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Open to Merit of Every Description? An Historical Assessment of the Constitution's Qualifications Clauses

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OPEN TO MERIT OF EVERY DESCRIPTION? AN HISTORICAL ASSESSMENT OF THE CONSTITUTION'S QUALIFICATIONS CLAUSES

JOHN C. EASTMAN*

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INTRODUCTION

In 1967, the United States House of Representatives refused to seat Congressman-elect Adam Clayton Powell, Jr. for alleged misappropriation of funds during the previous Congress. Powell took his case to the Supreme Court, which held that a single house of Congress, under its power to judge the qualifications of its members, could not impose qualifications in addition to those contained in the Qualifications Clauses of the Constitution, Article I, Section 2, Clause 2, and Section 3, Clause 3.[1] In reaching its conclusion, the Court surveyed the historical record and determined that the Qualifications Clauses were intended to be exclusive.[2]

Between 1990 and 1994, twenty-two states imposed a term limit, or length-of-service qualification, of one form or another on their representatives in Congress.[3] A handful of state and lower federal courts found such efforts unconstitutional, citing the *Powell* Court's conclusion about the exclusivity of the Qualifications Clauses.[4] Indeed, the Nevada Supreme Court refused even to let that state's measure on the ballot; it was, according to the court, "palpably" unconstitutional under *Powell*.[5] This past term, the United States Supreme Court agreed in *U.S. Term Limits, Inc. v. Thornton*, a split 5-4 decision, invalidating an Arkansas term limits provision because it effectively imposed a qualification for office and, according to the Court's reading of the "historical and textual evidence,". . ."neither Congress nor the States . . . possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."[6] In *Term Limits*, the Court relied heavily on the historical assessment made by the *Powell* Court.[7] The purpose of this article is to review and assess some of the history upon which the *Powell* Court relied by looking at the four principal debates in Congress over contested elections in which a state-imposed qualification was at issue.

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1. Powell v. McCormack, 395 U.S. 486, 522 (1969).

2. *Id.* at 522-48.

3. *See* Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 561 & n.3 (1994) (citing *Direct Voice*, WALL ST. J., Nov. 10, 1994, at A7.).

4. *E.g.*, U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 356 (Ark. 1994), *aff'd sub nom.* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995); Thorsted v. Gregoire, 841 F. Supp. 1068, 1076 (W.D. Wash.), *aff'd sub nom.* Thorsted v. Munro, Nos. 94-35222 etc., 1996 WL 4397 (9th Cir. Jan. 4, 1996).

5. Stumpf v. Lau, 839 P.2d 120, 122 (Nev. 1992).

6. *Term Limits*, 115 S. Ct. at 1866. This article was prepared prior to the Court's ruling in *Term Limits*. Its assessment of the historical record nevertheless remains valid; I have incorporated references to the *Term Limits* opinion where appropriate.

7. *See id.* at 1848-52.

I. THE CONTESTED ELECTION CASES

A. Barney v. McCreery (1807)

The *Powell* Court's treatment of the first of these debates, the 1807 contested election case of *Barney v. McCreery*, was faulty, citing for its conclusion a Committee of Elections report that was rejected by the whole House.[8] William McCreery's election was challenged for his alleged failure to meet a city residency requirement imposed by Maryland law.[9] The U.S. Constitution requires that a representative be an inhabitant of the state,[10] and the House Committee of Elections expressed the view that the Maryland law was unconstitutional because it imposed an additional qualification.[11] Citing the report of the Committee of Elections, the *Powell* Court concluded that it was then settled "that the States have not a right to require qualifications from members, different from, or in addition to, those prescribed in the constitution."[12]

The actual record of the debates, however, shows that the basis of the House's decision was much less clear than the *Powell* Court suggested.[13] A lengthy debate arose over the report proffered by the Committee of Elections, which had claimed that, since the Article I qualifications were exclusive, the additional restriction imposed by the Maryland law was unconstitutional and McCreery was therefore entitled to his seat. During the debate, several members of the House argued that McCreery was eligible to represent Baltimore because he was a resident of the city of Baltimore, as required by the Maryland law;[14] indeed, the report of the Elections Committee was recommitted so that the Committee could take additional evidence as to McCreery's actual

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8. Powell v. McCormack, 395 U.S. 486, 542-43 (1969) (quoting from 17 ANNALS OF CONG. 871 (1807)). The *Term Limits* Court compounded the error made by the *Powell* Court. While the *Powell* Court merely relied on a report by the Committee on Elections that was rejected by the House, the *Term Limits* Court stated affirmatively and erroneously that "[t]he whole House . . . did not vote on the Committee's report." *Term Limits*, 115 S. Ct. at 1861.

9. 17 ANNALS OF CONG. 871 (1807). An act passed by the Maryland legislature in November 1802 gave the Baltimore district two representatives; it also required that one be a resident of the County of Baltimore, the other of the City of Baltimore. *Id.* (Report of the House Committee of Elections).

10. "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." U.S. CONST. art. I, § 2, cl. 2 (emphasis added).

11. 17 ANNALS OF CONG. 871 (1807). Most of the debate is also reprinted in M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, at 167-221 (Washington, Gales & Seaton 1834).

12. CLARKE & HALL, *supra* note 11, at 171; *see Powell*, 395 U.S. at 542-43.

13. *See* 17 ANNALS OF CONG. 870-920; 1231-38 (1807). Indeed, the *Term Limits* majority conceded that "the House Debate may be inconclusive." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1861 (1995). Oddly, the majority attempted to minimize the inconclusive nature of the *McCreery* debates by citing an 1814 letter from Thomas Jefferson to Joseph Cabell for the proposition that "commentators at the time apparently viewed the seating of McCreery as confirmation of the States' lack of power to add qualifications." *Id.* Jefferson's position in the letter which the majority cited, however, was that the States have power to impose additional qualifications. *See infra* text accompanying note 246.

14. 17 ANNALS OF CONG. 890 (1807) (Rep. Montgomery); *id.* at 905 (Rep. Bibb).

residence.[15] Others were uncertain whether the Maryland law required a twelve-month residency in the city, or merely residency at the time of the election.[16] Concerns were also expressed that it was only McCreery's membership in the previous Congress that prevented him from residing in the city of Baltimore, and hence, that the purpose of the residency law was not violated.[17] Still others suggested that, although the Maryland legislature could not add qualifications, the people of Maryland, by way of an amendment to the Maryland constitution, could.[18]

The House ultimately seated McCreery by a vote of 89 to 18, but only after severing the resolution from the Committee of Elections' reported rationale.[19] The resolution to seat McCreery was originally reported by the Committee as follows: "*Resolved*, That William McCreery [having the greatest number of votes and being duly qualified, agreeably to the Constitution of the United States,] is entitled to his seat in this House."[20] The bracketed words were struck in the Committee of the Whole, however, and the House approved the deletion by a decisive vote of 70 to 37.[21]

John Randolph of Virginia then moved to amend the resolution so as to read, "*Resolved*, That William McCreery, not being qualified according to the law of Maryland, is not entitled to his seat in this House."[22] When Randolph's motion was ruled out of order, he moved instead to insert the phrase, "being duly qualified by the law of Maryland," in lieu of the previously deleted clause in order "to bring the question of the constitutionality of the law of Maryland before the House."[23] Randolph's motion did not accomplish his purpose, however, for it did not squarely present the constitutional issue, and the confusion it engendered would render any conclusion on the constitutional question suspect. Francis Gardner of New Hampshire, for example, stated that he "found himself considerably perplexed" by the amendment, which he thought required him to vote to seat McCreery on principles other than those he supported, lest a negative vote deprive McCreery of his seat altogether.[24] Randolph himself voted against the amendment,[25] although the

15. *Id.* at 898 (Rep. Randolph).

16. *Id.* at 890, 905 (Rep. Bibb). By an act passed in November 1790, Maryland required that representatives be residents of their district for twelve months prior to election. *Id.* at 871. It was unclear whether the 1802 Act, discussed *supra* note 9, retained the twelve-month residency requirement.

17. *Id.* at 905 (Rep. Bibb). McCreery had a summer home in Baltimore County, and a winter residence in Baltimore City, which he apparently ceased to occupy during the Ninth Congress when he and his family took up residence in Washington, D.C. *Id.* at 871.

18. *Id.* at 897 (Rep. Johnson). Representative Findley, the chairman of the Committee of Elections, made a similar argument, although he also argued that the Article I list of qualifications was exclusive. *Id.* at 876.

19. *Id.* at 1238.

20. *Id.* at 1231.

21. *Id.* at 1231-32. The record of votes only identifies 69 members in support of the resolution. *See id.* at 1232. It is unclear, therefore, whether one member voting in favor was not listed, or whether the number was miscounted.

22. *Id.* at 1233.

23. *Id.*

24. *Id.* at 1237.

25. *Id.*

proper course of action suggested by his statements during the debate would have been to vote for the amendment, then against the resolution as amended.[26] Randolph's amendment failed by a vote of 8 to 92, after which a vote on the unencumbered resolution simply stating that McCreery was entitled to his seat was approved 89 to 18.[27]

It is possible to dissect the final vote a little further. The eighteen members who voted against seating McCreery must have thought him ineligible under a constitutionally valid Maryland law, since no other rationale was offered.[28] Of the eighty-nine members who voted to seat McCreery, fifty had also voted to strike the Election Committee's rationale from the resolution, while only twenty-five had voted to retain it.[29] We can safely assume that most, if not all, of the latter twenty-five thought the Qualifications Clauses exclusive; all eleven from that group who participated in the debate so argued.[30]

The group of fifty who voted to seat McCreery and voted to strike the Committee rationale is more difficult to assess, however. Only six members of this group spoke during the debate; three clearly thought the states had the right to impose additional qualifications[31] and a fourth implied as much,[32] but the other two expressed the desire to avoid deciding the constitutional issue if at all possible.[33] Significantly, not a single member who spoke in favor of the exclusivity of the Qualifications Clauses voted to strike the Committee's rationale.[34] If we could extrapolate the views of the debate participants to this entire group of fifty, we might estimate that two-thirds, or thirty-three members, voted to seat McCreery because he was qualified under a constitutionally valid Maryland law, while one-third, or seventeen members, voted to seat him because he was so qualified, whether or not the law was constitutional, an issue which they wanted to avoid deciding. That would leave

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26. *See id.* at 882-86, 888-89, 1233, 1236 (Rep. Randolph's statements made during the debates). Compare Randolph's vote with that of Lemuel Sawyer of North Carolina, who argued for the states' right to add qualifications, *id.* at 880-81, who thought McCreery unqualified on that ground, *id.* at 881, and who voted for Randolph's amendment. *Id.* at 1237.

27. *Id.*

28. Of these 18, only Randolph spoke during the debate, and he argued that McCreery was not eligible under Maryland law. *Id.* at 1236. Neither party affiliation, state of residence, or region of the country correlate to the vote in a way that would provide an alternate explanation.

29. The remaining 14 members who voted to seat McCreery had not voted on the initial amendment to strike the Committee's rationale. *Id.* at 1232, 1237-38.

30. Randolph also voted against the initial amendment to strike the Committee rationale. *Id.* at 1232. He is not among this group of 25 because he voted against the final resolution, *id.* at 1238, but his vote is nonetheless anomalous with his stated position. *See id.* at 882-86, 888-89, 1233, 1236 (Rep. Randolph's statements during the debates). Two possible explanations suggest themselves: (1) Randolph may have thought an affirmative vote would suggest he believed McCreery was entitled to his seat (an assumption he seems to have made regarding his own amendment); or (2) he may have voted to retain the initial language because he believed it was correct, though not complete. McCreery was, after all, eligible under the constitutional qualifications. It was his state law eligibility that Randolph thought infirm. *Id.* at 1236.

31. *See id.* at 904-05 (Rep. Bibb); *id.* at 899-902 (Rep. Love); *id.* at 1232 (Rep. Sloan).

32. Representative Montgomery of Maryland argued that McCreery had been a resident of Baltimore City since 1803, *id.* at 890, but also that he would never consent to the House of Representatives judging the constitutionality of a state law. *Id.* at 1233.

33. *Id.* at 904 (Rep. Gardenier); *id.* at 1232 (Rep. Rhea).

34. *See id.* at 870-920, 1231-38.

fifty-one who thought the states had power to add qualifications (eighteen who voted not to seat McCreery, plus an estimated thirty-three who voted to seat him), as compared to forty-two who either thought the Qualifications Clauses exclusive or who wanted to avoid deciding the constitutional issue.

Of course, any such extrapolation is highly speculative.[35] The only thing one can assert with any confidence is that twenty-two members thought the states could add qualifications (the eighteen who voted against McCreery plus the four debate participants who voted both to seat McCreery and to delete the Election Committee's rationale),[36] while twenty-eight thought the states could not add qualifications (the twenty-five who voted both to seat McCreery and to retain the Election Committee's rationale, plus three debate participants who expressed the view that the Qualifications Clauses were exclusive but who did not cast a vote when the Election Committee's rationale was deleted).[37] The views of the remaining fifty-seven members[38] who voted to seat McCreery are impossible to ascertain from the debates. To the extent their views and votes correlate with the views and votes of those who did speak, however, the debates at least suggest that there may have been a majority in the House who believed the states did have the power to impose additional qualifications on their representatives to Congress.

B. Lyman Trumbull (1855)

The next major debate to occur in Congress over the power of states to add qualifications to those enumerated in the Constitution occurred in the Senate in 1856. The Illinois Constitution of 1848 contained the following clause:

> The judges of the supreme and circuit courts shall not be eligible to any other office or public trust, of profit, in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office, (except

35. There obviously need not be a correlation between the views of those who spoke during the debate and those who did not; the 4:2 ratio need not hold, therefore, over the whole group of 50. Some evidence suggests that the ratio was even higher: the only other member who spoke during the debate and who voted to strike the Committee rationale, Lemuel Sawyer of North Carolina, clearly supported the right of states to add qualifications. *Id.* at 879-82. Other plausible explanations for voting to delete the Election Committee's rationale would suggest the ratio was lower: some members who thought the Qualifications Clauses were exclusive might have voted to strike the Election Committee's rationale either to accommodate the concerns of their colleagues or because they thought it superfluous. Without a more comprehensive review of the views of non-speaking members, however, the extrapolation from those who did speak is at least as plausible as any other mechanism by which we might ascertain the views of the non-speaking members.

36. *See supra* text accompanying notes 28, 31-32.

37. *See supra* text accompanying notes 29-30, 34.

38. This number includes 46 from the group of 50 who voted to seat McCreery and to delete the Election Committee's rationale (the remaining four having spoken in favor of the state's right to add qualifications), *see supra* text accompanying notes 29, 31-32, plus 11 of the 14 who voted to seat McCreery but who did not vote on the amendment deleting the Election Committee's rationale (the other three having spoken for reading the Qualifications Clauses as exclusive).

> that of judge of the supreme or circuit court,) given by the general assembly, or the people, shall be void.[39]

In November 1854, former judges Lyman Trumbull and Samuel Marshall were elected to the U.S. House of Representatives. Both of their elections were contested as in violation of the Illinois constitutional provision, but after a very brief debate, the challenges were rebuffed by a vote of 125 to 5, approving a Committee of Elections report finding the Illinois provision unconstitutional because the Qualifications Clauses were exclusive.[40] In the interim, however, Lyman Trumbull was elected by the Illinois General Assembly to a seat in the U.S. Senate, and a more substantial debate as to the constitutionality of the provision arose there.

Trumbull was ultimately seated by a vote of 35 to 8, but as in the *McCreery* case, the rationale on which the vote was based is a mixed one.[41] The case was referred to the Committee on the Judiciary, which reported back after more than two months that the members of the committee were too divided in their opinions to reach a decision on the matter.[42] Senator John Crittenden of Kentucky then offered the following resolution during floor debate:

> *Resolved*, That Lyman Trumbull is entitled to a seat in this body as a Senator, elected by the Legislature of the State of Illinois, for the term of six years from the 4th of March, 1855.[43]

The resolution does not squarely present the constitutional issue, as Crittenden himself recognized, since it enabled Senators to vote to seat Trumbull either because he was qualified pursuant to the Illinois Constitution, or because the Illinois provision was unconstitutional and therefore void.[44] Crittenden argued vigorously that Trumbull was entitled to his seat under both rationales.[45]

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39. ILL. CONST. of 1848, art. V, § 10, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 999 (Francis N. Thorpe ed., 1909) [hereinafter THORPE].

40. *See* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM 1834 TO 1865, at 166-68 (D. W. Bartlett ed., Washington, GPO 1865) [hereinafter CONTESTED ELECTIONS]. The Committee Report relied principally on the constitutional commentaries of Chancellor Kent and Joseph Story. *Id.* at 167-68.

41. D. W. Bartlett, the Clerk to the Committee of Elections and editor of the 1865 volume of *Cases of Contested Elections in Congress*, states that "[t]he argument in favor of Mr. Trumbull's right to the seat proceeded upon the ground that the people of Illinois could not add to the qualifications of a senator as prescribed in the Constitution of the United States." CONTESTED ELECTIONS, *supra* note 40, at 621. As described below, Bartlett's summary is erroneous.

42. CONG. GLOBE, 34th Cong., 1st Sess. 514 (1856) (Sen. Butler) ("The result of the discussion [in Committee] has been such a division of opinion as to render it proper, in the opinion of the committee, that the case should be referred to the Senate . . . .").

43. *Id.* at 515.

44. *Id.* at 549.

45. *Id.* at 547-48. Crittenden asserted:

> The first question . . . that presents itself is, whether upon . . . a proper construction of the constitution of the State of Illinois, [Trumbull] is entitled to his seat. . . . I contend . . . that, according to the fair and rational construction of this instrument, it does not apply to the case of an officer who resigned more than twelve months before his election to the Senate.

Trumbull himself argued primarily that he was in conformity with the Illinois constitutional provision, having resigned more than eighteen months prior to his election,[46] although he also argued that the Illinois provision was void, that the Senate should defer to the state legislature's interpretation of the provision, and that the provision was intended only to apply to state officers.[47]

Significantly, Senators Stephen Adams of Mississippi and John Hale of New Hampshire both argued that the power of the Senate under Article I, Section 5 to judge the elections of its members was limited to judging the qualifications prescribed in the Constitution itself, but that "the State tribunals are the exclusive judges of the qualifications required by their own constitution."[48] How extensive was the support for this position cannot be ascertained, although more than half (five out of nine) of the Senators speaking in favor of seating Trumbull found him eligible under the Illinois provision, either because they had ascertained for themselves that it did not cover Trumbull's case, or because they deferred to the implicit finding of the Illinois General Assembly to that effect.[49] A late attempt by Charles Stuart of Michigan to amend Crittenden's resolution so as to clarify the rationale on which it was passed, "for the purpose of providing for future reference," was ruled out of order, and the matter was dropped.[50] The grounds upon which Trumbull was seated thus cannot be determined with any certainty.[51]

Id. at 548. He further maintained that "[t]he very enumeration [in the U.S. Constitution] of these qualifications excludes the idea that [the Framers] intended any other qualifications."
Id. Senator Foot (R-VT) also made both arguments. *Id.* at 579-82.

46. *Id.* at 58, 343, 467.

47. *Id.* at 467-68.

48. *Id.* at 582.

49. Three of the five also argued, at least in part, that the Qualifications Clauses in the Constitution were exclusive.

50. *Id.* at 583-84. Senator Stuart's amendment read: "For the reason that the said Lyman Trumbull, having resigned the office of judge more than one year previous to his election as Senator, is, in the opinion of the Senate, thereby relieved from the inhibition contained in the constitution of the State of Illinois." *Id.* at 583. The reporter states that "[e]xpressions of dissent were heard all round the Chamber." *Id.* Senator Stuart himself stated that he did not wish to pursue the matter because "the sense of the Senate seems to be against the proposition," but it cannot be determined from the recorded debate whether the Senate was against Stuart's amendment because it thought the Illinois provision unconstitutional, or because it wished to avoid the constitutional issue. *See id.* at 584.

51. Another complication, not raised during the debate, was that the second-place finisher, Illinois Governor Joal A. Matteson, was also disqualified under another provision of the 1848 Illinois Constitution. Matteson received 47 votes to Trumbull's 51, with one vote cast for a third candidate, Archibald Williams. CONG. GLOBE, 24th Cong., 1st Sess. 1 (1855). The Illinois Constitution of 1848 provided that "the governor . . . shall not be eligible . . . to any other office until after the expiration of the term for which he was elected." ILL. CONST. of 1848, art. III, § 3, *reprinted in* 2 THORPE, *supra* note 39, at 995. Although it might be argued that this disqualification only applied to state offices, a similar provision clearly rendered members of the Illinois General Assembly ineligible to the United States Senate:

> No person elected to the general assembly shall receive any civil appointment within this State, *or to the senate of the United States*, from the governor, the governor and senate, or from the general assembly, during the term for which he shall have been elected; and all such appointments, and all votes given for any such member for any such office or appointment, shall be void.

ILL. CONST. of 1848, art. III, § 7, *reprinted in* 2 THORPE, *supra* note 39, at 987 (emphasis added).

C. Wood v. Peters (1884)

Five years after the decision to seat Senator Trumbull, Kansas was admitted to the Union with a constitutional provision nearly identical to the Illinois provision at issue in Trumbull's case.[52] As was common, the enabling act for Kansas required that its constitution be in conformity with the U.S. Constitution, and the Kansas Constitution was carefully scrutinized before Congress admitted the state into the Union.[53]

In the November 1882 election, however, a sitting state district court judge, Samuel Peters, was elected to the U.S. House of Representatives as one of four members elected by the state on a general ticket.[54] Samuel Wood, who placed fifth in the general election (more than 16,000 votes behind Peters), challenged Peters's eligibility under the Kansas Constitution.[55] The Committee of Elections reported a resolution as follows:

> *Resolved*, That S. R. Peters was duly elected a member of Congress from the State of Kansas, and is entitled to his seat.[56]

Representative Risden Bennett of North Carolina proposed a substitute resolution on behalf of the minority of the Committee, as follows:

> *Resolved*, That Samuel R. Peters, of Kansas, is ineligible to the seat in the House of Representatives of the Forty-eighth Congress now held by him.
>
> *Resolved*, That Samuel N. Wood, of Kansas, is entitled to said seat.[57]

A short debate occurred in which the principal interlocutors were Wood and Peters themselves and two members of the Election Committee, Representatives Mortimer Elliott of Pennsylvania and Risden Bennett of North Carolina. The entire debate occupies less than seven pages in the Congressional Record, although Wood's two-hour speech occupies an additional twenty-two pages in the Appendix.[58] Bennett's substitute resolution was ultimately divided, with a separate vote taken on each of the two clauses. The first clause declaring Peters ineligible failed by a vote of more than five to one.[59] The

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52. The Kansas Constitution of 1859 disqualified judges and justices from holding "any other office of profit or trust under the authority of the state, or the United States, during the term of office for which said justices and judges shall be elected . . . ." KAN. CONST. of 1859, art. III, § 13, *reprinted in* 2 THORPE, *supra* note 39, at 1249-50.

53. Indeed, three prior Kansas constitutions had been rejected (the Topeka Constitution of 1855, the Lecompton Constitution of 1857, and the Leavenworth Constitution of 1858) because of the intensity of the dispute over slavery. *See* 2 THORPE, *supra* note 39, at 1179-241 (reprinting the Kansas constitutions).

54. 15 CONG. REC. 3296 (1884).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See id* at 3296-303. Bennett's speech is not reprinted in the main body of the Congressional Record, but a reference to the Appendix is made. *Id.* at 3301. The Appendix, however, does not contain a speech by Bennett on the subject.

59. 106 noes to 20 ayes. *Id.* at 3303.

second vote failed by an almost unanimous vote, with only two members voting to seat Wood.[60]

The original committee resolution was then approved on a voice vote, Bennett's call for a recorded vote having failed. Although Peters suggested that he had not violated the spirit of the Kansas constitutional provision, and further that the constitutional provision was hortatory only,[61] those claims were relatively weak and the principal argument for seating Peters made by both Peters and Elliott was that the Kansas provision was unconstitutional. The House's decision to seat Peters seems to rest, therefore, unambiguously on the ground that the states do not have power to impose additional qualifications on members of Congress.

D. Brigham Roberts (1899)

Despite the unambiguous nature of the decision by the Forty-eighth Congress to seat Judge Peters, the Fifty-sixth Congress afforded that decision no precedential weight a mere fifteen years later when it overwhelmingly refused to seat Brigham Roberts, the representative-elect from Utah.[62] Roberts was a polygamist, and the House appointed a special committee to address Roberts's "statutory disqualification, created by the Edmunds law,[63] and for higher and graver and quite as sound reasons."[64] The report by the majority of the special committee recommended against seating Roberts[65] and its recommendation was approved by the House by a vote of 268 to 50.[66] The majority's position rested on three alternative grounds: (1) The House has an inherent power to exclude a "defiant violator of law" and Roberts was thus ineligible because of his violation of Utah law against polygamy;[67] (2) Roberts was disqualified under the Edmunds Law, which specifically made polygamy a disqualification for office;[68] and (3) The people of Utah, in electing Roberts, had violated the understanding regarding the anti-polygamy condition under which they were admitted to the union.[69]

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60. *Id.* (The "nay" votes were not taken).

61. *Id.* at 3300.

62. 33 CONG. REC. 1072-104, 1123-49, 1175-217 (1899). The majority report, the minority report, and the debate participants failed to even mention the *Peters* case, although nearly every other Congressional precedent was cited. *See* H.R. Rep. No. 85, 56th Cong., 1st Sess., pts. 1-2.

63. Act of Mar. 22, 1882, ch. 47, § 8, 22 Stat. 30, 31-32 (Congressional act outlawing polygamy in United States territories).

64. 33 CONG. REC. 5 (1899) (statement of Rep. Taylor).

65. H. R. REP. NO. 85, 56th Cong., 1st Sess., pt. 1, at 2 (1900). Much of the House report is reprinted in 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 474-480 (1907).

66. 33 CONG. REC. 1217 (1899); 1 HINDS, *supra* note 65, § 480, at 560.

67. 1 HINDS, *supra* note 65, § 479, at 557.

68. 1 *id.* § 478, at 550.

69. 1 *id.* § 480, at 558 ("His election as Representative is an explicit and most offensive violation of the understanding by which Utah was admitted as a State."); *see also* 1 *id.* § 480, at 559 (statement of Sen. Rawlins) ("[I]t is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission . . . .").

These three propositions can be recharacterized to address the Qualifications Clause issues directly, as follows: (1) whether a single house of Congress, exercising its power to judge the qualifications of its members,[70] can create qualifications for office in addition to those in the Qualifications Clauses; (2) whether Congress as a whole can, by statute, create additional qualifications; and (3) whether a state, either by law or constitutional provision, can add qualifications.

The *Roberts* debate turned principally on the first proposition. The majority thought it could exclude Roberts from Congress before he took the oath of office, thus effectively creating an *ad hoc* disqualification under the House's power to judge the qualifications of its members.[71] The minority, on the other hand, insisted that the House, acting alone, had power only to judge, not to create, qualifications,[72] although it believed that the House did have the power to expel Roberts under Article I, Section 5, Clause 2.[73] Significantly, several members who supported the minority report thought that the Congress as a whole could probably impose additional qualifications,[74] but that Congress had not done so with the Edmunds Act, which applied only to territories.[75]

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70. "Each House shall be the Judge of the Elections, Returns, *and Qualifications* of its own Members . . . ." U.S. CONST. art. I, § 5, cl. 1 (emphasis added).

71. 33 CONG. REC. 1123 (1899).

72. *See, e.g., id.* at 1084 (Rep. Littlefield).

73. *Id.* at 1084, 1123. The Constitution provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2. Some members of the majority thought the minority's argument for expulsion was merely a ruse, because House precedents suggested that a member could only be expelled for acts committed while he was a member. *See, e.g.*, 33 CONG. REC. 1123 (1899) (statement of Rep. Powers) ("[I]t is a universal rule . . . that you can not expel a member from the House for any offense committed prior to his election . . . ."). However, the Supreme Court's decision in Murphy v. Ramsey, 114 U.S. 15, 43 (1885), finding polygamy to be an ongoing "state and condition" rather than a prior act, gives credence to the minority position.

74. *See* 33 CONG. REC. 1085 (1899) (statement of Rep. Littlefield) (describing the problem with the exclusion of John Wilkes from the British House of Commons as having been effected "by a mere resolution of the House, and without the concurrence of the other branches of the legislature"); *id.* at 1136 (statement of Rep. Lacey) (the proper remedy is expulsion "unless *by law* or by the Constitution express ineligibility had been created for [polygamy]") (emphasis added); *id.* at 1176 (Rep. Sims); *id.* at 1177 (Rep. Johnston). At least one member supporting the minority report, however, thought that neither a single house nor Congress could add qualifications. *Id.* at 1147 (Rep. Wilson).

75. Act of Mar. 22, 1882, ch. 47, § 8, 22 Stat. 30, 30; *see also* 33 CONG. REC. 1096 (1899) (Rep. Littlefield). In 1882, the House had refused to seat delegate George Q. Cannon, from the Territory of Utah, for violating the Edmunds Act. 1 HINDS, *supra* note 65, § 473, at 503. Cannon's election had also been challenged in 1873, but the anti-polygamy statute in force at the time did not contain a disqualification clause. *Id.* § 469, at 494. While the House was considering the 1873 case, Congress passed a law adding polygamy to the list of disqualifications for delegates to Congress. Act of June 16, 1874, H.R. 3679, 43d Cong., 1st Sess. (1874), *reprinted in* 1 HINDS, *supra* note 65, § 469, at 498-99. The House Committee on Elections then found Cannon ineligible, but the House voted not to consider the report. 1 HINDS, *supra* note 65, § 469, at 499-500. In both cases, the House assumed that its power to judge the qualifications of a delegate was the same as its power to judge the qualifications of a member. Representative Tayler of Ohio, on the other hand, argued that since the Edmunds Act applied to United States territories, including the District of Columbia, Roberts was ineligible when he arrived in Washington to take his seat in Congress. 33 CONG. REC. 1081 (1899). *But see id.* at 1096 (Rep. Littlefield) (finding Taylor's suggestion laughable).

More significantly, the debate over the majority's third proposition implied that both the majority and minority thought a state could add qualifications. Representative Tayler of Ohio, speaking for the majority, argued that the ban on polygamy in the Utah Constitution[76] operated as a disqualification on Utah's representatives to Congress.[77] Tayler argued in addition that because Congress had explicitly required the ban as a condition for admission to statehood, it was irrevocable without the concurrence of Congress.[78] Representative Littlefield of Maine, speaking for the minority, argued instead that neither the Utah Constitution nor Utah law actually made polygamy a disqualification for office.[79]

The ban on polygamy in the Utah Constitution of 1895 did not expressly impose a disqualification for office,[80] and the dispute between the majority and minority was over the true intent of the clause, not whether the clause was constitutional if it did impose such a disqualification.[81] In fact, the Utah Constitution contained two other disqualifications: Article IV, section 6, rendering "idiot[s], insane person[s], or person[s] convicted of treason or crime against the elective franchise . . . [in]eligible to hold office in this State";[82] and Article VII, section 23, making the governor ineligible "for election to the Senate of the United States during the term for which he shall have been elected governor."[83] Although the Article IV provision, viewed in isolation, might reasonably be interpreted as applying only to officials in state government, and not to members of Congress,[84] the Article VII provision is an express disqualification for a member of Congress. Nor can the latter clause be rationalized as merely a resign to run provision, for the governor is ineligible not just while he is governor, but "during the term for which he shall have been elected governor."[85]

As in the case of Kansas discussed above, the Utah Enabling Act required that the forthcoming Utah Constitution "not be repugnant to the Constitution

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76. "Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but *polygamous or plural marriages are forever prohibited.*" UTAH CONST. of 1895, art. III, *reprinted in* 6 THORPE, *supra* note 39, at 3705 (emphasis added).

77. 33 CONG. REC. 1081 (1899).

78. *Id.*

79. *Id.* at 1095; *see also* UTAH CONST. of 1895, art. III, *reprinted in* 6 THORPE, *supra* note 39, at 3705 (prohibiting polygamy forever); 1 HINDS, *supra* note 65, § 478, at 554 (citing Laws of Utah, 1892, ch. VII, pg. 5, made applicable after statehood by UTAH CONST. of 1895, art. XXIV, § 2, which provided that all territorial laws were continued in force unless contrary to the new constitution).

80. *See* UTAH CONST. of 1895, art. III, *reprinted in* 6 THORPE, *supra* note 39, at 3705.

81. Only Representative Snodgrass, a supporter of the minority report, suggested that a state could not add qualifications: "[The organic laws of Utah] impose no disqualification for office; and if they did, a single State thus operating alone can not effect an amendment to the Constitution of the United States." 33 CONG. REC. 1126 (1899). Snodgrass also stated, however, that members of Congress were state officers, thus implying that they are subject to state control. *Id.*

82. UTAH CONST. of 1895, art. IV, § 6, *reprinted in* 6 THORPE, *supra* note 39, at 3705.

83. UTAH CONST. of 1895, art. VII, § 23, *reprinted in* 6 THORPE, *supra* note 39, at 3714.

84. This interpretation cannot be sustained when the clause is viewed in context, however, since the Utah Constitution elsewhere defines state officers as including Representatives to Congress. UTAH CONST. of 1895, art. XXIV, § 12, *reprinted in* 6 THORPE, *supra* note 39, at 3733.

85. UTAH CONST. of 1895, art. VII, § 23, *reprinted in* 6 THORPE, *supra* note 39, at 3714.

of the United States."[86] The Utah Constitution was expressly so found in the proclamation by President Grover Cleveland admitting Utah to the union.[87] Thus, both by proclamation of the President and the decision of the House in the *Roberts* case, the clauses of the Utah Constitution imposing additional qualifications on members of Congress were treated as constitutional. Significantly, the majority report in the House found that Roberts met all three qualifications contained in Article I, Section 2, but nevertheless held him ineligible because "the language of the constitutional provision, the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime."[88]

While the *Roberts* case might be distinguished from the *McCreery*, *Trumbull*, and *Peters* cases because it alone involved a disqualification for crime,[89] the arguments made in the three earlier cases by those who would hold additional qualifications unconstitutional made no such distinction, and most of the arguments made by the *Roberts* majority are equally applicable to the earlier cases. Thus, by the end of the nineteenth century the congressional precedents are inconclusive. The decisions in both the *McCreery* case and the *Trumbull* case were inconclusive on the constitutional issue of the states' power to impose additional qualifications, and while the constitutional issue was decisively decided in the *Peters* case, the House reversed itself fifteen years later in the *Roberts* case when it recognized that not only states, but a single house of Congress, could impose additional qualifications.

Although the outcomes in the four cases are inconsistent or ambiguous, the debates that occurred are nevertheless useful for our purposes, since every important argument both in support of and in opposition to the states having power to impose additional qualifications was made and responded to at length during the course of the debates. It is to the strength of those arguments that we next turn.

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86. Act of July 16, 1894, 53d Cong., 2d Sess., *reprinted in* 6 THORPE, *supra* note 39, at 3693-94.

87. "Whereas the constitution and government of said proposed State are republican in form, [and] *said constitution is not repugnant to the Constitution of the United States* and the Declaration of Independence . . . [it is hereby admitted to the union]." Proclamation of President Grover Cleveland, January 4, 1896, *reprinted in* 6 THORPE, *supra* note 39, at 3700 (emphasis added). Although the President's generalized finding might not be accorded great weight under normal circumstances, given the intensity of the dispute over polygamy in Utah, and the explicit ban on polygamy in the Utah Enabling Act enacted by Congress, it is probably safe to assume that particular attention was paid to the polygamy provision.

88. 1 HINDS, *supra* note 65, § 476, at 522.

89. Indeed, the majority report stressed that feature of the case. *See* 1 *id.* § 476, at 522; 33 CONG. REC. 39-40 (1899) (Rep. Taylor). *But see* 33 CONG. REC. 1087 (1899) (statement of Rep. Littlefield) (arguing that the distinction between a disqualification for crime and other disqualifications "is purely arbitrary and gratuitous").

II. ARGUMENTS FOR INTERPRETING THE QUALIFICATIONS CLAUSES AS AN EXCLUSIVE LIST OF QUALIFICATIONS

A. *The* Expressio Unius *Principle of Interpretation*

The most straightforward argument for treating the Qualifications Clauses as exclusive derives from a common maxim of statutory interpretation: *expressio unius est exclusio alterius*, or, the expression of one thing is the exclusion of another. During the *McCreery* debate, Representative Lewis Sturges of Connecticut stated the principle as follows: "[W]hen the Framers of the Constitution undertook deliberately to enumerate the qualifications [in Article I, Section 2, Clause 2], it was presumable they meant that no others should be necessary."[90] Representative Mortimer Elliott of Pennsylvania stated the principle even more clearly during the *Peters* debate:

> The Constitution of the United States by this section prescribes certain qualifications for the office of Representative in Congress, and, having exercised the power, it has been exhausted, and neither Congress nor the States can add other qualifications. It comes within a well-settled rule of construction that the enumeration of certain requisites of qualification is equivalent to a prohibition of authority to impose others.[91]

Moreover, as Representative Elliott pointed out, the *expressio unius* principle was in the minds of the Framers during the federal convention.[92] In response to a motion by James Mason giving Congress the power to impose a property qualification, John Dickinson stated, "I am against any recital of qualifications in the Constitution. It is impossible to make a complete one, and a partial one would by implication tie up the hands of the legislature from supplying omissions."[93] Since the Constitution as finally adopted did contain such a recital of qualifications, Dickinson's statement would seem to suggest that the list "by implication" excludes all others.

There is a problem with this interpretation, however; Mason's proposal was to give *Congress* the power to impose a property qualification.[94] Application of the *expressio unius* principle to his proposed clause would thus have operated to limit Congress's ability to impose other qualifications,[95] but

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90. 17 ANNALS OF CONG. 877 (1807); *see also* 33 CONG. REC. 1144 (1899) (Rep. Crumpacker); CONG. GLOBE, 34th Cong., 1st Sess. 548 (1856) (Sen. Crittenden); *id.* at 579 (Sen. Mason); *id.* at 580 (Sen. Foot); *id.* at 583 (Sen. Butler); 17 ANNALS OF CONG. 203 (Rep. Quincy).

91. 15 CONG. REC. 3297 (1884).

92. *Id.*

93. *Id.* (citing 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 371 (Jonathan Elliot ed., New York, Burt Franklin 1888) [hereinafter ELLIOT'S DEBATES]).

94. 5 ELLIOT'S DEBATES, *supra* note 93, at 370.

95. Indeed, one member of the convention sought to amend the proposal by giving Congress the power to impose all needed qualifications precisely because of concerns like Dickinson's. *Id.* (statement of Mr. Gorham).

would have provided no limitation on the states, which do not derive their authority from the U.S. Constitution.

Dickinson also raised an *expressio unius* concern to the clause regulating age and citizenship qualifications. Because that clause, which ultimately became the Article I Qualifications Clauses, was not a grant of power to Congress but rather a list of standing qualifications, application of the *expressio unius* principle to it would operate to exclude the imposition of other qualifications, whether imposed by Congress or by the states.[96] Dickinson's comments were addressed to the initial version of the clause, however, which was phrased positively.[97] It may therefore be a sufficient answer to the *expressio unius* concern that the clause was rephrased in the negative form finally included in Article I.[98] As the *Roberts* majority report stated, "the conclusion seems reasonable, if not absolutely irresistible, that the change from the affirmative to the negative form was intentionally made and with the very purpose of obviating such objections."[99]

Even if the Qualifications Clauses are read as a positive list, it is not at all clear that the *expressio unius* principle is properly applied so as to exclude all other qualifications. Joseph Story, in his highly regarded *Commentaries on the Constitution*, cautioned against the misapplication of the *expressio unius* principle in constitutional interpretation.[100] Because of the importance of the doctrine, and because Story himself thought the doctrine applicable to the Qualifications Clauses,[101] I cite Story's description of the *expressio unius* principle in its entirety:

> Another rule of interpretation deserves consideration in regard to the constitution. There are certain maxims, which have found their way,

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96. A point made by the *Term Limits* Court. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1850 n.9 (1995).

97. It read as follows:

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

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 (Max Farrand ed., 1937) [hereinafter FARRAND].

98. *See infra* part III.B. The *Term Limits* majority summarily rejected the negative phrasing argument. *Term Limits*, 115 S. Ct. at 1849 n.8. Justice Thomas, in dissent, agreed "that the 'negative phrasing' of these Clauses has little relevance." *Id.* at 1885 (Thomas, J., dissenting). Justice Thomas, however, distinguished between the clause as originally phrased and the clause as finally adopted on the one hand, and a clause that conveyed an exclusive formulation, on the other. As an example of the latter, he gave: "Every Person who shall have attained to the age of twenty five Years . . . shall be eligible to be a Representative." *Id.* The former formulation, whether positively or negatively phrased, established for Thomas only minimum qualifications. *Id.*

99. 1 HINDS, *supra* note 65, § 477, at 530.

100. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 448, at 433 (Boston, Hilliard, Gray, & Co. 1833).

101. 2 *id.* § 625, at 101. Many of the contemporary opponents of term limits view Story's reading of the Qualifications Clauses as dispositive. As Justice Thomas pointed out in his *Term Limits* dissent, the Supreme Court has often found Story's views "more nationalist than the Constitution warrants." *Term Limits*, 115 S. Ct. at 1880 (Thomas, J., dissenting) (contrasting 2 STORY, *supra* note 100, §§ 1063-1069 with Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), on whether the Commerce Clause gives exclusive power to Congress).

> not only into judicial discussions, but into the business of common life, as founded in common sense and common convenience. Thus, it is often said, that in an instrument a specification of particulars is an exclusion of generals; or the expression of one thing is the exclusion of another. Lord Bacon's remark, "that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated," has been perpetually referred to, as a fine illustration. These maxims, rightly understood, and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition. But they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects of the instrument. Thus, it has been suggested, that an affirmative provision in a particular case excludes the existence of the like provision in every other case; and a negative provision in a particular case admits the existence of the same thing in every other case. Both of these deductions are, or rather may be, unfounded in solid reasoning. Thus, it was objected to the constitution, that, having provided for the trial by jury in criminal cases, there was an implied exclusion of it in civil cases. As if there was not an essential difference between silence and abolition, between a positive adoption of it in one class of cases, and a discretionary right (it being clearly within the reach of the judicial powers confided to the Union) to adopt, or reject it in all or any other cases. One might with just as much propriety hold, that, because congress has power "to declare war," but no power is expressly given to make peace, the latter is excluded; or that, because it is declared, that "no bill of attainder, or *ex post facto* law shall be passed" by congress, therefore congress possess in all other cases the right to pass any laws. The truth is, that in order to ascertain, how far an affirmative or negative provision excludes, or implies others, we must look to the nature of the provision, the subject matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the constitution declares, that the powers of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended. In relation, then, to such a subject as a constitution, the natural and obvious sense of its provisions, apart from any technical or artificial rules, is the true criterion of construction.[102]

Thus, as Story himself recognized, the *expressio unius* principle is not to be applied as a technical or artificial rule of constitutional interpretation, but rather should be applied only if the nature and purpose of the particular provi-

102. 1 STORY, *supra* note 100, § 448, at 433-35 (footnotes omitted).

sion admits of such a construction.[103] This qualification seems to have been recognized as well by Senator Crittenden, who, during the *Trumbull* debate, stated:

> The very enumeration of these qualifications [in Article I, Section 3, Clause 3] excludes the idea that they intended any other qualifications. That is the plain rule of ordinary construction; *but, for a reason above all technical considerations*, it is applicable here. The object of the Federal Constitution was to have a body framed by a uniform rule throughout the United States . . . .[104]

It is then to the nature and objects of the Qualifications Clauses that the proponents of exclusivity next turned.

B. *The Nature of the Qualifications Clauses*

The nature of the Qualifications Clauses, as viewed by the proponents of an exclusive reading, was most succinctly stated during the *McCreery* debate by Representative William Findley of Pennsylvania, Chairman of the Committee of Elections in the Tenth Congress:

> The qualifications of the National Legislature are of a national character, and as such must be uniform throughout the nation, and prescribed by the authority of the nation, and by it exclusively; but no State Legislature is vested with national authority, they cannot make citizens for the nation, nor prescribe qualifications either for citizens or for Executive officers of the nation, much less can they prescribe qualifications for the National Legislature, other than the nation itself has prescribed, nor abridge the Constitutional power of Congress to decide on the qualifications of its own members, agreeably to the rules prescribed by the Constitution; that authority, expressly vested by the whole, cannot be abridged or changed by a part—by a seventeenth part of the nation.[105]

In Findley's view, both the national character of the Congress and the need for uniformity of qualifications among its members rendered the nature of the clause susceptible to the *expressio unius* principle.[106] Justice Story agreed,

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103. 1 *Id.*

104. CONG. GLOBE, 34th Cong., 1st Sess. 548 (1856) (emphasis added).

105. 17 ANNALS OF CONG. 873 (1807).

106. *Id.* The *Term Limits* majority relied heavily on this argument, finding that "[t]he Constitution . . . creates a uniform national body representing the interests of a single people." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1864 (1995). The Court went on to state that allowing individual States to set qualifications would "undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure." *Id.* The *Term Limits* majority treats the issue as an all-or-nothing proposition, however: "The Congress of the United States . . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people." *Id.* at 1863. The majority's formulation ignored the distinction between "state people" and "national people," *see infra* text accompanying notes 125-28, and thus ignored the possibility that the nature of the system established in 1787 is partly national, partly confederal.

and both seem on first glance to be fully supported on the uniformity point by James Madison's important statement in *Federalist 52*:

> The qualifications of the elected, being less carefully and properly defined by the State constitutions [than those of the electors], 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 property or wealth, or to any particular profession of religious faith.[107]

Madison's statement is not as unambiguous as it first appears, however; if one considers that the setting of certain minimum qualifications only, such as age, citizenship, and inhabitancy, was "susceptible of uniformity," the statement takes on a different character. In fact, other qualifications were not only not susceptible of uniformity, but were regulated in vastly different ways in the existing state constitutions. Virginia, for example, jealously guarded her property qualification, and the several states had different definitions even for the uniform qualification of "inhabitancy."

That the Framers intended to establish only uniform *minimum* qualifications is implicit in an exchange that occurred in the Massachusetts Ratifying Convention between General Thompson and Rufus King, a leading Federalist and, like Madison, a member of the Federal Convention's Committee of Style. Thompson asked why old age had not been made a disqualification for office. King responded:

> [I]t would not extend to all parts of the continent alike. Life . . . in a great measure, depends on climate. What in the Southern States would be accounted *long life*, would be but the *meridian* in the Northern; what here is the time of *ripened judgment* is *old age* there. Therefore the want of such a disqualification cannot be made an objection to the Constitution.[108]

Thus, according to King, a maximum age was not made a national qualification because, unlike the minimum age contained in the Qualifications Clauses, it was not susceptible to uniformity. King did not deny that the states individually could add a maximum age qualification; in fact, his statement implied a general understanding that they could.[109]

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

108. Debate in Massachusetts Ratifying Convention, Jan. 17, 1788, *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 93, at 36.

109. The last sentence of the passage from No. 52 of *The Federalist* suggests that Madison may have held a contrary view. "Under [the] reasonable limitations [on age, citizenship, and state residency] the door of this part of the federal government is open to merit of every description

Representative Findley also claimed during the *McCreery* debate that the Qualifications Clauses were exclusive because of the national character of the Congress.[110] It was on this point that the most passionate arguments were made on both sides, because not only the character of the Congress, but that of the states as well, was implicated by Findley's claim. Representative John Rowan of Kentucky, siding with Findley on the issue, stated that "the States were to the Union what counties were to a State," or, in other words, that the states were mere administrative divisions of a consolidated national government.[111] To the strong states' rights men of Virginia, such statements were so surprising as to warrant little argument in reply. Representative Love provided this brief response:

> To gentlemen who hold these principles, who contended that this is a great consolidated Government, possessing all the powers of legislation, extended as its empire is over a territory of various climates, leading to various pursuits among its inhabitants, he could address no argument, but had the consolation to believe that the day was past when such doctrines could have their effect on the people of this country.[112]

Representative Philip Key of Maryland stated a more prudent version of Rowan's argument, as follows: "Shall a portion of the people of the United States, claiming their Representative under the Constitution of the United States, be restricted in their choice by a State law?"[113] For Key, members of the House of Representatives represented not "the people of any particular State, but the people of the United States generally."[114] Key's rationale, however, would allow the states to impose qualifications on its Senators, who much more clearly represented particular states;[115] it is to that extent inconsistent because a parallel clause in the Constitution sets qualifications for Senators.[116] His analysis is, moreover, hard to sustain even as applied to the House, and is based on an erroneous reading of the Constitution. Key stated that Article I, Section 2, Clause 1 provides that "the House of Representatives shall consist of members chosen every second year by the people *of the*

. . . ," suggests that the qualifications were not only to be uniform but exclusive. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961). Of course, the voters of a particular state could effectively create an old age or property qualification merely by refusing, election after election, to vote for anyone with the unwanted characteristics, thus causing a lack of uniformity in Congress on those additional grounds. It is hard to see how a decision by the people of a particular state to bind themselves to such qualifications in advance of the election in any way decreases uniformity. Madison's statement is important on the question of the objects of the Qualifications Clauses, not their uniformity. Accordingly, it is further addressed below. *See infra* part II.C.

110. 17 ANNALS OF CONG. 873 (1807).

111. *Id.* at 894.

112. *Id.* at 938.

113. *Id.* at 910.

114. *Id.* at 913.

115. During the *Trumbull* debate, Senator Pugh of Ohio argued that "[t]he House of Representatives is a body which owes its existence to the Federal Constitution; but the Senate is only the Congress of the Confederation remodeled." CONG. GLOBE, 34th Cong., 1st Sess. 550 (1856).

116. "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

United States,"[117] when in fact the clause actually provides for election by the people *of the several States*.[118]

As Representative John Randolph of Virginia pointed out, Article I, Section 2, Clause 1 is not the only clause of the Constitution which treats members of the House as representatives of the people of particular states rather than of the people as a whole:

> The gentleman affirmed that in the Senate alone was to be found any feature of a confederated Government. Did he forget, that in one of its most important acts, the election of a President, the House of Representatives voted by States? That at every session, they were called over and sworn in by States; and it would be more in the spirit of the Constitution, that the yeas and nays should be taken by States.[119]

Randolph could have included two other provisions: "Representatives . . . shall be apportioned among the several States,"[120] and members of the House of Representatives are to be chosen "by the People of the several States."[121] Even today, despite the Supreme Court's "one man, one vote," holding in *Reynolds v. Sims*,[122] members of Congress represent vastly different numbers of people because state lines are not crossed in the drawing of congressional districts.

Representative Quincy countered by accusing Randolph of thinking that the Constitution was a mere confederacy of the states, and pointed out that "the language of the Constitution was not *we the States*, but *we the people* of those states."[123] If Randolph's views are susceptible to such a reading,[124] Quincy and Key give too little recognition to the states and fail to recognize a crucial feature of the American system—that the people operate in two different capacities, one as the people of a partly-sovereign state, the other as a

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117. 17 ANNALS OF CONG. 910 (1807) (emphasis added).

118. U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Although not misciting the clause, the *Term Limits* majority makes a similar error, for it cites the clause to support the proposition that Members of the House of Representatives are "chosen directly, not by the States, but by the people," with the national people clearly implied. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1863 (1995).

119. 17 ANNALS OF CONG. 943 (1807). In his *Term Limits* concurrence, Justice Kennedy recognized these clauses in which "the Constitution is solicitous of the prerogatives of the States," but denied that they "support[] the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Term Limits*, 115 S. Ct. at 1873.

120. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

121. U.S. CONST. art. I, § 2, cl. 1.

122. 377 U.S. 533, 558 (1964). The holding in *Reynolds v. Sims* applied only to the states, but presumably would apply to federal reapportionments as well under the implied equal protection component of the Fifth Amendment, *see* Bolling v. Sharpe, 347 U.S. 497 (1954), were it not for the explicit constitutional provisions to the contrary. *See* U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 3.

123. 17 ANNALS OF CONG. 907 (1807) (emphasis in original).

124. Randolph did not actually claim the constitution was a confederacy, in so many words, nor did his argument depend on such a claim, but his view of states' rights was certainly elaborated upon, and perhaps expanded, twenty years later by the nullification theorists, especially John C. Calhoun.

portion of the United States. As James Wilson stated during the Pennsylvania Ratifying Convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people, and as an illustration of it, I beg to read a few words from the Declaration of Independence . . . .
>
> "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, *governments* are instituted among men, *deriving their just powers from the consent of the governed* . . . ."[125]

The dual nature of the people, and hence of their representatives, was clearly described by Senator Pugh of Ohio during the *Trumbull* debate:

> I agree that no State can dispense with, or subtract from, the requisites prescribed in the Federal Constitution; but I can see no pretense for asserting that the States may not superadd any qualification which is consistent with those requisites. A Senator is an officer of the Federal Government; he is, also, an officer of his own State. He is elected to represent the people of the State, in an aggregate and organized capacity, as one of the sovereign parties to our Federal compact. . . . Whilst the Federal Constitution might prescribe certain requisites, therefore, in order to secure the interests of the Federal Government, the rights of the citizens of all the States, and the welfare of the whole Union; whilst it might well do this, and bind each State to an observance of such requisites, no reason can be assigned why the people of a State—whose peculiar representative and officer in equal degree their Senator is—might not prescribe *other* qualifications, in addition, for the purpose of protecting their separate interests, rights, and welfare.[126]

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125. James Wilson, Pennsylvania Ratifying Convention, 4 Dec. 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62 (Philip B. Kurland & Ralph Lerner eds., 1987) (added by Wilson).

126. CONG. GLOBE, 34th Cong., 1st Sess. 550 (1856). Justice Thomas made the identical argument in his *Term Limits* dissent: "[T]he fact that the Constitution specifies certain qualifica-

Senator Foot rejected Pugh's characterization, arguing that "the Senate of the United States is the creation and its members the creatures of the Federal Constitution," and that

> the office of Senator or Representative in Congress is a United States office, and not a State office; that it is created by the United States Constitution, and not by the State constitution; that all its functions are derived from the Federal Constitution, and not from the constitution or any original right of the State.[127]

Senator Pugh, like James Wilson before him, makes the stronger argument. Thus, although Senator Foot and Representatives Key and Quincy were correct in asserting that the House of Representatives has a national character, they were wrong in ignoring the fact that it also has a confederal character in which the states, as states, are constitutionally guaranteed a role. As Representative Charles Snodgrass of Tennessee stated during the *Roberts* debate:

> I take the position that [a member of the House of Representatives] is a State officer, elected by the people of his State to represent them in Congress, which body is composed of the sum total of the number elected in all the States. It is true that the effects of such representation may become national in character, but nevertheless the choice of office is locally controlled. His resignation is made to the governor, and his place can not be filled except at the pleasure of the State authorities.[128]

The arguments about the partly national character of the Congress do not, therefore, provide an adequate rationale for reading the Qualifications Clauses exclusively so as to prohibit the states from imposing other qualifications suitable to protecting the partly confederal character of Congress.

C. *The Object of the Qualifications Clauses*

The proponents of an exclusive reading also argued that the object, or purpose, of the Qualifications Clauses was to protect the people's right to vote for whomever they chose, subject only to a very few fundamental limitations. Representative Findley clearly articulated this position during the *McCreery* debate: "It is the natural right of all men to choose whom they please, without regard to age, residence, &c., to represent and advocate their interests," and the imposition of qualifications for office is an infringement of that right.[129] In stating the position, Findley echoed the statements by a number of the participants in the state conventions which ratified the Constitution,[130] state-

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tions that the Framers deemed necessary to protect the competence of the National Legislature does not imply that it strips the people of the individual States of the power to protect their own interests by adding other requirements for their own representatives." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1886-87 (1995) (Thomas, J., dissenting).

127. CONG. GLOBE, 34th Cong., 1st Sess. 579-80 (1856).

128. 33 CONG. REC. 1126 (1899).

129. 17 ANNALS OF CONG. 873 (1807).

130. *See id.* at 872-77.

ments which the Supreme Court cited in both *Powell v. McCormack*[131] and *Term Limits*.[132] Alexander Hamilton, for example, argued during the New York ratifying convention that "the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[133] Similarly, Robert Livingston argued during the Virginia ratifying convention that "[t]he people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."[134]

The position articulated by Findley and several of the founders may prove too much for the present inquiry, however, for under such a rationale even the minimal qualifications listed in the Constitution would be an infringement on the natural rights of the people. The question then, is not whether the right of suffrage can be infringed, but by whom. Findley attempted an answer:

> [I]t is necessary for the protection of society that this right be abridged, but it ought to be no further abridged than is absolutely necessary for the safety of the society, and of this the society itself are the only competent and authoritative judges; and in the United States the society have decided on this principle by their general and ratifying conventions, and they have delegated no authority even to Congress, much less to States, to alter or add to or diminish these qualifications.[135]

Findley's response fails to take account of the parallel societies—state and national—that operate in the American regime. It therefore provides no response to the position articulated by Senator Pugh above, that the people in their individual state capacities as well as the people in their national capacity have interests, the protection of which might require the infringement of "the natural right of all men to choose whom they please" to represent them.[136] As Findley himself recognized: "The right of prescribing new or additional qualifications of members of Congress, is not a question between the Federal and State Governments; it rests between the State Legislature and the people."[137] Findley appears to have been speaking only of the people in their national capacity, but once the people are also recognized in their state capacities, Findley's analysis would seem to require that those lesser societies could also seek to protect their societal interests by imposing additional qualifications. Indeed, Representative Johnson suggested during the *McCreery* debate that the problem with the Maryland provision was that it was enacted by the

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131. *See* 395 U.S. 486, 532-41 (1969).

132. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1849-51, 1856-71 (1995).

133. *Powell*, 395 U.S. at 540-41 (citing 2 ELLIOT'S DEBATES, *supra* note 93, at 257); *see also Term Limits*, 115 S. Ct. at 1851.

134. *Powell*, 395 U.S. at 541 (citing 2 ELLIOT'S DEBATES, *supra* note 93, at 292-93); *see also Term Limits*, 115 S. Ct. at 1851.

135. 17 ANNALS OF CONG. 873-74 (1807).

136. *See supra* text accompanying note 126.

137. 17 ANNALS OF CONG. 874 (1807).

state legislature, not by the state people.[138] After repeating Findley's natural rights argument, he stated: "Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?"[139]

There is a possible answer to Findley's conundrum, one suggested by Senators Seward and Foot during the *Trumbull* debate: Article VI of the Constitution provides that the Constitution "shall be the supreme Law of the Land."[140] Thus, if the Qualifications Clauses insure the right of individual citizens to vote for anyone who is constitutionally qualified, additional qualifications imposed by a state legislature or by the people would be an infringement of that constitutionally protected right, and hence must give way to the higher authority. To the extent that the sovereignty of a state's people is also recognized and protected by the national Constitution, however, as described above,[141] the people's right to prescribe certain limitations on themselves in the choosing of representatives rests on the same constitutional plane as the individual's right to choose whom he will. The Supremacy Clause does not tilt the scale toward one side or the other when both rights are constitutionally recognized.[142]

Nor is Findley's purpose the only possible purpose of the Qualifications Clauses. Given the history of representation under the Articles of Confederation, it is at least plausible that the clauses were intended merely to prevent states from sending underage representatives, or those just recently naturalized. As Representative John Randolph stated during the *McCreery* debate:

> [S]o far from fixing the qualifications of members of [the] House, the constitution merely enumerated a few *disqualifications* within which the States were left to act. It said to the States, you have been in the habit of electing young men barely of age; you shall send us none but such as are five and twenty: some of you have elected persons just naturalized; you shall not elect any to this House who have not been seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority; you shall elect none whom your laws do not consider as inhabitants. Thus guarding against too great laxity in the State regulations, by general and negative provisions, leaving them, however, within the limits of

138. *See id.* at 896-98.

139. *Id.* at 897. Representative Rowan also asked, "[h]ad the Legislature of the State of Maryland the power of thus contracting the choice of the people?" *Id.* at 892. Elsewhere, however, he clearly implied that not even the people of the state could impose qualifications in addition to those enumerated by the people of the whole. *See id.* at 896-98.

140. CONG. GLOBE, 34th Cong., 1st Sess. 343, 579 (1856) (statements of Sen. Seward and Sen. Foot, respectively) (referring to U.S. CONST. art. VI, cl. 2).

141. *See supra* text accompanying note 119-22.

142. The *Term Limits* majority also suggested at one point that the clauses embody "an egalitarian ideal—that election to the National Legislature should be open to all people of merit . . . ." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1862 (1995). As Justice Thomas pointed out, "the majority apparently would read the Qualifications Clauses to create a personal right to be a candidate for Congress," *id.* at 1891 (Thomas, J., dissenting), although the majority denied that its statement had such implications. *Id.* at 1851 n.11.

> those restrictions, to act for themselves; to consult the genius, habits, and, if you will, the prejudices of their people.[143]

Representative Robert Miers of Indiana made a similar argument during the *Roberts* debate, although he focused more on the citizenship qualification:

> We all know that in England the people had been in the habit of sending to their lawmaking power young men, minors who were not matured, minors who were not capable of comprehending the Government and legislating for its best interests. They had not only been doing that, but nonresidents, alien citizens, had been sent to Parliament for the purpose of making laws. I believe, and take it not only from my judgment, but from the reasonings on that occasion and from the debates, that the real purpose of the founders in enacting the Constitution was to make a concise statement and guard against the possibility of foreigners controlling the Republic. I believe the reason of that fixed limit upon citizenship was in order that aliens and nonresidents might be shut out from the great American House of Congress for a period of time until they should become Americanized and catch the spirit of the Republic.[144]

Thus, in this view, the Qualifications Clauses were intended to protect certain national interests against state folly; they said nothing about the ability of the states to impose additional qualifications to protect their own interests.

At first glance, it is hard to reconcile Randolph's statement of purpose and his corollary view that the states could impose additional qualifications with the passages from the ratifying conventions cited above.[145] Furthermore, three important passages from the *Federalist* papers lend even more credence to the Findley claim that the purpose of the Qualifications Clauses was to protect the natural right of the people to choose whomever they wished. In *Federalist* 52, Madison wrote:

> Under [the] reasonable limitations [of age, citizenship, and residency], 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.[146]

Similarly, in *Federalist* 57, Madison wrote:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[147]

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143. 17 ANNALS OF CONG. 883-84 (1807).
144. 33 CONG. REC. 1138 (1899).
145. *See supra* text accompanying note 133-34.
146. THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961).
147. *Id.* NO. 57, at 351.

Finally, Hamilton wrote in *Federalist* 60:

> 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. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. 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.[148]

These passages are clearly sweeping, and strongly suggest, standing alone, that the Qualifications Clauses set forth an exclusive list of qualifications. Before we can be certain of such a conclusion, however, we must place the passages in context, remembering that Madison and Hamilton were writing during a particular political controversy and responding to particular concerns raised by the "Anti-Federalist" opponents of the national constitution.[149]

Foremost among the concerns of the Anti-Federalists was that the national government was given too much power under the proposed constitution.[150] Anti-Federalists were concerned, for example, that the preemptive regulatory power given to Congress over the times, places, and manner of elections[151] would enable it to impose a property qualification and thereby create an oligarchic national government. Hamilton's statement in *Federalist* 60 is a direct response to this concern. Placed in this context, Hamilton's statement is merely a rebuttal to the charge that Congress could impose a property (or other) qualification, not that the states were similarly limited. When combined with the fact that the states do not derive their power from the U.S. Constitution, it is at least plausible that the sweeping last sentence of the passage, describing the Constitutional qualifications as "fixed," meant only that Congress could not add qualifications because the Time, Place and Manner Clause conferred upon it no such authority, not that the Qualifications Clauses themselves set forth an exclusive list of qualifications.

Anti-Federalists also argued that the terms of office for Representatives (two years) and especially Senators (six years) were too long, since under the Articles of Confederation, members of the Continental Congress were elected annually, and were subject to recall by their states.[152] The following is from the minority report of the Pennsylvania ratifying convention:

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148. *Id.* NO. 60, at 371 (Alexander Hamilton).

149. In a similar vein, the Supreme Court has long recognized that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821).

150. J.R. Pole, *Introduction* to THE AMERICAN CONSTITUTION FOR AND AGAINST 17 (J.R. Pole ed., 1987).

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

152. ART. OF CONFED. art. V, *reprinted in* 1 THORPE, *supra* note 39, at 11.

> The permanency of the appointments of senators and representatives, and the controul the congress have over their election, will place them independent of the sentiments and resentment of the people, and the administration having a greater interest in the government than in the community, there will be no consideration to restrain them from oppression and tyranny.[153]

Anti-Federalists also objected to the fact that the new Constitution did not mandate rotation in office:

> [I]n a government consisting of but a few members, elected for long periods, and far removed from the observation of the people, but few changes in the ordinary course of elections take place among the members; they become in some measure a fixed body, and often inattentive to the public good, callous, selfish, and the fountain of corruption. To prevent these evils, and to force a principle of pure animation into the federal government, . . . and to produce attention, activity, and a diffusion of knowledge in the community, we ought to establish among others the principle of rotation. Even good men in office, in time, imperceptibly lose sight of the people, and gradually fall into measures prejudicial to them.[154]

Madison responded to both of these concerns. In *Federalist* 52, after recognizing that it was "essential to liberty that the government in general should have a common interest with the people" and that it was "particularly essential" that the House of Representatives "should have an immediate dependence on, and an intimate sympathy with, the people,"[155] Madison argued that biennial elections were sufficient to insure the necessary commonality of interest between representatives and the people. Similarly, in *Federalist* 57, Madison spoke of the importance of frequent elections:

> [T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be com-

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153. The Address and Reasons of Dissent of the Minority of the Convention in Pennsylvania to Their Constituents, 18 Dec. 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST § 11, at 48-50 (Herbert J. Storing ed., 1981).

154. Letter from a Federal Farmer, Jan. 10, 1788 (attributed to Richard Henry Lee), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 153, § 8, at 286, 290-91. The *Term Limits* majority made much of the fact that supporters of the Constitution never countered such arguments by responding that the states could individually impose a rotation requirement on their members of Congress. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1859-60 (1995). "If the participants in the debate had believed that the States retained the authority to impose term limits, it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces." *Id.* at 1860. It is at least as inconceivable, however, that the opponents of the Constitution would not have raised the issue if a restriction on state power was understood. As Justice Thomas pointed out in his dissent, "The recorded ratification debates also contain no affirmative statement that the States cannot supplement the constitutional qualifications. . . . If the Federal Constitution had been understood to deprive the States of this significant power, one might well have expected its opponents to seize on this point in arguing against ratification." *Id.* at 1901 (Thomas, J., dissenting).

155. THE FEDERALIST No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

> pelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.[156]

It was also in response to such concerns of the Anti-Federalists that Madison argued in *Federalist* 51 that "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[157] The principal auxiliary precaution Madison described was the system of checks and balances contained in the Constitution. Significantly, though, Madison thought that was not enough:

> But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. *It may even be necessary to guard against dangerous encroachments by still further precautions.*[158]

It was in this context of answering Anti-Federalist charges against the "oligarchic[ ]" features of the new government[159] that Madison argued that under the reasonable limitations of the Qualifications Clauses, the door of Congress was "open to merit of every description"[160] and that "[n]o qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."[161] It was in the context of demonstrating the numerous ways in which the national government would remain subject to the people's will that Madison even addressed the Qualifications Clauses. But in such a context, Madison's broad language must be understood as applicable to the national government only; the issue of state power was not at issue.[162]

Moreover, Madison stated that "[i]t may even be necessary to guard against dangerous encroachments [by the Congress] by still further precautions."[163] What was to be the source of such further precautions? Given the important role Congress plays in the Constitutional amendment process, it is hard to envision the amendment process as a ready mechanism.[164] The states

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156. *Id.* No. 57, at 352.
157. *Id.* No. 51, at 322.
158. *Id.* (emphasis added).
159. *See id.* No. 57, at 350.
160. *Id.* No. 52, at 326.
161. *Id.* No. 57 at 351.
162. As Justice Thomas argued in his *Term Limits* dissent, "[o]ne should not lightly assume that Madison and his colleagues, who were attempting to win support at the state level for the new Constitution, were proclaiming the inability of the people of the States or their state legislatures to prescribe any eligibility requirements for their own Representatives or Senators." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1892 (1995) (Thomas, J., dissenting).
163. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
164. Article V, of course, provides that *Congress* may propose amendments whenever two

are a much more likely source for such precautions and if, in the judgment or inclination of the people of a state, additional precautions become necessary,[165] the context in which Madison was writing would suggest that the constitution he was defending provided no barrier. Reading the Qualifications Clauses as setting a minimal limitation on state power rather than setting forth an exclusive list of qualifications is in accord with such concerns. As Justice Thomas wrote in his *Term Limits* dissent: "[w]hen the people of a State themselves decide to restrict the field of candidates whom they are willing to send to Washington as their representatives, they simply have not violated the principle that 'the people should choose whom they please to govern them.'"[166]

D. *An Unrepublican Parade of Horribles*

The proponents of the exclusive interpretation also argued that it was an important principle of republican government that the qualifications of elected officials should be fixed,[167] and that if the states were free to impose additional qualifications, true republican government would be at an end. During the *McCreery* debate, Representative Sturges rattled off the following qualifications that might be imposed if the principle of state power over the subject were established:

> Will gentlemen attend to the consequences of the doctrine they contend for against the acceptance of the [Election Committee's] report? If the States had a right to superadd, why might they not say, by law, that the candidate should have an income of $10,000 per year? Why not, if they should think it expedient, apportion the number of Representatives to which they are entitled, among the different professions of the community? Why not say that a certain number should be physicians, a certain number lawyers, and a certain number clergymen? Why not say that the candidate should be an inhabitant of the particular State any number of years he pleases—say twelve, or any other number—although, by the Constitution, a residence of

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thirds of both Houses deem it necessary. U.S. CONST. art. V. Even the alternate route by which a convention can propose amendments requires that Congress call the convention after application by two thirds of the state legislatures. *Id.*

165. Such as the district residency requirement at issue in *McCreery*. *See supra* part I.A.; *see also infra* part II.D.

166. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1891 (1995) (Thomas, J., dissenting) (quoting 2 ELLIOT'S DEBATES, *supra* note 93, at 257 (remarks of Alexander Hamilton at the New York convention)).

167. *See, e.g.*, Representative Smilie during the *McCreery* debate: "[T]here was a principle in a Republican Government of as much importance as any other, as respected the safety of the Government, that the qualifications of the people elected should be firm, steady, and unalterable." 17 ANNALS OF CONG. 887 (1807). James Madison had argued that the qualifications of both the electors and the elected should be, and were, fixed by the national constitution. The qualifications of the electors were clearly not "fixed" by the national constitution, however, but were tied to whatever qualifications the several states imposed upon their own electors. Thus, the issue is not whether qualifications should be fixed, but whether they could be fixed in state constitutions as well as the national constitution. Moreover, because of the different nature of the authority granted to at least some of the state governments—all powers were given except those specifically reserved, whereas only specifically granted powers were given to the national government—qualifications might also be "fixed" by state legislatures and still conform to Madison's analysis.

> seven years within the United States is sufficient? Why not say he should profess certain political principles? Why not that he should possess certain moral qualifications? Or, to come more nearly to the particular case now under consideration, if they had a right to restrict the residence to a particular town in the district, why not to a particular street in that town, or even to a particular house? Were gentlemen prepared to admit these consequences?[168]

Representative Rowan echoed Sturges's concerns and suggested that such qualifications would run afoul of the Guarantee Clause of the Constitution.[169] In so doing, he suggested an answer to his own concerns. Some qualifications, such as owning a large landed estate, would undermine republicanism and verge toward aristocracy, and thus might be checked by Congress as necessary and proper to effect the guarantee of Article IV, Section 4.[170] Other qualifications, however, such as residency within the district, were representation enhancing and thus were compatible with the Guarantee Clause. As John Randolph stated, "residence within the body of the county or district [is] of the very essence of representation."[171]

The Fourteenth Amendment, and by it the incorporation of the First Amendment as applicable to the states, have afforded modern courts additional tools with which to check the imposition of unrepublican qualifications, but those opposed to an exclusive interpretation of the Qualifications Clauses had an answer to such concerns even prior to the Fourteenth Amendment. As John Randolph argued during the *McCreery* debate:

> The most violent suppositions were pressed into service to show that the States cannot be trusted. He might as well suppose that the States

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168. 17 ANNALS OF CONG. 878 (1807) (Rep. Sturges); *see also* 15 CONG. REC. 3297, 3300-01 (1884) (Representatives Elliott and Peters discussing fixed qualifications for members of Congress during the *Peters* debate).

169. 17 ANNALS OF CONG. 892-93 (1807) (Rep. Rowan). "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

170. The Supreme Court stated in Luther v. Borden, 48 U.S. (7 How.) 1, 42-43 (1849), that some issues arising under the Guarantee Clause are political questions not justiciable by the courts, thus depriving the clause of much of its power. *See also* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-50 (1912) (holding that whether a state ceased to be republican in form because it adopted initiative and referendum procedures was a nonjusticiable political question). Enforcement of the clause *by Congress* remained a possibility because, as the *Luther* Court implied, Congress might refuse admission to members from states that imposed unrepublican qualifications. *Luther*, 48 U.S. (7 How.) at 42.

171. 17 ANNALS OF CONG. 885 (1807). Article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," might also have provided a limitation on the states. U.S. CONST. art. VI, cl. 3. Senator Foot argued during the *Trumbull* debate, however, that if a state could add disqualifications on judges, "it has equal power to impose the same disability upon those professing the Roman Catholic faith, or the Jewish faith, or the Calvinistic faith," CONG. GLOBE, 34th Cong., 1st Sess. 580 (1856), despite the express ban on religious qualifications contained in Article VI. The two kinds of disqualifications were indistinguishable, according to Foot, because "the State has just as much power to impose tests of qualification for office under the United States, which are expressly prohibited by the Federal Constitution, and quite as much power to take away or abrogate those tests of qualification which it expressly prescribes, as it has to superadd other tests which are clearly excluded by implication." *Id.* Senator Pugh countered by stating it was sufficient to say that religious tests were expressly prohibited. *Id.* at 583.

> might require five millions of acres of land as a qualification necessary to entitle a man to vote; and then most of the States would be wholly unrepresented; indeed none but Yazoo men could vote.[172] There would be an end of the Government. No quorum of that House would ever assemble. Such monstrous cases might amuse, but could never convince. The Constitution had confided to the States, *State interests*. If they were not safe there let them adopt this report, do away all State rights, and then we should have that consolidated government which the gentleman from Kentucky so much admired, but which he from his very soul detested and abhorred.[173]

Senator Pugh made a similar observation during the *Trumbull* debate: "Why should we fear that the people of the States, either through their conventions or through their Legislatures, will abuse this power more than we should abuse it? Has all wisdom departed from the people?"[174]

While such arguments may carry little weight in the twentieth century, when most Americans tend to view the national government as the defender of individual rights against unrepublican and discriminatory state practices, the opposite was true in the late eighteenth and early nineteenth century, when the states were seen as a bulwark against encroachments on liberty by the central government.[175]

E. *The Constitution Affords the States No Power to Add Qualifications*

The final argument made by the proponents of exclusive interpretation was that the Constitution nowhere gives the states power to impose additional qualifications for members of Congress. Essentially, this argument is a derivative of the argument made earlier; because Congress is a creation of the national Constitution, the states have no power over congressional elections except that which the same Constitution gives them. The exponents of this argument view the Time, Place and Manner Clause of Article I, Section 4, as the sole grant of power to the states over the subject of congressional elections,[176] and since the power to add qualifications for members of Congress is not a regulation of time, place, or manner, it is not included within the clause.[177] As Representative Quincy remarked during the *McCreery* debate,

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172. The *Term Limits* majority made a similar argument. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1858 (1995) ("[U]nder the dissent's approach, the States could achieve exactly the same result [as not holding elections] by simply setting qualifications for federal office sufficiently high that no one could meet those qualifications."). Randolph's answer to his 1807 opponents is equally applicable to the *Term Limits* majority.

173. 17 ANNALS OF CONG. 944 (1807).

174. CONG. GLOBE, 34th Cong., 1st Sess. 583 (1856).

175. Even a property qualification, which immediately suggests oligarchic motives to the twentieth century observer, was seen as enhancing representation in the largely agrarian society of the eighteenth century by requiring that the representative have a stake in the community he was to represent.

176. Or one of two powers granted to the states, the other being the indirect power under Article I, Section 2, Clause 1 to set the qualifications for electors. U.S. CONST. art. I, § 2, cl. 1.

177. The *Term Limits* majority correctly pointed out that if the states had power to impose qualifications under this clause, "Congress itself would have the power to 'make or alter' [qualifi-

"[i]t must be remembered, that if the power of fixing qualifications be not given in this clause, it was given nowhere; there was no delegation of it to the people, or to the States."[178]

There are two problems with Quincy's argument: first, the states do not derive their powers from the national Constitution, but from the people of the several states via the several state constitutions. The national Constitution acts rather by way of prohibition on state powers, and the states are presumed to have powers not delegated to the national government nor prohibited to them, as the Tenth Amendment to the Constitution makes clear.[179] As Samuel Wood argued during the *Peters* debate:

> The Federal Convention was not delegating rights or powers to the States, as the majority report seems to assume, or to the people; it was the States in convention delegating powers to the General Government, and imposing certain restrictions upon the States, restrictions upon the powers already possessed by the States. And it should not be forgotten that the States surrendered no right not expressly named, and they gave us no power not specifically delegated in the Constitution of the United States. Among the powers possessed by the States before the Federal Constitution was formed was that of prescribing the qualifications of their agents or representatives in Congress. The right to fix other qualifications, in addition to those enumerated in the Constitution, was retained by the States along with that mass of powers not specifically delegated.[180]

In response to this problem, Representative Elliott argued:

> From whence do the States derive power to prescribe qualifications for members of Congress? The power is not delegated to them by any provision of the Constitution of the United States. The office is essentially a Federal one, and it is clear to me that unless some section of the Constitution of the United States can be pointed out which gives the States the power to prescribe qualifications for Representatives in the Congress of the National Government no such power exists.[181]

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cations]." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1869 (1995). Attributing such a result to the Framers would be "unfathomable," since, as the *Term Limits* majority and the *Powell* Court before it correctly realized, the Framers clearly intended that *Congress* should not have the power to control the qualifications of its own members. *Id.* at 1852; Powell v. McCormack, 395 U.S. 486, 540 (1969).

178. 17 ANNALS OF CONG. 908 (1807); *see also id.* at 912 (statement of Rep. Key) ("I lay it down as a political truth, that the States, in their sovereign capacities, have no power, right, or authority to interfere with the elections of Representatives to Congress, except so far as the Constitution of the United States [Art. I, § 4.] gives them special power so to do.").

179. U.S. CONST. amend X; *see also infra* part III.D.

180. 15 CONG. REC. app. at 76 (1884).

181. 15 CONG. REC. 3297 (1884); *see also* CONG. GLOBE, 34th Cong., 1st Sess. 467 (1856) (statement of Sen. Trumbull) ("Where did the Legislature of Illinois get the power to elect whomsoever it pleased to the Senate? . . . The power to elect a Senator is not inherent in a State; it is derivative from the Constitution of the United States.").

Elliott's response merely collapses into the question about the nature of the national legislature discussed above,[182] however, and does not address the dual nature of representatives in Congress. Moreover, it does not respond to the second half of Wood's argument, that the states had prescribed qualifications for their representatives to the Continental Congress prior to the Federal Convention.

The second problem with Quincy's argument is that it turns on a reading of Article I, Section 4 as a grant of power to the states,[183] but even a cursory examination of the text of the clause does not readily support such a reading. Article I, Section 4 provides: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators."[184] The states legislatures *shall* prescribe such regulations, but Congress *may* make or alter them. The clause is not a grant of power to the states, but a mandate to them, with a preemptive power given to Congress.[185] As John Randolph argued during the *McCreery* debate:

> The gentleman had undertaken to find a denial of the power of a State to superadd qualifications to a Representative, in a grant of power to the States "to regulate the time, place, and manner of holding elections," and had contended, with great propriety, that in every grant of [power,] the powers not enumerated, and not necessary to carry the enumerated powers into effect, were denied. Mr. R. said that, at the first blush, the clause in question might appear to contain a grant of power to the States, but look at it for a moment with a steady eye and its complexion varied. *It was in fact a grant of power to Congress, with a mere permission to the States* to exercise that power until Congress should choose to take it out of their hands. The Government could not have been called into existence, without the intervention of this power, and as it must be lodged somewhere, the States were permitted to exercise it at the sufferance of Congress. This clause, then, being a grant of powers to Congress and not to the States contained a denial to Congress, and not to the States, of the powers not enumerated in it.[186]

The importance of this distinction is that, if valid, it undermines the argument that the Constitution has comprehensively regulated congressional elections, and thus that the states have only that power over the subject which the

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182. *See supra* part II.B.

183. The *Term Limits* majority also read the Time, Place and Manner Clause as a grant of authority to the states. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1869 (1995) ("The Framers intended the Elections clause to *grant* States authority to create procedural regulations . . . .") (emphasis added); *id.* at 1873 (Kennedy, J., concurring) ("[The clause] *grants* States certain powers over the times, places, and manner of federal elections . . . .") (emphasis added).

184. U.S. CONST. art. I, § 4.

185. Justice Thomas recognized this distinction in his *Term Limits* dissent: "Contrary to the majority's assumption, . . . this Clause does not delegate any authority to the States. Instead, it simply imposes a duty upon them." *Term Limits*, 115 S. Ct. at 1883 (Thomas, J., dissenting).

186. 17 ANNALS OF CONG. 942 (1807) (emphasis added).

Constitution gives them. The state legislatures would thus have a power to regulate the time, place, and manner of elections that exists outside of the Constitution, subject to the preemptive power given by the Constitution to Congress. Similarly, Article I, Section 2, Clause 1 would recognize that the people of the several states have a power to choose their own representatives to Congress that exists prior to the Constitution; that same clause would then merely mandate that they do so "every second Year" by electors having the same qualifications as "Electors of the most numerous Branch of the State Legislature."[187] Under such an interpretation, the Qualifications Clauses would serve merely to provide an additional restriction on the recognized power of the people of the several states; they cannot send someone who has not attained the age of twenty-five, or been seven years a citizen, or who was not at the time of his election an inhabitant of the state.

The problem with such an interpretation is that it is also possible that the several elections clauses, taken together, comprehensively regulate the election of members of Congress, thus implying that the states are prohibited from exercising any preexisting power over the subject except that which is specifically granted. The crucial issue, then, is not whether the Constitution grants the people of the several states[188] the power to impose qualifications,[189] but whether the several elections clauses should be read to imply a prohibition on their power. From what has been argued thus far, the clauses themselves do not dispositively settle the question. We turn, therefore, to the arguments for interpreting the Qualifications Clauses as a list of minimum qualifications.

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187. *See* U.S. CONST. art. I, § 2, cl. 1.

188. I say "people of the several states" in order to take account of the legitimate concern raised by Representative Findley during the *McCreery* debate. He observed:

> [T]he power of prescribing additional qualifications has not by the people in their conventions been granted to Congress, nor does Congress claim or pretend to exercise it. They have not, either by the federal ratifying conventions *or by the State constitutions*, vested that power in the State Legislatures. Whence then did the State Legislatures derive this right of making supplements to the qualifications prescribed by the Federal Constitution? Not from the people, in any known manner.

17 ANNALS OF CONG. 876 (1807) (emphasis added). By including the language about state constitutions, Findley implicitly recognized that the people of a state might grant such a power to their state legislature. When one considers, however, that many of the state legislatures are given by their state constitutions a general grant of legislative power subject only to certain prohibitions, rather than a limited grant of power, such as was given to Congress, the distinction between the state and the people of the state becomes less important.

189. Both sides of the debate generally agreed that setting qualifications was not a time, place, or manner regulation, and the fact that qualifications were listed in a separate clause strongly supports this conclusion, despite the opinion by Justice Black in *Oregon v. Mitchell* to the contrary. *See* Oregon v. Mitchell, 400 U.S. 112, 117 (1972). The Illinois provision disqualifying judges that was at issue in the *Trumbull* case, however, also specified that "[a]ll votes for [judges or justices], for any elective office, (except that of judge of the supreme or circuit court,) given by the General Assembly or the people, shall be void." ILL. CONST. of 1848, art. V, § 10, *reprinted in* 2 THORPE, *supra* note 39, at 999. As Senator Pugh argued, the provision was thus not simply a disqualification, but a manner of election regulation as well, because it specified the manner in which the disqualification was to be enforced. CONG. GLOBE, 34th Cong., 1st Sess. 550 (1856).

III. THE ARGUMENTS FOR INTERPRETING THE QUALIFICATIONS CLAUSES AS A LIST OF MINIMUM QUALIFICATIONS

A. *Some Additional Qualifications Are Compatible with the Constitutional Qualifications*

The first argument made by defenders of the states' right to impose additional qualifications was that some qualifications, such as the district residency requirement at issue in *McCreery*, were compatible with the Qualifications Clauses of the Constitution, and hence were permissible. Thus, Representative Sawyer argued:

> An inclusion [in the Constitution] of a condition of residency in a State was not an exclusion of a residency in a district; and a State, by annexing the latter condition to the former, did not in any respect affect the full operation of that clause of the Constitution, according to its sense, expressed or implied. There was no necessity, under the most liberal construction of this article, to suppose that a residency in a State should supersede the necessity of a residency in a district. So far from the views which the Framers of the Constitution had being thwarted by a construction of the kind he contended for, it would be the means of more completely carrying them into effect, unless it could be supposed that a person's being better qualified than the Constitution required should disqualify him altogether; for undoubtedly the surest, and in fact the only way of becoming a resident of a State, was to become a resident of a district—for every State was composed of districts.[190]

The district residency requirement at issue in *McCreery* was an addition to the residency requirement contained in the Constitution, and it might be argued in response to Sawyer that at least in the three fields of age, citizenship, and residency specified in the Constitution, the states could not alter the qualifications because the constitutional clause had occupied the field. Thus, as Senator Foot later argued in the *Trumbull* case, a state could not require that a Senator be forty years old instead of thirty, or twenty-one years a citizen instead of nine, despite the fact that "[t]hese tests of qualification are not expressly prohibited in the Federal Constitution; nor are they in direct conflict or contravention of those expressly prescribed in that instrument."[191]

The question whether stricter qualifications of the same type as those specified in the Constitution are compatible with the Constitution cannot be answered, of course, without assessing the nature of the Qualifications Clauses themselves. If state inhabitancy was meant to be the exclusive residency requirement, then the additional requirement of district residency would be incompatible with the constitutional requirement; but if state residency at a minimum was intended, the additional qualification of district residency is perfectly

190. 17 ANNALS OF CONG. 880 (1807).
191. CONG. GLOBE, 34th Cong., 1st Sess. 580 (1856).

compatible with the constitutional requirement.[192] While there is some evidence to suggest that the Framers were concerned with representatives having a certain set of minimum qualifications,[193] calling the additional qualifications compatible merely begs the question of the nature of the Qualifications Clauses themselves.

The analysis is slightly different with respect to additional qualifications that do not deal with age, citizenship, or residency, but the question about their compatibility is the same. One might argue that because the Constitution says nothing about property qualifications, or about ineligibility for state officers, a state's imposition of such qualifications is not in conflict with the age, citizenship, or inhabitancy requirements of the Qualifications Clauses. Senator Pugh, during the *Trumbull* debate, conceded that "no State can dispense with, or subtract from, the requisites prescribed in the Federal Constitution," but he saw "no pretense for asserting that the States may not superadd any qualification which is consistent with those requirements," no reason why a state "might not prescribe *other* qualifications, in addition, for the purpose of protecting their separate interests, rights, and welfare."[194]

Again, though, calling a property qualification or the judicial ineligibility provision at issue in the *Trumbull* case compatible with the Qualifications Clauses begs the question about the nature of those clauses. They are compatible if the clauses were intended to occupy the qualifications field with respect only to age, citizenship, and residency requirements, but incompatible if the clauses were intended to occupy the entire qualifications field. As Senator Pugh recognized, "such additional requisites must not only be consistent with those specified in the Constitution of the United States, but with the whole spirit and tenor of that instrument."[195] Thus, the essential inquiry is not compatibility, but the nature and object of both the Qualifications Clauses and the entire Constitution of which they are a part.

B. *Negative Phrasing of the Qualifications Clauses*

Several of the proponents of state power argued that because the Qualifications Clauses were phrased negatively, the Framers intended them to set forth minimum, not exclusive, qualifications. John Randolph framed the argument during the *McCreery* debate as follows:

> Mark the distinctions between the first and second paragraphs [of Article I, Section 2]. The first is affirmative and positive. "They shall have the qualifications necessary to the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," &c. No man could be a member without these requisites; but it did not follow that he who had them was entitled to

192. The same inquiry is necessary for the age and citizenship qualifications as well.
193. *See supra* text accompanying note 146.
194. CONG. GLOBE, 34th Cong., 1st Sess. 550 (1856).
195. *Id.*

> set at naught such other requisites as the several States might think proper to demand. If the Constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally ran thus: "*Every person* who has attained 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 the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives." But so far from fixing the qualifications of members of that House, the Constitution merely enumerated a few *disqualifications* within which the States were left to act.[196]

Representative Bibb echoed Randolph's argument, and pointed out that "[t]he language was not such, according to legal construction, as to induce the House to say that the State authorities might not require other qualifications."[197] More importantly, as has already been described,[198] John Randolph argued that the Framers were concerned lest the states send unqualified representatives to Congress:

> [The Constitution] said to the States, you have been in the habit of electing young men barely of age; you shall send us none but such as are five and twenty: some of you have elected persons just naturalized; you shall not elect any to this House who have not been seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority; you shall elect none whom your laws do not consider as inhabitants. Thus guarding against too great laxity in the State regulations, by general and negative provisions, leaving them, however, within the limits of those restrictions, to act for themselves; to consult the genius, habits, and, if you will, the prejudices of their people.[199]

Reading the clauses as setting forth only minimum qualifications addresses those concerns.

There are two criticisms of the negative phrasing argument. The first is that, by the same reasoning, states could add qualifications to the office of President, since the clause describing presidential qualifications is also phrased

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196. 17 ANNALS OF CONG. 883 (1807) (emphasis in original).

197. *Id.* at 890. Bibb was no doubt referring to the *expressio unius* principle of interpretation which, in its common usage, applied to positively-phrased recitations, not negatively-phrased ones. *See supra* part II.A.; *see also* 33 CONG. REC. 39 (1899) (statement of Rep. Taylor) ("the language providing for the age, and so on, is negative in its character"); 15 CONG. REC. app. at 75 (1884) (statement of Rep. Wood) ("[The clause] is not a grant of power. It does not attempt to prescribe the qualifications of members of Congress. These provisions are negative and limitations on the States."); CONG. GLOBE, 34th Cong., 1st Sess. 549 (1856) (statement of Sen. Pugh) ("Its language is that of exclusion, and not of qualification.").

198. *See supra* text accompanying note 143.

199. 17 ANNALS OF CONG. 883-84 (1807).

in negative terms.[200] As Representative Key pointed out during the *McCreery* debate:

> The expressions used in [Article II] are in negative terms, in the same manner as those used with respect to qualifications of Representatives; and does any reasonable man, and does any friend of the Constitution, say that the States can superinduce or add any other qualification to the President than those designated by the Constitution? If negative expressions apply to one case, so they do to the other.[201]

It is perhaps a sufficient response to Key's argument that the President is a national officer in a way that neither Representatives nor Senators are,[202] but another response is also possible. The states do not elect Presidents; presidential electors do, and the Constitution also contains a negatively-phrased Qualifications Clause for them: "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[203] As Samuel Wood pointed out during the *Peters* debate:

> If [the clause fixed the qualifications of electors], then foreigners, non-residents, minors, persons convicted of crimes, &c., may be appointed Presidential electors. Most of the States, if not all of them, have fixed other qualifications as to age, residence, &c. Maryland required, at one time, that six should be residents of the Western and four of the Eastern Shore. Other States were divided into districts, and electors were required to live in their districts. If States can add to these negative inhibitions as to the qualifications of Presidential electors, they certainly can do the same as to members of Congress.[204]

State practice is not necessarily a guide to constitutionality, however, as will be discussed below, and the distinction between the qualifications for President and those for presidential electors is a weak response to Key's criticism. The qualifications for members of Congress are simply much more like those for the President than those for presidential electors; any distinction between the

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200. Article II, Section 1 provides:

> No Person except a natural born Citizen, or a Citizen of the United States at the time of Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

U.S. CONST. art. II, § 1, cl. 5.

201. 17 ANNALS OF CONG. 914 (1807); *see also id.* at 918 (statement of Rep. Howard) (pointing out that the Qualifications Clauses for both the President and Senators were negatively phrased).

202. Representative Key, of course, responded that the members of Congress, who can declare war *for* or levy taxes *on* the whole nation, are no less national representatives than the President. *Id.* at 914. That argument, however, returns us to the nature of the Congress, discussed above. *See supra* part II.B.

203. U.S. CONST. art. II, § 1, cl. 2.

204. 15 CONG. REC. app. at 76 (1884). Justice Thomas made a similar argument in his *Term Limits* dissent: "We have long understood that [the States] do have the power . . . to set qualifications for their Presidential electors." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1883 (1995) (Thomas, J., dissenting).

two must therefore be based on the nature and object of the clauses rather than the fact that they are negatively phrased. To repeat Joseph Story's admonition:

> The truth is, that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction.[205]

The second criticism of Randolph's negative phrasing argument is one recognized by the Supreme Court in *Powell v. McCormack*[206] and summarily accepted by the *Term Limits* majority.[207] The Qualifications Clauses, as reported to the Convention by the Committee of Detail, were originally phrased positively.[208] The Committee of Style, which was appointed only "to revise the stile of and arrange the articles which had been agreed to,"[209] "had no authority from the Convention to make alterations of substance in the Constitution."[210] Constitutional scholar Charles Warren thus treated the negatively-phrased final clause and the positively-phrased draft clause as synonymous.[211] As the Supreme Court subsequently recognized in *Nixon v. United States*,[212] however, "we must presume that the [Committee of Style's] reorganization or rephrasing accurately captured what the Framers meant in their unadorned language."[213] Thus, another explanation is at least equally plausible: the Committee of Style changed the clause from positive to negative phrasing because the negative phrasing more accurately reflected the intention of the convention. The *expressio unius* concerns expressed by John Dickinson in response to the positively phrased original version of the clause[214] suggest that the change was made deliberately, but it is impossible to tell from the debates whether the other delegates to the convention agreed that the *expressio unius* principle was implicated, and if so, whether such implication was a cause for concern or an intended effect.

C. *State Practice*

The proponents of state power also argued that the common practice of several of the states since the ratification of the Constitution was to impose additional qualifications of one sort or another. Representative John Randolph stated during the *McCreery* debate that such "was so obvious and natural" a construction of the Qualifications Clauses "that it had been adopted by the States, and acted upon from the commencement of the Government, without

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205. 1 STORY, *supra* note 100, § 448, at 434.
206. 395 U.S. 486, 536 (1969).
207. *Term Limits*, 115 S. Ct. at 1849 n.8.
208. *Powell*, 395 U.S. at 536 (citing 2 Farrand, *supra* note 97, at 249-50).
209. *Id.* at 538 (quoting 2 FARRAND, *supra* note 97, at 553).
210. *Id.* at 539 (quoting CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422 n.1 (1929)).
211. WARREN, *supra* note 210, at 422 n.1.
212. 113 S. Ct. 732 (1993).
213. *Nixon*, 113 S. Ct. at 737.
214. *See supra* text accompanying note 96.

any man dreaming of, or starting an objection to it."[215] Representative Love pointed out that "[i]n perhaps every State in the Union, have laws been enacted of a similar nature to" the district residency requirement at issue in *McCreery*.[216] Even Representative Alston pointed out that his own state of North Carolina imposed a twelve-month district residency requirement, although "he had always believed that had the people of one district chosen to elect a man from another district, possessing other qualifications as required by the Constitution, he would be entitled to his seat."[217]

Similarly, during the *Trumbull* debate, Senator Toombs recognized "that the constitutions of [perhaps] half the States in the Union have provisions in them which may be declared void" if the Senate found that the Kansas provision at issue in the case was void,[218] and Senator Mason recognized "that there are many of the States in this Union who have considered themselves as retaining a power to place qualifications or disqualifications upon the office of Senator," though he himself thought the clauses exclusive.[219] Samuel Wood, during the *Peters* debate, presented a comprehensive listing of state-imposed qualifications[220] and cited the Supreme Court's statement in *Stuart v. Laird*[221] that "[a] contemporary exposition of the Constitution, practiced under and acquiesced in for a period of years, fixes its construction."[222]

There are two criticisms that can be made of this argument, and a reconciling explanation. First, a number of the state constitutional provisions cited do not actually impose additional qualifications on members of Congress. Some clearly apply only to officers under the state constitution, and thus do not include representatives to Congress.[223] Others are resign-to-run provisions, and have the effect of rendering the state office vacant, not of disqualifying the state officer from Congress.[224] The answer to this criticism is that a sufficient number of state constitutions[225] and state statutes[226] expressly

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215. 17 ANNALS OF CONG. 884 (1807).

216. *Id.* at 902.

217. *Id.* at 891.

218. CONG. GLOBE, 34th Cong., 1st Sess. 466 (1856); *see also id.* at 550 (statement of Sen. Pugh) (listing the state provisions).

219. *Id.* at 579-80.

220. 15 CONG. REC. app. at 78-81 (1884).

221. 5 U.S. (1 Cranch) 299 (1803).

222. 15 CONG. REC. 78 (1884) (quoting Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803)); *see also* Ray v. Blair, 343 U.S. 214, 229 (1952) (arguing that the "[l]ong-continued" practice of depriving presidential electors of the independence the Constitution designed "weigh[ed] heavily in considering the constitutionality" of a Democrat Party requirement that electors pledge to support nominees of the Democratic Party).

223. *See, e.g.*, TENN. CONST. of 1796, art. IX, § 3, *reprinted in* 6 THORPE, *supra* note 39, at 3421 (imposing a two-year ineligibility for office of "any person" bribing an elector); R.I. CONST. of 1842, art. II, § 1, *reprinted in* 6 THORPE, *supra* note 39, at 3224-25 (setting property requirement and one-year residency requirement for voting); R.I. CONST. art. IX, § 1, *reprinted in* 6 THORPE, *supra* note 39, at 3231 ("No person shall be eligible to any civil office . . . unless he be a qualified elector for such office.").

224. *See, e.g.*, DEL. CONST. of 1792, art. III, § 8, *reprinted in* 1 THORPE, *supra* note 39, at 573 ("No member of Congress . . . shall at any time hold or exercise the office of judge."); N.H. CONST. of 1784, pt. 2, *reprinted in* 4 THORPE, *supra* note 39, at 2469 ("No president or judge of the supreme court shall hold . . . any place or office . . . from any other State, government, or power whatever.").

225. *See, e.g.*, GA. CONST. of 1798, art. I, § 11, *reprinted in* 2 THORPE, *supra* note 39, at 792

imposed additional qualifications on members of Congress to suggest that state legislators, at least, thought the practice constitutional.[227]

The second criticism is that frequent violations of the Constitution do not make the practice any less unconstitutional.[228] As Representative Key stated during the *McCreery* debate, "[v]iolations of the Constitution, by some of the States, are now cited as precedents from which destructive conclusions are drawn."[229] This criticism is all the more compelling when one considers, as Key pointed out, that because residence in a district of a state was also necessarily residence in the state itself, such state constitutional provisions could never be judicially challenged in the House as long as they were complied with.[230] But Key's criticism misses the point of Randolph's argument; it is not that unconstitutional actions become constitutional by a sort of adverse possession,[231] but that actions by the states, taken in many instances by the very same people who drafted and/or ratified the Constitution, are strong evidence of the intended meaning of the Constitution itself.[232]

Finally, there is also an explanation of these state provisions that renders them ineffectual, though not unconstitutional. As Senator Foot argued in the *Trumbull* case, disqualifications "in the constitutions of several of the States [are] regarded simply as the expression of a rule of policy or expediency for the action of the Legislature or of the people, and merely advisory to them, and not [as] having the force of a binding obligation."[233] To be sure, said Foot, a disqualification clause "is entitled to respectful consideration, and should have its proper degree of influence upon the action of the elective power," but the clause is hortatory only, and the Senate would infringe the

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(No member of the General Assembly shall, "after having taken his seat, be eligible to any [office under this state or the United States] during the time for which he shall have been elected.").

226. *See, e.g.*, Ga. Act of Feb. 11, 1799, setting a three-year state residency requirement on members of Congress.

227. The *Term Limits* majority observed that "the number of state-imposed qualifications [was] remarkably small," with only "one instance of a state-imposed property qualification . . . and five instances of district residency requirements." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1866 n.41 (1995). While 6 out of 50 might be "remarkably small," the majority seems to forget that 6 instances of qualifications at the time of the founding amounts to nearly 50% of the 13 State constitutions in effect at the time.

228. *See, e.g., id.* at 1864 ("One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States . . . .").

229. 17 ANNALS OF CONG. 914 (1807).

230. *Id.*

231. Randolph's statement is susceptible to such an interpretation, however. *Id.* at 889 (statement of Rep. Randolph) ("[P]ractice, long established practice, under the Constitution, was the best evidence what the Constitution was. Powers indisputably exercised by the States ever since its adoption, were as much departed from the General Government, and imparted to the States, as if especially delegated by the Constitution itself.").

232. The Supreme Court has recognized that the actions of the early Congresses are more persuasive evidence of the Framers' intent than those of early state legislatures. As I have shown above, however, in the only action of an early Congress on this subject, the *McCreery* case, Congress deliberately avoided deciding the constitutional question. *See supra* part I.A. Other early congressional actions, however, support the power of the states. As new states entered the union with constitutional provisions establishing additional qualifications, Congress approved their state constitutions as being in conformity with the U.S. Constitution. Therefore, by its own actions, Congress gave its tacit approval to such provisions.

233. CONG. GLOBE, 34th Cong., 1st Sess. 581 (1856).

will of the people, not follow it, by following such a clause.[234] While the clauses to which Foot was pointing do not read as advisory clauses, his explanation is a plausible one. More importantly, he points to an important problem with Congress's refusing to seat a member who arrives with an otherwise valid election certificate demonstrating the support of a majority of voters.[235] That problem is addressed in more detail below.[236]

D. *The Tenth Amendment as a Rule of Interpretation*

Given the ambiguity surrounding the Qualifications Clauses described above, the proponents of state power argued most vigorously that the Tenth Amendment to the Constitution required that the ambiguity be resolved in favor of the states. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[237] The Amendment's implication on the qualifications issue was hotly contested in each of the debates. Moreover, several different interpretations of the amendment were suggested on both sides of the debates. I shall first attempt to summarize the various interpretations and then suggest the one that I find most persuasive.

First and foremost, the proponents of state power argued that the Tenth Amendment established a rule of constitutional interpretation. Thus Representative Sawyer argued during the *McCreery* debate:

> But even supposing that [members of Congress] should be impeded in their progress [of interpreting the Qualifications Clauses] by the difficulty which a construction either way would produce, in rendering a negative injury to the Constitution, or a positive one to the States, still their doubts would be dispelled and their progress made easy by another clause in the Constitution, and which was added for the express purpose of clearing up all doubts that might arise under its interpretation. It was this: whatever powers and authorities are not expressly[238] delegated by the Constitution to the United States, or necessarily arising under it, shall be reserved to the States themselves, or to the people. Now, he hoped that a mere commencement to exercise a certain power under the Constitution was not to be considered as a complete termination of it, with regard to the States. A right could not be said to be delegated absolutely, which may be

234. *Id.*
235. *Id.*
236. *See infra* text accompanying note 265.
237. U.S. CONST. amend. X.
238. The language of the Tenth Amendment, of course, is "the powers not delegated," not "the powers not expressly delegated." U.S. CONST. amend. X. A similar clause in the Articles of Confederation included "expressly," but the word was deliberately dropped by Congress before submitting the Tenth Amendment to the states for ratification. *Compare* ART. OF CONFED. of 1777, art. II, *reprinted in* 1 THORPE, *supra* note 39, at 10 *with* U.S. CONST. amend. X. Sawyer's reading is not limited to powers "expressly delegated," however, but includes those powers "necessarily arising" under the Constitution. 17 ANNALS OF CONG. 880-81 (1807).

> exercised conjointly. He thought, therefore, that he could lay it down as an undeniable rule, that the right which each State had to require a person to become a resident of the district for which he may be elected, was not delegated expressly by the Constitution, for there were no words in it to that effect, neither did it flow from a necessary operation of any of its provisions; therefore, it must belong to the States themselves, or to the people.[239]

Sawyer's interpretation of the Tenth Amendment to some extent begs the question about the nature and purpose of the Qualifications Clauses. As the proponents of an exclusive interpretation argued, the clauses comprehensively regulated qualifications for members of Congress,[240] and thereby, by necessary implication, prohibited the states from entering the field themselves. Therefore, the Tenth Amendment was not relevant.[241] Anticipating Sawyer's argument, Representative Sturges stated:

> It was not by any means a necessary, but, as . . . [I] conceive[], a forced application, that, because the States were not prohibited in express terms, they did possess the right. The implication was, in his opinion, directly the reverse. But it had been, and would undoubtedly be urged, though it had not yet been stated in the debate, that whatever powers were not expressly denied in the Constitution to the States, or, in other words, what had not expressly been granted by the States to the General Government, was retained by the States. He acceded to the correctness of the position generally. But a distinction was to be observed in those cases where, from the nature of the subject, there was no incompatibility; where there was no clashing in the concurrent exercise of powers by the General and the State Governments, the principle would apply; but in those cases where, from the nature of the subject, there would be an incompatibility, the principle could not, and ought not to apply. For instance, in attending to the legislative powers granted to the General Government by the eighth section of the first article of the Constitution, they found that Congress had the power "to lay and collect taxes." In this clause the same power was not denied to the States, and it was retained by them. But why? Because, from the nature of the subject, there would, in its exercise, be no interference with the General Government. In the seventh clause of the same section and article, Congress have the power "to establish post offices and post roads." A power over the same subject was not in express terms denied to the States. But had the States a right to establish post offices and post roads? He answered, no. Why not? For the reason and on account of the distinction he had mentioned—because, from the nature of the subject, were they to exercise

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239. 17 ANNALS OF CONG. 880-81 (1807).

240. *See, e.g.*, CONG. GLOBE, 34th Cong., 1st Sess. 548 (1856) (statement of Sen. Crittenden) ("The Constitution of the United States decides upon the whole matter . . . .").

241. The *Term Limits* majority made a similar point: "The Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1856 (1995).

> the power, there would be an interference with the powers of Congress; and there would be a serious inconvenience, for it was desirable, and, indeed, indispensable, that there should be a uniformity in the laws regulating post offices and post roads. So in the case now before the Committee. Should the States be allowed the power to determine the qualifications of the elected, more especially where they have the right to superadd, after the Constitution had enumerated certain qualifications, that incompatibility, that interference of powers which he had mentioned would exist.[242]

Of course, Sturges's position also begs the question about the nature of the Qualifications Clauses. Significantly, though, the examples he cited involve express delegations of power to Congress. The Qualifications Clauses do not read as a delegation of power at all, either to Congress or to the States;[243] rather, they read as a limitation on power, and since no power over the subject is granted to Congress, either expressly or by necessary implication, the power that the clauses limit must be a state power.[244] The Tenth Amendment does not help answer how far the limitation on state power should extend, but the Supreme Court has stated that implied prohibitions on state power are disfavored.[245] That rule, when combined with the Tenth Amendment, suggests that the limitation, or prohibition, on state power is not to be expanded beyond that actually required by the constitutional text. As Thomas Jefferson wrote in 1814:

> Had the Constitution been silent nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them would have belonged to the State. So, also, the Constitution might have prescribed the whole and excluded all others. It seems to have preferred the middle way. It has exercised the power in part by declaring some disqualifications . . . . But it does not declare itself that the member shall not be a lunatic, a pau-

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242. 17 ANNALS OF CONG. 877-78 (1807).

243. *Cf. supra* text accompanying note 185.

244. As discussed above, the proponents of an exclusive interpretation rejected this understanding of state power. *See supra* part II.E. Thus, Representative Alston argued during the *McCreery* debate that because "[t]he Constitution, in speaking of Representatives, had neither said the States *should* assign qualifications, nor that they *might*," the states had no power to impose qualifications, and anyone meeting the constitutional list was eligible to a seat in Congress. 17 ANNALS OF CONG. 892 (1807) (emphasis added). Similarly, Representative Rowan stated that "[n]o power had been given to the State sovereignties to superadd qualifications . . . ." *Id.* at 894. The fallacy of this argument is that it treats the states as creatures of the Constitution. Rowan himself stated, "that, as to the purpose of electing members to the lower House of Congress, the States were to the Union what counties were to a State," *id.*, a proposition vigorously rejected by Representative Randolph. *Id.* Representative Key offered a less extreme version of the same argument that implicitly relied on the nature of a power over congressional elections: "I lay it down as a political truth, that the States, in their sovereign capacities, have no power, right, or authority to interfere with the elections of Representatives to Congress, except so far as the Constitution of the United States gives them special powers so to do." *Id.* at 912. Because the only grant of state power, according to Key, was the Article I, Section 4 Time, Place and Manner Clause, the states had no power to superadd qualifications. *Id.*

245. As Justice Thomas noted in his *Term Limits* dissent, the Court is reluctant "to read constitutional provisions to preclude state power by negative implication." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1887 (1995) (Thomas, J., dissenting).

> per, a convict of treason, of murder, of felony, or other infamous crime, or 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.[246]

A second counter to Sawyer's view of the Tenth Amendment as a rule of interpretation recognizes that the reserved powers clause of the Tenth Amendment is bifurcated; powers not delegated to the United States, nor prohibited to the States, are reserved to the States *or* to the people.[247] The opponents of state power to add qualifications interpreted the bifurcation in two slightly different ways, but both interpretations operate in their view to deprive the states of the power to add qualifications.

First, as Representative Quincy argued during the *McCreery* debate, power is reserved either to the states or to the people depending on the nature of the power:

> As to rights reserved, now came in the tenth amendment to the Constitution, cited by the gentleman from Virginia on his right, which speaks of rights reserved to the States, or to the people. What rights? When the whole right of voting was the subject of consideration, as it was at the formation of the Constitution, the exclusion of a part was the inclusion of the remainder. The Constitution had said that certain persons should not have a right to be elected members of this House: was not this a declaration that all others might? This was a right then which was reserved to the people, and not to the States.[248]

Representative Key made a similar argument, and specified precisely how the people were to exercise their reserved rights:

> To form a correct idea of this subject, and of the true meaning of the article of reserved powers, it is only necessary to trace with precision in what body the power was originally lodged; to that body it is reserved. If it was lodged in the States as sovereignties, then the reservation is to the States in that capacity; but if it was a power in the people, and such as the States in their sovereign capacity never had exercised or could exercise, (as in the present case,) then it was reserved to the people, to be used or controlled by them in the manner prescribed by the Constitution.[249]

There are two problems with Quincy and Key's argument. First, it fails to recognize that "the people" might be either the people of the state or the people of the whole United States. Second, in treating "the people" as only the people of the whole United States, the argument, especially as articulated by

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246. Thomas Jefferson to Joseph C. Cabell, *quoted in* 15 CONG. REC. app. at 84 (1884) (Rep. Wood).

247. U.S. CONST. amend. X (emphasis added).

248. 17 ANNALS OF CONG. 908 (1807).

249. *Id.* at 917.

Key, makes the clause redundant; it says, in effect, that the people have a reserved power to amend the Constitution, the same power to amend already prescribed in Article V.[250]

The second interpretation of the bifurcation of reserved powers rests on a temporal view of the clause. Thus, as Representative Howard stated during the *McCreery* debate, "no power could be imparted by the States to the General Government, or reserved from it, which was not *previously* possessed by them."[251] Joseph Story offers a similar interpretation in his *Commentaries on the Constitution*,[252] and Representative Elliott elaborated on the interpretation during the *Peters* debate:

> Congress such as we now have under the Constitution is a creature of that instrument, and the States did not prior to the birth of the National Government possess the right to send representatives to a congress which had no existence; and it is seemingly clear that they did not possess the power to prescribe qualifications for representatives to a body unknown to the world until the adoption of the Federal Constitution. I think it is very plain that article 10 of the amendments to the Constitution can have no application to the question involved in this case. The right of the people of the States to send Representatives to the Congress of the United States is not a right growing out of the sovereignty of the respective States. The right to elect Representatives to Congress does not spring from the State governments, but is a right growing out of the formation of the National Government. The States could not have reserved powers they did not possess.[253]

Samuel Wood countered, however, that the states did have the power to choose their representatives to the national government prior to 1787:

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250. Justice Thomas made the same point in his *Term Limits* dissent: "To be sure, when the Tenth Amendment uses the phrase 'the people,' it does not specify whether it is referring to the people of each State or the people of the Nation as a whole. But the latter interpretation would make the Amendment pointless . . . ." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1876 (1995) (Thomas, J., dissenting).

251. 17 ANNALS OF CONG. 919 (1807) (emphasis added). The *Term Limits* majority relied heavily on this argument. "[T]he power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States . . . . [T]hat Amendment could only 'reserve' that which existed before." *Term Limits*, 115 S. Ct. at 1854. "With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified." *Id.* at 1855. "[E]lecting representatives to the National Legislature was a new right, arising from the Constitution itself." *Id.* at 1856. Apart from the fact that the states did have power to impose qualifications on the representatives to the national legislature under the Articles of Confederation, a fact which the *Term Limits* majority ignored, the majority misconstrues the Tenth Amendment. As Justice Thomas correctly asserted:

> [I]t was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of the people of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.

Id. at 1878 (Thomas, J., dissenting).

252. 2 STORY, *supra* note 100, §§ 626-627, at 101-03.

253. 15 CONG. REC. 3297 (1884).

> When the Constitution of the United States was formed the right of each State to be represented in Congress existed under the Confederation, and was reserved with certain limitations. It would be nonsense to say that the Constitution of the United States delegates to the State the right to send Representatives to Congress. It was sovereign States, which had just secured their independence, that met in convention for the purpose of forming "a more perfect Union."[254]

Congress was not the creature of the Constitution, asserted Wood, because, as the Supreme Court recognized in *Lane County v. Oregon*,[255] "Both the States and the United States existed before the Constitution."[256] As Wood elaborated:

> If the States and the United States existed before the Constitution, then representation, as stated by Judge Story, is not, as I have said, a creature of the Constitution, but existed prior to its adoption, and the article I have quoted is an inhibition on the States and not a grant of power.[257]

Similarly, Senator Pugh stated during the *Trumbull* debate:

> It is suggested, however, that the Legislatures of the States derive their power of electing Senators from the Constitution of the United States, and not from their respective State constitutions. But this, if admitted to its full extent, will be found immaterial. It is not a power conferred on any Legislature as a matter of gift or permission from the Federal Government, but as a matter of right—and because the Legislature represents the people, and acts only as an agent for the people . . . .
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> . . . [T]he Senate is only the Congress of the Confederation remodeled. Hence, pursuing a usage even older than the Declaration of Independence, the power of electing Senators is not *conferred* on the State Legislatures by the Constitution of the United States, but is *recognized* as existing in them, previously, as the agents of State sovereignty and the impersonations of State independence.[258]

The best counter to both aspects of the bifurcation argument was given by John Randolph during the *McCreery* debate. He argued that a proper understanding of the Tenth Amendment

> lay in a dexterous use of the word "States." In geography, it implied a portion of country within certain limits. In politics, it might mean the government of that portion of country, or the people inhabiting it, as socially and politically connected. The Framers of the Constitution well knew that in some States, as in Connecticut, the power of the Government was commensurate with that of the people in their origi-

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254. *Id.* app. at 87.
255. 74 U.S. (7 Wall.) 71 (1865).
256. 15 CONG. REC. app. at 75 (citing *Lane County*, 74 U.S. (7 Wall.) at 76).
257. *Id.* app. at 76-77.
258. CONG. GLOBE, 34th Cong., 1st Sess. 550 (1856).

> nal sovereign capacity; that in others, as in Virginia, it was very limited. When therefore the Constitution makes a reservation of power "to the States, or to the people," it merely declares that the State Government shall possess the power where not forbidden by its own peculiar constitution; but where not allowed to exercise such a power by its own constitution, it shall remain with the people.[259]

Thus, when one takes to heart James Wilson's admonition to remember that the people operate in a dual capacity, the Tenth Amendment does provide the rule of interpretation that answers the inquiry. Since the people of the whole United States, via the Constitution, have neither delegated the power of adding qualifications to the United States, either expressly or by necessary implication, nor prohibited the power to the states, again either expressly[260] or by necessary implication, the power is reserved to the states, or to the people of the states, as the people of each state determine according to their own constitutions. The people of the whole, of course, also have a reserved power to alter this allocation of power, but their reserved power is found in the Article V amendment clause, not in the Tenth Amendment.

IV. CONCLUSION

The Supreme Court stated in *Powell v. McCormack* that, by its decision to seat Representative McCreery in 1807, the House of Representatives had determined that the Constitution prevented the States from imposing additional qualifications on members of Congress.[261] The Court erroneously relied upon an Elections Committee report that was rejected by the House, however, and the House seemed deliberately to avoid deciding the constitutional issue when it voted to seat McCreery. The subsequent decision by the Senate in 1856 to seat Lyman Trumbull was equally ambiguous on the constitutional issue. Moreover, although the decision by the House to seat Representative Peters in 1884 unambiguously found such action by states to be unconstitutional, the decision by the House just fifteen years later in refusing a seat to Brigham Roberts renders the 1884 decision at least suspect, and may overturn it entirely.

Given such ambiguity in the congressional precedents, I have explored the strength of the arguments, pro and con, made during the debates. I have tried to convey each argument in the words of its strongest proponent, and also have offered the various counters to each of the arguments made by the participants of the several debates. In the end, the arguments against the exclusive interpretation of the Qualifications Clauses, and in favor of the power of states to superadd to the qualifications listed in them, are stronger and more consistent, both logically and with the historical record and the nature of the American regime. Such an interpretation leaves the states free to impose all sorts of qualifications, however, perhaps even some that are unrepublican in nature.

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259. 17 ANNALS OF CONG. 943 (1807).
260. Compare the express prohibitions on state power contained in U.S. CONST. art. I, § 10.
261. Powell v. McCormack, 395 U.S. 486, 543 (1969); *see supra* part I.A.

Although the Fourteenth Amendment has provided the courts with numerous tools by which to counter such abuses, Senator Pugh offered the definitive pre-Fourteenth Amendment response to those who warned of such abuses:

> I revere the Constitution of the United States and the Union established by it as sincerely and as devotedly as any Senator upon this floor, and I would go as far as any Senator to maintain them to the full extent of all the powers which have been delegated by the people of the States. But, sir, although I regard it as a Constitution appropriate for our Federal form of Government, it never occurs to me that it is by implication to be carried further, and to the destruction and overthrow of the State constitutions and governments. When the people of the States meet in their conventions, to frame their own constitutions, they have some little modicum of wisdom left to them. They are able to provide wise restrictions. They have the experience and the whole history of this Government down to the present time to guide them. It seems to me that all arguments addressed to our fears, that the States may affix unworthy restrictions or improper restrictions can safely be answered by declaring that the people are not only the source of authority, but the source of wisdom.[262]

Ultimately, any experiment in self-government, and especially the American experiment, which is based on that principle more than any other regime, has to depend upon the wisdom of the people if it is to succeed.

I have postponed until now the discussion of one problem this interpretation raises, however; that of enforcement. Article I, Section 5 of the Constitution provides, "Each House shall be the Judge of the Elections, Returns *and Qualifications* of its own Members."[263] If, by this clause, each House of Congress is empowered to judge all such qualifications, including those added by the states, two problems immediately arise. First, as Senator Foot pointed out during the *Trumbull* debate, the Congress would have to consult "the constitutions and laws of [every State in the Union] in order to determine the constitutional right to a seat . . . of its own members."[264] This power to judge the qualifications would thus make Congress the final interpreter of state constitutions and laws. In other words, the clause would give to the representatives of the whole nation the power to alter or nullify state constitutional provisions of particular states, not because they were not in conformity with the national constitution, but by the power to interpret.[265]

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262. CONG. GLOBE, 34th Cong., 1st Sess. 583 (1856).

263. U.S. CONST. art I, § 5 (emphasis added).

264. CONG. GLOBE, 34th Cong., 1st Sess. 581 (1856).

265. Of course, Congress also has the power to judge election returns. Most such cases, however, involve allegations of vote fraud; Congress is thus judging questions of fact rather than questions of law, a power that is much less intrusive on state authority. Some state laws might be implicated by Congress's power to judge elections, however, such as the Illinois constitutional provision at issue in the *Trumbull* case, which provided that all votes cast for an ineligible judge were void. *See* ILL. CONST. of 1848, art. V, § 10, *reprinted in* 2 THORPE, *supra* note 39, at 999. The potential conflict with state authority is no less in such a case than in the case of Congress judging state qualifications. The *Term Limits* majority, therefore, made too much of the issue when it states, "[t]he Constitution's provision for each House to be the judge of its own qualifica-

Second, even assuming that Congress was up to the task of being the final interpreter of State constitutions and laws, it would, if it refused to seat a member for being disqualified under a state constitutional provision, be placed in the awkward position of rejecting the interpretation the people and/or the legislature of the state had placed on its own constitution and worse, depriving the majority will expressed in the particular election of any force.

One answer to these concerns is to interpret the Article I, Section 5 power to judge qualifications as a power to judge only the constitutionally mandated qualifications. Such a solution does a disservice to the language of the clause, however, and it may afford a political minority in a particular state little remedy for occasional abuses. Representative Peters was clearly unqualified under the Kansas Constitution; his election therefore clearly violated the express and deliberate will of the people of Kansas, as articulated in that Constitution.[266] Depriving the House of the power to judge the Kansas qualification would undermine the power of the people of the several states to fix certain restrictions upon themselves.

A second answer to such concerns is for the state to regulate the manner of enforcement as well as the qualifications. As we have seen, the Illinois Constitution of 1848, by declaring that all votes cast for an ineligible candidate were void, attempted (unsuccessfully) to do just that.[267] The Illinois enforcement provision did nothing to address the majority rule concern, however, and when the Senate chose not to enforce the provision itself, it proved of little value. The Arkansas term limit initiative invalidated in *Term Limits* would have taken the Illinois solution one step further. It did not impose an absolute disqualification, but merely denied a place on the ballot to those candidates the people of the state wanted to disqualify. Because such candidates could still have run as write-in candidates, and could have served if elected, the will of a majority in the face of even the disqualification would not necessarily have been thwarted.[268] More importantly, because of the nature of a ballot access restriction, any dispute over the qualification would never have reached the Congress; the Article I, Section 5 power to judge qualifications would thus not have been infringed.

The Arkansas solution had one additional benefit. It took advantage of the states as laboratories in self-government, a feature of the American federal system of government praised by such prominent commentators as Alexis de Tocqueville and Justice Louis Brandeis. As the pressure to reform government may ultimately find its way into a constitutional amendment limiting the terms of members of Congress, state experimentation would have increased the

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tions thus provides further *evidence* that the Framers believed that the primary source of those qualifications would be federal law." U.S. Term Limits, Inc, v. Thornton, 115 S. Ct. 1842, 1859 (1995) (emphasis added).

266. *See supra* part I.C.

267. ILL. CONST. of 1848, art. V, § 10, *reprinted in* 2 THORPE, *supra* note 39, at 999.

268. Opponents of the Arkansas measure pointed out that write-in campaigns are rarely won, and thus that such a provision is really no option at all. The history of write-in campaigns has typically not involved incumbents, however, so a write-in option might well be more viable than the success rate of past write-in campaigns would suggest.

likelihood that the qualifications ultimately agreed upon would be the best that could be devised; errors at the state level are simply more easily corrected than those committed in an amendment to the national constitution.