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## Constitutional Law - Qualifications Clauses - Elections - Term Limits - Candidates

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CONSTITUTIONAL LAW — QUALIFICATIONS CLAUSES—ELECTIONS—TERM LIMITS—CANDIDATES—The United States Supreme Court held that term limits imposed by states on United States congressional candidates violate the Qualifications Clauses of the United States Constitution.

*U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

Arkansas voters adopted a Term Limits Amendment (“Amendment 73”) to the Arkansas Constitution in the November 3, 1992 general election.<sup>1</sup> Amendment 73 places limits on officials elected in Arkansas to both the Arkansas and the United States governments.<sup>2</sup> Section 3 of Amendment 73 prohibits the certification of candidacy for election to the United States House of Representatives for any person who has previously served three or more terms as a member of the United States House of Representatives from Arkansas.<sup>3</sup> Amendment 73 also prohibits the certification of candidacy for

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1. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1845 (1995). The purpose of Amendment 73 is stated in its preamble, which provides:

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

ARK. CONST. amend. 73 pmb1.

2. *Term Limits*, 115 S. Ct. at 1845-46. Section 1 of Amendment 73 limits an elected official in the executive branch of the state government to two 4-year terms. *Id.* Section 2 limits members of the Arkansas House of Representatives to three 2-year terms and members of the Arkansas Senate to two 4-year terms. *Id.* at 1846.

3. *Id.* at 1846. Section 3 of Amendment 73 provides:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

ARK. CONST. amend. 73, § 3.

election to the United States Senate for any person who has previously served two or more terms as a member of the United States Senate.<sup>4</sup>

Bobbie Hill ("Hill") on behalf of herself and the League of Women Voters filed suit in the Pulaski County Circuit Court against incumbent state constitutional officers and legislators, United States Senators and Representatives in office, the Arkansas State Democratic Party, the Arkansas State Republican Party and the State Board of Election Commissioners seeking a declaratory judgment invalidating Amendment 73.<sup>5</sup> After a hearing on motions for summary judgment, the court declared that section 3 of Amendment 73 violates the Qualifications Clauses<sup>6</sup> of the United States Constitution.<sup>7</sup> Hill appealed to the Supreme Court of Arkansas, where a five-to-two majority affirmed the decision and declared section 3 of Amendment 73 unconstitutional.<sup>8</sup>

The Attorney General of the State of Arkansas and the intervenors filed a petition for a writ of certiorari<sup>9</sup> to the United

4. ARK. CONST. amend. 73, § 3.

5. U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 352-53 (Ark. 1994), *aff'd sub nom.* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995). Hill was a supporter of John Dawson, a State Representative who had served seven terms in office. *Term Limits*, 872 S.W.2d at 353. Additional interested parties intervened as party-defendants, including the Arkansas State Attorney General's Office. *Id.* Organizations joining as additional defendants included U.S. Term Limits, Inc., Arkansas for Governmental Reform, and Americans for Term Limits. *Id.* An amended complaint added Dick Herget ("Herget") as a party-plaintiff. *Id.* Herget was a supporter of Ray Thornton ("Thornton"), a member of the United States Congress who had served three terms in office. *Id.* Thornton also joined as a party-plaintiff. *Id.*

6. *Term Limits*, 872 S.W.2d at 357. The qualifications for membership in the United States Congress are set forth in Article I of the Constitution. The second clause of section 2 provides: "No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Article I also provides: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* § 3, cl. 3.

7. *Term Limits*, 872 S.W.2d at 357. The court also held that although the issue was justiciable and section 3 is severable from the other provisions of the amendment, the entire amendment is void because it lacks an "Enacting Clause." *Id.* An enacting clause is a "clause at the beginning of a statute which states the authority by which it is made." BLACK'S LAW DICTIONARY 526 (6th ed. 1990).

8. *Term Limits*, 872 S.W.2d at 361. The Arkansas Supreme Court also affirmed on the issues of justiciability and severability, but reversed the circuit court's holding that the absence of an enacting clause renders the amendment void. *Id.* at 354-55, 359.

9. A writ of certiorari is "[a]n order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court . . . . If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court." BLACK'S LAW DICTIONARY

States Supreme Court.<sup>10</sup> Both petitions were granted and consolidated for argument.<sup>11</sup>

The Court considered the related issues of whether states may add to or alter the qualifications set forth in the Constitution and if not, whether a ballot access restriction form in Amendment 73 was an alteration of those qualifications.<sup>12</sup> The Court began its analysis of these issues by reviewing its previous interpretations of the Qualifications Clauses in *Powell v. McCormack*.<sup>13</sup> Justice Stevens, writing for the majority, focused first on the historical background that led the Court to the conclusion that the qualifications enumerated in the Constitution are “fixed and unalterable.”<sup>14</sup> The Court explained that the holding of *Powell* incorporates the principles of democracy and history, reasoning that all members of a democratic society should be eligible for election and also be able to elect representatives of their choosing.<sup>15</sup> The Court reaffirmed its holding in *Powell* before examining its application to additional qualifications imposed by states.<sup>16</sup>

The Court next addressed the argument that the imposition of additional qualifications for members of Congress is a power reserved to the states.<sup>17</sup> First, the Court identified the source of the power to add qualifications, reasoning that because the ratification of the Constitution marked the birth of the power to set qualifications for membership in Congress, the states never had possession of this power and could therefore not reserve it.<sup>18</sup> The Court drew further support for its view of the national character of the power from clauses in the Constitution that reflect the nature of federal power over Congress and the limited delegation of powers to the states.<sup>19</sup> The Court concluded that

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1609 (6th ed. 1990).

10. *Term Limits*, 115 S. Ct. at 1847.

11. *Id.*

12. *Id.*

13. 395 U.S. 486 (1969) (holding that a member of the United States Congress who is not constitutionally ineligible for membership cannot be excluded by a congressional committee).

14. *Term Limits*, 115 S. Ct. at 1849. The Court drew its conclusions from Parliamentary practices and Constitutional Convention debates. *Id.* Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg and Breyer. *Id.* at 1845.

15. *Id.* at 1848-51. Adam Clayton Powell (“Powell”) was a member of the United States House of Representatives from New York who was excluded from office by a congressional committee, despite his eligibility under the age, citizenship, and residency requirements, because he had wrongfully used government funds. *Powell*, 395 U.S. at 489-93.

16. *Term Limits*, 115 S. Ct. at 1852.

17. *Id.*

18. *Id.* at 1854.

19. *Id.* at 1855. The Court specifically examined Article I, Section 6 of the

states do not have the power to add qualifications because the power has not been delegated to the states.<sup>20</sup>

The Court addressed additional historical evidence not discussed in *Powell* to support its holding that states are precluded from adding qualifications.<sup>21</sup> The Framers' fear of the abuse of state power provided the principal evidentiary basis for the Court's belief that the Framers did not intend this power to be in the hands of the states.<sup>22</sup> The majority found further support for its position in the absence of any discussion during the ratification of the Constitution for reservation of the power within the states,<sup>23</sup> in past congressional practices,<sup>24</sup> in established principles of democracy<sup>25</sup> and in the past and present practice of states to impose term limits only on state officials, if at all.<sup>26</sup>

Constitution, which provides that salaries of members of Congress be "ascertained by Law, and paid out of the Treasury of the United States," and the clauses in Articles I and II, which delegate specific actions related to federal elections to the states. *Id.*

20. *Id.* at 1856.

21. *Term Limits*, 115 S. Ct. at 1856.

22. *Id.* at 1857.

23. *Id.* at 1859. The ratification debates addressed the question of term limits, or rotation, extensively. *Id.* The Federalists argued vociferously against the rotation system of the Articles of Confederation and for voters' unlimited rights to choose their own representatives. *Id.* Several states, however, including New York and Virginia, proposed amendments to limit the number of terms a representative could serve. *Id.* In all of the debates over the rotation issue, no proposal was set forth to reserve that power for the states. See generally DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed. 1863) (recounting the ratification debates).

24. *Term Limits*, 115 S. Ct. at 1861. Specifically, the Court referred to the case of William McCreery, a United States Representative from Maryland who was allowed to retain his office by resolution of Congress despite an alleged failure to meet a requirement imposed by the state. *Id.* The Court noted that congressional debates over the 1807 McCreery resolution pointed to the conclusion that states are prohibited from imposing requirements above and beyond the requirements set forth in the Constitution. *Id.* The Chairman of the House Committee on Elections stated that "neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them." *Id.* (citation omitted).

25. *Id.* at 1862-64. The Court echoed the values of the principles previously described in *Powell*. *Id.* Specifically, the Court discussed the egalitarian ideal that the people should choose who will govern them. *Id.* at 1862. The Court stressed the centrality of this ideal in the framework of the government by stating: "[T]he Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people . . . and chosen directly, not by the States, but by the people." *Id.* at 1863.

26. *Id.* at 1864-66. The Court pointed to several states, including New Hampshire, Georgia, Delaware and South Carolina, that had state constitutional provisions revised at the time of the ratification of the Constitution requiring that their state representatives meet additional property requirements. *Id.* at 1865. The Court, however, explained: "In the revised Constitutions, each State retained property qualifications for its own state elected officials yet placed no property qualifications on its congressional representatives." *Id.*

The Court rejected the argument that Amendment 73 does not impose qualifications, but merely exercises Arkansas' right to regulate the manner of elections.<sup>27</sup> The Court held that Amendment 73 is an indirect instrumentality used to accomplish an unconstitutional goal.<sup>28</sup> The Court also rejected the argument that Amendment 73's limitations are not absolute and may be circumvented by a write-in campaign.<sup>29</sup>

The Court concluded that the imposition of state-decided qualifications proposed by Amendment 73 would so significantly alter the structure of federal government that an amendment to the Constitution would be required.<sup>30</sup> The Court thus affirmed the judgment of the Supreme Court of Arkansas.<sup>31</sup>

In a concurring opinion, Justice Kennedy stressed the importance of separating American citizens' national political identities from their state political identities.<sup>32</sup> Justice Kennedy reasoned that an erosion of the boundaries between the orders of government would threaten the federal system.<sup>33</sup> The

27. *Id.* at 1866-67. The Petitioners argued that section 3 of Amendment 73 does not impose any additional qualifications based on the Court's earlier reasoning in *Storer v. Brown*, 415 U.S. 724 (1974) (holding that provisions of the California Elections Code that require candidates to follow specific preliminary procedures do not impose additional qualifications). The Court did not decide whether section 3 is an additional qualification under *Storer* because it concluded that it is inherently unconstitutional. *Id.* at 1867.

28. *Id.* at 1867. The Court drew upon language from *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944)), when it stated that "Constitutional rights would be of little value if they could be . . . indirectly denied." *Id.*

29. *Term Limits*, 115 S. Ct. at 1868. The Court held that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Id.*

30. *Id.* at 1871. The Court stated: "In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'" *Id.*

31. *Id.*

32. *Id.* at 1872 (Kennedy, J., concurring). Justice Kennedy stated: "In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system." *Id.*

33. *Id.* Justice Kennedy stressed the distinction between citizens' political identities when he stated:

[T]he Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union. It does not at all follow from this that the sole political identity of an American is with the State of his or her residence. It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence.

concurrence also questioned the logic of a power that would prevent people from exercising their right to vote for a candidate simply because they had previously voted for the candidate.<sup>34</sup>

In a dissenting opinion, Justice Thomas reasoned that the Constitution is silent about the power of states to add qualifications.<sup>35</sup> Thus, the dissent concluded that states are not prohibited from exercising this power.<sup>36</sup> The dissent relied on the principle that the power of government stems from the people.<sup>37</sup> The dissent further asserted that the people's will is manifested through the exercise of power by individual states.<sup>38</sup> Justice Thomas rejected the majority's interpretation of the Tenth Amendment<sup>39</sup> and substituted his own interpretation, concluding that no power could be withheld from the states without a specific limitation.<sup>40</sup>

Justice Thomas agreed with the majority that the Framers of the Constitution intended to provide a connection between the people and their representatives.<sup>41</sup> However, the dissent argued that this link exists only between representatives from each state and that state's population.<sup>42</sup> The dissent then rejected the majority's characterization of the states' rights described in the Times, Places and Manner Clause of the Constitution as a

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34. *Term Limits*, 115 S. Ct. at 1874. Justice Kennedy explained the illogical result of a process in which after selecting a candidate to support, voters would be barred from continuing to support their chosen candidate because they had previously voted for the candidate. *Id.*

35. *Id.* at 1875 (Thomas, J., dissenting). The dissent found that the Constitution does not address the question of whether states can prescribe eligibility requirements for congressional candidates. *Id.*

36. *Id.* Because the Constitution is silent on the matter of state-imposed requirements, the dissent concluded that: "[W]here the Constitution is silent, it raises no bar to action by the States or the people." *Id.*

37. *Id.*

38. *Id.* The dissent noted that this contention was based on established national practices focused on the states, such as elections of members of Congress, electoral college membership, and ratification of constitutional amendments. *Id.* at 1877.

39. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, not prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

40. *Term Limits*, 115 S. Ct. at 1877. Justice Thomas explained his interpretation of the Tenth Amendment: "[T]he Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State." *Id.* at 1876.

41. *Id.* at 1881.

42. *Id.* Justice Thomas did not reach a firm conclusion about whether the nature of a congressional member's allegiance after election is with the nation as a whole or with an individual state, but distinctly concluded that the states have exclusive control over the process of selecting congressional members. *Id.*

delegation of power.<sup>43</sup> Instead, Justice Thomas asserted that the states' "right" is merely a duty imposed on states.<sup>44</sup>

At the same time, Justice Thomas disagreed with the majority's holding that Amendment 73 violates the Qualifications Clauses of the Constitution.<sup>45</sup> The dissent contended that the Qualifications Clauses only establish minimum requirements and prevent total abolition of requirements for membership in Congress.<sup>46</sup> Justice Thomas agreed with the majority position that Congress does not have the power to add qualifications for its members.<sup>47</sup> However, Justice Thomas did not agree that the Framers intended this limitation to extend to the states.<sup>48</sup> The dissent also relied on historical evidence to arrive at its conclusion that the Qualifications Clauses are not exclusive.<sup>49</sup>

The dissent disagreed with the majority's holding that the distinction between Amendment 73 being an absolute bar to reelection and merely being an obstacle is irrelevant<sup>50</sup> and questioned why the majority's analysis of the Qualifications Clauses was affected by the intent of Amendment 73.<sup>51</sup> Justice Thomas asserted that he would not construe the Qualifications Clauses to prohibit state powers in any manner beyond their

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43. *Id.* at 1883. The Times, Places and Manner Clause states: "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.

44. *Term Limits*, 115 S. Ct. at 1883.

45. *Id.* at 1884.

46. *Id.* at 1885.

47. *Id.* at 1889. Justice Thomas stated that the restriction preventing members of Congress from adding qualification requirements to its own members does not stem from restrictive language in the Qualifications Clauses, but rather from the absence of a constitutional provision affirmatively granting Congress such power. *Id.*

48. *Id.* at 1890. Justice Thomas argued that the states could authorize their state legislators to prescribe qualifications. *Id.* at 1890-91.

49. *Term Limits*, 115 S. Ct. at 1890-908. The dissent examined the Constitutional Convention, the Federalist papers, the ratification debates and state practices. *Id.*

50. *Id.* at 1910. Justice Thomas argued that Amendment 73 does not create absolute term limits, but rather establishes a procedure by which candidates covered in the amendment would have to win by write-in votes. *Id.* at 1908. Justice Thomas further questioned the studies showing write-in victories to be practically impossible and pointed out differing studies in which candidates not from the fringe had successfully waged write-in campaigns. *Id.* at 1909-10.

51. *Id.* at 1911. Justice Thomas explained: "If a law does not in fact add to the constitutional qualifications, the mistaken expectations of the people who enacted it would not seem to affect whether it violates the alleged exclusivity of those Clauses." *Id.*

plain meaning.<sup>52</sup>

An examination of the constitutionality of limitations on congressional qualifications must begin by understanding the status of this area at the time the Constitution was drafted. In 1764, Great Britain's Parliament declared one of its members ineligible despite satisfaction of standing requirements.<sup>53</sup> This declaration raised the question of Parliament's power to effectively add qualifications and led to the establishment of the rule that qualifications for membership in Parliament are "fixed" by law and are not "occasional."<sup>54</sup> The controversy concerned John Wilkes ("Wilkes"), a member of the House of Commons who had committed libel and had been expelled from Parliament because of his libelous activities.<sup>55</sup> Wilkes was later re-elected three times, but each time Parliament declared him ineligible.<sup>56</sup> In 1782, the House of Commons expunged resolutions declaring Wilkes ineligible.<sup>57</sup> Parliament's control over the qualifications of its members was effectively limited to the laws providing standing requirements.<sup>58</sup>

The American Constitutional Convention convened five years after Wilkes' victory in Parliament. One of the issues facing the Framers was whether to adopt a system of rotation in the legislative branch of the federal government similar to that contained in the Articles of Confederation.<sup>59</sup> The Constitution did not adopt such a rotation system, but limited the number of years in a term of membership.<sup>60</sup> The Framers considered including qualifications such as property ownership,<sup>61</sup> but adopted only those qualifications set forth in the Qualifications

52. *Id.* at 1913-14.

53. *Powell v. McCormack*, 395 U.S. 486, 527-32 (1969) (citing 22 PARLIAMENTARY HISTORY OF ENGLAND 1411 (1782)) (discussing the controversy and how it relates to the issue of imposing additional qualifications for members of the legislature).

54. *Powell*, 395 U.S. at 528 (citing 16 PARLIAMENTARY HISTORY OF ENGLAND 590 (1769)).

55. *Id.* at 527 (citing 15 PARLIAMENTARY HISTORY OF ENGLAND 1393 (1764)). Wilkes had published a highly critical attack on a British peace treaty with France in which he alleged charges of bribery, despotism, and corruption. *Id.* (citing R. POSTAGE, THAT DEVIL WILKES (1929)).

56. *Id.* at 528 (citing 16 PARLIAMENTARY HISTORY OF ENGLAND 545).

57. *Id.* (citing 22 PARLIAMENTARY HISTORY OF ENGLAND 1411).

58. *Id.* at 529 (citing T. MAY, PARLIAMENTARY PRACTICE 66 (T. Webster ed., 13th ed. 1924)).

59. See ARTICLES OF CONFEDERATION art. V (1777). The Articles provided a limit on terms of state representatives: "[N]o person shall be capable of being a delegate for more than three years in any term of six years." *Id.*

60. See U.S. CONST. art. I, § 2, cl. 1; *Id.* § 3, cl. 1.

61. See generally 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911) (recounting the Constitutional Convention debates).

Clauses pertaining to age, citizenship, and residency.<sup>62</sup>

An extensive analysis of the exclusivity of the Qualifications Clauses was set forth by the Supreme Court in *Powell v. McCormack*.<sup>63</sup> The issue before the Court in *Powell* was whether either House of Congress has the authority to exclude an elected member who meets the requirements of the relevant Qualifications Clause.<sup>64</sup> The Court held that the only membership qualifications that Congress can judge are those standing qualifications enumerated in the Constitution.<sup>65</sup>

The *Powell* opinion concerned Adam Clayton Powell ("Powell"), a Representative from New York elected to the 90th Congress.<sup>66</sup> Despite Powell's satisfaction of the requirements for congressional membership set forth in the Constitution, the House of Representatives passed a resolution excluding Powell from his seat in the House because of reports that Powell had wrongfully diverted House funds and had made false reports on personal spending.<sup>67</sup> The Supreme Court examined both the historical context of the Qualifications Clauses and the democratic principles inherent in United States Government and concluded that the House of Representatives could not exclude Powell because he was an elected member who met all of the constitutional requirements.<sup>68</sup> The Court held that the standing qualifications set forth in the Constitution are exclusive and unalterable, absent a constitutional amendment.<sup>69</sup>

The Court addressed a different aspect of the Qualifications Clauses in *Storer v. Brown*.<sup>70</sup> The issue in *Storer* was whether the portion of the California Elections Code preventing ballot access to independent candidates who had failed to disaffiliate within a qualified period is constitutional.<sup>71</sup> The Supreme Court

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62. See U.S. CONST. art. I, § 2, cl. 2; *Id.* § 3, cl. 3. See *supra* note 6 and accompanying text for a discussion of the Qualifications Clauses.

63. 395 U.S. 486 (1969).

64. *Powell*, 395 U.S. at 495.

65. *Id.* at 550.

66. *Id.* at 489.

67. *Id.* at 492-93.

68. *Id.* at 521.

69. *Powell*, 395 U.S. at 521.

70. 415 U.S. 724 (1974).

71. *Storer*, 415 U.S. at 726-28. The constitutionality of the provisions was challenged under the First and Fourteenth Amendments and the Qualifications Clauses of the Constitution. *Id.* at 727. The California Elections Code provide an additional challenged requirement to independent candidates for the filing of nomination papers signed by 5-6% of eligible voters obtained at least 24 days after the primary and 60 days before the general election. *Id.* The Court remanded this part of the case involving the voter signatures for determination of the constitutionality of the severity of this ballot access restriction. *Id.* at 746.

held that although these provisions constitute an absolute bar to some candidates, the provisions are valid because they do not operate to deprive candidates of any constitutional rights.<sup>72</sup> The rationale used by Justice White in the Court's opinion to uphold the constitutionality of the election provision involving disaffiliation demonstrates that the challenged provisions do not operate to add qualifications to candidates.<sup>73</sup>

The Court did not directly address the issue of the Qualifications Clauses again until 1993 in *Nixon v. United States*.<sup>74</sup> In *Nixon*, the Court distinguished its holding in *Powell* regarding the justiciability of a review of the House of Representatives' exclusion procedure from the nonjusticiable issue presented in *Nixon*. In *Nixon*, Walter L. Nixon ("Nixon"), former Chief Judge of the District Court for the Southern District of Mississippi, challenged the constitutionality of a Senate Rule employed to impeach him.<sup>75</sup> The Court explained that its holding in *Powell* found the qualifications of House membership to be "of a precise, limited nature" as specified by the Constitution.<sup>76</sup> Congress had exceeded its constitutional authority in *Powell*, the Court explained, and a judicial review of the authority was necessary; whereas in *Nixon* no such additional authority had been exercised.<sup>77</sup> The Court's interpretation of the *Powell* holding, as explained in *Nixon*, reiterated the Supreme Court's view of the fixed nature of qualifications for membership in Congress.<sup>78</sup>

The Supreme Court's decision in *Term Limits* is especially notable when contrasted with other decisions handed down during the Court's October 1994 Term because of its perspective on the scope and definition of federalism and federal power. In a Term in which the Court's most significant decisions effectively limited the power of the federal government,<sup>79</sup> the *Term Limits*

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72. *Id.* at 737.

73. *Id.* at 746. The Court dismissed the argument that additional qualifications were imposed by these provisions as "wholly without merit . . . . The non-affiliation requirement no more establishes an additional requirement for . . . office . . . than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Id.* at 746 n.16.

74. 113 S. Ct. 732 (1993).

75. *Nixon*, 113 S. Ct. at 734.

76. *Id.* at 740.

77. *Id.*

78. *Id.*

79. *See, e.g., United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Congress' power under the Commerce Clause to invalidate federal criminal statutes is limited); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (holding that all federal, state, and local racial classifications must be reviewed under a strict scrutiny standard of review); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (holding

decision stands apart in its denial of an expansion of recognized state power.

The decisive vote which determined the outcome of *Term Limits* was cast by Justice Kennedy.<sup>80</sup> An analysis of the *Term Limits* decision must carefully examine Justice Kennedy's concurrence in order to understand the reason that his vote was for the limitation of state power. Justice Kennedy's primary focus was on the very nature of federalism and its place in the political identity of the people of the United States.<sup>81</sup> Justice Kennedy's definition of federalism emphasized the importance of separating state and federal power.<sup>82</sup> Justice Kennedy asserted that this separation of power is inherent in the separation of American citizens' political identities.<sup>83</sup> American citizens identify with their states and with their country.<sup>84</sup> Justice Kennedy asserted that the American citizen's national political identity can only retain its legitimacy if it is controlled without interference from states.<sup>85</sup> It is this aspect of Justice Kennedy's

that a district court's remedial power in desegregation actions is limited to eliminating racial discrimination in public schools and had been exceeded by a district court's ordering of funding to improve desegregation); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (holding that the Justice Department had exceeded its statutory authority under § 5 of the Voting Rights Act, 42 U.S.C. §§ 1971, 1973 to 1973bb (1988 & Supp. V 1993) by forcing a state to create new congressional districts).

80. *Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring). The majority in *Lopez*, *Adarand*, *Jenkins*, and *Miller* consisted of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Thomas and Scalia. See *Lopez*, 115 S. Ct. at 1624; *Adarand*, 115 S. Ct. at 2038; *Jenkins*, 115 S. Ct. at 2097; *Miller*, 115 S. Ct. at 2475.

81. *Term Limits*, 115 S. Ct. at 1872.

82. *Id.* Justice Kennedy described the Framers' creation of the system of federalism as:

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

*Id.*

83. *Id.*

84. *Id.* Justice Kennedy explained that these two identities are necessary to the federalist system of government: "It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence." *Id.*

85. *Id.* Justice Kennedy drew authority for this proposition from the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that states cannot interfere with federal power). *Id.* Justice Kennedy distinguished his position in *Lopez* from his position in *Term Limits* by explaining that the proposed term limits amendment presented the opposite problem from *Lopez*. *Id.* at 1873. Justice Kennedy explained that in *Term Limits* a state was encroaching on matters reserved to the federal government by the term limits amendment, whereas

opinion that seems to explain his vote on the constitutionality of Amendment 73. Preserving the sanctity of the federal government's freedom to operate independently of state interference appears to be the concern that shifted Justice Kennedy's alliance in *Term Limits*.

A complete analysis of the Court's holding in *Term Limits* must explore the limitations of the holding. The specific holding in *Term Limits* can be better understood when contrasted with the Court's holding in *Storer*. It is important to address the *Storer* decision in an analysis of the *Term Limits* decision because of a crucial distinction between the two cases. Proponents of Arkansas' Amendment 73 and other similar statutes in other states attempt to fit term limits into the same category as the *Storer* disaffiliation provisions in order to avoid classification as additional qualifications. The threshold for determining the constitutionality of such provisions, however, is whether constitutional rights are directly or indirectly violated. The Court examined the intent behind the drafting of Amendment 73 in determining exactly whose constitutional rights are violated and the manner in which they are violated.<sup>86</sup> The Court weakly distinguished between the provisions in *Storer* and Amendment 73 by using a test of constitutionality which is difficult to define.

Despite its practical effect, the *Term Limits* decision has caused a significant uproar by demonstrating how close the United States system of government came to complete upheaval. A five-to-four vote in favor of state-imposed congressional term limits would have shifted an enormous amount of power out of the hands of the federal government. A new system of democracy would have arisen, with individual states as the centers of decision-making. The stark disagreement between the majority and the dissent over the established history and basic

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in *Lopez*, the federal government was encroaching on matters reserved to states in enacting the Gun-Free School Zones Act. *Id.*

86. *Term Limits*, 115 S. Ct. at 1867-68. The Court found that "it cannot be seriously contended that the intent behind Amendment 73 is other than to prevent the election of incumbents." *Id.*

concepts of the Constitution raised interesting questions which will factor into upcoming elections and subsequent appointments to the Supreme Court, as well as upcoming decisions before the Supreme Court.<sup>87</sup>

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87. Notably, the effects of the *Term Limits* decision may be felt in *Romer v. Evans*, 115 S. Ct. 1092 (1995) (granting certiorari), in which the Court granted certiorari and heard oral arguments on October 10, 1995 to decide the constitutionality of Colorado's voter-initiated constitutional amendment prohibiting laws which protect against discrimination on the basis of sexual orientation.

