candidates); State ex rel. Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942) (statute declaring a candidate ineligible in the general election after having been defeated in the primary could not be enforced against a candidate for the House of Representatives); Benesch v. Miller, 446 P.2d 400 (Alaska 1968) (statute barring write-in votes at the general election for a candidate defeated in the primary could not be enforced against a candidate for the Senate). *But see* Secretary of State v. McGucken, 222 A.2d 693 (Md.App. 1966) (candidate for the House of Representatives could be excluded from the ballot for failure to comply with a statute requiring appointment of a campaign treasurer).

90. 415 U.S. 724 (1974).

party within a year prior to the primary and therefore, by remaining affiliated with that party, could have sought to appear on the general election ballot by seeking nomination in the party's primary.[91] The Court tersely rejected the contention that, as applied to candidates for Congress, this non-affiliation requirement constituted an unconstitutional qualification.[92] Justice White's opinion for the majority treated the requirement as a procedural ground rule rather than as an exclusion from candidacy.

> The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.[93]

Subsequent cases have recognized that reasonable election procedures, which may include considerable winnowing of candidates, do not thereby establish unconstitutional qualifications for Congress.[94] Neither *Storer* nor the subsequent cases provides a constitutional defense for term limits. Term limits are not election procedures and do not simply prescribe a certain course to election for persons who have run up against the limit. Rather, they prevent the election of such persons by any means.[95]

---

91. *Id.* at 728.

92. *Id.* at 746 n. 16.

93. *Id.*

94. *See* Hopfmann v. Connolly, 746 F.2d 97, 103-03 (1st Cir. 1984) (state could comply with provision of the state Democratic charter, which required candidates in the Senate primary to have received at least fifteen percent of the votes at the state party convention); Williams v. Tucker, 382 F.Supp. 381, 388 (M.D.Pa. 1974) (prohibition of a primary loser running as a general election independent candidate could be enforced against a candidate for the House).

A statute barring candidacies for a period of years following late filing of a campaign statement was upheld as applied to a would-be congressional candidate in Lukens v. Brown, decided shortly before *Storer.* 368 F.Supp. 1340 (S.D.Ohio 1974). Although the *Lukens* court said the would-be candidate's case had to be tested against the Qualifications Clauses, the analysis, which was quite confused, seemed to turn on Equal Protection principles. If the *Lukens* court did purport to decide a challenge based on the Qualifications Clauses, then it extended the "election regulation" concept well beyond its proper bounds. Because Lukens had filed a campaign statement in connection with an earlier election a few weeks late, his congressional candidacy in a subsequent election was banned. Whether or not, as I believe, *Lukens* is erroneous, nothing in the court's opinion suggests that states are permitted to adopt qualifications that are not *bona fide* election regulations.

95. In Part IV, we shall consider whether "quasi-term limits," which permit those affected by the limits to be elected by write-in votes, constitute "times, places and manner" regulations rather than "qualifications."

2. *Conditions of candidacy*

States have sometimes made a holder of one office—typically but not always a judicial office—ineligible to run for another office until the term of the first office has expired. Courts have invariably struck down such restrictions as unconstitutional qualifications when the office for which the would-be candidate wanted to run was either the Senate or the House of Representatives.[96] More moderate requirements—that candidates for a second office take leaves of absence[97] or resign[98] from the office they already hold—have been enforced against persons running for Congress.

It is a slight simplification to say, as some commentators do, that conditions on running for Congress that the candidate can satisfy—such as a "resign-to-run" requirement—are constitutional, but that a provision that "flatly prohibits" the affected individual from running for Congress—a term limit or a ban during the *term* of one's present office—is unconstitutional.[99] As the Second Circuit's very thoughtful opinion in *Signorelli v. Evans*[100] demonstrates, the question is more subtle and cannot be reduced to a single formula or criterion. For example, a requirement that a candidate for the House live in the district from which he or she wishes to run could probably be satisfied with less inconvenience by many people than a "resign-to-run" requirement, yet the in-district residency requirement is unconstitutional.[101] A requirement that lawyers resign from the bar would no more "flatly prohibit" congressional candidacies than a requirement that judges resign from the bench, yet the former would be an unconstitutional qualification while the latter is not.[102] It is not necessary here to trace the full analysis set forth in *Signorelli*, for it is plain that the doctrine that permits some

96. *See, e.g.*, State ex rel. Handley v. Superior Court of Marion County, 151 N.E.2d 508 (Ind. 1958); State ex rel. Johnson v. Crane, 197 P.2d 864 (Wyo. 1948); State ex rel. Wettengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946). Readers of the latter case may find reason to regret this doctrine, as the judge whom it enabled to run for the Senate from Wisconsin was one Joseph R. McCarthy.

97. *See* Alex v. County of Los Angeles, 111 Cal.Rptr. 285 (Cal.App. 1974).

98. *See* Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983); Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980); Adams v. Supreme Court of Pennsylvania, 502 F.Supp. 1282 (M.D.Pa. 1980).

99. *See* Levy, *supra* note 9, at 1938.

100. 637 F.2d 853 (2d Cir. 1980).

101. Hellmann v. Collier, 141 A.2d 908 (Md.App. 1958); Exon v. Tiemann, 279 F.Supp. 609, 613 (D.Neb. 1968).

102. *See Signorelli*, 637 F.2d at 859.

"resign-to-run" statutes to be applied to congressional candidates does not come close to supporting congressional term limits. Term limits are much more similar to the unconstitutional ban on candidacies during the term for which the official has been elected than to "resign-to-run" requirements. The only way to avoid a length-of-the-term prohibition is not to be elected to Office A at Time 1 in order to be eligible to run for Office B at Time 2. Term limits function in precisely the same way, except that Office A and Office B are the same.

Under "resign-to-run" statutes, candidates have the ability to run for Congress at the time specified for filing nomination papers, simply by resigning from their present offices. This is one reason, but not the only reason such statutes have been upheld. In addition, the statutes promote "the integrity and independence of the judicial branch," and thereby protect the state's "fundamental interests in the structure of [its own] government."[103] *Signorelli* was extended in *Joyner v. Mofford*[104] to nonjudicial elective officeholders. According to the *Joyner* court, such officials come within the *Signorelli* principle that the states may regulate officeholders "peculiarly within the essential regulatory authority of the States."[105] Plainly, members of Congress are not within the "essential regulatory authority of the States." Furthermore, the "resign-to-run" statutes have been upheld in part because the reviewing courts have been satisfied that their purpose is to guard the state's interest in performance of the duties of the would-be candidate's present office, not the obstruction of that person's desire to be elected to Congress. The same cannot possibly be said for term limits.

3. *Are term limits qualifications?*

Gorsuch and Guzman argue that when a state imposes term limits, it is not establishing a new "qualification" in addition to those contained in the Constitution, but instead is regulating the "manner" of the election. They assert that the Supreme Court "has never attempted to define either of the two terms."[106] This is incorrect, as is shown in their very next paragraph, in which Gorsuch and Guzman quote a passage from *Powell* that defines the

103. *Id.* at 861.
104. 706 F.2d 1523 (9th Cir. 1983).
105. *Id.* at 1530, quoting from *Signorelli.*
106. Gorsuch & Guzman, *supra* note 10, at 355.

kind of regulation that comes within the negative implication of the Qualifications Clauses and therefore could not be used by Congress as a basis for excluding Adam Clayton Powell:

> [T]he Constitution leaves the House without authority to exclude any person, duly elected by his constituents, *who meets all the requirements for membership expressly prescribed in the Constitution.*[107]

The Constitution does not use the word "qualifications."[108] Rather, it sets forth certain requirements an individual must satisfy to serve in Congress, the most important of which is being elected. The negative implication that is created by this setting forth of certain requirements extends to all additional requirements. The Supreme Court stated this clearly in *Powell*,[109] and it is hard to see what else could be meant by the proposition that the Qualifications Clauses are exclusive.[110]

The reason Gorsuch and Guzman are unable to recognize and understand the clear definition that they themselves quote from *Powell* is that they have already assumed that such a reading is impossible. If it is proposed that any "requirement for membership" is a qualification, then, according to Gorsuch and Guzman,

> one could conclude that any election regulation creates a qualification; for example, a requirement that a candidate

---

107. 395 U.S. at 522 (emphasis added, emphasis in original deleted), *quoted in* Gorsuch & Guzman, *supra* note 10, at 355.

108. That is, the word does not appear in the sections that actually establish qualifications. It does appear in Art. I, § 5, making each house "the judge of the elections, returns and qualifications of its own members." U.S. CONST. art. I, § 5.

109. 395 U.S. at 522.

110. Another claim that term limits do not establish "qualifications" and therefore are permissible "times, places and manner" regulations is put forward by Mark P. Petracca, *A New Defense of State-Imposed Congressional Term Limits*, 26 PS 700 (1993). According to Petracca,

> Instead of a qualification on officeholders, the principle of rotation in office . . . gave citizens the right to expect the periodic return of officeholders to private station and created a restraint on the legislature as a political institution.

Id. at 703. Petracca's argument is a non sequitur, because there is no contradiction between a requirement being a "qualification" and its serving the purpose of returning officeholders to private life and restraining the legislature institutionally. To the contrary, term limits are proposed as a qualification that will serve as the means to accomplish these objectives. Petracca's evidence nowhere indicates that the Framers thought of rotation as *not* establishing a qualification for office. *Id.* Rather, his evidence simply supports the unsensational proposition that persons who supported the principle of rotation tended to believe there were good reasons for doing so. Petracca does not refer to the statement in *Powell*, quoted *supra*, text accompanying note 109, that the negative implication of the Qualifications Clauses permits anyone to run for Congress "who meets all the requirements for membership expressly prescribed in the Constitution." 395 U.S. at 522. Term limits certainly violate this injunction, and Petracca presents no evidence that the Framers had any different view of what constituted a "qualification."

> gather a given number of signatures before gaining access to the ballot could be cast as imposing a fourth qualification that he demonstrate popular support for his candidacy. Thus, any attempt to determine whether a term limit ought to be considered a qualification must go beyond mere conclusory labeling and explain why the label assigned is appropriate.[111]

As we have seen, if rules such as signature requirements are to be considered as establishing qualifications, it is only in the sense that they are subordinate to the overriding qualification of being elected, which is set forth in the Constitution. Because they overlook this obvious point, Gorsuch and Guzman believe it is necessary to go through an elaborate search for the proper distinction between establishing "qualifications" and regulating the "manner" of elections.[112] After setting up and shooting down a few red herrings—such as, that restrictions might be qualifications if they are "severe"[113] or if they are "direct"[114]—they conclude that

> a state election law will be considered as a manner regulation [and therefore not a qualification] unless it presents unavoidable analogies to the three constitutionally enumerated qualifications.[115]

---

111. Gorsuch & Guzman, *supra* note 10, at 354.

112. *Id.* at 355-368. Actually, as we shall see in Part II in connection with Safranek's article, *supra* note 12, establishing qualifications is not *distinct* from regulating the manner of elections, it is simply an aspect of the manner of conducting elections that is removed from Art. I, § 4 by virtue of the negative implication contained in the Qualifications Clauses.

113. *Id.* at 357-60. In this section, Gorsuch and Guzman repeat the fallacy of treating the ballot access cases as if they were not distinguishable from cases involving restrictions on running for Congress unrelated to facilitating the electorate's ability to choose the candidate of its choice. *Id.* at 357-59. They also point to cases upholding the Hatch Act, which regulated political activities of civil service employees. *Id.* at 359, *citing* United Public Workers v. Mitchell, 330 U.S. 75 (1947) and United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). However, as they acknowledge, the parties did not challenge the Hatch Act as an unconstitutional qualification for running for Congress, so that the Court never had occasion to consider the point. *Id.* If it had, it might or might not have upheld a prohibition on federal civil servants running for Congress on grounds similar to those governing cases like *Signorelli*, but either way, the constitutionality of term limits would not be affected.

114. Gorsuch & Guzman, *supra* note 10, at 360-61. Gorsuch and Guzman give further evidence of the confusion of their position by discussing *Signorelli* under this heading. The problem Gorsuch and Guzman supposedly are trying to solve is how to distinguish the establishment of a qualification from a regulation of the manner of conducting elections. *Signorelli* could not possibly have a bearing on this question, because the requirement that judges resign if they want to run for Congress (or other public office) could not possibly be upheld as regulation of the times, places and manner of conducting congressional elections. Rather, as we have seen, the requirement was upheld on the ground that it was not a qualification, partly because the court was persuaded the state was motivated by the desire to protect the integrity of its own judiciary rather than by the desire to control who could run for Congress.

115. *Id.* at 363. This conclusion is based in part on the assertion that the Supreme Court "has chosen to construe the qualifications clauses extremely narrowly." *Id.* Gorsuch

In Gorsuch and Guzman's view, then, the negative implication of the Qualifications Clauses is limited to the types of qualifications enumerated in the Constitution. Essentially, no age, citizenship or residency qualifications may be imposed beyond those contained in the Constitution, but any other types of qualifications are permitted, and their establishment is a part of regulating the manner of congressional elections. If we were starting from scratch with the text of the Constitution, this would not be an impossible interpretation. However, it is ruled out by the same history and overwhelming weight of authority—reviewed in the previous section—that establishes the exclusivity of the Qualifications Clauses.

The property qualifications eliminated on August 10, 1787, were not "unavoidabl[y] analog[ous] to the three constitutionally enumerated qualifications"[116] and therefore would not be precluded under Gorsuch and Guzman's analysis. Yet, if the history we have reviewed means anything, it means that property qualifications may not be added. In addition, Gorsuch and Guzman's position is inconsistent with *Powell v. McCormack*, because the exclusion of Adam Clayton Powell by reason of prior misconduct was not analogous to an age, citizenship or residency qualification. The views of treatise-writers such as Story, who believed that the Qualifications Clauses prohibited states from barring members of certain professions or religions from running for Congress,[117] would have to be set aside if the Gorsuch-Guzman position were accepted. Also set aside would be a unanimous body of case law striking down statutes prohibiting state officeholders from running for Congress during the terms for which they were elected.[118]

---

and Guzman make this assertion despite their earlier (erroneous) statement that the Supreme Court has never attempted to define "qualification." *Id.* at 355. Their assertion is based on a claim that the vast majority of election restrictions the Court has examined have been treated as manner regulations. *id.* at 363. All the cases Gorsuch and Guzman refer to are the ballot access cases, listed in *infra* note 222. In other words, Gorsuch and Guzman are repeating once more the central fallacy of their argument, that the states' ability to establish election procedures somehow creates grave questions regarding the reach of the negative implications of the Qualifications Clauses.

116. Gorsuch & Guzman, *supra* note 10, at 363.

117. *See supra* note 32 and accompanying text.

118. *See supra* note 96. Gorsuch and Guzman attempt to bolster their position by arguing that the danger of congressional self-perpetuation that the exclusivity of the Qualifications Clauses was intended to obviate is not implicated by qualifications imposed by states. This is a weak argument, for two reasons. First, as we shall see in Part II in connection with Hills' article, *supra* note 11, the premise is incorrect. The exclusivity of the Qualifications Clauses is aimed at additional qualifications imposed by any source. Second, accord-

The scope of the negative implication created by the enumeration of certain qualifications for members of Congress in the Constitution is not problematic. The winnowing of candidates that occurs in an orderly election process is not the establishment of prohibited qualifications. Within limits, the states can impose requirements on their own officials who choose to run for Congress, so long as the requirements do not rule out or unduly burden their candidacies. Otherwise, any restriction that prevents anyone from running for Congress who is eligible by the terms of the Constitution is an invalid qualification.

III. HETERODOXY

The previous Part presented the basic reasons for concluding both that the qualifications for members of Congress set forth in the Constitution are exclusive and that term limits constitute prohibited qualifications. This Part elaborates on the reasons supporting the first of these conclusions by responding to challenges from Stephen J. Safranek[119] and Roderick M. Hills, Jr.[120]

Although Safranek and Hills both attempt to show that states may add to the qualifications for Congress stated in the Constitution, they take different approaches. In particular, Safranek relies on the "times, places and manner" clause of Art. I, § 4,[121] contending that the word "manner" includes "the power of states to regulate the length of incumbency."[122] Hills, for reasons that will become clear, eschews reliance on the "times, places and manner" clause. I shall contend that Hills cannot do without the "times, places and manner" clause, and Safranek cannot do with it. Here it is worth noting that if congressional term limits were upheld, it would make a significant practical difference which theory was accepted. When states act under the "times, places and manner" clause, their actions may be overruled by legislation enacted by Congress. If, as Hills contends, the states have author-

ing to Gorsuch and Guzman, restrictions that hitherto have been thought to be qualifications may be imposed by the states under Art. I, § 4, *under which Congress has the last word.* Their assertion that the purpose of exclusivity is to protect against possible abuse by Congress if it were given any power to set qualifications undermines their argument that restrictions on ability to run for Congress may be established under Art. I, § 4.

119. Safranek, *supra* note 12.

120. Hills, *supra* note 11.

121. *See* U.S. CONST. art I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

122. *See* Safranek, *supra* note 12, at 325.

ity to impose term limits outside the "times, places and manner" clause, then presumably Congress would be helpless to disturb such limits.

A. *Safranek's Reliance on the "Times, Places and Manner" Clause*

We may begin with Safranek, who believes that the word "manner" in the "times, places and manner" clause is broad enough to give the states, subject to the superior authority of Congress, the power to limit congressional terms. He devotes a considerable portion of his article to describing and analyzing the discussion and debate on the "times, places and manner" clause at the constitutional convention and, especially, at the ratification conventions in the states.[123] According to Safranek, opponents of the Constitution argued that the clause gave dangerous power to Congress, which might abuse its power to regulate congressional elections to favor particular factions or interests. Supporters of the Constitution generally did not deny the broad meaning of the clause, but argued that the power was desirable as a means of preventing abusive practices in the states, such as extreme malapportionment.[124] In the absence of such abuses, Congress would be unlikely to act.[125]

All of this may be conceded. In addition, we may grant the conclusion that follows—which few were likely to have doubted anyway—that *barring a negative implication from the Qualifications Clauses,* the "times, places and manner" clause is broad enough to authorize the establishment of qualifications, including term limits. If there were no qualifications set forth in the Constitution, or if it were clear that the enumeration of qualifications was not intended to be exclusive, then one would need to search the Constitution for authorization to set qualifications, and authorization would indeed be found in the "times, places and manner" clause.

The crucial question is not, as Safranek seems to believe, whether "times, places and manner" is broad enough to include the setting of qualifications, but whether the enumerated qualifications create a negative implication of exclusivity. If so, that implication acts as an exception to the broad grant of power in Art.

123. *See id.* at 327-340.
124. *See id.* at 332.
125. *See id.* at 337.

I, § 4.[126] Safranek addresses this point, but not in a satisfactory way. First, he contends that the defenders of the Constitution, in responding to the argument that the delegation of power in Art. I, § 4 was too broad, did not point to the Qualifications Clauses as a limitation on the "times, places and manner" clause.[127] The obvious explanation is that the opponents of the Constitution were not claiming that Art. I, § 4 included the power to set qualifications. Despite his ample showing that Art. I, § 4 was a major target of anti-Federalist attacks, Safranek does not cite a single opponent of the Constitution who contended that Art. I, § 4 would permit the creation of new qualifications for Congress.[128] The anti-Federalists had every incentive to do so, because charges that Congress would abuse its power by manipulating qualifications for membership would have been more credible than the charges that they actually made in the debates on the "times, places and manner" clause, such as that Congress might order elections held in only one place, "the most inconvenient in the

126. In *Oregon v. Mitchell*, Justice Black relied on Art. I, § 4 to conclude that Congress could set a minimum voting age for federal elections despite his view that Congress was without power to set a minimum age in state and local elections. 400 U.S. 112, 119-31 (1974). This meant that in many states, one voting age would be in effect in congressional elections and a different age in elections for the state legislature, despite the specific injunction of Art. I, § 2 and the Seventeenth Amendment that the qualifications for voting for Congress and for the most numerous house of the state legislature are to be the same. Justice Black's opinion thus provides some authority for Safranek's proposition that the "times, places and manner" clause may trump other, more specific constitutional provisions. However, Justice Black's position is an implausible one, and no other justice accepted it. Justice Douglas, and Justices Brennan, White and Marshall, believed Congress had the power under the Fourteenth Amendment to lower the voting age for federal *and* state elections, and therefore had no occasion to consider the relation of Art. I, § 4 on the one hand, and Art. I, § 2 and the Seventeenth Amendment on the other. *See id.* at 135, 229. Justice Harlan, considered these constitutional provisions together and wrote that it was "difficult to see how words could be clearer in stating" that the "times, places and manner" clause gave Congress no authority to set qualifications for voting in federal elections. *See id.* at 210. Justice Stewart reached the same conclusion:

> The "manner" of holding elections can hardly be read to mean the *qualifications* for voters, when it is remembered that § 2 of the same Art. I explicitly speaks of the "qualifications" for voters in elections to choose Representatives.

Id. at 281, 288 (emphasis in original) (concurring in part and dissenting in part).

127. *See* Safranek, *supra* note 12, at 338.

128. Apparently, there is no record of any such claim being made by an opponent of the Constitution in the state ratifying conventions, on which Safranek's research is focused. Charles Warren quotes a Massachusetts anti-Federalist newspaper article asserting that Congress would have unlimited power to set qualifications. WARREN, *supra* note 31, at 424 n.1. However, this was by no means a significant anti-Federalist theme, and there is no apparent explanation for its almost complete absence from the debate other than nearly universal recognition that the exclusive qualifications for Congress were specified in the Constitution.

State."[129] In light of the apparent thoroughness of Safranek's research, this silence alone lends important support to the Supreme Court's conclusion in *Powell* that the qualifications in the Constitution were understood to be exclusive.

Safranek admits that it is "not implausible" that the Federalists' silence on the Qualifications Clauses as an exception to Art. I, § 4 is attributable to the lack of any anti-Federalist claims to the contrary.[130] But he objects to this reasoning because the "times, places and manner" clause is "broad in meaning" and therefore "should be read broadly."[131] This is fallacious, because the breadth of a provision has no bearing on whether a portion has been carved out by an exception.[132] In the end, Safranek appears to concede the point, for he writes that state or congressional actions taken under Art. I, § 4 are null and void if they conflict with other portions of the Constitution, *including the Qualifications Clauses!*[133]

Safranek is thus brought back to where the Supreme Court was when it had to decide *Powell.* Either the qualifications set forth in the Constitution are exclusive, in which case the "times, places and manner" clause has no bearing, or they are not, in which case, presumably, the states and Congress may create new qualifications under Art. I, § 4, and each house may impose additional qualifications when it judges members' qualifications under Art.

129. Remarks of Patrick Henry at the Virginia Ratifying Convention, June 5, 1788, *in* 9 The Documentary History of the Ratification of the Constitution 951, 964 (1990). *See generally* THE FEDERALIST No. 59, at 361 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

There were also occasions when it would have been convenient for the Federalists to be able to argue that states could add to the qualifications contained in the Constitution, such as when the Constitution was criticized for not containing property qualifications for representatives. There appears to be no instance in which a defender of the Constitution responded that the states could impose such additional qualifications. *See, e.g.,* 2 THE FOUNDERS' CONSTITUTION 74 (Philip B. Kurland & Ralph Lerner eds., 1987) (reprinting an excerpt from the debate at the Massachusetts Ratifying Convention, January 17, 1788). The silence of both supporters and opponents of the Constitution on numerous occasions when it would have been in their tactical interests to argue that qualifications could be added to those stated in the Constitution is hard to explain unless there was a general understanding that the Qualifications Clauses were intended to be exclusive.

130. *See* Safranek, *supra* note 12, at 338 n.67.

131. *See id.*

132. The *importance* of the values or interests embodied in a provision may be a good reason for a disinclination to find exceptions, but importance and breadth are not the same. It makes sense to interpret the "times, places, and manner" clause broadly, so that unforeseen needs for regulation of elections can be met. On the other hand, there is no important value that is sacrificed if some particular aspect of regulation of elections is disposed of by means other than the powers granted by Art. I, § 4.

133. *See id.* at 350.

I, § 5. Safranek criticizes *Powell*, but his criticisms are intemperate, ill-founded,[134] and in any event or adduce no evidence or reasoning that was not available when *Powell* was decided. Safranek disagrees with *Powell*, but offers no reason for it to be reconsidered.

Litigants attempting to defend congressional term limits have argued that even if the qualifications set forth in the Constitution were intended to prevent Congress from setting up additional qualifications, states remain free to do so.[135] They argue in this manner because both *Powell* and the historical record canvassed in Part I preclude a credible argument that Congress is free to set its own members' qualifications. On the other hand, they maintain that the Framers manifested no intent to prevent states from adding qualifications.[136] The next section will show that the latter contention is erroneous.[137] But even if it were correct, it could not support state power under Art. I, § 4, because that section gives ultimate power to Congress. Thus, the deficiencies noted in this section are not limited to Safranek's argument. Rather, *any defense of congressional term limits based on Art. I, § 4 that purports to confine itself to state power is contradictory.*

Supporters of term limits must either embrace the untenable proposition that Congress can set its own qualifications or eschew reliance on Art. I, § 4. In the next section, we shall see that the only serious attempt to take the latter path has proved an utter failure.

B. *Hills' Attempt to Avoid the "Times, Places and Manner" Clause*

Professor Hills' constitutional defense of congressional term limits is more intricate than Safranek's but, as I shall attempt to demonstrate, is no more sound. Hills avoids dependence on Art.

134. For example, Safranek says that the *Powell* Court "set forth no reasons for holding that the Framers had chosen the negative language [in the Qualifications Clause] for mere style." *Id.* at 365. In fact, Chief Justice Warren's opinion gave extensive consideration to this point. *See Powell*, 395 U.S. at 537-539; *see also supra* note 50. More generally, Safranek claims that the debates at the constitutional convention do not provide "*any* justification for thinking that the qualifications imposed by the Constitution are exclusive." *See* Safranek, *supra* note 12, at 350 (emphasis added). Safranek does not even allude to the forceful argument to the contrary, discussed in Part I of this paper. Safranek's absolutism contrasts with the *Powell* Court's recognition that various interpretations of the constitutional debates are possible. *See* 395 U.S. at 532.

135. *See, e.g.*, Brief for Petitioners U.S. Term Limits, et al., U.S. Term Limits v. Thornton, Nos. 93-1456 and 93-1828, (Sup. Ct. pending) at 25-50.

136. *See id.* at 43-44.

137. *See infra*, notes 182-89 and accompanying text.

I, § 4 by arguing that unless there is a negative implication in the Qualifications Clauses, the states' power to impose additional qualifications is implicit both in their power to limit suffrage in congressional elections and in the power of the people of the states to choose their representatives.[138] He then concedes that there is a negative implication in the Qualifications Clauses, but, he claims, one applicable only to qualifications imposed by state or federal statutes, not to those imposed by state constitutions.[139]

1. *Is there an affirmative basis outside Art. I, § 4 for finding power in the states to add qualifications?*

Hills offers two arguments for the proposition that, pending discussion of the possible negative implications of the Qualifications Clauses, states have implicit power to add qualifications for members of Congress. First, he argues, the ability of the states to set qualifications for voters implies an ability to set qualifications for those elected.[140] Second, the ability to set qualifications is in-

138. *See* Hills, *supra* note 11, at 103-09. DeCarli is driven to eschew the "times, places and manner" clause for reasons similar to Hills'. *See* DeCarli, *supra* note 11. DeCarli maintains that although neither the national nor state legislatures may add qualifications to those set forth in the Constitution, the voters of a state acting through the initiative process may do so. *See id.* at 866-68. To support this result, he relies on the Tenth Amendment, which provides that "[t]he 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." *See* U.S. CONST. amend. X. DeCarli believes that the last clause makes an important distinction between the "states," meaning the state governments of which the state legislatures are the head, and the "people," meaning the voters of each state. *See* DeCarli, *supra* note 11, at 868-70. Because of the importance placed by the Framers on direct election of the House by the people rather than by the state legislatures—a principle extended to the Senate by the Seventeenth Amendment—DeCarli argues that the power to add qualifications for members of Congress was reserved by the Tenth Amendment to the "people," but not to the "states."

Despite the importance DeCarli places on the Tenth Amendment, he does not appear to have read it very carefully. If he had, he would have noticed that the reservation of a power, whether to the states or to the people, is subject to the condition that the power is neither delegated to the United States nor prohibited to the states. Since DeCarli himself believes the power to add congressional qualifications is prohibited "to the states," by which he means the state legislatures, by his own account the reservation clause of the Tenth Amendment does not come into play.

Those who follow the footnotes (and if you are not among that number, what are you doing here?) will see that there are other fatal flaws in DeCarli's argument. But for the reason just stated, the argument does not make it out of the starting gate.

139. *See* Hills, *supra* note 11, at 122. Hills' way of dealing with *Powell* is to note that it presented only the question whether a single house of Congress could add qualifications, *see id.* at 100 n.15, and then to ignore the decision entirely. Hills never acknowledges or responds to the obvious point that *Powell*'s conclusion that the qualifications for Congress are "fixed in the Constitution," *see* 395 U.S. at 540, has grave implications for the constitutionality of attempts by anyone to add new qualifications.

140. *See* Hills, *supra* note 11, at 103-07.

trinsic in the power to choose representatives.[141] Neither argument has merit.

a. *The argument from control of the suffrage*

Hills claims that voter qualifications for Congress are set at the discretion of each state.[142] This is a misleading characterization of the Constitution, which says that qualifications for congressional voting must be the same as those for the lower house of the state legislature.[143] Although the states ultimately determine who may vote,[144] they cannot devise special qualifications for voting for Congress. The fact that any qualifications they impose must be applicable to voting for the state legislature as well as Congress is a significant deterrent to tinkering with the congressional franchise.[145]

---

141. *See id.* at 107-09.

142. *See id.* at 103.

143. Article I, dealing with the House, provides:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

U.S. CONST. art. I, § 2, cl. 1.

The Seventeenth Amendment, dealing with the Senate, provides:

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years. . . . The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

U.S. CONST. amendment 17, § 1.

144. Since the 1960s, the discretion of the states to set qualifications for voting has been substantially limited by the Voting Rights Act and by Supreme Court jurisprudence under the Equal Protection Clause. *See, e.g.*, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1968) (invalidating a voting restriction on school district elections under the Equal Protection Clause). However, as Hills correctly points out, when the Constitution was adopted the states had broad power to disenfranchise categories of citizens. *See* Hills, *supra* note 11, at 103.

145. Madison expressed this view emphatically in *Federalist* No. 52:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. . . . The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is comfortable to the standard already established, or which may be established, by the State itself. It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their consti-

Thus, when Hills argues that it would be "extremely odd" to entrust states with the power "to control suffrage directly" but not to set legislators' qualifications, and that doing so would "truly be choking on the gnat while swallowing the camel,"[146] he is arguing from an inaccurate premise. The states' control over congressional suffrage is indirect and, because of the big string attached, severely limited. Still, is Hills correct that it was "extremely odd" to give even this indirect control to the states over suffrage but deny them control over qualifications of the persons elected? No, for the reasons given by Madison in *Federalist No. 52.* Imposing a uniform suffrage in the Constitution would have been "as dissatisfactory to some of the States as it would have been difficult to the convention," so that tying congressional suffrage qualifications to those of the lower house of the state legislature was "the best [solution] that lay within [the convention's] option."[147] In contrast, qualifications for office were "more susceptible of uniformity," and therefore were "very properly considered and regulated by the convention."[148] Thus, the concern of the Framers was not with whether they were consuming gnats or camels, but with imposing the degree of uniformity that was feasible.

Hills also argues that the ability to vote for an office is an implicit prerequisite for holding the office, and that therefore the grant of power to the states to determine the congressional franchise impliedly gave them the power to determine qualifications for office.[149] This argument has numerous flaws. First, as we have seen, the premise that the states were given discretionary authority to define congressional voting qualifications is misleading. Second, Hills cites no reliable authority in support of his premise that eligibility to vote for an office is an implied condition of eligibility to hold the office.[150] Third, that proposition was false in the Eighteenth Century and it is false now. Hills claims, for example, that his statement was true in England, but it is well-

---

tutions in such a manner as to abridge the rights secured to them by the federal Constitution.

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

146. *See* Hills, *supra* note 11, at 104.

147. THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

148. *Id.*

149. *See* Hills, *supra* note 11, at 105-07.

150. The only authority Hills gives is John Randolph, an eccentric and extreme states-righter. *See id.* at 105. When Randolph made the statements Hills relies on, he was acting as an advocate in the *McCreery* case in 1807.

known that in England, neither law nor custom has required members of the House of Commons to reside in the districts they represent, meaning that parliamentary candidates were and are routinely ineligible to vote for the seat that they hold or seek to hold. In the United States, it is customary for House candidates to live and vote in their districts, but they are not required to by law.[151] Similarly, former felons are commonly denied the right to vote,[152] but they may not be denied the right to run for Congress.[153]

Even if setting a voting qualification were tantamount to setting a candidate qualification, it would not follow that the states are empowered to disqualify persons from running for office who are *not* disqualified from voting. No state prohibits persons from voting because they have served two terms in the United States Senate. Such a voting prohibition would be both absurd and plainly unconstitutional. Hills gives no explanation why his argument for the states' power to set congressional qualifications should go beyond the states' actual regulation of the franchise. His argument based on the supposed state power to control the congressional franchise thus fails on numerous grounds.

b. *The argument from the people's power to choose representatives*

Hills' other argument for an implied power in the states to set congressional qualifications, barring negative implications emanating from the qualifications set forth in the Constitution, is that the power is implicit in the people's power to choose their representatives. Hills argues that the people may choose representatives in stages, the first of which is the establishing of qualifications that serve to eliminate some candidates, and the second of which is to choose among the remaining candidates.

151. *See* Hellmann v. Collier, 141 A.2d 908 (Md. 1958).

152. *See, e.g.*, ARIZ. CONST. art. 7, § 2. The constitutionality of this restriction on the franchise was upheld in *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding the California Constitution's comparable provision).

153. *See* Application of Ferguson, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968); Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950); State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918).

Hills presumably would regard the Minnesota decisions as incorrect, though the New York prohibition was statutory, so that under Hills' version of the Qualifications Clauses, it would be invalid. However, even if it were clear that states, through their constitutions or otherwise, had the power to prevent former felons, non-district residents, and others who are denied the right to vote from running for Congress, there is no reason to assume that all states would avail themselves of the opportunity. Thus, it would still be the case that some people would be eligible to run for Congress but ineligible to vote for themselves. Yet, this is what Hills argues is impossible.

> If the people can reject a candidate by voting for another name on a ballot, then why can not they reject a candidate by voting for a qualification that the candidate lacks?[154]

This argument may strike some readers as bizarre. It certainly strikes me that way. Hills believes he has an answer:

> Such an election may seem unfamiliar to modern observers, but one must not confuse the familiar with the constitutionally necessary: the Constitution does not forbid the states from choosing legislatures in unfamiliar ways.[155]

No doubt, this is correct. But the "choosing" of representatives by the people must take place by means of something recognizable, as Hills' choice of language seems to concede, as an "election."[156] There is great room for innovation and evolution in the conduct of elections, as is attested by the adoption of the secret ballot, the primary system, and many other changes over the course of American history. But the term "election" is not infinitely plastic.[157] Given a primary system, elections inevitably take place in stages, but each stage is directed toward choosing between particular candidates to fill a particular office for a particular term.[158] Hills' argument is based on a proposed merging of the setting of ground rules for the election into the election itself. One excellent reason for rejecting his argument is that it simply does violence to English usage.[159]

---

154. Hills, *supra* note 11, at 108.

155. *Id.* at 109.

156. Thus, Article I, § 4 refers to the holding of "elections" for Senators and Representatives. U.S. CONST. art. I, § 4. At the time of the adoption of the Constitution, the election for Senators would take place in the state legislature, while Representatives were chosen at a general election.

157. *See, e.g.*, O'Brien v. Fuller, 39 A.2d 220, 224 (N.H. 1944). In this case a statute provided that delegates to state party conventions from each county "shall elect" a county committee. The court ruled that "even if the word 'elect' be broadly defined," it would not comprehend an informal process in which the ability to select some members apparently was delegated to specific individuals. *Id.* at 224.

158. This principle was an important element of the Democratic Party reforms following the 1968 convention. Reformers complained of delegate selection processes in which the key stages occurred before the candidates for President were identified. For a detailed account of the adoption of the reforms, see BYRON SHAFER, QUIET REVOLUTION (1983). The reforms, which assured each party member an opportunity to cast a vote in either a caucus or a primary for an identified presidential candidate, have in this respect been adopted by both parties. They have been criticized, but precisely on the ground that the reforms made the presidential nominating process more "plebiscitary," that is, more like an election. *See* NELSON POLSBY, CONSEQUENCES OF PARTY REFORM (1983).

159. Hills' position is also at odds with the Supreme Court's decision in *Lucas v. Forty-Fourth General Assembly of Colorado.* 377 U.S. 713 (1964). In that case, a statewide electoral majority had approved a legislative districting plan that failed to comply with the one person-one vote rule. By Hills' method of reasoning, the plan should have been upheld on the theory that the "election" of legislators included the statewide referendum, in

Hills' argument is a bad one aside from its unreasonableness as interpretation of language. That is, not only are elections distinct from the establishment of electoral ground rules as a matter of linguistic practice,[160] but it is important that they should be distinct. Let us look at Hills' explanation of how he believes the system should work:

> Take candidate Old Timer, the long-term incumbent excluded because she has served more than 12 consecutive years in the House. . . . If she was rejected by the voters in an ordinary election, [she and her supporters would have no complaint]. But there is more than one way to reject an incumbent. The voters could reject Old Timer by voting for an opposing candidate in a normal election; they could also reject her by voting in a referendum for a qualification that Old Timer lacked.
>
> [A term limits initiative] can be considered an 'election' of the latter sort. Old Timer was excluded from the final ballot, but she was excluded because she lost a free, fair referendum on qualifications, in which she and her supporters could have canvassed . . . voters to vote against the qualification that ultimately excluded her. If her supporters were so upset at Old Timer's exclusion from office by the state imposed qualification, then they should have voted against the term limitation and persuaded their neighbors to do likewise.[161]

In Hills' conception, then, it is legitimate and contemplated that constitutional decisions setting the ground rules for elections should be fought out on the basis of short-term tactical considerations and partisan advantage. This is an extreme and untenable position. No one doubts that much debate over democratic processes is guided by tactical and partisan concerns. Differences over which processes are fairest and most expeditious

---

which all votes were equally weighted. Indeed, the argument would have been slightly less far-fetched in *Lucas* than in the case of term limits, because legislative districts must be revised every ten years, whereas the first "phase" of a single "election," namely the term limit vote, might be separated by decades, or even centuries, from the second "phase," namely the choice among the candidates not disqualified by the term limit. The Supreme Court demonstrated greater common sense:

> [I]ndividual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved.

377 U.S. at 736. Similarly, the possibility of defeating the term limit when it appears on the ballot or of opposing the term limit at a hypothetical repeal vote is not a part of the "election" of members of Congress. Rather, it is a nonjudicial remedy whose availability, as the Court said in *Lucas,* cannot be used to evade judicial review.

160. As an analogy, it is the kickoff, not the coin toss, that starts a football game.

161. Hills, *supra* note 11, at 138-39.

are inevitable, and there is no reason to expect debates on such matters to be unaffected by partisan and self-interested calculations. At the same time, the existence of a democracy depends on the widespread recognition that some aspects of the process are debated not on self-interested grounds, but in terms of the public interest.[162] Considerable tension exists between the need for procedures that are perceived to be impartial and the inevitable tactical considerations that are present because the consequences can often be foreseen.[163]

Hills apparently rejects the idea that debate on democratic processes should be conducted, at least in part, on the basis of fairness and the public interest, removed from considerations of tactical advantages in this year's or next year's elections. But even if Hills thinks it is appropriate to debate issues such as term limits on grounds of short-term benefit for specific candidates and parties, much of the electorate is likely to disagree with him. Let us alter Hills' example slightly by supposing that term limits are in force and that Old Timer, anticipating that in two years she will be ineligible to run for reelection, sponsors a proposal to repeal or modify the term limits. If she and her supporters candidly admit that they are motivated to preserve her tenure in Congress, her measure is likely to be widely discredited as a purely selfish and manipulative proposal. Even if voters are wrong to expect such proposals to serve broader purposes than Old Timer's reelection, so long as they have such expectations, Hills' assertion that she has a fair chance to run in a multi-stage "election" will be incorrect.

For those who regard such concerns as too theoretical or speculative, there are some more concrete reasons why the adoption of term limits (or the failure to repeal them), combined with a subsequent election among the candidates not disqualified by the term limits, cannot be regarded as an "election" within the meaning of the Constitution. First, the electorate that adopts the term limits is not the same as the electorate that chooses the candidates six, twelve, or a hundred years later. To be sure, the electorate in a primary is not identical to the electorate in the general election. But the degree to which the electorate changes

162. *See, e.g.*, Anthony Downs, *The Public Interest: Its Meaning in a Democracy*, 29 SOC. RES. 1, 5-7 (1962); Frank Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616, 633 (1957).

163. I have previously attempted to sort out some of these questions—not necessarily with great success. *See* Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 335-48 (1989).

from the primary to the general is so much less than the degree to which it changes from the adoption of term limits to the election of candidates that the difference is one of kind. If a candidate in the year 2092 is disqualified by a term limit adopted by initiative in 1992, in what sense can it be said the candidate "was rejected by the voters," as Hills would have it, at a time before the candidate and virtually all voters were born?

In the case of the House of Representatives, Hills' position is even more obviously untenable. In a state that has more than one congressional district, only persons residing in a given district may vote in that district. Yet, if term limits are adopted in a statewide initiative election, voters from outside the district will have voted in a crucial stage of what Hills regards as the "election" to fill the House seat. Hills regards this as an insignificant objection, because "state law determines whether a state will be divided into electoral districts: states are free to hold at-large elections of federal representatives instead of elections from geographical districts."[164] Hills' argument, even if it could survive the other objections, depends crucially on this assertion that the states are free to hold at-large elections. Unfortunately for Hills, the assertion is false. Since 1967, Congress has required single-member district elections for the House of Representatives.[165]

In sum, the Constitution calls for the people to choose their representatives at elections, and the "elections" do not include referenda held years, decades, or centuries earlier on term limits or other qualifications for office. In the case of the House of Representatives, even if a statewide referendum could be regarded as an integral part of the election of representatives, the election would thereby be rendered violative of federal law. Hills' contention that the power to choose representatives implies the power

164. *See id.* at 143 n.184.

165. *See* 2 U.S.C. § 2c (1988). Anyone who doubts Congress' authority to require single-member district elections for the House of Representatives, as it has done, may consult Safranek's demonstration of the breadth of Congress' power under Art. I, § 4 of the Constitution. *See* Safranek, *supra* note 12, at 327-50.

Hills' claim that his theory is an "originalist" one is undermined by the fact that it crucially depends on the (false) proposition that House elections need not be conducted in geographical districts. The Framers of the Constitution certainly contemplated otherwise. As Madison argued during the constitutional convention:

> It was a provision every where established that the Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathise, with the rights of the people in every part of the Community.

2 FARRAND, *supra* note 42, at 124 (July 26, 1787).

to set qualifications is as weak as his argument based on the supposed state power to set qualifications for the franchise.

2. *Do the Qualifications Clauses permit state constitutions to create new qualifications?*

Hills' failure to show that there is some affirmative basis in the Constitution other than the "times, places and manner" clause for discerning power in the states to set congressional qualifications is fatal to his argument against the exclusiveness of the qualifications specified in the Constitution. Hills agrees that both the national and state legislatures are precluded from adding qualifications.[166] Reliance on Art. I, § 4 would be contrary to his contention that additional qualifications may be created only in state constitutions.[167] However, Hills' position contains additional weaknesses.

Before turning to Hills' arguments against exclusivity, we should consider the heavy weight of authority against him and other proponents of the view that states may add to the qualifications of members of Congress. We have seen that Hills ignores *Powell* as dealing only with the powers of Congress, despite *Powell*'s obvious relevance for the meaning of the Qualifications Clauses. In addition to *Powell*, there is overwhelming judicial authority standing directly for the proposition that states may not

166. *See* Hills, *supra* note 11, at 119.

167. Similar considerations prevent Hills or other defenders of congressional term limits from relying on a "structural" interpretation of the Constitution, in which the interpreter deduces constitutional principles from the overall structure of the government created by the Constitution as well as from the specific provisions in the text. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The structuralist approach, perhaps reinforced by the Tenth Amendment, might seem to open the door for the defender of term limits to argue that the federal structure of the government, with its emphasis on preserving the sovereign powers of the state, should guide the interpretation of the Qualifications Clauses in the direction of creating a negative implication for Congress but not for the states.

Of course, the empirical premise of such an argument would be subject to contest. The purpose for enacting the Constitution was to establish a strong national government that, while respecting the states' sovereignty, would have sufficient autonomy to carry out the functions for which it was created. In addition, as we shall see *infra* notes 191-94 and accompanying text, such an interpretation conflicts with the language of the Qualifications Clauses themselves. However, the structuralist defense of term limits would be subject to a more specific objection. When it comes to the regulation of congressional elections, it would be inappropriate to look to the Constitution as a whole for governing principles of federalism. These are provided with specificity in Art. I, § 4, which gives states the power to regulate the "times, places and manner" of elections, but subject to the ultimate determinations of Congress. To apply *these* principles of federalism to the question of the power to add new qualifications would run afoul of *Powell v. McCormack*, which determined that Congress lacks such a power.

add to the qualifications for Congressional candidates. The Supreme Court itself implied as much in *Storer v. Brown*,[168] when it rejected the contention that a one-year party non-affiliation rule for independent candidates was "an additional requirement for the office of Representative." If states were permitted to add qualifications, it would have been irrelevant whether the non-affiliation rule was "an additional requirement."[169] Other courts have been more explicit. In particular, courts of at least twenty-three states have considered whether the state was empowered to impose its own qualifications on candidates for Congress. Relying more or less on the arguments set forth in Part II of this article, every one of them has answered in the negative.[170] One federal

168. 415 U.S. 724, 746 n.16 (1974).

169. The Court may have proceeded as it did in the belief that the non-affiliation rule was so obviously not an additional qualification that the need to decide whether or not the state was empowered to add qualifications was obviated. However, case law would have indicated that the question whether the non-affiliation rule was a qualification, simple though it may have been, was a more contestable issue than whether the states were empowered to impose qualifications. *Compare supra* note 90 and accompanying text, *with infra* note 171 and accompanying text. Furthermore, the Court ordinarily makes it explicit in such situations which issues it is deciding and which it is not. In *Storer*, the Court seems not to have regarded it as any issue at all whether states are permitted to add qualifications for Congress. The weight of authority on the question is so heavy that the Court was quite justified in regarding it as a non-issue. Indeed, the state defendant in *Storer* did not dispute the contention that states are unable to add qualifications for Congress "as a general proposition." Appellee's Brief at 35, Storer v. Brown, 415 U.S. 724 (1974).

170. Alaska: Benesch v. Miller, 446 P.2d 400 (Alaska 1968).
Arizona: Stockton v. McFarland, 106 P.2d 328 (Ariz. 1940).
Arkansas: U.S. Term Limits v. Hill, 872 S.W.2d 349 (Ark. 1994).
California: Alex v. County of Los Angeles, 111 Cal.Rptr. 285 (Cal.App. 1973) (by implication).
Delaware: Buckingham v. State ex rel. Killoran, 35 A.2d 903 (Del. 1944) (dictum).
Florida: State ex rel. Davis v. Adams, 238 So.2d 415 (Fla. 1970).
Georgia: Lowe v. Fowler, 240 S.E.2d 70 (Ga. 1977).
Indiana: State ex rel. Handley v. Superior Court, 151 N.E.2d 508 (Ind. 1958).
Maryland: Hellmann v. Collier, 141 A.2d 908 (Md. 1958); Shub v. Simpson, 76 A.2d 332 (Md.), *appeal dismissed*, 340 U.S. 881 (1950).
Michigan: Richardson v. Secretary of State, 160 N.W.2d 883 (Mich. 1968).
Minnesota: Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950); State ex rel. Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918).
Nebraska: State ex rel. O'Sullivan v. Swanson, 257 N.W. 255 (Neb. 1934).
Nevada: State ex rel. Santini v. Swackhamer, 521 P.2d 568 (Nev. 1974).
New Mexico: State ex rel. Chavez v. Evans, 446 P.2d 445 (N.M. 1968).
New York: Application of Ferguson, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968); O'Connor v. Cohen, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940).
North Dakota: State ex rel. Sundfor v. Thorson, 6 N.W.2d 89 (N.D. 1942).
Ohio: State v. Russell, 8 Ohio N.P. 55 (1900).
Oklahoma: Oklahoma State Election Bd. v. Coats, 610 P.2d 776 (Okla. 1980); Riley v. Cordell, 194 P.2d 857 (Okla. 1948).
Oregon: Ekwall v. Stadelman, 30 P.2d 1037 (Or. 1934).
South Dakota: In re Opinion of the Judges, 116 N.W.2d 233 (S.Dak. 1962).

court commented on the "singular unanimity" with which state courts have so held,[171] and the federal courts that have considered the question, though fewer in number, have been equally unanimous.[172] Although Hills wishes to distinguish between the power of state legislatures to add qualifications and the power of states to do so in their constitutions, many of the state courts that have ruled on the question have struck down state constitutional provisions.[173] No judicial authority and, as far as I am aware, no other legal commentator prior to Hills has ever suggested that the states' power to add qualifications depended on whether they acted through a constitutional provision or by other means.

There is a second preliminary point: to claim that the constitutionality of a state action depends on the means by which the state acts runs against the constitutional grain. Ordinarily, it is a matter of indifference to the Federal Constitution how a state chooses to structure its decision-making processes.[174] In particular, the Court has made it clear on several occasions that the fact that the state has acted through a process of popular vote has no bearing on the constitutionality of the state's action.[175]

Washington: State ex rel. Chandler v. Howell, 175 P. 569 (Wash. 1918).

Wisconsin: State ex rel. Wettengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946).

Wyoming: State ex rel. Johnson v. Crane, 197 P.2d 864 (Wyo. 1948).

171. Stack v. Adams, 315 F. Supp. 1295, 1297 (N.D.Fla. 1970).

172. *See* Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983) (reporting that the parties had agreed to this premise); Signorelli v. Evans, 637 F.2d 853, 858 (2d Cir. 1980); Thorsted v. Gregoire, 841 F.Supp. 1068 (W.D.Wash. 1994); Public Citizen, Inc. v. Miller, 813 F.Supp. 821, 831 (N.D.Ga. 1993); United States v. Richmond, 550 F.Supp. 605, 607 (E.D.N.Y. 1982) (dictum); Dillon v. Fiorina, 340 F.Supp. 729 (D.N.M. 1972); Exon v. Tiemann, 279 F.Supp. 609, 613 (D.Neb. 1968).

173. *See, e.g.*, the cases cited *supra* note 170 from Arizona, Arkansas, California, Delaware, Indiana, Michigan, Minnesota, South Dakota, Washington, Wisconsin, and Wyoming.

174. Even when the Constitution specifically delegates a function to the state legislatures, the provision may be interpreted to leave it up to the states to decide how the function should be performed. *See* Smiley v. Holm, 285 U.S. 355 (1932) (the delegation to state legislatures under the "times, places and manner" clause incorporates normal state legislative procedures, such as the gubernatorial veto); Davis v. Hildebrant, 241 U.S. 565 (1916) (state could subject its legislature's power under the "times, places and manner" clause to a referendum requirement). However, in Hawke v. Smith, 253 U.S. 221 (1920), the Court said that the function of ratifying amendments to the United States Constitution is a non-legislative function vested in state legislatures, and therefore could not be subjected to a referendum requirement.

175. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Hunter v. Erickson, 393 U.S. 385, 392 (1969); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736 (1964). *See generally* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1505-06 (1990). Eule refers to a large number of additional Supreme Court cases adjudicating the constitutionality of provisions enacted by popular vote and reports that nothing in the Court's analysis suggested that the means of enactment had any influence one way or the other. *See id.* at 1505 n.5.

Bearing in mind these preliminary reasons for skepticism, let us turn to Hills' argument that the Constitution does not set forth exclusive qualifications for Congress. He begins his argument on solid ground by pointing out that neither the language of the Qualifications Clauses nor that of any other provision of the Constitution specifically precludes additional qualifications.[176] As we saw in Part II, the setting forth of certain qualifications leaves open the question whether there is an implication that the list is exclusive.[177]

The heart of Hills' argument is his attempt to demonstrate that the Framers intended to preclude only additional qualifications that might be created by legislatures.[178] Hills claims that

176. *See* Hills, *supra* note 11, at 110.

177. Hills does not claim to present conclusive evidence that the qualifications in the Constitution were *not* intended to be exclusive, though he does respond to a number of possible points in favor of exclusivity.

He uses what seems to me a tortured analysis, bringing in the Religious Test Clause, art. VI, cl. 3, to respond to the contention that the Qualifications Clauses should be interpreted as exclusive on purely linguistic grounds. *See id.* at 112-14. Hills' argument is based on the premise, which is plainly erroneous in my opinion, that negative implications must either always be read into the Constitution, or never. To the contrary, neither exclusivity nor non-exclusivity is an automatic conclusion; the question is one of interpretation, and each provision of the Constitution (or any other text) must be considered on its own merits.

Hills also argues that a negative implication from the Qualifications Clauses cannot be based on a desire of the Framers for uniformity of qualifications. *See id.* at 116-19. Although this argument seems to me open to question on the basis of Madison's argument in *Federalist No. 52*, I shall not take issue with it here. Finally, Hills presents a lengthy and interesting analysis of some of the Nineteenth-Century exclusion cases in Congress. *See id.* at 119-32. As we saw in Part I, the cases in Congress are not a major portion of the argument for exclusivity and were given little weight in *Powell*.

178. *See id.* at 119-23. This argument is introduced in a curiously elliptical manner. Hills suggests that the Qualifications Clauses should be read as containing a negative implication, but only a partial one. However, his initial explanation of what he has in mind is slippery. At first, he says the Qualifications Clauses "can be construed to exclude any other qualifications that might otherwise be implicitly imposed by the U.S. Constitution." *Id.* at 114. This suggestion, that the enumeration of specific qualifications in the Constitution negates the existence of implicit qualifications but without any negative implication for the addition of qualifications by Congress or by the states, is a possible reading of the language of the Constitution. However, it is not the one Hills wants to reach, nor is it consistent with *Powell* or the massive weight of authority we have considered. Thus, in the same paragraph, Hills explains his interpretation with the statement that "the only *federal* limits on election are . . . those three explicitly listed in the U.S. Constitution." *Id.* This is a significant and unexplained change in meaning, because this second formulation, unlike the first, suggests that the negative implication of the Qualifications Clauses extends to Congress.

Hills is not through yet, however. He goes on to state that the negative implication does not mean that "the state peoples themselves, through their state constitutions, can not impose extra qualifications." *Id.* Thus, without explanation or justification, Hills slips from an interpretation that at least is plausible given the language of the Constitution, that the only negative implication is against finding any additional qualifications implicit in the Constitution, to his final position that the only permissible sources of additional qualifications are state constitutions.

"Madison, like others at the convention, was opposed to additions of qualifications by the legislature, not to additions of qualifications in general."[179] Hills goes on:

> It would be a singular perversion of Madison's reasoning to interpret his argument against legislative control of qualifications as a justification for excluding the electors themselves from adding extra qualifications for the elected through state constitutions. Madison's argument was a *defense* of the electors' power, not a limitation of it. . . . Because state constitutions represent the state peoples' will, they could impose qualifications where the legislature could not.[180]

It is undoubtedly true that the Framers were particularly concerned with the possibility of abuse by Congress of any power it might be given to set qualifications. The history discussed in *Powell* demonstrates as much. Furthermore, as we saw in Part II, the constitutional convention debated proposals to give Congress the power to set property qualifications or to set qualifications without limitation. It was therefore natural that most of the debate would be cast in terms of the dangers emanating from Congress. It does not follow that the Framers intended to permit the states to add qualifications or that the language they enacted in the Constitution is susceptible of that conclusion.

Hills' argument to the contrary contains at least four serious deficiencies.[181] First, he ignores evidence showing that some of the concerns voiced by the Framers are at least as applicable to qualifications that might be added by the states, by whatever means, as they are to qualifications that might be added by Congress. Second, he draws false implications from the statements of the Framers whom he quotes. Third, his conclusion is not a plausible interpretation of the language of the Constitution. Fourth, his conclusion is flagrantly and fatally anachronistic.

a. *The Framers did not intend for the states to have power to create qualifications*

For the reasons just given,[182] most of the debates on congressional qualifications at the Philadelphia convention focused on the danger of permitting Congress to set qualifications for its

179. *Id.* at 120-21.

180. *Id.* at 122.

181. DeCarli's argument, *see* DeCarli, *supra* note 11, that the voters of each state may add qualifications is subject to the same deficiencies.

182. *See* paragraph in text, *supra*, following note 180.

own membership. On August 10, 1787, as we saw in Part II, the convention was considering proposals permitting Congress to set property qualifications or qualifications of any sort. However, the concerns of the delegates related to qualifications were not limited to potential abuses by Congress. The main reason there was no specific discussion of the states' ability to add to the qualifications for members of Congress appears to be that no one contemplated the possibility that under the Constitution they would have such a power, and no one proposed that they should. Indications that this must have been the case appear in the debates on the provisions that ultimately appeared in the Qualifications Clause.

On August 8, the delegates were debating a motion by John Rutledge of South Carolina to require that persons elected to Congress be seven-year residents of the states from which they are elected. Madison, in his journal, reported the following statements in opposition:

> Mr. [George] Read [of Delaware] reminded him that we were now forming a *National* Government and such a regulation would correspond little with the idea that we were one people.
>
> Mr. [James] Wilson [of Pennsylvania]—enforced the same consideration.[183]

After further debate, all proposals to add a durational residence requirement were defeated.[184] The argument made by Read and Wilson shows that it was not only Congress that could frustrate the Framers' purposes by adding qualifications. Read and Wilson regarded anti-carpetbagging regulations as likely to obstruct the national character of the Union. The likelihood of such obstruction being established would be at least as great from the states, whether or not in their state constitutions and whether or not by vote of the people, as from Congress.

Further evidence emerges from remarks made on August 9, during the debate on the period of citizenship that should be required for senators. Oliver Ellsworth of Connecticut argued against too long a period "as disparaging meritorious aliens from emigrating to this Country."[185] A number of delegates made similar arguments, including Madison, who urged that too long a pe-

183. 2 FARRAND, *supra* note 38, at 217 (emphasis in original; abbreviations expanded).
184. *See id.* at 218-19.
185. *Id.* at 235.

riod "will discourage the most desirable class of people from emigrating to the U.S."[186]

It is thus very clear from the debates that although conflict of interest made it particularly dangerous for Congress to control its members' qualifications, there were other values that excessive qualifications could interfere with, regardless of the source of the qualifications. Some of these values were implicated by durational residence and citizenship requirements, but the most important was the value of preserving the opportunity for the people to select the representatives of their choice. It would have made little sense for delegates like Read, Wilson, Ellsworth, and Madison to argue strenuously that certain qualifications would be harmful to the nation and to the concept of representation, and yet to say nothing about the possibility of state interference with these values, unless they were confident that the Constitution they were shaping made no allowance for the states to add to the qualifications for Congress.

b. *The historical record is bereft of support for Hills' position*

It is therefore not surprising that Hills, for all the diligence of his research, is unable to provide a single instance of anyone during the constitutional debates (or on any other occasion during the period of the adoption and ratification of the Constitution) saying that the Constitution should not or would not restrict additional qualifications created by the states. Instead, Hills selects statements of the Framers that point to particular dangers of leg-

186. *Id.* at 236. Neither Hills, *supra* note 11, nor DeCarli, *supra* note 11, makes any reference to the debates on durational residence and citizenship qualifications. DeCarli is especially brazen, when he asserts that "there is no evidence that . . . voters in a particular state were barred from requiring a certain term of residency," *id.* at 881, without mentioning Read's and Wilson's argument that such requirements would interfere with the functioning of a "*National* government." He also asserts that the debates on the citizenship period "do not imply that the people of the individual states were to be prohibited from adding to them by amending their state constitutions," *id.* at 884, without mentioning the arguments of Ellsworth, Madison, and others that an excessive period would discourage desirable immigration. Indeed, DeCarli's characteristic methodology is to ignore all evidence contrary to his position and then declare boldly that there is no such evidence. To give one additional example, DeCarli asserts that the rejection by the convention of the property qualifications section was the result solely of an unwillingness to entrust Congress with setting such qualifications. According to him, it is "evident from the discussions that property requirements were neither favored nor disfavored." *Id.* at 879. DeCarli's ability to make this argument is greatly facilitated by his omission of any reference to Benjamin Franklin's eloquent argument during the debate that property qualifications "tended to debase the spirit of the common people," and that they would "betray a great partiality to the rich" that would hurt the United States "in the esteem of the most liberal and enlightened men" in Europe. 2 FARRAND, *supra* note 42, at 249.

islative creation of new qualifications, and draws the unwarranted inference that therefore there was no intention of barring qualifications that might be imposed in state constitutions.[187] The inference is unwarranted as a matter of logic and it is inconsistent with Madison's ringing statement in *Federalist No. 52*: "The door of [the legislative branch] of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."[188]

---

187. For example, he quotes this passage from the debate on whether Congress should have power to set property qualifications, in which Madison said he

> opposed . . . the Section as vesting an improper and dangerous power in the legislature. The qualifications of the electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from their Constituents, there was the same reason for being jealous of them.

Hills, *supra* note 11, at 120, *quoting* 2 FARRAND, *supra* note 42, at 249-50 (Hills' emphasis deleted). According to Hills, this passage "shows that Madison, like others at the convention, was opposed to additions of qualifications by the legislature, *not to additions of qualifications in general*." *Id.* at 120-21 (emphasis added). The passage Hills quotes does not show that Madison was unopposed to additional qualifications. To give one reason for a conclusion does not negate the existence of others. If a police officer suggests that I bolt my house securely because a serial killer has been ravaging the neighborhood, I would not interpret the statement to imply that I should open my doors if a run-of-the-mill burglar comes calling.

In the case of Madison's passage, Hills' argument is especially weak. The context, after all, was debate on a proposal that Congress should have the power to add qualifications. Even so, only the last sentence in the quotation is specific to dangers emanating from Congress. The first and third full sentences are perfectly general and just as applicable to qualifications added by states as to those added by Congress. Furthermore, Hills omits the argument that Madison goes on to make, that the power to set qualifications might be used by one faction against another. *See* 2 FARRAND, *supra* note 38, at 250. As we know from *Federalist No. 10*, Madison regarded the danger of factions as greater at the state level than at the federal level.

188. THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961). Hills makes no mention of this celebrated passage. DeCarli does, but he argues that Madison could not have intended that the voters of the state would be barred from adding qualifications because of his statement in *Federalist No. 45* to the effect that the national government's powers were limited while the state government's powers would continue to be "numerous and indefinite." *See* DeCarli, *supra* note 11, at 887. To say the least, this is a non sequitur. DeCarli agrees that the Qualifications Clauses were intended to prevent Congress from adding qualifications. Thus, interpreting them to prevent states from doing the same does not in any way aggrandize the federal power. The fact that the Qualifications Clauses take away from the state governments the power to add qualifications for Congress hardly diminishes the extent to which those governments' powers are "numerous and indefinite." Even if it did, it would be irrelevant to DeCarli's main argument, which is that the voters of each state, as *distinct from the state governments*, have the power to add qualifications. *See id.* at 866-68.

The proposition that the states, by whatever means, would be able to set qualifications for Congress does not appear to have been considered at all at the constitutional convention or during the ratification debates.[189] That is the only plausible explanation of the silence on the issue that characterized the debates. Hills ignores the evidence, contained in the debates, of Framers who took very seriously the protection of values that would have been jeopardized by extending to states the power to add qualifications in their constitutions. He agrees that the Qualifications Clauses carry a negative implication, but his argument that there was an exception for qualifications created by state constitutions is made up out of whole cloth.

c. *Any notion that the exclusive effect of the Qualifications Clauses is restricted to Congress and does not apply to states or state constitutions is inconsistent with the language of the Constitution*

Even if the historical record supported Hills' assertions, his position would be untenable given the language of the Qualifications Clauses. To see this, let us suppose for the sake of argument that the Framers, if asked, would have said they intended to prevent legislatures from adding qualifications but had no objection to states doing so by amending their constitutions. Hills' argument still would depend on the fallacious assumption that he can proceed from the conceded ambiguity in the language of the Qualifications Clause on the exclusivity question, by means of such historical assumptions about the beliefs of the Framers, to a determination based on policy. Thus, he writes:

> The originalist position regarding the exclusivity of the Qualifications clauses is, therefore, one of doubt. There was no unambiguous consensus about whether the Qualifications clauses should allow additions or exclude them. These doubts should be resolved in favor of the states for reasons of policy and constitutional structure.[190]

Hills glosses too quickly over the type of ambiguity that is presented by the Qualifications Clauses. The fact that language is ambiguous and therefore, by definition, susceptible to more than

189. For a reference to the one apparent exception, see *supra* note 128.

190. Hills, *supra* note 11, at 132. By "constitutional structure," Hills apparently refers to his argument that it is not now as dangerous to permit states to add qualifications as it would have been in the Eighteenth Century, because of the protections added by the Fourteenth Amendment. *See id.* at 133-35.

one interpretation, does not mean the language is susceptible to *any* interpretation. Let us return, momentarily, to the example from Part II of my statement to my son regarding permissible desserts. In Part II, I assumed that the statement, "You may have an apple for dessert," probably was intended and understood to have the negative implication that my son was not permitted to have ice cream. However, the language I used was ambiguous, and therefore there is room for my son to suggest that I was simply alerting him to the presence of apples or encouraging him to have one, without intending any negative implication. His suggestion might be a very weak one, depending on the factual background, but it would not be incoherent. Now, however, suppose my son acknowledges that he understood my statement to have a negative implication and therefore to preclude him from having any of the maple walnut, mint chocolate chip, or pistachio ice cream, but that he did not think there was any intent to prevent him from having some butterscotch fudge whirl, which happened to be the flavor he wanted. Now, my son's position is preposterous. Barring some exotic background facts, my statement could not have had this meaning. Either it contained a negative implication or it did not. If it did, there was nothing in it that distinguished between flavors. If my intention were to allow him to eat butterscotch fudge whirl but no other flavor, I could not possibly have imagined I was communicating that intention by saying, "You may have an apple for dessert."

The Constitution sets forth certain qualifications for members of Congress. In doing so, it may mean that additional qualifications are precluded, or it may simply impose these qualifications as a minimum. The language makes either of these interpretations plausible, but those are the only choices.[191] If the latter interpretation were chosen, then we would need to look elsewhere

191. I am simplifying here, to facilitate the exposition. We have already seen some other plausible interpretations of the language of the Qualifications Clauses, namely Hills' suggestion that the clauses negate the possibility of finding any implied qualifications in the Constitution, *see id.* at 114, and Gorsuch and Guzman's suggestion that the negative implication extends only to age, citizenship and residence requirements more stringent than those in the Qualifications Clauses. *See* Gorsuch & Guzman, *supra* note 10, at 363. (By "plausible," I mean with respect to the language of the Qualifications Clauses alone. Neither interpretation is plausible when considered in light of the history of the Qualifications Clauses' adoption and interpretation.) Similarly, if there are peaches in the kitchen, my statement might now be interpreted as permitting my son to eat: 1) only an apple; 2) an apple or a peach, but not ice cream; 3) any of the three desserts. The statement still would not be subject to the interpretation that it permits one flavor of ice cream while excluding others.

in the Constitution for the power to add qualifications. The "times, places and manner" clause, with the broad meaning that Safranek argues for, would be the only plausible location. There is no plausible way to read the language of the Constitution as permitting additional congressional qualifications, but only if created by state constitutions.

Thus, even if we grant to Hills all the assumptions he wants to make and more about the beliefs of the Framers, he still has no answer to some simple questions: If the Framers intended to preclude additional qualifications by federal or state legislatures but not by state constitutions, why did they not say so? Why is there not a single statement to that effect in the historical record? Above all, *how could they conceivably have imagined that they were achieving this by the words they wrote in the Constitution?* The silence of the Qualifications Clauses is susceptible to the meaning that the qualifications set forth are exclusive, and it is susceptible to the meaning that the enumerated qualifications are minimums to which additional qualifications may be added. The nature of the ambiguity leaves no room for Hills' in-between proposal.

It is for this reason above all that Hills' effort to evade *Powell v. McCormack* fails. It is true that in *Powell*, the Court did not have before it the question whether states could add qualifications. But because the ambiguity in the Constitution is an either-or ambiguity, the Court's determination that Congress has no power to add qualifications resolved that ambiguity once and for all. *Powell* is based on "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution."[192] No evidence presented by Safranek or Hills in any way shakes the conclusion that the Court's interpretation was probably right as a matter of history. That interpretation of the Constitution—though concededly not the Court's actual holding in *Powell*, given the particular controversy it had before it—is as conclusive for qualifications added by the states as it is for qualifications added by Congress. As such, *Powell* was consistent with a massive amount of virtually unanimous authority. Subsequent decisions, including the Court's treatment of the qualifications issue in *Storer v. Brown*, merely reinforce *Powell*'s interpretation.

I have cast the preceding argument in terms of the permissible interpretations, given the language of the Constitution, because

192. *Powell*, 395 U.S. at 540.

that is the most fundamental point. The search for the intent of the Framers is not conducted for the purpose of bypassing the language of the Constitution. Rather, assuming that one's jurisprudential views make the intent of the Framers relevant at all,[193] it is so their intent can cast light on the meaning of the words they wrote in the Constitution. In the case of the Qualifications Clauses, the words are susceptible of more than one meaning, and the Framers' intent is relevant to choosing among those meanings. Opinions that the Framers might have held but that are not even arguably expressed by the language they chose are irrelevant.

At the same time, the foregoing argument is highly relevant to what the intent of the Framers actually was. That is, because the Framers did not choose language that could plausibly be regarded as expressing Hills' idea—that qualifications could be added, but only in state constitutions—it is highly unlikely that this is what they intended. As we shall now see, Hills' imputation of intent to the Framers is very unlikely for yet another reason, namely, that his position is extremely anachronistic.

d. *Hills' position is anachronistic*

As we have seen, Hills' contention that the Framers intended to permit congressional qualifications to be created by state constitutions has no direct support in the statements that were made at the time. At bottom, his position rests on the imputation to the Framers of a political theory. "Because state constitutions represent the state peoples' will, they could impose qualifications where the legislature could not."[194]Whether those who framed the Constitution wanted to entrust matters as significant as congressional qualifications to the immediate will of the people is at least questionable. As historian Lance Banning has written,

> [A]ll the delegates agreed that, everywhere, the country suffered from an "excess of democracy." There was a general consensus that the revolutionary constitutions had confided too much power to the lower houses of assembly, which could not effectively be checked by governmental branches less immediately responsive to popular demands. Rule by the assemblies seemed to demonstrate that unrestrained majorities were dangerous custodians of private rights and public good. Liberty,

193. They are relevant for Hills, who avows that his argument is based on "originalist and policy grounds." *See* Hills, *supra* note 11, at 100.

194. *Id.* at 122.

> defined as popular control of power, no longer seemed a certain guarantee of liberty defined as the inherent rights of all—or even of the well-considered, long-term interests of the community.[195]

Nevertheless, it is not necessary to rely on such general considerations to demonstrate the implausibility of Hills' position. For at the core of that position is an assumption that state constitutional provisions are associated with popular elections. That assumption is largely though not entirely valid today, but it is quite fallacious for the period of the adoption of the Constitution.

It is hard to be sure whether the crucial point for Hills is that a qualification appear in a state constitution or that it be approved by a vote of the people. Sometimes he seems to have a somewhat mystical belief in state constitutions, as in the above quotation in which he asserts that state constitutions "represent the state peoples' will."[196] However, Hills also suggests that for the Framers, the important point was whether qualifications were added by popular election. Thus, he writes that Madison, who argued against qualifications being added by legislatures, did not intend to prevent "the electors themselves from adding extra qualifications for the elected through state constitutions."[197]

Apparently, Hills' mystic belief that state constitutions, unlike legislation, reflect the "peoples' will" and his emphasis on popular elections stem from a belief that constitutional provisions are necessarily voted on and statutes are not. If so, Hills is incorrect. The federal Constitution does not require state constitutional amendments to be submitted to elections, and one state, Delaware, to this day declines to do so.[198] On the other hand, legislation, especially in states that have adopted the initiative and referendum processes, often is voted on. Under Hills' view that qualifications can be created only in state constitutions, Delaware's legislature could amend the state constitution to include congressional term limits, but states like California, North Dakota and Washington, which adopted congressional term limits

195. Lance Banning, *The Problem of Power: Parties, Aristocracy, and Democracy in Revolutionary Thought, in* THE AMERICAN REVOLUTION 104, 114 (Jack P. Greene ed., 1987).

196. *See* Hills, *supra* note 11, at 122. Ironically, the only support he gives for this proposition is a reference to Joseph Story, *see id.* at 122 n.100, whose influential writing against the ability of the states to add qualifications we examined in Part I.

197. *See id.*

198. DEL. CONST. art. XVI, § 1. *See* State v. Bender, 293 A.2d 551 (Del. 1972) ("Delaware differs from all of the other States of the Union which do require approval by the people of proposed changes in their constitution.")

by means of initiative statutes, did so unconstitutionally. Yet, if the crucial factor is the vote of the people, the result ought to be the opposite. It is difficult to find rhyme or reason in all this.

The situation is even worse for Hills if we consider the period of the adoption of the Constitution. Popular elections on state constitutional provisions were very much the exception rather than the rule. Apparently, only three New England states—Massachusetts in 1778, New Hampshire in 1783, and Rhode Island in 1788—had submitted proposed new constitutions to referenda by the time of the adoption of the federal Constitution.[199] Thus, the adoption of constitutions by popular vote was an avant garde idea, by no means one that could be taken for granted by the Framers. In any event, states were hardly likely to adopt new constitutions simply for the purpose of adding congressional qualifications. If, as Hills contends, such qualifications could be imposed in state constitutions, the vehicles for their adoption would have been constitutional amendments. But no state had a procedure for submitting constitutional amendments to popular vote at the time of the framing of the Constitution, and no state adopted such a procedure until Connecticut did so in 1818.[200] In many states, constitutional conventions were summoned for constitutional amendments, but in at least three, Delaware, Maryland, and South Carolina, amendments were enacted by the state legislature.[201] Thus, Hills' reliance on the popular mandate supposedly embodied in state constitutions but not in legislatures is misplaced. His conclusion that the Framers must have entrusted the creation of additional congressional qualifications to "state peoples" enacting their will though the medium of elections on amendments to state constitutions is based on a false premise.[202]

199. *See* Austin Ranney, *The United States of America*, *in* REFERENDUMS 67, 68-69 (David Butler & Austin Ranney eds., 1978).

200. *See* WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 125 (1910) ("The first constitution to take the final determination upon amendments from the legislature and to confide this power in the hands of the people was that of Connecticut in 1818"). *See also* JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 25 (1992) (stating that, as of 1787, five states had no formal amending process; four states amended by legislative action; three amended by constitutional convention; the remaining two states had a council of censors meet periodically to revise the constitution).

201. *See* DODD, *supra* note 200, at 120 ("The constitutions of Maryland (1776), Delaware (1776), and South Carolina (1778) made provision for partial amendment through legislative action.")

202. DeCarli's position, that the Framers intended congressional qualifications to be created by popular election in the states is even more flagrantly anachronistic than Hills'. As we have seen, referenda were nearly unknown in America at the time of the adoption

In sum, Hills' position is based on the anachronistic assumption that the Framers believed congressional qualifications could safely be created by popular votes on state constitutional amendments. In asserting that the Framers held this opinion, Hills ignores views expressed by the Framers that certain qualifications, if imposed, would interfere with the concept of a national government or with national interests such as immigration. No affirmative evidence that the Framers held the opinion attributed to them is presented, as Hills relies instead on unwarranted inferences from arguments *against* discretion to create new qualifications that were based on the particular dangers of abuse by Congress. Furthermore, nothing would follow even if one believed, against the evidence, that the Framers held such an opinion, because they failed to embody that opinion in the language of the Constitution. Finally, this entire superstructure, weak though it is, has no foundation to rest on unless one accepts either the demonstrably false proposition that persons eligible to run for an office must be eligible to vote for it or the self-evidently silly proposition that an "election" includes the prior activity of setting the ground rules for the election.

No one who reads Gorsuch and Guzman's, Safranek's, and Hills' articles can doubt their ingenuity or their diligence. Starting from very different premises, they have probed and tested the case that congressional term limits are unconstitutional. By doing so, they have performed a very useful service, though surely not the one they intended. Before their articles appeared, the conventional wisdom that congressional term limits are unconstitutional was widely shared but not closely scrutinized. That fact in itself ought to have created some doubts, and perhaps it is what started these writers on their labors. In any event, in the famous words of John Stuart Mill:

> If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is some one to do for us what we otherwise ought, if we have any regard for either the certainty or the vitality of our convictions, to do with much greater labour for ourselves.[203]

---

of the Constitution, and they were completely unknown for specific propositions such as the adoption of a congressional qualification.

203. JOHN STUART MILL, ON LIBERTY 44 (David Spitz ed., 1975).

Gorsuch and Guzman's, Safranek's, and Hills' failures are due to no deficiencies in themselves as advocates or as scholars, but to the weakness of the cause they espouse. Those of us who revel in the conventional wisdom may do so with much greater confidence thanks to their efforts.

IV. EVASION

Parts II and III have demonstrated that efforts by the states to impose congressional term limits are unconstitutional. Proponents of congressional term limits in nine states, cognizant of their constitutional difficulties under the Qualifications Clauses, drafted their proposals in the form of "quasi-term limits."[204] "Quasi-term limits," it will be recalled, is the term we are using to describe regulations that preclude the name of a person who has served a specified number of terms in Congress from appearing on the ballot. To date, the two courts that have considered the constitutionality of quasi-term limits have struck them down on the ground that they are the equivalent of absolute term limits and therefore violate the Qualifications Clauses.[205] No serious non-judicial consideration of the constitutional validity of quasi-term limits has appeared in print.

Granted that absolute term limits are unconstitutional for the reasons set forth in Parts II and III, can the constitutional ban be evaded by adoption of quasi-term limits?[206] The answer is no, for three different reasons. Like an absolute term limit, a quasi-term limit is an unconstitutional attempt to add to the exclusive qualifications for Congress set forth in the Constitution. Unlike absolute term limits, quasi-term limits are also unconstitutional because they violate Equal Protection and First Amendment rights of affected candidates and their supporters, and because they violate the associational rights of political parties to nominate the qualified candidates of their choice.

---

204. For identification of the nine states, *see supra* note 16.

205. Thorsted v. Gregoire, 841 F.Supp. 1068, 1081 (W.D.Wash. 1994) (appeal pending in 9th Circuit); U.S. Term Limits v. Hill, 872 S.W.2d 349, 357 (Ark. 1994), *cert. granted* 114 S.Ct. 2703 (1994). In *Thorsted*, the court gave as an alternative reason for striking down quasi-term limits that they violate the First and Fourteenth Amendments. 841 F.Supp. at 1082.

206. Ironically, the use of quasi-term limits might have been inspired in part by comments of writers who have criticized congressional term limits as unconstitutional. One reason for the unconstitutionality of term limits, according to some of these writers, was that they did not allow for the possibility of write-in votes. *See, e.g.*, Corwin, *supra* note 9, at 589; Latz, *supra* note 9, at 206. None of these writers seems to have considered the constitutional difficulties that would plague quasi-term limits.

A. *The Qualifications Clauses*

Two courts to date have considered the constitutionality of quasi-term limits, and both have struck them down on the ground that they violate the Qualifications Clauses.[207] To thus regard quasi-term limits as what they are—gimmicky evasions of the Constitution—is not the least equivocal basis for striking down quasi-term limits, but it may be the most appropriate, because it goes to the heart of the issue.

It will be recalled that the Court in *Powell* regarded the interpretation of the Qualifications Clauses as a matter not of dusty history but of great consequence to a democratic society.

> Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them.". . . As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.[208]

It is certainly true that many people today believe earnestly that the adoption of term limits will enhance rather than detract from the democratic character of our government. Some may believe, with Hills,[209] that the dangers today from permitting additional qualifications are less than they would have been when the Constitution was adopted. But the Constitution contains procedures for its own amendment precisely because the Framers recognized that circumstances and even fundamental beliefs will change with time.

Supporters of term limits may believe it is too difficult to amend the Constitution when the incumbents in Congress have

---

207. Thorsted v. Gregoire, 841 F.Supp. 1068, 1081 (W.D.Wash. 1994) ("The initiative would . . . have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement. A state may not do indirectly what the Constitution forbids it to do directly."); U.S. Term Limits v. Hill, 872 S.W.2d 349, 357 ("This effort to dress eligibility to stand for Congress in ballot access clothing . . . is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.").

208. 395 U.S. at 547.

209. *See* Hills, *supra* note 11, at 133-35.

such an obvious personal stake in resisting term limits. But difficulty is not the same as impossibility. The Congress that proposed the Seventeenth Amendment acted against the self-interest of many Senators, who had been elected by state legislatures and would face new challenges in popular elections. Recently, Utah state legislators were persuaded to limit their own terms.[210]

Term limit supporters can seek to elect new representatives who are pledged to support term limits, or they can seek to persuade state legislatures to call for a constitutional convention. The task facing term limit proponents does not look especially formidable compared, say, with the one that faced the women who met in Seneca Falls in 1848 and resolved that women should have the right to vote. They waited three-quarters of a century for the Nineteenth Amendment, despite the fact—as even the most passionate believer in term limits must concede—that the justice of their cause was no less compelling than the strongest case that can be made for term limits. The undeniable groundswell of opinion in favor of term limits is no reason to allow gimmicks to replace the constitutional amendment process. To the contrary, that groundswell will remind us that the difficulty of the amendment process was devised in order to assure that the constitutional structure should not be drastically altered, perhaps for the worse, unless a change in public opinion demonstrates its durability as well as its force.

As this discussion illustrates, striking down quasi-term limits as violative of the Qualifications Clauses is, in a sense, the most straightforward and non-evasive approach, because it addresses the real intent and what will be at least a frequent effect of denying multi-term incumbents access to the ballot: that such incumbents should not be elected. It must be acknowledged, however, that there is something to be said for confining the Qualifications Clauses to restrictions that formally, and not merely practically, disqualify candidates. It is clear enough that quasi-term limits are nothing more than an attempted end run around the Qualifications Clauses, but striking them down on that ground opens the possibility of future claims that election procedures in a given state place one class of candidates at some disadvantage and therefore may be regarded as qualifications. The First

210. UTAH CODE ANN. § 20A-10-201.

Amendment and the Equal Protection Clause will ordinarily be the most appropriate constitutional settings for evaluating challenges to such regulations. For the judiciary to "exalt form over substance" by treating quasi-term limits as regulations of the "manner" of conducting elections under Article I, § 4, rather than as qualifications, would therefore be a defensible action, especially since, as the next two sections will show, quasi-term limits would be struck down in any event.

If the Supreme Court follows the lead of the lower courts and declares quasi-term limits to be invalid qualifications, it will be supported by solid authority holding that the prohibition on additional congressional qualifications cannot be evaded by denying access to the ballot while preserving theoretical eligibility for the office. Admittedly, two early cases suggested that the possibility of running as a write-in candidate could make a constitutional difference under the Qualifications Clauses.[211] However, more numerous decisions have struck down state-created qualifications that excluded candidates from primaries. This is significant because the purpose of a primary election is not the election of a member of Congress, but rather a determination of who will appear on the general election ballot.[212] Even during the period

211. In *State ex rel. O'Sullivan v. Swanson*, a state statute had been interpreted to prohibit a person defeated in a primary for one office to be nominated as an independent for a different office in the general election. 257 N.W. 255 (Neb. 1934). The court held that the statute could be applied against O'Sullivan, a loser in a gubernatorial primary who sought to be nominated by petition as an independent in the general election for Senator. The court explained that the statute did not impose a qualification on O'Sullivan because he could run as a write-in candidate. *Id.* at 256. In *State ex rel. Sundfor v. Thorson*, a statute declaring a person ineligible to be a candidate in the general election after losing in the primary for the same office was declared unconstitutional as applied to a candidate for the House of Representatives. 6 N.W.2d 89 (N.D. 1942). The *O'Sullivan* case was distinguished on the ground that there, write-in votes had been permitted.

In light of subsequent developments, especially *Storer v. Brown*, *see supra* notes 87-95 and accompanying text, the statutes in both cases would be properly upheld as legitimate election procedures winnowing the field and upholding party competition. Thus, *O'Sullivan* was correctly decided for the wrong reason and *Sundfor* was incorrectly decided.

One case more recently decided, *Hopfmann v. Connolly*, can be read as supporting the proposition that denial of ballot access falls short of establishing a qualification, but only weakly so. 746 F.2d 97 (1st Cir. 1984). In upholding a state law deferring to a rule of the state Democratic Party requiring candidates to pass a 15 percent threshold at a state convention in order to be placed on the ballot in the Democratic primary, the court relied in part on the fact that the candidate could run as the candidate of a different party, as an independent, or as a write-in. *Id.* at 103. However, the court also relied, more soundly, on an analogy to other ballot access requirements such as the need to obtain a specified number of signatures on nomination papers. *Id.* at 103. The requirement is therefore valid as a regulation of the manner of the election under Article I, § 4 and does not impose an additional qualification.

212. For example, in *State ex rel. Chandler v. Howell*, the court declared:

when *Newberry v. United States*[213] temporarily removed primaries from the scope of congressional regulation of federal elections, state courts continued to rule that the ban on additional qualifications applied to primaries. As the Arizona Supreme Court wrote:

> We think that while the Newberry case . . . so long as it stands unreversed or qualified, is authority that Congress may not regulate the manner of conducting a primary election or convention in any state, yet it is in no way to be taken as authority that a state may provide additional qualifications to those set forth in the Federal Constitution for a candidate for Congress, *even at a primary election or convention held to nominate those whose names shall appear on the ballot at a general election* to be held for members of Congress.[214]

After *Newberry* had been overruled in *United States v. Classic*[215] and *Smith v. Allwright*,[216] the two cases that restored Congressional authority over primaries, the new concept that the primary was an integral part of the overall election process was applied to questions arising under the Qualifications Clauses. Thus, the Wisconsin Supreme Court wrote:

> If Mr. McCarthy under Wisconsin law cannot be a candidate for nomination at the primary, he can never be a candidate at the election of any political party. He is therefore disqualified to take the first step if the argument of the relator is sound. His right to be a candidate at the election would be a barren right. Neither by constitutional provision nor legislative enactment can the state of Wisconsin prescribe qualifications of a candidate for *nomination* for the office of United States Senator in addition to those prescribed by the constitution of the United States.[217]

> The relator lays stress upon the fact that the election from which he is seeking to have the candidacy of Judge Webster eliminated is a primary and not a general election, and that the nomination of candidates for Congress is a matter of state regulation. . . . [T]he fact that the state, in the absence of federal legislation on the subject, has the authority to provide the manner and means of primary elections, does not give the state the authority to determine the qualifications of those seeking nomination for membership in Congress at such elections.

175 P. 569 (Wash. 1918).

213. 256 U.S. 232 (1921).

214. Stockton v. McFarland, 106 P.2d 328, 331 (Ariz. 1940) (emphasis added).

215. 313 U.S. 299 (1941).

216. 321 U.S. 649 (1944).

217. State ex rel. Wettengel v. Zimmerman, 24 N.W.2d 504, 508-09 (Wis. 1946) (emphasis added). *See also* State ex rel. Handley v. Superior Court, 151 N.E.2d 508, 511 (Ind. 1958) (applying similar principles to prevent an unconstitutional qualification from being enforced at a party nominating convention); Dillon v. Fiorina, 340 F.Supp. 729 (D.N.M. 1972) (applying similar principles in a federal court to a statute that had the

In summary, with a few early exceptions courts have struck down state-created qualifications at the nomination stage, thereby demonstrating an awareness that barring a candidate from the ballot is tantamount to disqualifying the candidate. This has been done so that the right to run for Congress, subject only to the minimal qualifications in the Constitution, would not be "a barren right."[218]

B. *Equal Protection and the First Amendment*

Now, for the first time in this article, we turn to constitutional doctrines other than those surrounding the Qualifications Clauses. Theoretically, the analysis in this section and the next is applicable equally to quasi-term limits imposed on state and local officials as well as on members of Congress. However, the only practical reason for enacting quasi-term limits is the desire to get around the Qualifications Clauses. Accordingly, the quasi-term limits issues will normally arise only in connection with candidates for Congress.[219]

If absolute term limits do not violate the Equal Protection Clause or the First Amendment,[220] it may be asked, how could quasi-term limits, which are less restrictive, even if only slightly so, be unconstitutional?[221] This question has a straightforward answer. Whatever may be the state's interests in limiting the period of incumbency, it is much more difficult for the state to

effect of blocking a candidate running in a Senate primary until after at least two years residency in the state).

218. State ex rel. Wettengel v. Zimmerman, 24 N.W.2d 504, 508 (Wis. 1946).

219. Unless, that is, the proponents of term limits mess up, as they appear to have done in Florida and Washington. The initiatives in those states cast all the limits as quasi-term limits. *See* FLA. CONST. art. VI, § 4; WASH. INITIATIVE MEASURE 573 (adding unnumbered sections to WASH. REV. CODE chapters 7.16, 29.15, 29.68, 43.01, and 44.04). Ironically, the Florida and Washington supporters of term limits may need to argue, in the spirit of the preceding section of this article, that reviewing courts should look at the substance and not the form of the restriction. That is, they should ask for the limits on state officials to be viewed as "really" imposing eligibility requirements rather than merely regulating ballot access. Otherwise, the state term limits are likely to go down with the federal ones on the theories outlined in this and the following section.

220. The California Supreme Court so held in Legislature v. Eu, 816 P.2d 1309 (Cal. 1991), *cert. denied* 112 S.Ct. 1292 (1992), *cert. denied sub nom.*, Californians for Citizen Government v. Legislature, 112 S.Ct. 1293 (1992).

221. Apparently, Gorsuch and Guzman regard this as a rhetorical question, whose answer is: they cannot be. *See* Gorsuch & Guzman, *supra* note 10, at 375 ("by allowing the write-in candidacy . . ., a state might actually provide voters more than is required by First and Fourteenth Amendment analysis"). Gorsuch and Guzman never propose any justification for the state barring a *qualified* candidate from the ballot, as opposed to the justifications that may exist for creating a qualification in the form of an absolute term limit.

justify imposing a grave handicap on a candidate *who is conceded to be eligible.*

Since 1968, the Supreme Court has decided a number of cases in which the denial of a position on the ballot was challenged on equal protection and First Amendment grounds.[222] Although some commentators have expressed consternation at the Court's failure to settle on a consistent "standard of review" in these cases,[223] the principles of the decisions are discernible. First, in cases involving ballot access for an individual candidate rather than a party, the Court protects not so much the rights of the candidate as the rights of the candidate's supporters to cast an effective vote and to associate politically. Second, the Court considers whether the regulations in question have a differential impact on political viewpoints. The Court will be particularly solicitous to protect "outsider" parties and candidates, such as those that pose alternatives to the two major parties and, especially, indigents. Third, the Court makes a serious inquiry into the seriousness of the obstacles to ballot access that are complained of, because the Court recognizes the states' interests in keeping the number of candidates and parties on the ballot to a reasonable number, running an orderly election process, and protecting the integrity of party competition and of elections generally.

The multi-term incumbents who are affected by congressional term limits ordinarily represent the two major political parties and, almost by definition, are not "outsiders." Whether term limits discriminate against a particular political viewpoint is more debatable. Term limits have tended to draw support from Republicans,[224] perhaps because of the belief that the entrenchment of Democratic incumbents has impeded Republican efforts to win control of the House of Representatives.[225] One may question

222. The principal decisions are Williams v. Rhodes, 393 U.S. 23 (1968); Jenness v. Fortson, 403 U.S. 431 (1971); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974); Clements v. Fashing, 457 U.S. 957 (1982); Anderson v. Celebrezze, 460 U.S. 780 (1983).

223. *See, e.g.*, Latz, *supra* note 9, at 183-97.

224. *See, e.g.*, Eid & Kolbe, *supra* note 9, at 2; Nelson W. Polsby, *Some Arguments Against Congressional Term Limitations*, 16 HARV. J.L. & PUB. POL'Y 101, 102 (1992) ("Not all advocates of term limits are Republicans, but most are. The current movement for term limits started and was organizationally maintained in the offices of Eddie Mahe, an ingenious Republican political consultant.")

225. *See, e.g.*, Lee Atwater, *Altered States: Redistricting Law and Politics in the 1990s*, 6 J.L. & POL. 661 (1990).

whether this belief is well-founded.[226] In any event, support for term limits has been sufficiently bi-partisan and their effects will impinge on members of both parties frequently enough that courts are unlikely to look askance at quasi-term limits simply because of their alleged partisan bias. A more plausible claim of content discrimination can be made on the premise that political viewpoints need not be ideological in the left-right sense. Some people believe that experience is a virtue in a representative, and that the country is well-served if Congress includes some members who can remember things that happened in the Capitol more than a decade ago. Others believe that both parties in Congress need effective leadership and that they are unlikely to get it from individuals who are already lame ducks the minute they assume leadership positions. Whether it is too avant garde to suggest that centrists and, if you will, even elitists might have constitutional rights, is an interesting question, but one that we need not dwell on here.

The greatest vulnerability of quasi-term limits arises not because they are especially invasive of the constitutional rights the Court has identified in the ballot access cases, but because of their utter irrationality.[227] No matter how misguided some of us may believe absolute term limits are, they are not "irrational" in the sense in which that term is used in constitutional law. In contrast, the exclusion from the ballot of a candidate who is concededly qualified, on the ground that in the past the candidate has demonstrated sufficiently strong support in the electorate to be elected and reelected to Congress a specified number of times, runs directly counter to the interests the Court has identified as justifying the exclusion of some candidates from the ballot.

This can be seen most clearly by considering *Storer v. Brown*,[228] which upheld a statute prohibiting a candidate from running as an independent in the general election if the candidate was reg-

226. *See* Gary C. Jacobson, *The Persistence of Democratic House Majorities, in* THE POLITICS OF DIVIDED GOVERNMENT 57, 62-63 (Gary W. Cox & Samuel Kernell, eds., 1991); Bruce I. Oppenheimer, *Split Party Control of Congress, 1981-86: Exploring Electoral and Apportionment Explanations*, 33 AM.J. POL. SCI. 635 (1989).

227. *Cf.* Burdick v. Takushi, 112 S.Ct. 2059 (1992), in which the Supreme Court upheld the constitutionality of a state's refusing to permit write-in votes. Although analysis showed that the burden on potential supporters of a would-be write-in candidate was "slight," the state still was required to assert interests to justify that burden, and the interests recognized by the Court were interests in facilitating the electorate's ability to choose the candidate of its choice within a system of orderly party competition. *Id.* at 2066-67.

228. 415 U.S. 724 (1974).

istered as affiliated with a political party within a year prior to the primary election. Justice White, speaking for the Court, explained the policy of the statute.

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.[229]

If quasi-term limits are to be taken seriously as anything other than forbidden qualifications in disguise, then they contemplate that on a regular basis, incumbents over the limit will run as write-in candidates against the winner of the primary in their own party as well as against the nominee of the opposing party. Nothing more sharply in contrast to the orderly process Justice White described in *Storer* could be imagined.

Of course, the states are not constitutionally required to follow the policies Justice White described as justifying the non-affiliation rule. but all of the ballot access restrictions the Court has upheld, like the one in *Storer*, have been designed to facilitate the ability of the majority of voters to elect the candidate of their choice. Most commonly, valid restrictions are intended to assure that only candidates and parties with significant voter support will be listed on the ballot.[230] The decisive constitutional issue is whether the net effect of the restriction is conducive or detrimental to a genuine majority determination of the winning candidate.

> That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious

229. *Id.* at 735.
230. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974).

> to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.[231]

Unlike valid restrictions that exclude candidates who *lack* voter support, quasi-term limits are aimed at candidates the state fears will enjoy *too much* voter support. Only ballot restrictions that facilitate voter choice have been upheld.[232] Restrictions, such as quasi-term limits, designed to prevent voters from electing a qualified candidate, are profoundly hostile to equal protection and First Amendment principles.[233]

To be sure, proponents claim that excluding long-term incumbents from the ballot facilitates the election process by offsetting unfair incumbency advantages and thereby equalizing the chances of all candidates.[234] The argument may be inadmissible in light of the Supreme Court's view that "the concept that government may restrict the speech of some elements of our society

231. Lubin v. Panish, 415 U.S. 709, 715 (1974).

232. Clements v. Fashing, 457 U.S. 957 (1982), is not to the contrary, despite some language in Justice Rehnquist's plurality opinion that might create that impression. In *Clements* the Court upheld Texas rules that created absolute ineligibility in certain cases, including a prohibition of one Baca, a justice of the peace, from running for the legislature during his term of office. Rehnquist characterized this as a "waiting period" of a maximum of two years before Baca could run for the legislature, and characterized such a waiting period as *de minimis*. *Id.* at 967. More importantly, for present purposes, the waiting period was upheld not because it was part of an orderly process of electing legislators but because it preserved the integrity of a judicial office. *Id.* at 968. Despite Rehnquist's conflating this issue with some of the ballot access cases in his analysis, *Clements* is a very different case from the others, because it is the only one of the series that involves real qualifications for office rather than election procedures. The state may have acted rationally in preventing Baca running for the legislature before his term as justice of the peace expired, but this does not mean it would have been rational for the state to allow Baca to run but deny him a place on the ballot.

233. This is shown by the holdings of several courts that departure from ballot neutrality in the relatively minor matter of ordering the names of candidates and parties on the ballot is prohibited by the Equal Protection Clause. *See, e.g.*, McClain v. Meier, 637 F.2d 1159, 1165-67 (8th Cir. 1980); Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977); Gould v. Grubb, 536 P.2d 1337 (1975). There are some decisions to the contrary, such as *Clough* which upheld the listing of incumbents first because strict scrutiny should be reserved for voting cases involving "more clear-cut and certain cases of inequality," and because the incumbent-first ordering was an "informational device," identifying the candidate running for reelection. Clough v. Guzzi, 416 F.Supp. 1057, 1067-68 (D.Mass. 1976). The *exclusion* of a candidate from the ballot is a "clear-cut" and "certain" case of inequality, and constitutes the withholding rather the an the provision of information to voters. The decisions that strike down biased ordering are based on the constitutional requirement that the state's ballot be "neutral in character." *Sangmeister*, 565 F.2d at 468. In the words of one such decision, equal protection "requires all candidates, newcomers and incumbents alike, to be treated equally." Mann v. Powell, 333 F.Supp. 1261 (N.D.Ill. 1969).

234. *See, e.g.*, Hills, *supra* note 11, at 143-45.

in order to enhance the relative voice of others is wholly foreign to the First Amendment."[235] The argument is also weak on empirical grounds. Although incumbents seeking reelection have done well, especially in recent decades, explaining the reasons for their strong performance has proved to be a surprisingly difficult task. It has been especially difficult to show a connection between electoral strength and incumbency perquisites that might be regarded as unfair, such as resources for constituency casework, extensive use of the franking privilege, and the like. Other possible explanations of the incumbency advantage, such as that incumbents tend to act as their constituents want them to and that the constituents tend to reward them with votes, would not justify the state in handicapping incumbents when they seek reelection.[236] Even if the defenders of quasi-term limits could do what a host of highly sophisticated political scientists have had difficulty doing, namely, demonstrate that the incumbency advantage in recent decades has been attributable to unfair perquisites and benefits to incumbents,[237] it would still be the case that

235. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

236. For consideration of these questions and an extensive review of the empirical literature, see Daniel Hays Lowenstein, *Incumbency and Electoral Competition,* paper presented at the annual meetings of the American Political Science Association, Chicago, September 3-6, 1992.

A particular difficulty proponents will face in any attempt to justify quasi-term limits empirically as equalization devices is likely to be the cut-off that the quasi-term limits establish. The point is not that a cut-off at three, four, five, or six House terms and at two Senate terms is arbitrary. Line-drawing is intrinsically arbitrary, and quasi-term limits cannot be faulted on that ground alone. However, an equalization defense of quasi-term limits is necessarily based on the premise that there is an incumbency advantage that increases with the number of terms served. Otherwise, there is no justification for excluding multi-term incumbents from the ballot and not single-term incumbents. Unfortunately for the defenders of quasi-term limits, the premise seems to be false. The incumbents who benefitted most from the surge in the incumbency vote percentage during the mid-1960s were freshmen running for reelection. *See* Richard Born, *Generational Replacement and the Growth of Incumbent Reelection Margins in the U.S. House,* 73 AM. POL. SCI. REV. 811 (1979).

237. *See, e.g.,* John C. McAdams & John R. Johannes, *Congressmen, Perquisites, and Elections,* 50 J. POL. 412 (1988) (finding no correlation between incumbents' vote percentages and the amount of constituency casework they do). *After* the surge in incumbency vote advantage of the mid-1960s, incumbents' resources for casework, advertising themselves, and sending mail to constituents all surged through the end of the 1970s, while the incumbency vote advantage did not increase significantly. *See* Gary C. Jacobson, THE POLITICS OF CONGRESSIONAL ELECTIONS 42 (1987); Glenn R. Parker, *Members of Congress and their Constituents: The Home-Style Connection, in* CONGRESS RECONSIDERED 171, 186-89 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed., 1989). During the 1980s, growth in perquisites declined, but there was a surge in the incumbency vote advantage as measured by the reelection rate. *See* Gary C. Jacobson, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS 45 (1990).

I do not mean to deny that political scientists have found some evidence in support of the seemingly plausible hypothesis that incumbents receive electoral benefit from the

barring incumbents from the ballot would go way beyond any effort to "equalize" the effects of the perquisites and benefits.[238] The defense of quasi-term limits as attempts to equalize the opportunities of challengers and incumbents is a sham. The only real purpose of quasi-term limits is to frame a practical ban on candidacies in a manner that the proponents hope will evade the Qualifications Clause.

C. *Associational Rights of Parties*

Quasi-term limits violate not only the Qualifications Clauses (arguably) and the equal protection and First Amendment rights of candidates and their supporters (almost certainly); they also interfere unconstitutionally with the associational rights of political parties. Quasi-term limits prohibit candidates who are fully qualified for the office they seek and who meet all qualifications for party nominees, such as length of affiliation with the party, from seeking the nomination of their party. Likewise, they prevent the party, by any means whatsoever, from nominating the qualified individual who may well be the party's choice.

Such an interference with the associational rights of parties is unconstitutional under the doctrine set forth in *Tashjian v. Republican Party of Connecticut*[239] and *Eu v. San Francisco County Democratic Central Committee*.[240] These cases establish in parties a broad immunity from state regulation of their election-related activity, including the right to "select a standard bearer who best represents the party's ideologies and preferences."[241] In *Tashjian*, the Court struck down a statute that prevented the Republican Party

perquisites they enjoy. A significant example is Douglas Rivers & Morris P. Fiorina, *Constituency Service, Reputation, and the Incumbency Advantage, in* HOME STYLE AND WASHINGTON WORK 17 (Morris P. Fiorina & David W. Rohde, eds., 1989). However, the causes of the incumbency vote advantage and even its magnitude are much more complex questions than the popular debate often reflects.

238. The incumbency advantage in House races was estimated at 7.2% in James L. Payne, *The Personal Electoral Advantage of House Incumbents, 1936-1976*, 8 AM. POL. Q. 465, 472 (1980), and as oscillating around 10%, with considerable variance, in Andrew Gelman & Gary King, *Estimating Incumbency Advantage without Bias*, 34 AM.J. POL. SCI. 1142 (1990). To give a single percentage figure such as these is inevitably to simplify a complex question. *See generally*, Lowenstein, *supra* note 236, at 20-35. Nevertheless, to deny candidates places on the ballot and force them to rely on write-in votes is surely to handicap them by far more than the ten percent which forms the high end of estimates of the incumbents' vote advantage. Furthermore, the estimates of the incumbency vote advantage are not limited to whatever portion of the advantage might be attributable to unfair causes.

239. 479 U.S. 208 (1986).

240. 489 U.S. 214 (1989).

241. *Eu*, 489 U.S. at 224 (internal quotation omitted).

from permitting independent voters to participate in certain Republican primaries. In *Eu* the Court struck down a number of California regulations of parties, including a ban on endorsements by party organizations of candidates in party primaries.

There are two ways in which a quasi-term limit might be administered by a state. The most straightforward method would be to exclude ineligible incumbents from the primary altogether, but to permit them to run as write-in candidates in the general election. Any write-in votes cast for the ineligible incumbent in the primary would be ignored and the eligible candidate receiving the most votes in the primary would appear on the ballot as the party's nominee in the general election.[242] The alternate method would be to declare that an ineligible incumbent who "wins" the primary with write-in votes is the party's "nominee" in the general election, but to omit the nominee and the party from the general election ballot.

Either way, the quasi-term limit is vastly more intrusive into a party's ability to function than were the regulations struck down in *Tashjian* and *Eu*.[243] Under the first method of administering the quasi-term limit, parties and their voters are barred from considering qualified candidates in their own primaries. Since by definition the candidates whom the parties are barred from nominating are the ones with whom the parties and voters have associated as their successful nominees on at least two previous occasions, there is a substantial possibility that the parties and

242. This is the method used in Arkansas, whose quasi-term limit initiative awaits review in the Supreme Court. Arkansas law prohibits write-in votes in primaries. *See* 6A ARK. CODE ANN. § 7-5-525(c)(1987).

243. I have recently written an article criticizing the reasoning and some of the results in *Tashjian* and *Eu*. Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741 (1993). Regrettably, my criticism does not render these decisions any the less authoritative. Even if it did, the views I express in that article would not save quasi-term limits. A central part of my hypothesis is that when plaintiffs suing in the name of a party attack statutes that have been approved by all or most of that party's representatives in the legislature, the dispute is more properly characterized as an intra-party disagreement than as an instance of the state interfering with the autonomy of a private association. Since all the quasi-term limits affecting members of Congress have been passed by initiative, this point is inapplicable. Indeed, many party organizations have vigorously opposed term limit initiatives. In particular, the California Democratic Party's executive board has adopted a resolution declaring that the party regards Democrats as eligible to run in primaries without regard to the term limits that were adopted in 1990 (for state offices) and the quasi-term limits that were adopted in 1992 (Congress). *See Open Candidates Status*, California Democratic Party, June 13, 1993, Anaheim, California (resolution regarding California democratic party primary candidates) (copy on file with HARV. J.L. & PUB. POL'Y).

voters are being prohibited from associating with the candidates of their choice.

Furthermore, a candidate affected by the quasi-term limits who chose to pursue the only permitted means of seeking reelection would be compelled by the state to oppose his own party's nominee in the general election. Such a drastic interference with the ability of a candidate to associate with his or her party be seeking to become its nominee is surely unconstitutional. Thus, in *Bullock v. Carter*[244], a state attempted to defend high filing fees for candidates who wished to run in party primaries on the ground that the candidates could avoid the filing fees by running as independents. The Court responded that "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law."[245] Quasi-term limits go even further by making the abandonment of party affiliation an absolute condition of running for Congress.

Under the second method of administration, the interference with parties' associational rights occurs at two stages and is equally drastic. At the nomination stage, the parties and their voters are now theoretically able to choose the candidate they want, but they are denied the right to conduct their primaries under the ground rules of their choice. Instead, the state forces them to place certain candidates at a grave handicap. If party voters nevertheless use write-in votes to "nominate" the term-limited incumbent, the party is harshly penalized by the state, which denies the party a place on the state's general election ballot as a punishment for the effrontery of "nominating" the candidate disfavored by the state's term limit policy.[246]

The extent of the state's interference with party associational rights can be illustrated by considering the plight of a voter who is a partisan of Party *A* in a competitive House district. Suppose the voter prefers Irene, Party *A*'s term-limited incumbent, over John, the only candidate appearing on the Party *A* ballot. The voter greatly prefers either Irene or John over Carla, the probable candidate of Party *B*. If the voter casts a write-in vote for

244. 405 U.S. 134 (1972).

245. *Id.* at 146-47.

246. I place the word "nominate" in parentheses because in the context of elections conducted with a state-provided ballot under a state-prescribed system of primaries, it seems to me doubtful whether a "nomination" occurs unless its result is that the nominee appears on the ballot as the party's candidate.

Irene, the consequence may be to throw the general election to Carla, who will have the advantage of being the only candidate on the ballot. If the voter decides to support Irene anyway, it may be very difficult to persuade fellow Party *A* members to do likewise, either because they want to maximize the chances for party victory in the general election or because they find it too difficult to cast a write-in ballot in the primary. For the state purposefully to distort the party's deliberations in such ways is a severe interference with the associational rights of the party.

Even if the second method of implementing quasi-term limits is employed, the term-limited candidate is likely to regard one write-in campaign as less onerous than two, and therefore run against his or her own party's primary winner in the general election. Thus, quasi-term limits, however implemented, contemplate routine general election contests with two credible candidates, one running as a write-in, from one of the major parties. Parties that enjoy majority support in a district or state are thus faced with the prospect of repeated schism with the attendant possibility of defeat by the minority party. Of course, parties always must endure the risk of disunity and defeat.[247] But this does not entitle the state to thrust disunity upon the parties.

In *Tashjian,* the party's inability to determine who could vote in its primaries was less obstructive of associational rights than a party's complete inability to select the nominee of its choice under a quasi-term limit. In *Eu,* the party's inability to endorse a candidate in the primary election was far less damaging to the party than the prohibition, under quasi-term limits, of the party and its voters even considering a qualified candidate in the primary, or in the alternative, the prospect of the party's being excluded from the general election ballot as punishment for having nominated the wrong candidate. In neither *Tashjian* nor *Eu* did the state impose such severe distortions on party deliberations as would willfully and predictably be imposed by quasi-term limits, however they are administered. And in neither *Tashjian* nor *Eu* did the state impose schism on parties.

247. The most famous historical example in the United States is the 1912 presidential election, in which Democrat Wilson was elected with 42% of the popular vote, compared to the combined 51% received by the two Republicans, Roosevelt (27%) and Taft (24%). *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 85-89 (1982) (citing the 1912 election as an illustration of the electoral imperative of two unified parties resulting from the American plurality-take-all system). *See also* William H. Riker, *The Number of Political Parties: A Reexamination of Duverger's Law,* 9 COMPARATIVE POL. 93 (1976) (providing a more extended theoretical discussion of this electoral imperative.

The only justifications for this heavy-duty party-bashing on the part of the state that can be put forth honestly are themselves constitutionally suspect: 1) a desire to evade the implied restrictions created by the Qualifications Clauses; and 2) a desire to drastically handicap certain candidates in opposition to, rather than in facilitation of, the people's right to choose the candidate of their choice. Barring an unlikely abandonment of *Tashjian* and *Eu* by the Supreme Court, quasi-term limits cannot withstand attack.

V. CONCLUSION

State-imposed congressional term limits impose qualifications on candidates for Congress in addition to those set forth in the Constitution. As such, they are void under the interpretation of the Qualifications Clauses that has enjoyed overwhelming judicial and non-judicial support and that was authoritatively adopted by the Supreme Court in *Powell v. McCormack.* The energetic but unsuccessful efforts of Gorsuch and Guzman, Hills, and Safranek to overcome the constitutional case against congressional term limits provide significant evidence of the strength of that case. As John Marshall claimed for the issue of judicial review, the question is indeed one whose interest exceeds its intricacy.

Quasi-term limits are a clever attempt to escape the unconstitutionality of absolute term limits, but not clever enough. Even if they evade the ban erected by the Qualifications Clauses, their attempt to do so lands them in new, equally fatal constitutional difficulties. In addition, quasi-term limits denigrate the entire term limits movement.[248] Whatever the merits of term limits, they are supported by many people who respect the Constitution and wish to strengthen American democracy. Quasi-term limits, which thumb their nose at the Constitution, should be given short shrift by the courts.

Proponents of congressional term limits should foreswear reliance on gimmicks and turn to the hard work of seeking a constitutional amendment. I, for one, heartily hope that they will fail, but I shall respect their efforts.

248. Petracca, *supra* note 110, at 703, refers to quasi-term limits as "circumvention mechanisms." Petracca, a distinguished political scientist who is one of the very few prominent members of his profession to support term limits, has been a welcome voice of reason on his side of the policy debate.