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The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. [Term limits are] an absurd species of ostracism.

— Founding Father Robert Livingston

I. INTRODUCTION

On November 8, 1994, the voters of Maine enacted a term limits law that arbitrarily limited the democratic right to vote for the candidate of their choice. The law provided that Maine's United States Representatives could not appear on the ballot after six consecutive years of service and that Maine's United States Senators could not appear on the election ballot after twelve consecutive years of service.[1] On May 26, 1995, the United States District Court for the District of Maine found that the law was an unconstitutional violation of the Qualifications Clauses of the United States Constitution and permanently enjoined the Maine Secretary of State and the Maine Attorney General from implementing, carrying out, or enforcing the law.[2] This ruling vindicated a fundamental constitutional principle that neither the United States Congress, the states, nor the people themselves can limit the right of a United States citizen to vote for the candidate of his choice.

This Article reviews the Maine Act,[3] traces the history of the Qualifications Clauses, analyzes the important cases that address these provisions, and concludes that the Maine Act was an unconstitutional violation of the Qualifications Clauses and an affront to our nation's fundamental democratic principles. The United States District Court acted appropriately in striking it down.

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1. ME. REV. STAT. ANN. tit. 21-A, § 421 (West Supp. 1995-1996).

2. League of Women Voters v. Diamond, No. 94-377-P-H (D. Me. May 26, 1995).

3. This Article does not address the Maine Term Limitations Act of 1993, which imposes term limits on state legislators and certain state officers. *See* ME. REV. STAT. ANN. tit. 21-A, §§ 551-554 (West Supp. 1995-1996).

II. THE MAINE CONGRESSIONAL TERM LIMITATIONS ACT

The Maine Congressional Term Limitations Act of 1994 was passed as part of a nationwide political effort to limit the terms of entrenched leadership in both the U.S. Senate and in the U.S. House of Representatives.[4] At the inception of the movement, members of the Democratic party constituted a majority of the entrenched leadership in Congress, and the Republicans spearheaded the term limits movement. When term limits proponents in Maine failed to get their bill through the Democratic dominated Maine Legislature, a ballot initiative campaign was mounted and the Act was approved by referendum. Other states passed similar term limits laws.[5] Ironically, the same voters who were concerned about entrenchment in Congress also swept the Democrats out of control in both the House and the Senate.[6]

The Maine Congressional Term Limitations Act of 1994 states that its purpose is "[t]o prevent potential corruption in office by limiting the number of terms Representatives and Senators may hold [and] . . . to preserve the integrity of the ballot by limiting the corrupting influence and dominance of special interests upon entrenched incumbents."[7] Term limits also allows more citizens to hold public office.

To accomplish these objectives, the law forbids the Maine Secretary of State from accepting or verifying signatures on any nomina-

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4. See section 421(2) of title 21-A for the stated purpose of the term limits law. *See infra* note 7.

5. As of 1994, term limits laws have been passed in Arizona, Arkansas, California, Colorado, Florida, Maine, Michigan, Missouri, Montana, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, and Wyoming. Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL'Y 1, 2-3 n.3 (1994).

6. The Maine Congressional Term Limitations Act and other term limits laws throughout the country were enacted in the November 1994 general election. That same election forced the Democrats out of power in both the U.S. Senate and House of Representatives.

7. Title 21-A, § 421(2)(A)-(B). The Act further states:

> 2. Purpose and intent. The People of the State of Maine declare their purpose and intent in enacting this legislation to be as follows.
>
> . . . .
>
> C. To defend their right to stand for and hold public office by encouraging a larger selection of candidates, and by curtailing the effects of entrenched incumbency, which discourages competitive elections, particularly in primaries.
>
> D. To protect and defend their right to equal protection of the laws by giving more citizens of this state the opportunity to stand for and hold public office.
>
> E. To ensure that those who are elected to Congress will return to private life to live in this state under the laws they have made while serving in Congress.

Id. § 421(2)(C)-(E).

tion paper of any person who served in the U.S. House of Representatives for six or more of the previous eleven years or who served in the U.S. Senate for twelve or more of the previous seventeen years.[8] In other words, the names of Representatives from Maine may not be put on the ballot if they have served three consecutive terms, and the names of Senators from Maine may not be placed on the ballot if they have served two consecutive terms. The law does not apply to write-in campaigns.[9] Congressional service prior to January 1, 1994, is not counted for the purposes of the Act.[10]

The upshot of all of this is that the Act limits Representatives from Maine to three consecutive terms and Senators from Maine to two consecutive terms. After that, a candidate can test his luck in a write-in campaign, but cannot place his name on the official ballot.

On November 23, 1994, I challenged the constitutionality of the Act on behalf of the League of Women Voters of Maine, League President Alvin M. Moss, and the Maine Civil Liberties Union. The Complaint set forth that the term limits law violates the Qualifications Clauses of the U.S. Constitution, the freedoms of expression and association, the Equal Protection Clause,[11] and the right of voters to vote for the candidate of their choice. The thrust of the challenge was based upon the Qualifications Clauses in Article I, Sections 2 and 3, of the United States Constitution.

III. The Evolution of the Qualifications Clauses

The qualifications for the office of U.S. Senator are established by and set forth in Article I, Section 3, Clause 3 of the U.S. Constitution: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."[12]

The qualifications for the office of U.S. Representative are established by and set forth in Article I, Section 2, Clause 2 of the U.S. Constitution: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[13] Thus,

8. *Id.* § 421(3).
9. *Id.* § 421(4).
10. L.D. 1983, § 2 (116th Legis. 1993).
11. The Equal Protection Clause challenge was premised on the fact that the citizens of Maine would not be equally represented in Congress, since the powerful positions in that body would be held by individuals from states which did not forbid their representatives from accumulating seniority.
12. U.S. Const. art. I, § 3, cl. 3.
13. *Id.* § 2, cl. 2.

there are no constitutional qualifications for being elected to Congress other than the qualifications for age, citizenship, and residence in the state being represented.

Historically, the English House of Commons and the colonial legislatures recognized a wide variety of qualifications and permitted the exclusion or expulsion of representatives for a wide variety of reasons.[14] This all came to a head, however, with the exclusion of John Wilkes from Parliament in 1764.[15] During the previous year, Mr. Wilkes, while serving in the House of Commons, wrote an article criticizing a peace treaty with France. He claimed that the treaty was a result of bribery and corruption in the Cabinet.[16] The article led to Mr. Wilkes's arrest, trial, and twenty-two month imprisonment for seditious libel.[17] Despite the article and Mr. Wilkes's conviction, he was repeatedly reelected to Parliament.[18] Upon each election, the Parliament refused to seat him.[19]

Mr. Wilkes's struggle and advocacy of libertarian causes became a rallying cry in both England and in the Colonies.[20] In America, Mr. Wilkes became a hero in the struggle for liberty:

> [T]he cry of "Wilkes and Liberty" echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press .... The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty.... They named towns, counties, and even children in his honour.[21]

In 1782, the House of Commons vindicated Mr. Wilkes, voted to expunge his record, and held that its efforts in previously excluding him from office were "subversive of the rights of the whole body of electors of this kingdom."[22] The Parliament simultaneously ended the arbitrary exercise of power to exclude members from the House of Commons in favor of the "indisputable right [of the people] to return whom they thought proper" to the legislature.[23] Five years later, Mr. Wilkes's victory was well-remembered by the Founding

14. Powell v. McCormack, 395 U.S. 486, 523-32 nn.46-59 (1969).

15. *Id.* at 527-28.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 528.

20. *Id.* at 530-31. During a House of Commons debate in 1781, a member remarked that expelling Mr. Wilkes had been one of the great causes creating a division between England and America. *Id.* at 532 n.60 (citing R. POSTGATE, THAT DEVIL WILKES, 171-72, 173-74 (1929)).

21. *Id.* at 531 (citing 11 L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 222 (1965)).

22. *Id.* at 528 (citing 22 PARL. HIST. ENG. 1411 (1782)).

23. *Id.* at 527, 535.

Fathers who attended the Constitutional Convention in Philadelphia.

By July 1787, the Founding Fathers had agreed to an age qualification for membership in both the Senate and the House.[24] A bitter debate then ensued over the proposal from George Mason of Virginia to add qualifications requiring property ownership, citizenship, and financial solvency.[25] James Madison, perhaps echoing the Wilkes debate in England, led the way in arguing for fixed, minimal qualifications that could not be tampered with by any governmental body and stated that Mr. Mason's proposal 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.... 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.[26]

Madison emphasized his Wilkesian argument for fixed, limited qualifications in *Federalist* paper number 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 qualifications of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.*[27]

The Federalists also argued that rotation—the 18th century term for "term limits"—was incompatible with the people's right to choose.[28] Alexander Hamilton, in this same vein, argued that the need for reelection was more effective than mandatory term limits because the representative knows that his future is in the hands of his constituents.[29]

In addition, the ratification debates confirm the understanding of the Framers that the Qualifications Clauses could not be added to or altered. James Madison, in *Federalist* paper number 52, proclaimed

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24. *Id.* at 532.

25. *Id.* at 532-33.

26. *Id.* at 533-34 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 249-50 (Max Farrand ed., rev. ed. 1966)).

27. United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1857 (1995) (quoting THE FEDERALIST No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961)).

28. *Id.* at 1860.

29. *Id.* (citing statement of Alexander Hamilton (June 17, 1788), *in* 2 ELLIOT'S DEBATES 320 (Jonathan Elliot ed., 1876)).

the intent of the Qualifications Clauses to be an open door for virtually all candidates:

> The qualifications of the elected, being less carefully and properly defined by the state constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. . . . Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.[30]

Madison's message is clear and resounding. Unlike those in the states, the qualifications for federal candidates were carefully thought out, properly defined—and are to be uniform throughout the nation and open to all candidates.

Alexander Hamilton, in *Federalist* paper number 60, was even more direct: "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."[31]

After due consideration and debate, the Constitutional Convention approved—and the States ratified—a Constitution with no qualifications other than minimal age, citizenship, and residency requirements. As set forth above, these minimal requirements were carefully thought out and debated. The Founding Fathers were, in their time, revolutionaries who believed in political democracy. Very few of their contemporaries in Europe placed trust in the ability of the "masses" to choose a responsible government. Instead, traditional liberal thinkers favored "noblesse oblige," a philosophy whereby the upper classes were obligated to act benevolently toward their less fortunate countrymen. The framework promulgated by the Founding Fathers was radically different: citizens were to have an equal say in their destiny.

The minimal requirements of the Qualifications Clauses were, therefore, not a brief summary of restrictions for candidates, but a fundamental political statement of the Founding Fathers' faith and trust in democratic principles. Virtually anyone could run for political office. The only meaningful exclusion from political office was the vote of one's fellow citizens. These profound declarations of democracy were to be exclusive and unalterable.

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

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

These minimal requirements were later upheld by Congress in 1807.[32] At that time, the qualifications of Representative William McCreery of Maryland were challenged because he did not satisfy an additional residency requirement imposed by that State.[33] The Chairman of the House Committee of Elections, considering Mr. McCreery's exclusion, determined that the States did not have the power to add further qualifications and that restrictions upon voters to choose their representatives must be limited to those " 'absolutely necessary for the safety of the society.' "[34] The Chairman of the House Committee on Elections further elaborated that the narrow qualifications established by the Founding Fathers cannot be altered by either the Congress or the States:

> The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them.[35]

The full House of Representatives—comprised of many of the original Framers and their followers—subsequently resolved that Representative McCreery was entitled to his seat.[36] In a private letter commenting on this congressional debate, Thomas Jefferson noted that "to add new qualifications to those of the Constitution would be as much an alteration as to detract from them."[37]

Thus, the Founding Fathers spent a considerable amount of time considering the qualifications of U.S. senators and representatives. The resounding consensus of the Framers was that the fundamental dictates of democracy mandated minimal, unalterable qualifications upon elected representatives. The Founding Fathers placed their ultimate faith in the ability of the voters to make the right choice. Viewed in the context of a world of monarchs, this was a truly revolutionary concept.

IV. THE EXPULSION OF ADAM CLAYTON POWELL, JR.

Adam Clayton Powell, Jr. was a representative from New York and Chairman of the Committee on Education and Labor. In 1966,

32. Powell v. McCormack, 395 U.S. 486, 542-43 (1969) (quoting 17 ANNALS OF CONG. 871-74, 1237 (1807)).

33. United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1861 (1995); Powell v. McCormack, 395 U.S. at 542.

34. Powell v. McCormack, 395 U.S. at 543 (quoting 17 ANNALS OF CONG. 874 (1807)).

35. United States Term Limits, Inc., v. Thornton, 115 S. Ct. at 1861 (quoting Powell v. McCormack, 395 U.S. at 542-43 (quoting 17 ANNALS OF CONG. 872 (1807))).

36. *Id.*

37. *Id.* at 1861-62 (quoting from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON at 82 (Andrew Lipscomb ed., 1904)).

a congressional subcommittee determined that Representative Powell wrongfully had diverted Committee funds to himself and had directed that certain illegal salary payments be made to his wife.[38] He was removed from his committee chairmanship and expelled from the House of Representatives.[39] He and thirteen of his constituents challenged the expulsion on the grounds that a representative could only be expelled if he or she failed to meet the minimal qualifications of age, citizenship, or residency.[40]

Chief Justice Earl Warren's opinion in *Powell v. McCormack*[41] is both a legal masterpiece and the definitive writing on the Qualifications Clauses. In *Powell*, the U.S. Supreme Court traced the foundations of the Qualifications Clauses from 1553 to the Constitutional Convention—and concluded that the records of the debates of the Founding Fathers, "viewed in the context of the bitter struggle for the right to freely choose representatives which had recently concluded in England and in light of the distinction the Framers made between the power to expel and the power to exclude," mandated that Congress could expel one of its members based only on age, citizenship, or residency.[42] "Our examination of the relevant historical materials leads us to the conclusion that petitioners are correct and that the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements of membership expressly prescribed in the Constitution."[43] In other words, the Article I qualifications for federal candidates are exclusive and cannot be added to by Congress.

The *Powell* decision reaffirmed the fundamental tenet of democracy embodied in the Qualifications Clauses: The popular choice of the people shall prevail, regardless of any other considerations. In laying down the fixed and minimal qualifications required for elected representatives, the Framers placed absolute faith in the judgment of the people and in the rule of democracy. The Supreme Court in *Powell* held that these principles are inalterable and cannot be overcome by the personal shortcomings of Representative Powell.[44]

Due to its exhaustive and thorough analysis of the history of the Qualifications Clauses, *Powell* has become the modern focal point for all cases on the qualifications of federally elected officials. Its progeny also clearly established that *states*, as well as Congress, are

38. Powell v. McCormack, 395 U.S. at 489-90.
39. *Id.* at 490, 493.
40. *Id.* at 493. All parties agreed that Congressman Powell had satisfied these three minimal qualifications.
41. 395 U.S. 486 (1969).
42. *Id.* at 532.
43. *Id.* at 522 (footnote omitted).
44. Powell v. McCormack, 395 U.S. 486 (1969).

precluded from adding qualifications.[45] Indeed, every federal and state court to consider this issue determined that the Qualifications Clauses are exclusive and inalterable.[46] The courts have, for example, invalidated efforts by the states to add district residency requirements,[47] felony disqualifications,[48] disloyalty qualifications,[49] and disqualification of state officials.[50]

V. QUALIFICATIONS VERSUS ELECTION PROCEDURES

One area left open by *Powell*, however, is the distinction between what is a "qualification" for the purposes of the Qualifications Clauses and what is a bona fide election procedure. This Author believes that a bona fide election procedure is a procedural requirement which can be satisfied by meeting a guideline, such as gathering a reasonable number of signatures. A "qualification," on the other hand, is an insurmountable bar to running for federal office. Because term limits legislation has the practical effect of preventing a candidate from winning an election, it is an unconstitutional qualification.

Article I, Section 4, Clause 1, of the Constitution authorizes the states to establish the "Times, Places and Manner of holding Elections for Senators and Representatives . . . ." These procedural restrictions are not qualifications for candidates, but are intended to ensure that the election process is executed freely and appropriately. Without appropriate election procedures, the democratic process easily could erode into disorderly or corrupt elections. As set forth by the Supreme Court in *Storer v. Brown*, "there must be a substantial regulation of elections if they are to be fair and honest

45. United States Term Limits, Inc. v. Thornton, 115 S. Ct. at 1861-64; *see also* Lowenstein, *supra* note 5, at 19, 43-44 n.170-73.

46. United States Term Limits, Inc. v Thornton, 115 S. Ct. at 1861-64; *see also* Lowenstein, *supra* note 5, at 43-44.

47. Hellmann v. Collier, 141 A.2d 908 (Md. 1958); State *ex rel.* Chavez v. Evans, 446 P.2d 445 (N.M. 1968).

48. Application of Ferguson, 294 N.Y.S.2d 174 (N.Y. Sup. Ct. 1968), *aff'd* 294 N.Y.S.2d 989 (N.Y. App. Div. 1968); *In re* O'Connor, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940); Danielson v. Fitzsimmons, 44 N.W.2d 484 (Minn. 1950); State *ex rel.* Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918).

49. Shub v. Simpson, 76 A.2d 332 (Md. 1950), *appeal dismissed*, 340 U.S. 881 (1950); *In re* O'Connor, 17 N.Y.S.2d 758 (1940).

50. State *ex rel.* Pickrell v. Senner, 375 P.2d 728 (Ariz. 1962); Stockton v. McFarland, 106 P.2d 328 (Ariz. 1940); Buckingham v. State *ex rel.* Killoran, 35 A.2d 903, 905 (Del. 1944); Lowe v. Fowler, 240 S.E.2d 70 (Ga. 1977); State *ex rel.* Handley v. Superior Court of Marion County, 151 N.E.2d 508 (Ind. 1958); Richardson v. Hare, 160 N.W.2d 883, 887-88 (Mich. 1968); State *ex rel.* Santini v. Swackhamer, 521 P.2d 568 (Nev. 1974); Riley v. Cordell, 194 P.2d 857 (Okla. 1948); Ekwall v. Stadelman, 30 P.2d 1037 (Or. 1934); *In re* Opinion of Judges, 116 N.W.2d 233 (S.D. 1962); State *ex rel.* Wettengel v. Zimmerman, 24 N.W.2d 504 (Wis. 1946). *See also* Cobb v. State, 722 P.2d 1032 (Haw. 1986).

and if some sort of order, rather than chaos, is to accompany the democratic processes."[51]

In *Storer*, the Court examined a provision of the California Elections Code that forbade an individual from putting his name on the ballot as an independent candidate in a general election if that individual had registered with a political party within one year prior to the preceding primary election.[52] The Code also required independent candidates to have nomination papers signed by not fewer than five percent nor more than six percent of the entire vote cast in the preceding general election and included restrictions on when the signatures must be obtained and submitted.[53] The aggrieved political candidates claimed, among other things, that these restrictions violated the Qualifications Clauses.[54] The State, on the other hand, argued that these election restrictions were consistent with its right and obligation to govern the time, place, and manner of elections.[55] The Court noted that previous decisions had allowed states "to limit voting to residents, to require registration for voting, to close the registration books at some point prior to the election,"[56] to require that independent candidates demonstrate substantial support in the community by getting signatures on nomination papers,[57] and to regulate the number of candidates on the ballot.[58] With respect to restrictions limiting the ability of candidates to leave a political party and run as independents, the Court upheld the ballot restrictions as a valid means of governing the election process.[59] The

51. Storer v. Brown, 415 U.S. 724, 730 (1974).

52. *Id.* at 726.

53. *Id.* at 727.

54. *Id.* at 727-28. The four candidates in this action all sought to run in the 1972 California general election. Two of the candidates, Storer and Frommhagen, had been registered with the Democratic Party until early in 1972. The other two candidates, Hall and Tyner, were members of the Communist Party but were not able to run under that party affiliation because that party had not qualified for ballot position in California. *Id.*

55. *Id.* at 729-30.

56. *Id.* at 730-31 (citing Dunn v. Blumstein, 405 U.S. 330 (1972)). The Court, however, invalidated the Tennessee one-year residency requirement for voting. *Id.* at 730.

57. *Id.* at 732 (citing Jenness v. Fortson, 403 U.S. 431 (1971)).

58. *Id.* at 732.

> The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.... Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.

Id. at 732-33 (quoting Bullock v. Carter, 405 U.S. 134, 145 (1972)) (citations omitted).

59. *Id.* at 735-36.

State, the Court reasoned, was not forbidding the individuals from running for office; rather, it was simply protecting the integrity of the political process by not allowing people recently registered in a political party to switch out of the party and run as independents.[60] The Court also found that it was a reasonable election restriction to require that independents demonstrate that they had voter support by requiring nomination petitions since independent candidates, unlike candidates in a Republican or Democratic primary, do not have to survive a primary election.[61] The Court, however, invalidated the California nomination petition provision as being so severe that it effectively precluded a candidate from running.[62]

Thus, states have broad powers to regulate the time, place, and manner of elections. They exceed their authority, however, when the election restrictions become insurmountable. Once this line is crossed, the statute is deemed to have the substantive effect of excluding a candidate from the ballot.

Similarly, in *Hopfmann v. Connolly*, the United States Court of Appeals for the First Circuit upheld a Massachusetts Democratic Party requirement that a candidate must receive fifteen percent of the vote at the State Democratic Convention before he can challenge the convention's endorsement in the state primary election.[63] The First Circuit specifically found that this was an election procedure, not an additional qualification, because the candidate still had other means to run for election:

> [T]he 15 percent rule does not add a qualification that precludes [the candidate] from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide political office and potentially become the party nominee. . . .
>
> . . . Failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate.[64]

Again, the practical distinction between a bona fide election restriction and an unconstitutional qualification appears to be whether the restriction is surmountable. The Democratic Party restriction in *Hopfmann* was found to be surmountable since the candidate could run in another party, run as an independent, or run as a write-in candidate. The restriction, in essence, simply governed who could

60. *Id.* at 736.
61. *Id.* at 738-40.
62. *Id.* at 738-39.
63. Hopfmann v. Connolly, 746 F.2d 97, 102-03 (1st Cir. 1984).
64. *Id.*

run in a Democratic Party election.[65] An election procedure requiring a reasonable amount of nomination signatures is acceptable because it is surmountable: The candidate can go out and collect the signatures. Where the "procedure" cannot be reasonably satisfied, it becomes an unconstitutional qualification for running for office.

Term limits are an insurmountable qualification. Once an individual has completed the number of allotted terms, he or she is precluded from placing his or her name on the ballot. This restriction cannot be overcome. Therefore, term limits are a qualification for office, in addition to age, citizenship, and residency—and violate the exclusivity of the Qualifications Clauses of the Constitution.

The drafters of the term limits legislation will no doubt argue that term limits are not an insurmountable restriction because candidates may still run for office by means of a write-in campaign. Such a campaign, however, is not practical and the barriers to a statewide write-in election make the chances of winning unrealistic. Thus, under *Storer*, term limits—even with a write-in option—would not be permitted. There, the Court found that it was unreasonable to require an independent candidate to have nomination papers signed by five percent of the eligible voters within a specific, short time frame. The Court found that this restriction was unduly burdensome and did not serve any state purpose consistent with regulating the time, place, and manner of elections. This is also true with the restriction for term limitations. Requiring a candidate to forego placing his or her name on the ballot and to pursue a write-in campaign is an extraordinarily burdensome barrier to election. This barrier also has no relationship to the state's legitimate purposes in regulating the time, place, and manner of elections. The very lack of a relationship demonstrates that term limitations laws are unconstitutional violations of the Qualifications Clauses.

VI. *UNITED STATES TERM LIMITS, INC. V. THORNTON*

The *Thornton* case arose out of the aforementioned nationwide effort to impose term limits on members of Congress. On November 3, 1992, the voters of Arkansas amended their State Constitution and limited the terms of their federal and state representatives.[66] The preamble of the Arkansas amendment is, in many respects, similar to the preamble of the Maine Congressional Term Limitations Act of 1994:

65. Practically speaking, however, Massachusetts politics, at least at the time of *Hopfmann*, was so dominated by the Democratic Party that the plaintiff might effectively have been barred from being elected to office.

66. United States Term Limits, Inc. v. Thornton, 115 S. Ct. at 1845. The so-called "Term Limitation Amendment" became the Seventy-Third Amendment to the Arkansas Constitution. *Id.*

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.[67]

As with the Maine Act, the names of U.S. Representatives from Arkansas who have served more than three terms may not be placed on the ballot, and the names of U.S. Senators from Arkansas may not be placed on the ballot if that individual has served two terms.[68] As in Maine, those individuals precluded from placing their names on the ballot can still pursue the option of a write-in campaign.[69]

Responding to a challenge to the Arkansas constitutional amendment by the League of Women Voters of Arkansas and other Arkansas voters, the Supreme Court invalidated the amendment in a five to four decision in *Thornton* on May 22, 1995.[70] Writing for five members of the Court (including Justice Kennedy, who concurred in a separate opinion), Justice Stevens found that the Arkansas constitutional amendment violated the Qualifications Clauses of the U.S. Constitution and ruled that the only limits that can be imposed on candidates for Congress are for age, a specific period of U.S. citizenship, and a requirement of residency in the state from which election is sought.[71] Relying heavily on *Powell*, the Court found that the Arkansas-imposed restriction is "contrary to the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.' "[72] In summary, the majority found that any other limitation would be contrary to the intent of our Founding Fathers and would impair fundamentally the constitutional commitment to representative democracy.[73]

The *Thornton* Court followed *Powell* in reviewing the extensive history of the Qualifications Clauses in English common law, in the debates before the Constitutional Convention, and after the ratification of the Constitution. Based on this examination of Wilkes's

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67. *Id.*
68. *Id.* at 1846.
69. *Id.* at 1868.
70. *Id.* at 1842, 1846, 1867.
71. *Id.* at 1850 & n.9 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 123 (Max Farrand ed., 1911); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (3d ed. 1858); C. WARREN, THE MAKING OF THE CONSTITUTION 421 (1947)).
72. *Id.* at 1845 (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969) (internal quotation marks omitted)).
73. *Id.* at 1845, 1856.

" 'long and bitter struggle for the right of the British electorate to be represented by men of their own choice,' "[74] Madison's "Wilkesian" concern that a republic could be converted into an aristocracy or oligarchy by limiting the number of individuals capable of being elected,[75] and Alexander Hamilton's " 'immutability of the qualifications set forth in the Constitution,' "[76] the *Thornton* Court reaffirmed the holding in *Powell* that "history shows that, with respect to Congress, the Framers intended the Constitution to establish fixed qualifications."[77]

Justice Stevens also emphasized that his ruling and the holding in *Powell* did not rely solely upon historical evidence, but also were based upon " 'an examination of the basic principles of a democratic system.' "[78] Allowing "Congress to impose additional qualifications would violate that 'fundamental principle of our representative democracy . . . "that the people should choose whom they please to govern them." ' "[79] First, the Court, following *Powell*, "emphasized the egalitarian concept that the opportunity to be elected was open to all" regardless of age, wealth, profession, or religion—and that any limitation on candidates would operate to narrow the spectrum of elected representatives.[80] Second, the *Thornton* Court followed *Powell* by recognizing that placing sovereignty into the hands of the people meant that the people and only the people should dictate who would control them.[81] The Court relied on comments by many of the Founding Fathers,[82] including an observation that Alexander Hamilton made before the New York Convention: "The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[83] Any restriction upon popular choice was, in the eyes of the Court, a threat upon sovereignty.[84]

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74. *Id.* at 1848 (quoting Powell v. McCormack, 395 U.S. at 528).

75. *Id.* at 1849 (quoting Powell v. McCormack, 395 U.S. at 534 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 250 (Max Farrand ed., 1911))).

76. *Id.* (quoting Powell v. McCormack, 395 U.S. at 540).

77. *Id.* at 1850.

78. *Id.* (quoting Powell v. McCormack, 395 U.S. at 548).

79. *Id.* (quoting Powell v. McCormack, 395 U.S. at 547 (quoting statement of Alexander Hamilton (June 17, 1788), *in* 2 ELLIOT'S DEBATES 18 (Jonathan Elliot ed., 1876))).

80. *Id.*

81. *Id.* at 1851.

82. *Id.*

83. *Id.* (quoting Powell v. McCormack, 395 U.S. at 540-41 (quoting statement of Alexander Hamilton (June 17, 1788), *in* 2 ELLIOT'S DEBATES 257 (Jonathan Elliot ed., 1876))).

84. *Id.*

The *Thornton* Court, after emphatically reiterating large tracts of the *Powell* decision, reaffirmed the holding that the qualifications for elected representatives in the Constitution are "fixed" and may not be added to by Congress.[85] The majority opinion then expanded upon *Powell* by ruling that states were also barred from creating additional qualifications upon federal candidates. The Court observed, as set forth above, that every federal and state court that had considered this issue had unanimously determined that states did not have the authority to alter the Qualifications Clauses of the Constitution.[86] The Court also expressed concern that allowing individual states to formulate different qualifications for their representatives would result in a patchwork of differing systems that would be inconsistent with the Framers' vision of "a uniform national system . . . creating a direct link between the National Government and the people of the United States."[87]

The majority of the Court was also unimpressed by the argument that the Arkansas incumbents would not be excluded from the political process because they could still mount write-in campaigns. Noting that write-in campaigns do not have a significant chance of victory, the Court held that limiting incumbents to write-in campaigns perverts the intent of the Qualifications Clauses and

> trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "It is inconceivable that guaranties [sic]

85. *Id.* at 1852.

86. *Id.* at 1852-53 (citing Chandler v. Howell, 175 P. 569 (Wash. 1918); Eckwall v. Stadelman, 30 P.2d 1037, 1040 (Ore. 1934); Stockton v. McFarland, 106 P.2d 328, 330 (Ariz. 1940); State *ex rel.* Johnson v. Crane, 197 P.2d 864 (Wyo. 1948); Dillon v. Fiorina, 340 F. Supp. 729, 731 (N.M. 1972); Stack v. Adams, 315 F. Supp. 1295, 1297-98 (N.D. Fla. 1970); Buckingham v. State, 35 A.2d 903, 905 (Del. 1944); Stumpf v. Lau, 839 P.2d 120, 123 (Nev. 1992); Danielson v. Fitzsimmons, 44 N.W.2d 484, 486 (Minn. 1950); *In re* Opinion of Judges, 116 N.W.2d 233, 234 (S.D. 1962)). Courts have struck down state-imposed qualifications in the form of term limits, *see, e.g.*, Thorsted v. Gregoire, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994); Stumpf v. Lau, 839 P.2d at 123, district residency requirements, *see, e.g.*, Hellmann v. Collier, 141 A.2d 908, 911 (Md. 1958); Dillon v. Fiorina, 340 F. Supp. at 731; Exon v. Tiemann, 279 F. Supp. 609, 613 (D. Neb. 1968); State *ex rel.* Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968) (per curiam), loyalty oath requirements, *see, e.g.*, Shub v. Simpson, 76 A.2d 332, 341 (Md. 1950), *appeal dismissed*, 340 U.S. 881 (1950); *In re* O'Connor, 17 N.Y.S.2d 758, 760 (N.Y. Sup. Ct. 1940), and restrictions on those convicted of felonies, *see, e.g.*, Application of Ferguson, 294 N.Y.S.2d 174, 176 (N.Y. Sup. Ct. 1968); Danielson v. Fitzsimmons, 44 N.W.2d at 486; State *ex rel.* Eaton v. Schmahl, 167 N.W. 481 (Minn. 1918) (per curiam)).

87. United States Term Limits, Inc. v. Thornton, 115 S. Ct. at 1855 (citing FERC v. Mississippi, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in part and dissenting in part)).

> embedded in the Constitution of the United States may thus be manipulated out of existence."[88]

The *Thornton* Court, accordingly, declared that term limits were not a time, place, and manner restriction, and that the Arkansas constitutional amendment was an impermissible effort to dress an unconstitutional qualification in "ballot access clothing."[89]

Thus, the Court in *Thornton* unequivocally laid down the law. No qualifications can be imposed upon members of Congress other than the minimal age, citizenship, and residency requirements set forth in the Constitution. Neither the states nor the voters themselves can impose further qualifications. The Court categorically ruled that term limits are an unconstitutional burden on the right to vote: "Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish."[90] Such a limitation, according to the Court, "would effect a fundamental change in the constitutional framework."[91] The remedy for voters who do not like a candidate or believe that he is entrenched, as argued long ago by Alexander Hamilton, is to vote for somebody else.

The *Thornton* majority's careful reliance on history and the overriding principles of democracy is, in fact, the correct analysis. The historical record, as exemplified in the statements of many prestigious Framers, overwhelmingly indicates that the qualifications for federal candidates could not be expanded by Congress or by any State, short of a constitutional amendment. The overriding principles of democracy also dictate that the electoral franchise cannot be limited by even the people themselves. The unique concept introduced to the world in the Constitution is "We the People."[92] Our sovereign is not a king, a congress, or a series of so-called "sovereign" states. The sovereignty in this nation is held by the people themselves, that is, the people who vote in any given election. These individuals, wisely or unwisely, determine who is to be elected—and their decisions cannot be altered by the Congress, by the States, or by a previous electorate. In recognizing these principles, the *Thornton* majority acted appropriately in striking down the Arkansas constitutional amendment on term limitations.

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88. *Id.* at 1868 (quoting, in part, Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960) (quoting Frost & Frost Trucking Co. v. Railroad Comm'n of Cal., 271 U.S. 583, 594 (1926))).

89. *Id.* at 1857 (quoting United States Term Limits, Inc. v. Hill, 872 S.W.2d 349, 357 (Ark. 1994)). The Court did not directly address the State's argument that *Storer* held a primary restriction to be a procedural restriction, not an unconstitutional exclusion, because, among other reasons, the candidates could still mount a write-in campaign. By ignoring this distinction, the *Thornton* Court glossed over a poorly thought-out statement in *Storer*.

90. *Id.* at 1871.

91. *Id.*

92. U.S. CONST. pmbl.

Justice Kennedy, who cast the deciding vote, concurred with the majority decision for different reasons. His opinion is founded upon the essential concept of federalism, rather than the exclusivity of the Qualifications Clauses. Specifically, the concurrence views federalism as one of this country's greatest achievements:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[93]

According to Justice Kennedy, a citizen's relationship with the federal government and with his state government are two separate and distinct sovereign relationships, and one relationship has no right or authority to impose upon the other. Thus, a *state* may not dictate the qualifications of a candidate for *federal* office. In the words of the concurrence, "[T]here exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere."[94]

Justice Kennedy, however eloquent, does not say anything fundamentally different from the majority decision. The majority opinion, relying heavily on *Powell*, focuses on the democratic principles underlying the sovereign right of the electorate to vote for their representatives in Congress.[95] This sovereign right to choose one's national leaders without the interference of the Congress, the States, or the electorate itself is what Justice Kennedy appropriately called federalism. The thrust of his opinion reflects the same roots and ideas set forth in the majority decision.

In contrast to the majority opinion and concurrence, the dissent, written by Justice Thomas and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, focuses more on ideological points. The dissenting opinion begins by noting that the text of the Qualifications Clauses is silent both as to whether states can add additional qualifications to federal candidates and as to whether each state has the power to set forth eligibility requirements for federal candidates.[96] This silence, the conservative authors of the dissent contend, cannot mean anything other than that the right to make additional qualifications on federal officials is reserved to the

93. United States Term Limits, Inc. v. Thornton, 115 S. Ct. at 1872 (Kennedy, J., concurring).

94. *Id.* at 1875.

95. *Id.* at 1851.

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

states or to the people.[97] In other words, the Constitution states certain requirements. No prohibitions or affirmative obligations can be read into its silence. Whenever a certain clause does not expressly state that it is exclusive and fixed, the power to add qualifications belongs to the states or to the people pursuant to the Ninth and Tenth Amendments. The decision as to whether the power belongs to the states or to the people is to be determined by the State Constitution.[98] The dissent contends that the Arkansas Constitution, by virtue of the term limitations amendment, gives the State of Arkansas the reserved power to add unique qualifications to their federally elected officials.[99]

The dissent is correct that the Qualifications Clauses are technically silent as to whether the qualifications for age, residency, and citizenship are the minimum qualifications or whether they are the exclusive and unalterable qualifications. It ignores, however, the lessons of the rich constitutional history reviewed and analyzed by both *Powell* and by the majority decision. This history overwhelmingly demonstrates that the Founding Fathers intended not to add to these qualifications.

The conservative dissenting justices also ignore the fundamental principles of democracy that motivated the revolutionary Framers of our society. The electoral franchise was thrown open to the masses more than it ever had been before. The decision as to who would run this nation ultimately was left to the citizens themselves, *not* to the Congress, the states, or some other form of power elite. The Founding Fathers, as the historical record demonstrates, clearly intended that nothing but the minimal qualifications set forth in the Constitution would come between a citizen and the right of that citizen to vote for the candidate of his choice. Assuming that the minority is correct and that states such as Arkansas are free to add qualifications to candidates, states would have the power to erode the democratic vision of the Framers. For example, one state, in its wisdom, may determine that electing educated representatives is in the best interests of the state and require that all of its federal candidates have a college degree from an accredited institution of higher learning. Another state could determine that people who own land have a greater stake in their society and require that its candidates own land as a precondition for running for office. Another state may determine that morality is an essential ingredient in elected representatives and require that all candidates have a firm background and commitment in a widely accepted branch of the Christian faith.

97. *Id.*

98. *Id.* at 1876-78.

99. *Id.* at 1877.

All of this, however, was emphatically *not* the vision of our Founding Fathers. These great visionaries cast down a gauntlet before the world and demonstrated that opening up the electoral franchise as widely as possible enriches freedom and the success of our nation. The Qualifications Clauses were expressly intended, in this vein, to allow the voters the broadest choice possible from which to choose their representatives.

VII. CONCLUSION

The broad and expansive discussion of the Qualifications Clauses in the majority opinion puts to rest the critical issues surrounding the constitutionality of the Maine Act and vindicates the challenge mounted by the League of Women Voters of Maine. The United States District Court for the District of Maine, following the lead of the Supreme Court, "Ordered, Adjudged, and Decreed that the Maine Congressional Term Limitations Act of 1994 is invalid and unconstitutional," and "Ordered, Adjudged, and Decreed that Defendants G. William Diamond and Andrew Ketterer, in their official capacities as Maine Secretary of State and Attorney General respectively, are permanently enjoined from implementing, carrying out, or enforcing any of the terms of this Act."[100]

The *Thornton* decision and the invalidating of the Maine Act are a clear victory for the civil liberties of voters. One of the fundamental principles of democratic government is the ability of voters to choose whomever they wish to run for elective office. The Founding Fathers considered property qualifications, religious qualifications, moral qualifications, and term limits—and rejected all of these limitations in favor of very straightforward and minimal age, citizenship, and residency qualifications. In a true democracy, the only qualification on holding office is the popular support of the voters. Any further limitation—no matter how seemingly well intended or meritorious—runs counter to the grain of our system of government.

Furthermore, the very election that swept in the Maine Congressional Term Limitations Act of 1994 also swept out incumbent congressmen and congresswomen throughout the United States. It is an irony of American democracy that the same election that brought term limits to Maine and other states also forced dozens of senior congressional leaders out of office and caused the Democratic Party to lose control of both Houses of Congress. The 1994 elections positively demonstrated that voters can change things on their own by voting for the person of their choice. When this choice is limited, we all lose.

100. League of Women Voters of Maine v. Diamond, No. 94-377-P-H (D. Me. May 26, 1995).

The Founding Fathers placed profound faith in the democratic process and the ultimate ability of the American people to choose responsible representatives. This was a dramatic concept at the time, and it took a revolution for these objectives to become reality. The history of our country has—beyond any doubt—vindicated the fundamental concept of representative democracy. This principle is firmly ensconced in the Constitution and in the soul of our nation. The Court acted correctly in not allowing it to be tarnished by the drifting winds of partisan politics.