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Polly J. Price
Emory University School of Law, pprice@emory.edu

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ESSAYS

TERM LIMITS ON ORIGINAL INTENT? AN ESSAY ON LEGAL DEBATE AND HISTORICAL UNDERSTANDING

*Polly J. Price**

INTRODUCTION

IN *U.S. Term Limits v. Thornton*,[1] the United States Supreme Court was asked to determine whether states have the power under Article I of the federal Constitution to impose additional qualifications for office for their United States Representatives and Senators. The context was an Arkansas law which presented what some considered to be the most important constitutional question of the last quarter century, and one of the most important election law issues ever to come before the Court: can states limit the terms of office for their members of Congress? The question mattered most of all to twenty-one states which had all within the last four years enacted through an initiative process some form of term limitation for their United States Senators and Representatives.[2] By a five-to-four vote,[3] the Supreme Court halted this political movement when

*Assistant Professor, Emory University School of Law; B.A., M.A., Emory University; J.D., Harvard Law School. The author acknowledges with thanks the contributions of Griffin B. Bell, Paul J. Larkin, Jr., Cleta Deatherage Mitchell, and Donald D. Ashley, co-counsel with the author for the State of Arkansas, for some of the ideas and research developed in the preparation of the briefs on the merits in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995). Several colleagues at Emory University, including Thomas Arthur, Andrew Kull, Charles Shanor, William Mayton, John Witte, Cynthia Baker, Robert Schapiro, George Shepherd, Ed Shoemaker, and the Legal History Reading Group, provided thoughtful comments on previous drafts; thanks also to my research assistants, Shawn Huizenga and Steven D. Grimberg. Any conclusions or errors in this Essay, however, are the author's sole responsibility.

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

[2] After the 1994 general election, twenty-two states had enacted either pure term limits or ballot access measures, and twenty-one of those states had used direct votes by the people to enact these provisions. See id. at 1909 n.39 (Thomas, J., dissenting).

[3] Justice Stevens wrote the majority opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Kennedy filed a separate concurring opinion. The dissenting

it ruled that states cannot limit terms for their own members of Congress because the Qualifications Clauses of the United States Constitution prohibit states from adding any restriction on candidacy that amounts to a "qualification."[4] When the Framers drafted the Constitution, and when it was ratified by the states, the Court said, the intent of all participants was to prohibit states from adding further qualifications to those enumerated in Article I, §§ 2 and 3, which require only that a candidate have attained a minimum age, be a United States citizen, and be an inhabitant of the state. The Arkansas term limits law was therefore held to be invalid because it added a qualification for congressional office, marking the first time the Supreme Court (or any federal appellate court, for that matter) has struck down a state election law on this ground. The Supreme Court's decision not only invalidates the various term limits laws enacted in fifteen states,[5] it also calls into question scores of other state laws affecting congressional candidacy.[6]

Along the way, some asserted that the answer to the historical question of the intent behind the Qualifications Clauses was obvious: of course states could not add to the qualifications enumerated in Article I of the federal Constitution. After all, this was the position in 1833 of the esteemed Joseph Story,[7] all other courts that have considered this question have thought so,[8] and in 1969, the Supreme

opinion, written by Justice Thomas, was joined by Justices Scalia and O'Connor, and Chief Justice Rehnquist.

[4] 115 S. Ct. at 1871.

[5] See, e.g., Thorsted v. Munro, Nos. 94-35222 et al., 1996 WL 39389 (9th Cir. Jan. 4, 1996) (invalidating Washington's term limits law).

[6] Examples of these other state laws include requirements that candidates be registered voters in the state, disqualification of convicted felons, and patronage restrictions. These additional state-law qualifications are discussed infra Part V.

[7] 1 Joseph Story, Commentaries on the Constitution of the United States §§ 612-615, 625 (3d ed. 1858).

[8] Some state courts have concluded that a state may not bar a convicted felon from candidacy for U.S. Representative or Senator because of the Qualifications Clauses, even though convicted felons may be barred from holding state office. See, e.g., Application of Ferguson, 294 N.Y.S.2d 174, 176 (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, 486 (Minn. 1950). Other state courts and two federal district courts have held certain additional state qualifications to violate the Qualifications Clauses because of the exclusivity doctrine. See Dillon v. Fiorina, 340 F. Supp. 729, 731 (D.N.M. 1972) (two-year residency requirement within the state held to be unconstitutional); Exon v. Tiemann, 279 F. Supp. 609, 613 (D. Neb. 1968) (district residency requirement unconstitutional); State ex rel. Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968) (same); Hellman v. Collier, 141 A.2d 908, 910 (Md. 1958) (same). A full

Court, in dicta at least, had already said so.[9] The weight of the scholarly authority on the side of Joseph Story was impressive, and for the majority in *Thornton* was "formidable indeed."[10] Few have claimed such power for the states.[11]

Unbelief has persisted, however, and but for one vote nearly carried the day in *Thornton*, where the disbelievers convinced four of the nine Justices that the received view was simply wrong. Joined by three others, Justice Thomas said in dissent that the historical evidence now "refutes any notion that the Qualifications Clauses were generally understood to be exclusive" with respect to the states.[12] The historical question, then, was only deceptively obvious.

The majority in *Thornton* provided an elaborate historical analysis of the Qualifications Clauses and concluded that the Framers intended to establish fixed qualifications in the Constitution that could not be changed or added to by either the states or the federal government.[13] Both the majority and the dissenters assumed that something like an "original intent" approach was the appropriate theory of constitutional interpretation.[14] Their approach followed this reasoning: first and foremost, the text of the Constitution should supply the answer. If the plain language of the text does not answer the question, then the beliefs and understandings expressed by the

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citation of lower courts that have addressed this question is found in *Thornton*, 115 S. Ct. at 1852-53. Interestingly, none of these cases predate the twentieth century.

[9] Powell v. McCormack, 395 U.S. 486, 542-43 (1969). The *Powell* decision is discussed infra Part IV.

[10] *Thornton*, 115 S. Ct. at 1852-53.

[11] Thomas Jefferson was one such voice. His view of the matter appears to be that states could impose additional qualifications. Jefferson's view is discussed in more detail infra Part II.

[12] *Thornton*, 115 S. Ct. at 1885 (Thomas, J., dissenting).

[13] Id. at 1850.

[14] Scholarly debate concerning theories of constitutional interpretation abound, of course, particularly over 'original intent' and what that means. See, e.g., Robert H. Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383 (1985); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987); Daniel A. Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989); Earl Maltz, Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory, 63 B.U. L. Rev. 811 (1983); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985); William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976); cf. William T. Mayton, Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation, 41 Emory L.J. 113 (1992) (discussing the use and misuse of legislative history as a method of statutory interpretation).

participants in the ratification debates (be they "Framers" or "ratifiers") may shed light on the meaning of the text.[15]

Both the majority and the dissent asked the historical question in the same way, although they ultimately reached different conclusions. Both opinions, however, show the extreme difficulty in practice of either ascertaining original intent or functioning without an explicit statement of it. Neither the majority nor the dissent squarely faced the problem posed by this case: where should the Court look if the text itself is not clear and the founding participants are silent? The majority, while claiming that the original understanding of the Framers was on its side, also relied upon a compelling national interest in uniformity that it found to permeate the ratification debates over Article I.[16] All sides in this debate invoked history, at least rhetorically.[17] To the uninitiated, these various claims of authority based upon history must seem like looking in the Bible for an answer.

This Essay suggests that the Court's one-vote resolution of the question depended upon the rejection of what is at least an implicit tenet of originalism: if the text of the Constitution itself does not clearly point to one answer, and the original understanding or intent of the Framers and ratifiers is not clear from debates and contemporaneous writings, then the behavior of the participants, after but sufficiently close to the fact, should be persuasive, because it might reflect the participants' understanding of what the federal Constitution permitted them to do. Immediately after the Constitution was ratified, states acted as though the Qualifications Clauses did not prohibit them from imposing additional,

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[15] See, e.g., *Thornton*, 115 S. Ct. at 1853-54 (recognizing that the text of the Constitution contains no express prohibition concerning qualifications added by the states); see also id. at 1856 ("The available affirmative evidence indicates the Framers' intent that States have no role in the setting of qualifications.").

[16] Id. at 1864 ("Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure."); see also id. at 1866 ("In sum, the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution . . . reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.").

[17] In a recent article, Martin Flaherty described an affinity for history in constitutional interpretation even among theorists whose work "is often seen as antithetical to originalism." Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 525 (1995).

supplemental qualifications. As early as 1789, states added a diverse range of other qualifications for office for their own representatives in Congress, and have continued to do so to this day. If these states were acting in defiance of the federal Constitution, contemporaries failed to object. So why, then, does the view persist that, regardless of how states have behaved, they are and always have been wrong on this point?

This Essay is divided into five Parts. Part I sets the stage for the historical debate by evaluating the text of the Qualifications Clauses as well as the limited evidence of what the Framers and the ratifiers thought about these provisions. Part II shows that many states, immediately after the federal Constitution was ratified, behaved as though the Qualifications Clauses did not prevent them from adding qualifications for congressional office-holding. Part III compares this early evidence of state behavior with a debate in Congress after the Civil War concerning the meaning of the Qualifications Clauses. Part IV returns to the twentieth century, evaluating the historical evidence in light of the Supreme Court's decisions in *Powell v. McCormack* and *Storer v. Brown*, and questioning whether other theories of constitutional interpretation better fit the resolution of the *Thornton* case. Finally, Part V, the conclusion, notes other state laws which are now presumptively unconstitutional, and poses a hypothetical "next case" of the convicted felon prevented by state law from appearing on the ballot for Congress.

There is no shortage of scholarly debate on the political issue of term limits,[18] but most evaluations of the historical evidence on the

[18] The constitutionality of such laws generated considerable debate in the legal community prior to the Supreme Court's decision in *Thornton*. See, e.g., George F. Will, Restoration (1992); Erwin Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L.J. 773 (1988); Erik H. Corwin, Recent Developments, Limits on Legislative Terms: Legal and Policy Implications, 28 Harv. J. on Legis. 569 (1991); Troy A. Eid & Jim Koble, The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office, 69 Denv. L. Rev. 1 (1992); 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); Steven R. Greenberger, Democracy and Congressional Tenure, 41 DePaul L. Rev. 37 (1991); Roderick M. Hills, Jr., A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97 (1991); William Kristol, Term Limitations: Breaking Up the Iron Triangle, 16 Harv. J.L. & Pub. Pol'y 95 (1993); Martin E. Latz, The Constitutionality of State-Passed Congressional Term Limits, 25 Akron L. Rev. 155 (1991); Daniel Lowenstein, Are Term Limits Constitutional? (American Political Science Ass'n Sept. 4, 1993); James C. Otteson, A Constitutional Analysis of Congressional Term Limits:

Qualifications Clauses fail to consider how the views of those clauses changed over the course of two centuries.[19] One purpose of this Essay is to consider again, in terms of how we interpret the text of the Constitution, the narrow but critically important historical question posed in *Thornton*: Did the Framers understand the Qualifications Clauses to prohibit both the federal government and the states from adding qualifications for office?

This question generated no clear answers in the *Thornton* case, despite the heavy hand of received scholarly authority. It generated no clear answers, I suggest, because the participants who drafted and ratified the federal Constitution themselves were not concerned with the question. We struggle to find evidence as to their thinking on this matter, when the immediate participants expressed no concern over the possibility that idiosyncratic state governments might impose additional qualifications that did not otherwise run afoul of the federal Constitution.[20] When the Framers did discuss the Qualifications Clauses, they did so primarily in the context of limiting the power of the federal government. Today, we view constitutionalism somewhat differently. We are now less concerned with preserving individual state identity in the face of a new federalism, and more concerned with preserving federal uniformity over states' idiosyncracies.

Improving Representative Legislation Under the Constitution, 42 DePaul L. Rev. 1 (1991); Stephen J. Safranek, Term Limitations: Do the Winds of Change Blow Unconstitutional?, 26 Creighton L. Rev. 321 (1993); Robert C. DeCarli, Note, The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses, 71 Tex. L. Rev. 865 (1993); Tiffanie Kovacevich, Comment, Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?, 23 Pac. L.J. 1677 (1992); 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).

[19] See e.g., Brendan Barnicle, Comment, Congressional Term Limits: Unconstitutional by Initiative, 67 Wash. L. Rev. 415 (1992).

[20] For example, the Impeachment Clause, Art. I, § 3, cl. 7, authorizes disqualification from federal office of any person convicted after being impeached. The Incompatibility Clause, Art. I, § 6, cl. 2, bars anyone from simultaneously holding office in the Legislative and Executive Branches. The Oath or Affirmation Clause, Art. VI, cl. 3, requires members of Congress to take an oath or to affirm to support the Constitution, and the Religious Test Clause, Art. VI, cl. 3, prohibits the federal and state governments from imposing a religious test as a qualification for federal office. The fact that the Framers felt the need to include the Religious Test Clause in the federal Constitution seems to indicate that the states otherwise could have enacted the additional qualification of a religious test for their representatives in Congress.

This Essay suggests that the Civil War was a critical turning point, obscuring our interpretation of the Framers' intent. The forty-eighth Congress, whose members included many veterans of the Civil War, heatedly debated whether states could establish additional qualifications, a debate that foreshadowed many of the arguments advanced in *Thornton.* The debate in the forty-eighth Congress, which went unnoted by the Supreme Court in *Thornton*, merits closer study because in that debate we see the Qualifications Clauses take on new significance compared to previous debates in Congress on the same issue.[21]

With Thomas Jefferson in one camp, then, and Justice Story in the other, we revisit an early chapter in American history.

I. SETTING THE STAGE FOR THE DEBATE: THE CONSTITUTIONAL PROVISIONS AND WHAT THE FRAMERS SAID ABOUT THEM

The Qualifications Clauses are among the first four clauses following the preamble to the United States Constitution. For those who enjoy visual images, in a pocket-sized version of the Constitution the clauses appear on the first two pages, yet the Court in *Thornton* found itself still with considerable doubt about their meaning. Article I, § 2, cl. 2 provides:

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

Similarly, Article I, § 3, cl. 3 provides:

> 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 in which he shall be chosen.

Without saying so explicitly, the majority began its analysis thoroughly grounded in originalism. By originalism, I mean an approach to constitutional adjudication that accords binding authority

[21]This thesis is not to be confused with the theory of "constitutional moments" proposed by Bruce Ackerman in We The People: Foundations, passim (1991). Ackerman suggests that the Civil War and Reconstruction era, resulting in the Reconstruction Amendments, impliedly amended other parts of the federal Constitution as well.

to either the text of the Constitution, when the text "clearly" provides the answer to the query, or, if the text is unclear, to the intentions of those who adopted it.[22] Constitutional analysis, like statutory interpretation, must begin with the text of the relevant law, and the Supreme Court itself has often stated that "the plain language of the enacted text is the best indicator of intent."[23]

In *Thornton*, however, the text of the Constitution does not answer the question. Instead, the majority determined that the prohibition on states to add qualifications was implicit in the text of the Constitution, based primarily upon historical intent, but also upon "democratic principles" derived from that history.[24] The Court declined to accept various arguments that the answer to the question could, in fact, be gleaned from the texts themselves.[25] One such argument noted that the text of the Qualifications Clauses was altered by the Committee of Style prior to submission to the states.[26] Originally, the clause had 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

[22] There are, of course, extreme forms of originalism such as "strict textualism" and "strict intentionalism." The majority opinion appeared to follow what Paul Brest has described as "moderate originalism," in which "[t]he text of the Constitution is authoritative, but many of its provisions are treated as inherently open-textured. The original understanding is also important, but judges are more concerned with the adopters' general purposes than with their intentions in a very precise sense." Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 204-05 (1980).

[23] Nixon v. United States, 113 S. Ct. 732, 737 (1993).

[24] *Thornton*, 115 S. Ct. at 1856. These are, apparently, the same "democratic principles" that the *Powell* court relied upon to determine that the Qualifications Clauses prohibit Congress from imposing additional qualifications upon any member duly-elected by a state. See id. at 1850.

[25] See Brief for State Petitioner at 36-38, 41, U.S. Term Limits v. Thornton, 115 S. Ct. 1842 (1995) (No. 93-1828).

[26] The Committee of Style consisted of five members of the 1787 Constitutional Convention who undertook over the course of five days the "last arrangement and composition" of the document, prior to submission to the states for ratification. Clinton Rossiter, 1787: The Grand Convention 225 (1966). The Committee of Style, as its name suggests, imposed primarily stylistic changes to the various provisions previously approved by the Convention. Id. at 224-26. The Committee lacked the substantive power to amend provisions adopted by the Convention. *Powell*, 395 U.S. at 538-39. The *Thornton* majority, however, rejected this argument. 115 S. Ct. at 1849 n.8.

> for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the State in which he shall be chosen.[27]

The clause emerged from the Committee of Style, however, phrased negatively, i.e., "*No person shall* be a Representative *who shall not* have attained to the age of twenty-five years," and so on. The majority and dissent both recognized that the Qualifications Clauses would mean the same thing had they been enacted in the originally proposed form.[28] Yet, either formulation is distinct from a third alternative, apparently not proposed at the constitutional convention, which could have read:

> Every Person who shall have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen, shall be eligible to be a Representative.[29]

Had the Committee proposed this formulation, it would be easier to construct an argument from the text of the Constitution itself that states could not add qualifications. As the dissent noted, the eventual text of the Constitution is "quite different from [this] exclusive formulation."[30] At least as a textual matter, then, the Qualifications Clauses do not themselves prohibit a state from establishing additional eligibility requirements for their own representatives in Congress. Given that the text of the Constitution does not answer the question, what, then, is the best evidence we have, contemporaneous with the drafting and ratification of the Constitution, concerning the Framers' understanding of the Qualifications Clauses?

The majority conceded that the text does not provide an answer, but was less forthright on whether the meaning of the text can be gleaned from the ratification debates. No one at the time of ratification, in fact, seemed to have posed that question. Nonetheless, the majority said two fundamental ideas are apparent from the debates.

[27] 2 The Records of the Federal Convention of 1787, at 565 (Max Farrand ed., 1966) [hereinafter Farrand].

[28] *Thornton*, 115 S. Ct. at 1885-86 (Thomas, J., dissenting).

[29] Id. at 1886.

[30] Id.

The first fundamental idea is an egalitarian concept.[31] The Committee of Detail[32] proposed that Congress have the authority to establish property qualifications for service in Congress, but the proposal was defeated.[33] Madison elaborated the reason for this defeat in *The Federalist*: "Under these reasonable limitations [enumerated in 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 to any particular profession of religious faith."[34] Wilson Carey Nicholas defended the Constitution by arguing that: "It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence . . . ."[35] Our appreciation of the egalitarian nature of such utterances should be bounded, however, by the recognition that the speakers probably referred only to qualifications established in the federal Constitution, not qualifications that might be found elsewhere. "Merit of every description," did not mean that the Framers expected the states to send Native Americans, blacks or women. It was understood that states could and would exclude such persons, even though such exclusions otherwise appear to be an additional qualification not enumerated in the text.[36]

Another fundamental idea is also apparent, according to the majority: the qualifications listed in Article I were not to be altered.[37] But not altered (or added to) by whom? Madison without question

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[31] Id. at 1850.

[32] The Committee of Detail was a five-member body charged with the task of drafting a Constitution to reflect the decisions that the Convention as a whole had reached. See *Thornton*, 115 S. Ct. at 1895 (Thomas, J., dissenting); 1 Farrand, supra note 27, at xxii-iii.

[33] 2 Farrand, supra note 27, at 249-51.

[34] The Federalist No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

[35] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 8 (Jonathan Elliot ed., 1863) [hereinafter Elliot's Debates].

[36] Under the *Dred Scott* decision, of course, blacks were not "citizens" as a matter of federal law. Dred Scott v. Sandford, 60 U.S. 393 (1856). Nonetheless, as discussed more fully in Part II, as a historical matter, no person in any of these categories was elected to Congress without first having the right to vote. For states that have excluded persons not entitled to vote from running for office, the exclusion was a state-imposed additional qualification.

[37] *Thornton*, 115 S. Ct. at 1856-58.

believed the qualifications set forth in the Constitution "ought to be fixed by the Constitution," and should then be "unalterable by the Legislature."[38] Similarly, Hamilton's view of the immutability of the qualifications set forth in the Constitution parallels Madison's:

> The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. . . . The qualifications of the persons who may choose or be chosen as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.[39]

But to what entity was this concern directed? To which "legislature" did Hamilton refer? The majority in *Thornton* considered Hamilton to mean "any" legislature, state or federal.

What concerned the Framers, however, as they said at the time, was the prospect of the *federal* legislature imposing additional qualifications on its members. The experience of John Wilkes and the English Parliament was still recent in the minds of the Framers.[40] While serving as a member of Parliament, Wilkes came into disfavor for a published attack on the Crown's peace treaty with France. In addition to a 22-month prison sentence, Parliament declared Wilkes ineligible for membership and ordered that he be expelled. Wilkes was nonetheless reelected several times to Parliament, but was consistently refused a seat by that body. The Qualifications Clauses were the Framers' resounding statement that a legislative body should not have the power to exclude properly elected representatives based upon its own whims. Instead, it should only be able to exclude duly-elected members based upon objective, and limited, criteria.

We see this view most clearly in arguments by James Madison in reaction to a proposal that would have given *Congress* the power to add property qualifications. Madison argued that such a power would grant "an improper & dangerous power in the Legislature" by which the Legislature "can by degrees subvert the Constitution."[41]

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[38] The Federalist No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[39] Id.

[40] A history of the Wilkes affair and its relevance to the Framers on this question is discussed in *Powell*, 395 U.S. at 527-29.

[41] 2 Farrand, supra note 27, at 249-50, *quoted in Thornton*, 115 S. Ct. at 1849.

Madison feared that 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."[42]

The Supreme Court, on its first occasion to review the history of the Qualifications Clauses, noted that the "parallel between Madison's arguments and those made in Wilkes' behalf is striking."[43] That Court recognized, correctly, that "Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation *to the Congress* of the discretionary power to establish any qualifications."[44] Curiously, however, none of the Framers seemed to talk about the issue with respect to the states, and whether the states could superimpose additional qualifications—a fact which caused little concern to the *Thornton* majority.

The question whether *states* might impose other qualifications, however, simply did not arise because in the debates about the Qualifications Clauses, the Framers expressed a paramount fear of an overreaching and undemocratic *federal* government. No definitive evidence exists that these statements about the desirability of uniformity, and that the qualifications would be unalterable, were made with state behavior in mind. In *Thornton*, the majority bypassed this problem by making the leap that when the Framers discussed limiting the power of Congress to add to or modify these qualifications, they must have meant the same outcome to apply to the states, even though no one said so. And the reason for this leap, according to the majority, is that it makes sense from the perspective of "democratic principles" within a federal system of government.[45] But the better interpretation of the historical record is that the Framers and ratifiers simply did not concern themselves with what the states might do. The focus of discussion on the Qualifications Clauses was on the new federation, and how to portray that entity as properly limited by a written constitution so that the states need not

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[42] Id.

[43] *Powell*, 395 U.S. at 534.

[44] Id. The Wilkes case, although undoubtedly an impetus for including defined qualifications in the United States Constitution, is not otherwise particularly helpful in terms of understanding what the Qualifications Clauses meant. There was, of course, no English constitutional equivalent to the dual-sovereignty system proposed in the federal Constitution.

[45] *Thornton*, 115 S. Ct. at 1862.

fear the Federal Congress' arbitrarily excluding one of its duly-elected members.[46]

In fact, the closest evidence that the Framers intended to limit the ability of states to add qualifications is an enigmatic statement by James Madison. Contrasting state control over the qualifications of electors with the qualifications of those whom the states would elect, Madison said:

> 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. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent, and, during the time of his service, must be in no office under the United States. 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.[47]

But what did Madison mean, and how many did he speak for? Again, surely he did not mean merit of every description, else Native Americans, free men of color, slaves and women would find that "this part of the federal government" was open to them as well. Surely no one at the time would have argued that states could not exclude these persons from voting as well as from serving in office,

[46] To be sure, debates about other provisions of Article I did express concern with state behavior in the conduct of federal elections. For example, the debates surrounding Article I, § 4, known as the Times, Places, and Manner Clause, indicate reciprocal fears on the part of both federalists and antifederalists. On the federalist side, the fear was that the states would refuse to cooperate with the new federal government, and might not hold any elections at all for federal representatives. See, e.g., 3 Elliot's Debates, supra note 35, at 366-69. Should that happen, Article I, § 4 permits the federal government to override state inaction or take over the administration of such elections. On the other hand, it is also clear from the ratification debates that the states greatly feared this power of the federal government, and it was therefore often characterized as a power that the Congress would exercise cautiously and only in the most extreme circumstances. A number of states, in fact, proposed amendments to the new Constitution to remove from Congress its authority in Article I, § 4 to interfere with state regulation of congressional elections, and the issue was seriously debated in the first federal Congress in 1789. See, e.g., 1 The Debate on the Constitution 428, 539, 751 (Bernard Bailyn ed., 1993); 2 id. at 452, 541, 556, 571, 693-94, 854-56.

[47] The Federalist No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).

and this result must have been a matter of state statute or at least custom. One plausible explanation is that Madison meant that states could not alter the minimum qualifications of age, citizenship, and inhabitancy, but that the door would be open only to those others as states may so choose. Only Congress was prevented from closing the door.[48] Furthermore, if uniformity at the state level were the objective, the Framers chose a peculiar way to accomplish it. Two of the three qualifications listed in the Qualifications Clauses—citizenship and inhabitancy—were defined by state common law in 1790, so that the thirteen original states could well have come up with thirteen varied definitions of those concepts. Although the first federal statute on naturalization was passed in 1790,[49] it merely supplemented existing common law definitions of citizenship.[50] In fact, there was no uniform definition of citizenship by birth until 1868, when for the first time a constitutional definition of citizenship

[48] Also possible is the view that Madison understood the Qualifications Clauses to prevent states from adding other exclusions. This view was adopted by the majority in *Thornton*. 115 S. Ct. at 1850.

[49] Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795). This Act applied only to free white inhabitants. The status of American Indians and persons born in United States territories was unclear. See Jill A. Pryor, Note, The Natural-Born Citizen Clause and Presidential Eligibility, 97 Yale L.J. 881, 882 n.7 (1988).

[50] The subject is slightly more complicated. U.S. Const. art. I, § 8, cl. 4 provides that Congress shall have power "[t]o establish an uniform Rule of Naturalization." Most scholars have agreed that the power granted to Congress by this section was limited to defining under what circumstances birth outside of the territorial United States would result in the rights of a natural-born citizen. See generally Frederick Van Dyne, A Treatise on the Law of Naturalization of the United States 6 (1907) (naturalization of foreigners was power expressly reserved to the federal government); James H. Kettner, The Development of American Citizenship 1608-1870, at 15-17, 30, 33-34 (1978) (discussing the British background for American naturalization law); Note, Constitutional Limitations on the Power of Congress to Confer Citizenship by Naturalization, 50 Iowa L. Rev. 1093, 1094 (1965) (noting that Art. I, § 8 arose out of a concern for the lack of uniformity between state laws regarding who was an alien and who was a naturalized citizen).

Interestingly, in 1844 Congress debated whether the Commonwealth of Virginia could naturalize and enfranchise aliens, thereby creating United States citizenship for purposes of voting in elections to the United States Congress. A "large majority" of the House committee considering a contested election case were of the opinion that, "as the power of the Federal Government 'to enact uniform laws upon the subject of naturalization' is, when exercised, exclusive, the statutes of Virginia prescribing an oath of fidelity to the Commonwealth, and declaring the mode in which persons shall become citizens of Virginia, are merely void; and that such persons, although treated by the laws of Virginia as citizens, cannot exercise the right of suffrage for members of the House of Representatives . . . ." See H.R.Rep. No. 520, 28th Cong., 1st Sess. (1844), at 3.

through the Fourteenth Amendment imposed uniformity throughout the states.[51]

Even Madison thought state law ought to govern questions of inhabitancy and citizenship. The first recorded contested election case in Congress involved the issue whether a member sent from South Carolina qualified as an inhabitant of that State and a citizen of the United States.[52] In 1789, the House Committee on Elections[53] determined that both inhabitancy and citizenship were to be defined by state law. Madison said of the issue: "I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us. . . ."[54]

Viewed in the light of all of these factors, the debates of the Framers and ratifiers are ambiguous.[55] The majority of the Court in

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[51] Citizenship acquired by birth in the United States is granted not by Congress but by the Fourteenth Amendment. See generally Bell v. Maryland, 378 U.S. 226, 249 (1964) ("The Fourteenth Amendment . . . makes every person who is born here a citizen.") (Douglas, J., concurring); Michael T. Hertz, Limits to the Naturalization Power, 64 Geo. L.J. 1007, 1044 (1976) ("Congressional power over citizenship is limited by the naturalization clause and the first sentence of the fourteenth amendment"); Pryor, supra note 49, at 892 n.65 (noting that citizenship acquired by birth in the United States is provided by the Constitution, not by Congress).

[52] Ramsay v. Smith, *reprinted in* M. St. Clair Clarke and David A. Hall, Cases of Contested Elections in Congress 23-37 (1834) [hereinafter "Clarke & Hall, Contested Elections"].

[53] The Committee on Elections was first established on April 13, 1789, by resolution of the House. Over the course of its existence, the Committee conducted hearings into cases of contested elections to congressional seats. It reported its findings to the full House for a vote by that body as to which candidate of a disputed election was to be seated. See Chester H. Rowell, A Historical and Legal Digest of all the Contested Election Cases in the House of Representatives of the United States, 1789-1901, at 3-4 (1901) [hereinafter "Rowell, Digest of Contested Election Cases"]. The Committee on Elections was officially terminated in 1947. Walter Stubbs, Congressional Committees, 1789-1982: A Checklist 41 (1985). Cases of disputed elections to the House of Representatives are now heard by the Committee on House Oversight. 1995 Congressional Staff Directory 713 (Ann L. Brownson ed., 1995). Procedurally, contested elections in the House of Representatives are governed by 2 U.S.C. § 381 *et seq.* (1995). For a history of statutory provisions governing the procedure for contesting federal elections, see S.Rep. No. 91-546, 91st Cong., 1st Sess. (1969); 1969 U.S.C.C.A.N. 1456 (listing statutes governing contested election procedures in the House of Representatives since 1798, compared with the practice of the Senate, which has considered each contested-election case directly without any statute governing its procedure).

[54] Clarke & Hall, Contested Elections, supra note 52, at 32.

[55] It is true that the Framers considered and rejected a proposal to include in the Constitution a limitation on the terms of the members of Congress, and that it was a "major source of controversy." See *Thornton*, 115 S. Ct. at 1859-60 & n.22 (discussing the various proposals at the constitutional convention). That fact may or may not inform the

Thornton, however, instead of looking elsewhere for authority on the question, were compelled by the "complete absence in the ratification debates of any assertion that States had the power to add qualifications."[56] Silence spoke louder than words, even though it is equally credible to conclude that silence on this question could mean that states were *not* prohibited from adding qualifications.

When we do not find an answer to our question, perhaps that is the occasion to ask whether the Framers cared about the question in the way we have asked it. If they did not, or at least if we can find no articulated position one way or the other, then we should, methodologically, remove ourselves one step from that debate to the next tier of historical evidence: how the states behaved in light of what they understood about the new Constitution. The majority in *Thornton* did not take this approach.[57]

II. A RESOLUTION: WHAT STATE BEHAVIOR CAN TELL US

Putting aside for a moment the possibility that states knowingly behaved in violation of the Constitution when they added qualifications for congressional office-holding, let us consider the more probable case that the states in the early history of our country believed, correctly, that the Constitution permitted them to impose additional qualifications. Thomas Jefferson, writing in 1814, did not object to states adding all kinds of qualifications upon those who would represent them in Congress. Jefferson wrote that Article I

> does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.[58]

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question whether *states* may impose term limits individually upon their own federal representatives. It is ignored for purposes of this Essay, however, because proposals for a federal requirement of uniform rotation in office were never discussed in terms of the meaning of the Qualifications Clauses. This Essay, instead, focuses solely on the narrow question whether states may add to those qualifications.

[56] *Thornton*, 115 S. Ct. at 1859.

[57] The dissent found compelling evidence here, but was only partly correct, as the importance of the post Civil War debate in Congress makes clear. See infra Part IV.

[58] 2 The Founders' Constitution 81 (Philip Kurland & Ralph Lerner eds., 1987) (quoting

On the other hand, Jefferson went on to note that the question was not without some doubt.[59] Of course, Jefferson was in Paris when the federal Constitution came into being, although he voted to ratify the Constitution, qualifying Jefferson as a "ratifier" if not a framer.[60] Jefferson's view was followed some twenty years later by Joseph Story's emphatic insistence to the contrary.[61]

Beginning in 1789, states supplemented the qualifications and the general election scheme set out in Article I in a number of different ways. Some states imposed durational residency requirements from the time of the first federal elections.[62] In Virginia, not only was a candidate for the House of Representatives required to have been a resident of the district he sought to represent, but each candidate was also required to be a freeholder.[63] Virginia's enumeration of eligibility requirements for congressional candidates was certainly not

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a letter from Thomas Jefferson to Joseph C. Cabell, Jan. 31, 1814, *reprinted in* 11 The Works of Thomas Jefferson 380 (P. Ford ed., 1905)).

[59] Id.

[60] Some constitutional theorists, of course, consider only the Framers' intent to be relevant. Others believe the views of the ratifiers are at least equal in importance, if not more important, than the views of the Framers. See Paul Brest, The Misconceived Quest for the Original Understanding, *in* Interpreting the Constitution: The Debate over Originial Intent 227-62 (Jack N. Rakove ed., 1990).

[61] 1 Joseph Story, Commentaries on the Constitution of the United States § 625 (3rd. ed. 1858). Story believed the prohibition on the states was *implicit* in the constitutional list of qualifications, under the "expressio unius, exclusio alterius" rule of construction:

> It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.

Id. Joseph Story's Commentaries are widely considered to be the preeminent early secondary source for interpretation of the Constitution.

[62] Among other states, Georgia and Virginia imposed durational residency requirements. 2 The Documentary History of the First Federal Elections 293-294, 453-57 (Gordon DenBoer et al. eds., 1984) [hereinafter "First Federal Elections"]. Jensen reported the following concerning the Georgia residency requirement:

> Even though the law itself contained a provision that Representatives must have been residents for three years of the districts they represented, the House apparently believed that the provision needed emphasis. On 4 February [1789], shortly before the election, it resolved, in effect, that even if a nonresident received more votes than a three-year resident, he was not eligible and was not to be commissioned a Representative by the governor.

Id. at 453. See also *Thornton*, 115 S. Ct. at 1903-04 & n.31 (discussing early residency requirements).

[63] 2 First Federal Elections, supra note 62, at 294.

unknown to the Framers. In the election of 1789, James Madison was a successful candidate for the House of Representatives from one of the ten districts, narrowly defeating James Monroe. There is no indication that Madison objected to Virginia's presumed authority to impose its own restrictions on candidates for Congress. In fact, in a letter to Madison, Edward Carrington pointed out that, in his view at least, the district residency requirement "may exceed the powers of the Assembly," but that his view was in the distinct minority because "both Federalists as well as Anti-Federalists at least professed to 'think it right'."[64]

Other states conducted at-large elections, even after Congress passed a statute requiring that Representatives be selected by district.[65] Madison himself seemed to think that states ought to experiment with this issue. In a letter to Jefferson on October 8, 1788, he wrote:

> A law has also passed [in Pennsylvania] providing for the election of members for the House of Representatives and of Electors of the President. The act proposes that every citizen throughout the state shall vote for the whole number of members allotted to the state. This mode of election will confine the choice to characters of general notoriety, and so far be favorable to merit. It is however liable to some popular objections urged against the tendency of the new system. In Virginia, I am inclined to think the state will be divided into as many districts as there are to be members. In other states, as in Connecticut, the Pennsylvania example will probably be followed; and in others again a middle course be taken . . . . *It is perhaps to be desired that various modes should be tried, as by that means only the best mode can be ascertained.*[66]

[64] Letter from Edward Carrington to James Madison (Nov. 10, 1788), *reprinted in* 2 First Federal Elections, supra note 62, at 367, *quoted in Thornton*, 115 S. Ct. at 1904.

[65] Act of June 25, 1842, 5 Stat. 491. After the enactment of the first law requiring congressional elections to be conducted by district, four states ignored the law and elected members to the twenty-eighth congress on an at-large basis. The delegates from New Hampshire, Georgia, Mississippi, and Missouri were seated even though their states had willfully disobeyed the new law. See Rowell, Digest of Contested Election Cases, supra note 53, at 117-20. Also, notably, the state of Kansas elected its Representatives on an at-large basis for the forty-eighth Congress. See 15 Cong. Rec. 3296 (April 23, 1884) (speech of Mr. Elliot). That election resulted in a contest in Congress that directly implicated the Qualifications Clauses. See infra Part III. This aspect of the election was not questioned by the Congress.

[66] Letter from James Madison to Thomas Jefferson (October 8, 1788), *reprinted in* 1 First

The early Congress, at least, thought that district residency requirements implicated the Qualifications Clauses, and members were divided on the issue of whether states could impose them notwithstanding the Qualifications Clauses.[67]

Historically, most states also demanded that candidates be qualified voters under state law. Among other states, North Carolina, South Carolina, and Virginia have long imposed such a requirement.[68] From the earliest colonial laws and charters, eligibility to vote was a minimum requirement for eligibility to hold office.[69] Today, most states still require that electors be state residents, although the length of the residency period varies. One historian, at least, has suggested that states behaved as though there were no constitutional restriction on additional qualifications: "In effect, the qualifications (beyond age and residency), nomination, and election of all fcderal officers except the Supreme Court were outside the control of the national government, and explicitly under the control of state governments."[70] In fact, the dissent in *Thornton* viewed this history of state practice as refuting the majority's position "that the Qualifications Clauses were generally understood to include an unstated exclusivity provision."[71]

One problem with the historical picture remains. The Articles of Confederation contained a provision for term limits,[72] which were considered but rejected by the Framers of the new Constitution for all members of both Houses.[73] The majority in *Thornton* pointed out that at the time of the first federal elections, many states imposed term limits on state officers, but they did not attempt to impose them upon their first representatives in Congress.[74] The significance?

Federal Elections, supra note 62, at 302-03 (emphasis added).

[67] See Barney v. McCreery (1807), in Clarke & Hall, Contested Elections, supra note 52, at 167. The *McCreery* case is discussed in more detail infra Part V.

[68] See, e.g., N.C. Const. of 1868, art. VI, §§ 4, 5 (superseded), *reprinted in* 5 Federal and State Constitutions 2815 (Francis N. Thorpe ed. 1909); S.C. Const. of 1868, art. VIII, § 7 (superseded), *reprinted in* 6 id. at 3298; Va. Const. of 1870, art. III, § 2 (superseded), *reprinted in* 7 id. at 3876.

[69] See Frank Hayden Miller, Legal Qualifications for Office in America, 1619-1899, *reprinted in* 1 Annual Report of the American Historical Association 91 (1899).

[70] Donald S. Lutz, The Origins of American Constitutionalism 162 (1988).

[71] *Thornton*, 115 S. Ct. at 1908 (Thomas, J., dissenting).

[72] See 2 The Debate on the Constitution, supra note 46, at 926-27.

[73] See *Thornton*, 115 S. Ct. at 1865 n.37 (citing 1 Farrand, supra note 27, at 20).

[74] *Thornton*, 115 S. Ct. at 1866.

According to the majority, although it did not need to look to state practice in order to reach its conclusion, early state practice nonetheless supported the majority's conclusion of a "general understanding that the qualifications in the Constitution were unalterable by the States."[75]

In reality, though, the evidence might reveal only a state's belief that term limits for its federal representatives were a bad idea politically, because it might disadvantage that state if term limits were not uniformly imposed by other states. In 1995, Arkansas and fourteen other states thought differently, or at least determined that they would impose term limits even if it meant putting themselves at some political disadvantage. The absence of a single state law imposing term limits in the early history of the federation, as historical evidence, is far from conclusive that the ratifiers thought of term limits as a substantive qualification which they could not add. More importantly, such evidence is even further removed from the conclusion that, therefore, states cannot add *any* substantive qualifications at all.

The *Thornton* petitioners' Tenth Amendment argument met with a similar fate. Because the majority found no compelling statement in the text of the Constitution granting states the power to add qualifications, the majority would not be compelled by the Tenth Amendment to consider that authority reserved to the states: "In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist."[76] On this issue, the majority did not look beyond the text of the Constitution itself, although had it found any persuasive statement from the Framers or in the ratification debates that states did not have authority to add qualifications, presumably it would have used this evidence for additional support. Curiously, for the majority, the text of the Constitution was sufficient to answer the question with respect to the Tenth Amendment, but not, in the first instance, on the question of the original understanding of the Qualifications Clauses.[77]

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[75] Id. (citation omitted).

[76] Id. at 1856.

[77] The dissent in *Thornton* takes lengthy issue with the majority's view of the Tenth Amendment. See 115 S. Ct. at 1875-85 (Thomas, J., dissenting).

We now revisit the question posed earlier concerning the proper significance to attach to behavior, as opposed to other, more direct evidence of original intent. Do we credit this state behavior as an appropriate understanding and interpretation of the Constitution? If so, then it is the best evidence we have that contemporaries understood that states could add their own qualifications to (but not alter) the minimum qualifications in Article I, §§ 2 and 3. What if, however, the immediate actions taken by the states to add their own qualifications were boldly in defiance of what they understood the Constitution to forbid? Then, of course, we cannot credit the behavior of the states as supporting a particular interpretation of what these constitutional provisions were intended to mean, and perhaps like Luther at Worms, we cannot let the *de facto* become the *de jure*.[78]

The answer to the historical question appears to be that, because the additional qualifications added by the early states generated no critical comment, we have to assume either that the state practices were consistent with the general understanding of the Constitution, or that the issue was of so little importance that none objected.[79] Thomas Jefferson's letter to Joseph Cabell in 1814 appears to be the earliest mention of the subject. Jefferson's statement—that the federal Constitution does not "prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for"—is startling if for no other reason than that he anticipated how states would behave for the next 200 years.[80] Jefferson, I think, shows us how odd it would have seemed to his contemporaries that states would retain the ability to determine which persons within its borders could vote in federal elections but could not use those same exclusions for the candidates themselves. It would have been unthinkable to the states that they could exclude from voting convicted felons, paupers, free persons of color and

[78] The reference is, of course, to Martin Luther's criticisms of papal practice in the period commonly referred to as the Protestant Reformation. See James M. Kittelson, Luther the Reformer 157-61 (1986).

[79] One exception appears to be an editor's note to Blackstone's Commentaries in 1803: "[T]hese provisions [acknowledging some state practices], as they require qualifications which the constitution does not, may possibly be found to be nugatory." 1 Blackstone's Commentaries, App. at 213 (St. George Tucker ed., 1803). That statement is speculative at best, and it is hardly an emphatic criticism of any state's practice.

[80] 2 Founders' Constitution, supra note 58, at 81.

women, but could not have excluded those same persons from running for office. Yet that is today the received view of the meaning of the Qualifications Clauses, or at least the view that was sanctioned by five votes from the justices of the Supreme Court.

With the exception of a few contested election cases in Congress (in which we see the various Congresses unable definitively to lay to rest the question), we see a strange silence in the popular press and in the writings of our more important statesmen, both preceding and following Jefferson's letter. When the subject arose again, most notably in Joseph Story's 1833 treatise on constitutional law, but also again in Congress after the Civil War, it became further removed from the ratifying conventions. We also begin to see more clearly the motivations of the participants on both sides of the debate at various periods in our history, keeping the question alive to serve a particular purpose or interest.

III. THE QUALIFICATIONS DEBATE IN CONGRESS BEFORE AND AFTER THE CIVIL WAR

The Framers and ratifiers, we have seen, were silent on the question of the significance of the Qualifications Clauses with respect to the states, and the suggestion is that the silence may be attributed to a lack of concern in the founding period with what states might do. But exactly this issue came to be of interest to some members of Congress on several occasions over the next 100 years. It is instructive to see how these later actors viewed the issue. We sometimes forget that judges are not the only public officials who interpret the Constitution—the early Congress did so routinely, and has continued to do so.[81] Each house of Congress is authorized by the Constitution to judge "the Elections, Returns and Qualifications of its own Members."[82] The various Congresses have determined the

[81] See generally Paul Brest, Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine, 21 Ga. L. Rev. 57 (1986) (arguing that Congress lacks the authority to counter constitutional interpretations by the judiciary); David P. Currie, The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791, 2 U. Chi. L. Sch. Roundtable 161, 162 (1995) (discussing the "array of structural constitutional issues that confronted the [first] Congress when it began to set up the government of the United States").

[82] U.S. Const. art. I, § 5, cl. 1.

outcome of innumerable contested elections.[83] Mostly the questions involved alleged irregularities in the ballot process in the states. In each case, Congress was required to resolve the question of who was the duly-elected member when two or more persons presented themselves at the opening session, claiming entitlement to the same seat.[84]

Occasionally, however, the question arose in a form closely resembling the historical question posed in *Thornton*. The early decisions of the House Committee on Elections, with only a few exceptions, decided all contested elections in a manner consistent with the view that states could add qualifications.

A. Early Contested Elections

The early decisions of the House Committee on Elections recognized that the

> right to judge, and the rule of decision, are distinct things; and, while the right to judge may be in one body, the prescription of the rule may be in another. The rule, in such cases as these, must be a State regulation, when it relates to points on which the States have exclusive legislation.[85]

The first recorded contested election case in Congress, *Ramsay v. Smith*, involved whether a member sent from South Carolina qualified as an inhabitant of that State and a citizen of the United States.[86] In 1789, the Committee on Elections determined that both

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[83] 1 Marie Garber, Contested Elections and Recounts: Issues and Options in Resolving Disputed Federal Elections, at iii (1990) (asserting that as of 1990 there have been over five hundred contested House elections in the history of the U.S. Congress); see also Faye Fiore, Feinstein Sworn In as Rival Charges Fraud Politics, L.A. Times, Jan. 5, 1995, at A3 (the U.S. Senate has considered "innumerable contested elections in its history.").

[84] E.g., Loyall v. Newton (1830), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 520-600; Easton v. Scott (1816), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 272-86; Jackson v. Wayne (1791), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 47-68. Other decisions reflect a strict adherence to other disqualifications under the federal Constitution. See, e.g., In re Van Ness (1802), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 521 ("The acceptance by a member of any Office under the United States, after he has been elected to, and taken his seat in Congress, operates as a forfeiture of his seat.").

[85] Spaulding v. Mead (1805), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 160.

[86] Ramsay v. Smith (1789), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 23-37.

questions were to be resolved by the law of South Carolina.[87] Similarly, *Barney v. McCreery*,[88] perhaps the best known of the contested election cases, confronted the issue of whether states could impose additional qualifications. The question was resolved not on the ground that Maryland's additional qualification was unconstitutional, but on the ground that McCreery had, in fact, complied with that state law.[89]

On three other occasions, both later in the nineteenth century, the House again faced the question whether states could add qualifications.[90] In those cases, contestants challenged the elections of representatives who also held a state office at the time of election, in violation of state law. Although in all of these cases the delegates retained their seats notwithstanding the state law that would have disqualified them, dissenters in all of these cases argued that such additional qualifications were permissible to the States: "To hold otherwise would be to hold invalid provisions in the constitutions of nearly all the States . . . some of which were adopted before the Constitution itself."[91]

To be sure, each time the question was resolved in favor of ignoring additional state qualifications. But dissenters were always present. One of the more important cases, which escaped the notice of the Court in *Thornton*, is a post-Civil War controversy, *Wood v. Peters*.[92] *Wood v. Peters* failed to lay the question to rest in any definitive way, but its importance lies in the fact that, prior to the

[87] Id. at 27-29, 32.

[88] Barney v. McCreery (1807), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 167.

[89] Id. at 171.

[90] See Turney v. Marshall; Fouke v. Trumbull (1855) *reprinted in* Rowell, Digest of Contested Election Cases, supra note 53, at 141-42; Wood v. Peters, *reprinted in* Rowell, Digest of Contested Election Cases, supra note 53, at 401-02 and William H. Mobley, Digest of Contested-Election Cases Arising in the Forty-Eighth, Forty-Ninth and Fiftieth Congresses 79-137 (1889) [hereinafter "Mobley, Digest of Contested-Election Cases"].

[91] Wood v. Peters, *reprinted in* Rowell, Digest of Contested Election Cases, supra note 53, at 401 (summarizing minority report of Mr. Bennett). "Resign to run" laws like those at issue in these two cases are now considered within the states' authority to regulate election to federal office. E.g., Joyner v. Mofford, 706 F.2d 1523, 1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983). Interestingly, although the earlier Congresses thought "resign to run" laws should be analyzed under the question whether they were impermissible additional qualifications imposed by the states, courts in the twentieth century have not analyzed the question in this manner. See, e.g., id.

[92] Wood v. Peters, *reprinted in* Mobley, Digest of Contested-Elections Cases, supra note 90, at 79-137.

Thornton case, it was the most significant recent public debate on this issue, and it proved that, at least from Congress' perspective, the question whether states could impose additional qualifications had not been resolved through the earlier contested election cases.

B. *The Contested Election Case of* Wood v. Peters

Wood v. Peters involved the November 7, 1882 general election in Kansas.[93] S.R. Peters, a sitting state court judge in Kansas, received the highest number of votes of the four Representatives elected at-large by Kansas voters. S.N. Wood came in fifth, and thus was narrowly denied by popular vote a seat in the House. Wood thereafter petitioned Congress, claiming that he was entitled to a seat in the House. Wood claimed Peters was ineligible to be seated in Congress as a duly-elected Representative from Kansas because Peters had been a sitting elected judge of the district court for the Ninth District of Kansas while he campaigned for federal office.[94] This situation, Wood argued, violated Art. 3, § 13 of the Kansas Constitution: "such justice or judge shall receive no fee or perquisites nor hold any office of profit or trust under the authority of the State or the United States during the term of office for which said justices or judges shall be elected . . . ."[95] The Committee on Elections agreed that Peters fell under this prohibition, and that if states had the power to add qualifications, then he was ineligible for his seat.[96]

The Committee's task was to recommend a resolution of the case to the full House for its vote on the matter. The Committee submitted two reports: a majority report, siding with Peters, and a minority report, siding with Wood. The three-page majority report concluded: "The question involved in this contest is not a new one. It has been too well settled to require further elaboration, and the committee will content themselves with a reference to a few of the authorities on the subject."[97] The chief authority cited by the majority was, of course, Joseph Story. The other authorities

[93] Id. at 79-81.
[94] Id. at 79.
[95] Id.
[96] Id. at 80.
[97] Id.

included majority reports from the Committee on Elections concerning two previous contested election cases in Congress, *Turney v. Marshall* and *Fouke v. Trumbull*, both of which relied almost exclusively on Joseph Story's 1833 view of the Qualifications Clauses.[98]

The minority report of the committee was a valiant but unsuccessful effort. In comparison with the majority report of three pages, the minority report spanned 55 printed pages.[99] It argued that not only did states currently have the power to add additional qualifications, states had always exercised that power, in strange and wonderful ways.[100] Moreover, the minority report argued, the Qualifications Clauses could not possibly mean that anyone possessing those three qualifications was entitled to serve in Congress—a dangerous doctrine to those in Congress at the time. The report claimed that if the majority's rule were correct "Susan B. Anthony may yet have [a] seat[] in this body."[101] Not only Susan B. Anthony, the report noted, but a certain "Mrs. Stanton" (presumably Elizabeth Cady Stanton) also qualified for a seat because she met the minimum requirements in the Constitution: she was at least 25 years old and had been a citizen for seven years as well as an inhabitant of the State of New York.[102]

Representative Risden Tyler Bennett of North Carolina, the author of the minority report, catalogued the then-known state election laws that would have been called into question if the Qualifications Clauses were exclusive and could not be added to by the states.[103] If space permitted, it would be instructive to reprint the report in full to appreciate their variety and number. In all, Mr. Bennett listed 39 states that since the beginning of the Republic had collectively violated the Qualifications Clauses numerous times, according to the view of the majority's report. He went on to note that the

[98] Turney v. Marshall, Fouke v. Trumbull (1855), *reprinted in* Rowell, Digest of Contested Election Cases, supra note 53, at 141-42.

[99] The minority report is reprinted in full in Mobley, Digest of Contested-Election Cases, supra note 90, at 82-136.

[100] Id. at 88-99.

[101] Id. at 83.

[102] Id.

[103] Id. at 88-99.

Qualifications Clauses, if exclusive with respect to the states, had been violated "a hundred times since the War."[104]

Even Mr. Bennett's list was not exhaustive. He failed to note, among others, a California provision that prohibited anyone who had participated in a duel from holding any public office.[105] Mr. Bennett also could have noted, but did not, that many of these provisions imposing substantive additional qualifications for office were present in the new constitutions of the former Confederate states.[106] The constitutions of those states had to be approved by Congress prior to readmission to the union.[107] Presumably, these additional qualifications did not cause alarm to the post-Civil War Congress because that body approved these constitutions without comment on the additional qualifications on candidacy for Congress contained in some of those documents.[108]

The controversy came before the full House for its vote on April 23, 1884.[109] Mr. Wood addressed the body for one and one-half hours. His remarks were not recorded, but he was followed by Mr. Peters, whose remarks were recorded because he was already a seated member of the 48th Congress.[110] Committee members also addressed the full House. A proposal to substitute the minority report for the majority report was defeated by a vote of 106 to 20. No vote was ordered on the majority's resolution, which was simply to confirm that Representative Peters properly held his seat.[111] Only nine members voted in favor of a roll call vote. The resolution was then adopted, although we do not know the breakdown of the vote.[112]

The minority report is remarkable for the depth of feeling on the historical issue. Mr. Bennett urged that Justice Story, writing in 1833, had misconceived "the facts of history":

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[104] Mobley, Digest of Contested-Election Cases, supra note 90, at 83.

[105] Cal. Const. of 1879, Art. XX, § 2 (repealed 1970) (no one who fights, sends or accepts a challenge to fight or assist in a duel may hold any public office).

[106] See, e.g., supra note 68.

[107] Act of March 2, 1867, 14 Stat. 428.

[108] See Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding, 2 Stan. L. Rev. 5, 126 (1949).

[109] See 15 Cong. Rec. 3296 (April 23, 1884).

[110] Id. at 3296-303.

[111] Id. at 3303.

[112] Id.

> [Joseph Story] answered for his day and time, and while his authority on certain questions is entitled to weight, it is undeniable that his reputation as an authoritative writer of text-books has waned in every law college and court in the land. The criticism that he has sought to legislate rather than to advise is universally made, and the Supreme Court of the United States have repeatedly negatived his theories respecting the centralized power of the Federal Government and its paramount authority over the sovereignty of the States. Judge Story was educated in the strictest school of Federalism, and all his views bear that impress.[113]

Bennett's view of Story's motivations is particularly intriguing for someone with a recall of the Civil War. The Civil War was, after all, a conflict about federalism. Bennett answered the precedent of the two prior contested election cases in Congress, *Turney v. Marshall* and *Fouke v. Trumbull*, by noting that those debates once again pitted Federalists against Democrats.[114] For the same reason that Story's opinion should be discounted, Bennett urged that these two cases should not control the House's resolution of the matter. Both cases reflected political battles over the subject of federalism, and according to Bennett, political views of federalism should not change the meaning of Article I.

How did the State of Kansas feel about the matter? The officers of the state sent a memorial to Congress asking it not to seat Mr. Peters because his election had taken place in violation of state law.[115] But how could that happen? Did not the state control who could appear on its election ballots, and could therefore keep ineligible candidates off the ballot by operation of state law? In fact, the answer is no. In 1882 in Kansas, as in many other states, all elections were conducted by write-in voting.[116] Printed ballots were

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[113] Mobley, Digest of Contested-Election Cases, supra note 90, at 100-01.

[114] Id. at 111-16.

[115] Id. at 103.

[116] Until the late 1800's, all ballots cast in this country were write-in ballots; the system of state-prepared ballots was introduced no earlier than 1888. Prior to that time, voters composed their own ballots or used preprinted tickets prepared by political parties. See Burson v. Freeman, 504 U.S. 191 (1992); Burdick v. Takushi, 112 S. Ct. 2059, 2070 (1992) (Kennedy, J., dissenting); see also L.E. Fredman, The Australian Ballot: The Story of an American Reform at ix (1968) (discussing how states adopted the Austrailian ballot system using government printed and distributed election ballots). After the institution of state-sponsored, preprinted ballots became common-place, and because states restrict the number of candidates who can be listed on such ballots, it has always been the case that

a thing of the future. The voters of Kansas wrote in the name of Judge Peters in sufficient numbers to make him the top vote-getter, due no doubt to the name recognition held by the previously elected state court judge. The voters were either oblivious to or disregarded the Kansas Constitution's prohibition on their actions.[117]

Congress was probably reluctant to unseat a person who had received such a large majority of the popular vote in his home state, and the resolution passed by the full House most likely reflected that determination. Despite all of the argument about what the original meaning of the Qualifications Clauses must have been (and this argument was really only a debate about whether Joseph Story was right or wrong in 1833), the resolution passed by the House was nothing more than a statement that Mr. Peters was entitled to his seat. It was yet another instance of a weighty question left unanswered for the sake of political expediency, and most likely divided along partisan lines to seat the political candidate of the majority party.

The interest of Kansas is readily apparent, but what accounts for the interest of Mr. Bennett in the matter? Why did Mr. Bennett exert such a substantial effort to prove his case? Mr. Bennett compiled a list of scores of laws that had been in effect both historically and in his own time that would have been invalid under Story's view of Article I. In all probability, the reason that the contest over *Wood v. Peters* went unresolved in Congress for nearly two years after the Kansas election was due to Mr. Bennett's efforts to prove his case, holding up submission of the Committee's report to the full House. What was in the issue for Mr. Bennett? We start with his own words:

> This is not a contest between Mr. Wood and Mr. Peters merely as men. They are nothing in this issue; it is an issue of principle of the highest importance. It is the sovereign State of Kansas, through her governor,

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some citizens cannot vote for the candidate of their choice unless they exercise a write-in option.

[117] Kansas voters in 1882 probably knew about the controversy because of state newspaper coverage while Peters was yet a candidate. See 15 Cong. Rec. 3299 (April 23, 1884) (noting that the issue was discussed prior to the election in certain Kansas newspapers). On the other hand, there was a real question concerning the extent to which the voters were aware that they were electing someone who was ineligible under the Kansas constitution. See Mobley, Digest of Contested-Elections Cases, supra note 90, at 122 (report of Mr. Bennett).

> State officers, and legislature, protesting that the House shall not nullify her constitution and begging that the wisdom of her fundamental law, in the attempt to preserve the purity of her judiciary, shall not be permitted to "cry aloud in the streets and no man hear it." For this reason, your minority of the committee have taken pains at great length to place their views on the records of this House.[118]

It was a states' rights issue: Mr. Bennett's interest in the states' ability to add additional qualifications, viewed as a right of each state against the federal government, was surely informed by his recent experience. Enlisting as a private in the Confederate Army following his graduation from the Lebanon Law School in Tennessee, he left the service of the Confederacy a colonel, having been wounded during the war on three occasions.[119] And as a representative of North Carolina, no doubt much of his constituency shared similar, though defeated, views on states' rights. In the context of Southerners siding with Midwesterners, we see the issue of loyalty to the restored Union raised during the debate in 1884 on the issue of the meaning of Article I.[120]

It was also a separation of powers issue. Mr. Bennett was himself an elected judge of the superior court in North Carolina from 1880 until he resigned in 1882 to run for Congress.[121] He resigned not merely to comply with North Carolina's version of the Kansas constitutional prohibition,[122] but also because the sentiment of the North Carolina bar compelled him. Mr. Bennett reprinted in his report a curious polemic from the North Carolina Daily Sentinel from April 19, 1869, nearly 15 years earlier. The polemic was titled, "A Solemn Protest of the Bar of North Carolina Against Judicial Interference in Political Affairs":

> The undersigned, present or former members of the bar of North Carolina, have witnessed the late demonstrations of political partisanship by the judges of the supreme court of the State with profound regret and

[118] Mobley, Digest of Contested-Election Cases, supra note 90, at 134-35 (report of Mr. Bennett).

[119] Biographical Directory of the United States Congress 1774-1989, Bicentennial Edition 609-10 (1989).

[120] See 15 Cong. Rec. 3300-02 (April 23, 1884).

[121] Biographical Directory of the United States Congress, supra note 119, at 610.

[122] Under former N.C. Const. of 1868, art. XIV, §7 (amended 1875) dual office-holding was prohibited. See generally Doyle v. Aldermen of Raleigh, 89 N.C. 147, 149 (1883) (explaining that the intent of this section was to prevent double office-holding).

> unfeigned alarm for the purity of the future administration of the laws of the land.
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> Active and open participation in the strife of political contests by any judge of the State, so far as we recollect . . . was unknown to the people until the late exhibition. . . . [N]ever before have we seen the judges of the Supreme Court, singly or en masse, moved from that becoming propriety . . . . From the unerring lessons of the past, we are assured that a judge who openly and publicly displays his political party zeal, renders himself unfit. . . . [A]ll experience teaches us that a partisan judge can not be safely trusted to settle the great principles of a political constitution while he reads and studies the book of its laws under the banner of a party.[123]

The statement was signed by 125 persons, all currently or previously members of the North Carolina bar, including Bennett himself. According to Bennett, the issue that sparked the controversy—a sitting state supreme court justice who spoke out in favor of the Republican candidate for President in 1868[124]—was a humiliating spectacle. Although beyond the scope of this paper, the issue in North Carolina in 1869 involved not only differing views on whether judges ought to be elected or appointed, it was also complicated by the charged political atmosphere engendered by Reconstruction in the aftermath of the Civil War. Representative Bennett's fervent support of the Kansas constitutional prohibition, then, originated not only in a separation of powers concept, but also, more importantly, in his view that a state should have the right to address that problem in any way it saw fit, including restricting eligibility for Congress to only those candidates who, like himself, had complied with North Carolina law. The *Wood v. Peters* debate took place in the midst of the constitutional upheaval engendered by the Civil War. The suspicion of states' rights created by the conflict—a conflict that fundamentally changed our view of constitutionalism—left little sympathy for arguments concerning a state's power over its representatives in a federal Congress.

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[123] Mobley, Digest of Contested-Election Cases, supra note 90, at 135-36 (reprinted in report of Mr. Bennett).

[124] See J. G. de Roulhac Hamilton, Reconstruction in North Carolina 349, 361, 390 (1914). Hamilton linked the statement by the North Carolina bar as a reaction to Chief Justice Pearson's public endorsement of Grant and the Republican Party. Id at 390.

IV. THE DEBATE IN THE TWENTIETH CENTURY: THE SUPREME COURT'S HISTORICAL MISTAKE IN *POWELL V. MCCORMACK* AND TEXT-BASED THEORIES OF CONSTITUTIONAL INTERPRETATION

The *Thornton* case was not the Supreme Court's first attempt to understand the Qualifications Clauses, and even its first attempt, in *Powell v. McCormack*,[125] did not occur until 1969. The issue in *Powell*, however, was distinctly different from the issue in *Thornton*. Amid allegations that Adam Clayton Powell, elected to serve in Congress from a district in the State of New York, had engaged in serious misconduct during a previous term in Congress, the House voted to exclude Powell from membership and declared his seat vacant.[126] Powell filed suit, alleging that Congress exceeded its powers under Article I. The Court held that Congress, when judging the qualifications of its members under the same grant of constitutional authority as that exercised by Congress in cases of contested elections, could not exclude a member on a ground other than that the member had not met the three qualifications set out in the Qualifications Clauses.[127] The Court "exhaustively" examined the history of the Qualifications Clauses, concluding that Congress had no power to impose additional qualifications when it sat in judgment of the qualifications of its members.

The *Powell* Court went on to say, however, that *states* also could not add qualifications, although that issue had not been raised and was unnecessary to decide the case.[128] The Court's opinion is curiously silent on the fact that there were a number of additional state qualifications that all Representatives from the State of New York at that time were required to meet.[129] Instead, the Supreme

[125] 395 U.S. 486 (1969).

[126] Id. at 489-93.

[127] Id. at 550.

[128] Id. at 541-47.

[129] The New York State election laws for congressional candidates in effect in 1966 included registered voter requirements including durational and county residency requirements; preclusion of candidates convicted of bribery, any felony, or other infamous crime; preclusion of candidates adjudged mentally incompetent; English-language literacy requirements; political party enrollment; nominating petitions bearing a certain number of signatures; filing of statements accepting the nomination and acknowledging fulfillment of statutory requirements; and state citizenship requirements. See N.Y. Elec. Law §§ 136, 137, 139, 147, 152 (consol. 1964).

Court recognized that Powell had been "duly elected,"[130] which, ironically, meant Powell had been duly elected according to substantive, state-imposed qualifications that are now presumptively unconstitutional.

The majority in *Thornton* delicately reconsidered that view, and although it affirmed the dicta in the *Powell* case, it did so more carefully, correcting certain historical mistakes into which the *Powell* court had blundered. Chief among the historical inaccuracies was the *Powell* court's analysis of an early contested election case, *Barney v. McCreery*.[131] The *McCreery* case was an election dispute from the State of Maryland in 1807. A challenger, disappointed in the previous election, claimed that McCreery had not met the requirements of a state law that he be a resident of the City of Baltimore, and therefore he should not be seated in Congress despite his victory at the polls.[132] That state law required that one of the two district representatives from Maryland be a resident of the City of Baltimore, and that the other be a resident of the adjacent county. A majority of the Committee on Elections, however, believed that the Maryland law was invalid because it was "repugnant to the constitution, and therefore void."[133] The *Powell* court failed to recognize, however, that the full House rejected the form of the Committee's resolution and instead approved a competing resolution that did not denounce the Maryland law as unconstitutional. In fact, the House voted overwhelmingly to seat McCreery without a report, after it went to considerable lengths to gather evidence on whether McCreery had complied with the very state law at issue.[134] The implication, of course, is that at least some members of the full House—if not a majority—thought that the Maryland law was constitutional.[135]

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[130] *Powell*, 395 U.S. at 489.

[131] Barney v. McCreery (1807), *reprinted in* Clarke & Hall, Contested Elections, supra note 52, at 167.

[132] Id. at 167-68.

[133] Id. at 167.

[134] See id. at 217-19; see also 17 Annals of Congress 882-86, 911-15 (1807), *reprinted in* 2 The Founders' Constitution, supra note 58, at 77-81 (House debate on the decision of the Committee on Elections in *McCreery*).

[135] Another author writing recently on the same subject failed to recognize the significance of the efforts by the House, before it voted to seat McCreery, to determine whether, in fact, McCreery had complied with the state law. See Sean R. Sullivan, Comment, A Term Limit By Any Other Name?: The Constitutionality of State-Enacted Ballot Access Restrictions on

At the oral argument in *Thornton*, the Chief Justice questioned whether the *Powell* Court had correctly interpreted history, perhaps implying that they might be hard-pressed to come up with a more accurate interpretation this time:

Mr. Chief Justice Rehnquist:	Well, how about the *McCreery* episode, where now it appeared apparently to the *Powell* court that the committee report had the same validity as another committee report which was adopted by the full—now it appears this report was not adopted by the House. Doesn't that cast some doubt on the historical abilities of the *Powell* court?
Attorney General Days:	Well, Mr. Chief Justice, that's one piece . . . .
Mr. Chief Justice Rehnquist:	Well, falsus in uno, falsus in omnibus.

(Laughter)

Attorney General Days:	Well, I—Mr. Chief Justice, I would be the last person to suggest that this Court was in error when it reviewed the history in *Powell v. McCormack*.
Mr. Chief Justice Rehnquist:	We're all in big trouble if that maxim is going to be applied, I must say.[136]

The historical mistake in *Powell* concerning the *McCreery* case was critical because it obscured for the Court the shift in the view of federalism that took place after the Civil War. In particular, the

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Incumbent Members of Congress, 56 U. Pitt. L. Rev. 845, 855 (1995). I am not aware which historians have "generally agreed that the committee report strongly influenced the final decision by the House," as the author claimed, or even how that influence supports the author's conclusion. Id. Any influence of the committee report, as best we can tell, could have been to inspire the full House, in revolt, to seat McCreery *because* he had first complied with the additional state qualification at issue.

[136] Tr. of Oral Arg. in U.S. Term Limits v. Thornton, O.T. 1994, Nos. 93-1456 and No. 93-1828, at 62.

debate in *Wood v. Peters* in 1884, compared with the debate in the *McCreery* case of 1807, shows explicitly a changing understanding of the Qualifications Clauses after the Civil War. A substantial number of members of Congress at the turn of the nineteenth century thought congressional candidates ought to comply with state laws that imposed additional qualifications. By contrast, after the Civil War, only Mr. Bennett and a few other supporters in Congress held this view. If we needed additional evidence that the terms of the debate had changed, this is it.

Legal debate and historical understanding, as the title of this Essay suggests, have an uneasy relationship, and none more uneasy than in the context of originalist interpretations of the Constitution. This is not to suggest that originalism was the wrong approach in this case, but it is instructive to consider two alternative methodologies. One is an approach to constitutional interpretation that also purports to be derived from history—the theory of "constitutional moments" proposed by Bruce Ackerman.[137] The *Thornton* decision could be consistent with Ackerman's theory of "constitutional moments," for example, by reasoning that the post-Civil War debate in Congress in the case of *Wood v. Peters* is evidence of an implied amendment of the Qualifications Clauses brought about by the aftermath of the Civil War. It could be argued that the Reconstruction Amendments, which were events of extraordinary constitutional participation and deliberation, resulted in a transformation in our understanding and beliefs about the Qualifications Clauses which should be honored, regardless of the original state practice.[138] *Wood v. Peters*, then, could be viewed as evidence of constitutional moment.

A second option, to resolve the *Thornton* case in a way not grounded in originalism, would be to hold that the de facto state practices of adding qualifications to office deserve some constitutional standing, unless a particular qualification for office violates the Equal Protection Clause or some other provision of the Constitution. On occasion, the Supreme Court has used the fact of a long-standing state practice to uphold that practice against a

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[137] Ackerman, supra note 21, passim; see generally McConnell, The Forgotten Constitutional Moment, 11 Const. Comment. 115 (1994) (describing the post-Reconstruction era as a "forgotten" constitutional moment meeting all criteria of the theory).

[138] The Supreme Court has itself noted that the Civil War significantly changed our understanding of federal-state relations. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976).

constitutional challenge, without inquiring too deeply into questions of original understanding.[139] In *Thornton*, no long-standing state practice of state-imposed term limitations existed. However, other state substantive restrictions on candidacy have existed for most of our history. Had the Court considered the Qualifications Clauses for the first time in the context of a state law that excluded a convicted felon, for example, it could have adopted that long history of state practice as evidence *both* of the ratifiers' original understanding of the Qualifications Clauses *and* as a factor weighing heavily in favor of accepting the practice itself as constitutional.

Because the Qualifications Clauses seem to be the kind of constitutional provisions not designed to evolve over time, however, the appropriate point of reference should be the framing of the Constitution. Originalism, therefore, is an adequate method by which the Qualifications Clauses may be interpreted, so long as historical analysis assumes its rightful place. The silence of the founders on a question posed over 200 years later is significant. This time, Justice Stevens should have listened to the dog that did not bark.[140] In this case, originalism cannot arrive at an answer without crediting the history of state behavior as an appropriate understanding by the states of what the Constitution permitted them to do.

Originalist interpretations that are unable to create consensus among the Court on a single question of history leave much room for critics to view the entire process as "falsus in uno, falsus in omnibus." The dissent in *Thornton*, construing the appropriate historical question to be the same as that posed by the majority, reached the opposite conclusion. Where the dissent falls short, however, is its failure to recognize that the terms of the debate had changed since the point of ratification. This failure, I believe, was the critical difference in the outcome of the case, and for this reason the dissenters were unable to persuade any one of the majority to change his or her vote.

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[139] In Establishment Clause cases, for example, the Court has sometimes upheld long-standing state religious practices against constitutional challenges unless considerations of policy counsel against it. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-92 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 676-80 (1970).

[140] Justice Stevens is fond of the Sherlock Holmes saga of the dog that did not bark as a metaphor with occasional legal significance. See, e.g., Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991); Griffin v. Oceanic Contractors, 458 U.S. 564, 589 (1982).

V. CONCLUSION: CONVICTED FELONS WITH A CONSTITUTIONAL RIGHT TO RUN FOR FEDERAL OFFICE? BEYOND *U.S. TERM LIMITS V. THORNTON*

Historically, every state has imposed and continues to impose some restrictions, qualifications, or requirements on candidacy for Congress. Whether through the authority of Article I, § 4, or because the "qualifications" for Congress beyond the minimum qualifications in Sections 2 and 3 are within the ambit of the state, states significantly control candidacy for Congress. In Arkansas, for example, husbands, wives and relatives within the fourth degree of consanguinity or affinity of the Governor are ineligible to be appointed by the Governor to fill congressional vacancies, and no persons appointed by the Governor may be eligible to succeed themselves.[141] In addition, virtually every state requires that candidates for Congress qualify as "electors" (i.e., voters).[142] Most states require that electors be state residents, though the length of the required residency varies.[143] Many states require candidates in primary and general elections to present petitions with a specified number or percentage of voter signatures to qualify for access to the ballot.[144] Some states require congressional candidates in primary elections to demonstrate allegiance to (or independence from) a political party.[145] Many states prohibit candidates from running in the general election when they have lost in a primary.[146] Many states also prohibit congressional candidates from holding state office or seats on state courts or from running for two seats concurrently.[147]

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[141] Ark. Const., amend. XXIX, § 2.

[142] See, e.g., Wash. Rev. Code § 29.15.025 (West Supp. 1996).

[143] See, e.g., Del. Code Ann. tit. 15, § 4101 (1993); Idaho Code § 34-604 (1995); Minn. Stat. Ann. § 204B.06 (West Supp. 1995); N.H. Rev. Stat. Ann. § 655:2 (1986); Va. Code Ann. § 24.2-500 (Michie 1993).

[144] See, e.g., Ala. Code § 17-7-1(a)(3) (1995); Cal. Elec. Code §§ 6831 & 6838 (West Supp. 1994); Fla. Stat. Ann. § 99.096 (West Supp. 1995); Iowa Code Ann. § 43.20 (West 1991); Ky. Rev. Stat. Ann. § 118.315(2) (Michie 1993); N.Y. Elec. Law § 6-142 (McKinney Supp. 1996).

[145] See, e.g., Colo. Rev. Stat § 1-4-601(4)(a) (Supp. 1995); Del. Code Ann. tit. 15, § 3002(b) (1993); Haw. Rev. Stat. § 12-3 (1995); Iowa Code Ann. §§ 43.18 & 49.39 (West Supp. 1995); N.C. Gen. Stat. § 163-106 (1995).

[146] See, e.g., Ark. Code. Ann. § 7-7-103(f) (Michie 1993); Kan. Stat. Ann. § 25-202(d) (1992); Md. Code Ann. Elec. § 8-2 (Michie 1993); N.H. Rev. Stat. Ann. § 659:91-a (1995); S.C. Code Ann. § 7-11-210 (Law Co-op. Supp. 1995).

[147] See, e.g., Alaska Const. art. IV, § 14; Ariz. Rev. Stat. Ann. § 38-296(A) (1991); La.

Some states prohibit candidates who advocate or are members of groups seeking the violent overthrow of the government.[148] In short, since the Republic came into being, the states have continued to exercise their authority over the election process governing candidates for Congress, in fifty very different ways. According to a compilation by the Federal Election Commission, state laws governing congressional elections "are enormously complex. They vary, for example, by state, by type of election . . . by type of federal office, by type of party or candidate, and by type of criteria and procedure."[149]

Are all of these state laws governing congressional elections called into question as a result of *U.S. Term Limits v. Thornton?* Probably not. The Supreme Court has previously recognized that states have some power under Article I, § 4, the Times, Places and Manner Clause, to regulate congressional candidacy, particularly where an exclusion from candidacy is only temporary or can be remedied by the candidate. In *Storer v. Brown*,[150] for example, the Court upheld a California statute which provided that candidates could not file for office as independents if they had been registered as a member of a political party within one year preceding the primary election. Prospective candidates for Congress challenged the state law on constitutional grounds, claiming that the statute added qualifications for election to Congress contrary to Article I, § 2 of the United States Constitution. The Supreme Court rejected this argument, noting that the Qualifications Clauses authorize significant limitations upon candidacy:

> In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and

Rev. Stat. Ann. § 453A (West Supp. 1995); Me. Rev. Stat. Ann. tit. 21-A, § 351 (West 1993).

[148] See, e.g., Alaska Const. art. XII, § 4; Ariz. Rev. Stat. Ann. § 16-806 (1991); Ga. Code Ann. § 21-2-7 (Michie 1993); Ill. Rev. Stat. Ch. 10, §§ 5/7-2, 5/10-1, 5/10-2 (Smith Supp. 1995); Or. Rev. Stat. § 236.030 (1991).

[149] Ballot Access Vol. 2: For Congressional Candidates (Federal Election Commission July, 1995); see also Senate Election Law Guidebook 1992, S. Doc. No. 15, 102d Cong., 2d Sess. (1992) ("A Compilation of Senate Campaign Information, Including Federal and State Laws Governing Election to the United States Senate"). Lest the author appear to have inherited the spirit of Representative Bennett, no complete historical catalogue of state laws governing qualifications for candidacy is presented here.

[150] 415 U.S. 724 (1974).

> manner of holding primary and general elections, the registration and qualifications of voters, *and the selection and qualification of candidates.*[151]

The Court upheld the state regulation of federal elections, despite its exclusionary effect, as a time, place, and manner regulation. These and similar laws have been upheld, according to the *Thornton* Court "because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position."[152]

State resign-to-run statutes have also been justified on the ground that such laws merely regulate the manner of conducting an election.[153] Viewing these laws in terms of procedural hurdles rather than substantive limitations, however, is a twentieth-century construct. In 1807 in the *McCreery* case, members of Congress debated the validity of a district residency requirement as a qualification.[154] Similarly, in the *Wood v. Peters* case in 1883, Congress debated Kansas' resign-to-run statute as though it were an additional qualification, not a time, place, or manner restriction.

The substantive/procedural distinction articulated in *Thornton* to uphold some state restrictions on candidacy, then, did not come from the Framers, or from any other historical actor prior to the twentieth century. And, oddly enough, all of the lower court decisions striking down state election laws on the basis of the Qualifications Clauses likewise did not occur until the twentieth century.[155] Yet, although the substantive/procedural distinction itself is without historical support, it probably will be applied to uphold the validity of those state election laws that do not completely exclude a particular class of candidates for office. Nonetheless, a fair number of the state election laws governing congressional candidacy, including the requirement that a candidate be a registered voter (thus excluding convicted felons), will fail the Supreme Court's substance/procedure dichotomy.

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[151] Id. at 730 (emphasis added).

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

[153] E.g., Joyner v. Mofford, 706 F.2d 1523, 1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983).

[154] See supra notes 131-35 and accompanying text.

[155] See supra note 10; see also *Thornton*, 115 S. Ct. at 1852-53 (listing the various lower courts addressing this issue).

Might the answer to the historical question have come out differently if the issue had not been term limits, but some other substantive restriction on candidacy? The case of the convicted felon, proposed hypothetically here, is particularly compelling as a model for evaluating the ratifiers' understanding of the Qualifications Clauses. Excluding a convicted felon from congressional service is clearly not a time, place or manner restriction governing candidacy. Consider the following: It has long been held that states may constitutionally exclude convicted felons from voting and therefore, presumably, from the less-protected or less-important right to run for state office.[156] Several federal statutes, in fact, disqualify convicted felons from serving in Congress,[157] but those statutes, if constitutional, apparently operate outside the restrictions of the Qualifications Clauses.

In addition, the national interest in excluding felons from running for office seems less compelling than a national interest in uniform terms of office in Congress. Excluding convicted felons from office is a long-standing state practice, but term limits are not. Term limits, moreover, look undemocratic because they prevent reelection of a candidate otherwise qualified under state law. Convicted felons, however, cannot vote, so their participation in the democratic process may, constitutionally, be limited. Jefferson considered it unthinkable that states did not have the power to exclude convicted criminals. Yet, despite all of these considerations, because of the majority's ruling that the Qualifications Clauses permit no additional substantive qualifications by the states or by Congress, we are left with the

[156] See Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (states may disenfranchise persons convicted of a felony). The Court has not considered whether states may prevent convicted felons from holding office, but it most likely would permit states to do so because the right to run for office is a lesser right than the right to vote—there is no constitutional right to run for office or to vote for a particular candidate. Cf. Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992) ("the right to vote in any manner and the right to associate for political purposes through the ballot" are not "absolute"); State ex rel. Maloney v. McCartney, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question, 425 U.S. 946 (1976) (upholding two-term limit for governor). For an interesting but ultimately unpersuasive argument to the contrary, see Steven B. Snyder, Note, Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons From Holding Elective Office, 4 J.L. & Pol. 543 (1988).

[157] Today various criminal code provisions disqualify felons from federal office. See, e.g., 5 U.S.C. §§ 7324-7327 (1994) (the "Hatch Act"); 18 U.S.C. §§ 201, 203, 592, 593, 1901, 2071, 2381, and 2383 (1994).

presumptive unconstitutionality of all state laws restricting the candidacy of convicted felons.

The majority opinion in *Thornton* is difficult to reconcile with almost any version of originalism, though it sought refuge there. The majority could have said, explicitly, that if the text of the Constitution provides no answer, and the participants in the ratification debates are silent, then the Court is justified to draw from "democratic principles" to interpret the text. It could then, with more justification, adopt the view that life within a federal system, particularly one transformed by the upheaval of the Civil War, must tolerate significant restrictions on idiosyncratic state practices for the sake of an overriding national interest in uniformity. Stated differently, the outcome reached by the majority in *Thornton* could be important within our constitutional framework for reasons other than historical accuracy, similar to the need of the 48th Congress to temper vestiges of states' rightism asserted after the Civil War. Historical accuracy may be less important than the particular needs of federalism that arise in different eras.

The majority opinion could have argued more forcefully that we must not permit individual states to impose term limits on members of Congress because democratic principles within our federal system now demand it. But we should not seek to justify that rule on the ground that the Framers or ratifiers came up with it—this is undoubtably the weakest link in the majority's decision in *Thornton*. Ultimately, *Thornton* instructs us that we must take great care when approaching perplexing historical questions, particularly those with constitutional significance. It cautions our quest for a unanimous, coherent view of our constitutional history. More importantly, it cautions us against asking the question in a way that the Framers would not have understood.