U.S. Term Limits, Inc. v. Thornton: State-Imposed Term Limits Are Unconstitutional, But What Else Did the Court Say

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I. INTRODUCTION

A recent opinion poll conducted in 1995 found that 73 percent of Americans supported term limits for members of Congress.1 An earlier poll conducted in 1991 showed that 75 percent of Americans favored term limits.2 Further, the 1991 poll showed this broad support for term limits was not confined to a particular demographic group.3 Such nationwide approval of term limits has been the impetus for the proposal and passage of term limit measures.4 Although there are proposals at the federal level,5 the United States Congress has not yet been able to pass a proposal for a constitutional amendment to limit its members’ terms.6

Because Congress has not passed an amendment to the Constitution to limit its terms, the states have attempted to effectuate term limits on their congressional delegations through state constitutional amendments7 or state statutes.8 These state-imposed term limits have

3. The poll indicated that 71 percent of blacks and 71 percent of Democrats approved of term limits. Id. Also, 77 percent of those earning less than $20,000 per year favored term limits. Id. Finally, the poll showed more women supported term limits than men. Id.
6. A proposed constitutional amendment to add term limits to Congress was defeated by the House of Representatives. Phil Kuntz, Congress Shows No Inclination Toward Reform, WALL ST. J., Aug. 11, 1995, at A6.
7. See, e.g., ARIZ. CONST. art. V, § 1; FLA. CONST. art. VI, § 4; MICH. CONST. art. II, § 10; MO. CONST. art. III, § 45(a); MONT. CONST. art. IV, § 8; OHIO CONST. art. V, § 8; OKLA. CONST. art. II, § 12A; OR. CONST. art. II, § 20; S.D. CONST. art. III, § 32.
prompted a substantial amount of scholarly commentary. Some scholars have argued that state-imposed term limits are unconstitutional, while others have argued that they are constitutionally permissible. Similarly, many student written works have examined the same issue and argued that state-imposed term limits are either constitutional or unconstitutional.

State-imposed term limits have generally taken two forms. One form, "pure term limits," flatly declares that an individual may not serve more than a specified number of terms as a United States Representative or Senator from any one state. The other form, "ballot-access term limits," prohibits an individual from appearing on the ballot after serving a specified number of terms in Congress as a Representative or Senator, but does not prohibit the candidate from serving if elected as a write-in candidate.

State attempts to limit congressional terms were voided, and the scholarly discussion became "academic," when the Supreme Court voided the term limits approved by the Arkansas legislature. The issue before the court centered on whether state-imposed term limits were constitutional. The court held that the term limits violated the Equal Protection Clause of the Fourteenth Amendment, because they favored the re-election of incumbents over new candidates.


13. Marcia Coyle, Court's Turn to Vote on Term Limits: They're Politically Hot, The High Court Must Decide if They're Constitutional, Nat'l L.J., Nov. 28, 1994, at A1.

14. See id. This type has been referred to as "genuine, unadulterated, undiluted term limits." Rotunda, supra note 10, at 570.

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granted certiorari\(^\text{16}\) and settled the question in *U.S. Term Limits, Inc. v. Thornton*\(^\text{17}\) (hereinafter "*U.S. Term Limits*"). This note examines the Court's opinion on the issue of whether state-imposed term limits are constitutionally permissible. The Court, in reaching its decision, properly relied on its precedents and the Framers of the Constitution historical materials on the exclusive nature of the qualifications\(^\text{18}\) for United States Representatives and Senators. The Court held that state-imposition of pure term limits violated the Constitution. Further, the *U.S. Term Limits* Court did not make a distinction between the two types of term limits, which was correct under Supreme Court precedents. Therefore, ballot access term limits are also unconstitutional. Thus, this note concludes that the judgment of the Supreme Court was well-founded.

Part II of this note describes the factual and legal background of the *U.S. Term Limits* case.\(^\text{19}\) Part III briefly summarizes the majority and dissenting opinions in the case.\(^\text{20}\) Part IV describes the author's analysis of the constitutionality of state-imposed term limits in this case.\(^\text{21}\) Finally, Part V examines the implications of the Supreme Court's opinion.\(^\text{22}\)


\(^{18}\) There are several qualifications for federal officials in the text of the Constitution. For example, an individual who has engaged in insurrection after taking an oath to uphold the Constitution cannot serve in Congress. U.S. CONST. amend. XIV, § 3. The main focus of this note, however, is the qualifications for service in Congress contained in Article I of the Constitution. For the House of Representatives, the Constitution provides: "No person shall be a Representative who shall not have attained 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. Likewise, for the Senate, the Constitution provides: "No person shall be a Senator who shall not have attained the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3. Thus, when this note refers to the Qualifications Clauses, the reference is to section 2, clause 2 and section 3, clause 3 of Article I.

\(^{19}\) See infra notes 23-45 and accompanying text.

\(^{20}\) See infra notes 46-69 and accompanying text.

\(^{21}\) See infra notes 70-142 and accompanying text.

\(^{22}\) See infra notes 143-223 and accompanying text.
II. U.S. TERM LIMITS V. THORNTON

A. Facts

On November 3, 1993, the voters of Arkansas approved Amendment 73, an initiative petition to amend the Arkansas Constitution. The amendment placed term limits on state executives and legislators as well as the state's congressional delegation. On November 13, 1993, Bobbie Hill and the League of Women Voters of Arkansas filed a complaint in an Arkansas state court seeking, among other things, declaratory relief that Section 3 of Amendment 73, the section that imposed term limits on Arkansas' congressional delegation, violated the United States Constitution. A congressman from Arkansas, Ray Thornton, was one of the named defendants. Both Arkansas State Attorney General Winston Bryant and the political organization U.S. Term Limits, Inc. intervened. Congressman Thornton, although a defendant, joined Hill in moving for summary judgment that Amendment 73 was unconstitutional. The trial court granted summary judgment because it found that Section 3 violated the United States Constitution.

23. ARK. CONST. amend. 73.
25. ARK. CONST. amend. 73, § 1.
26. ARK. CONST. amend. 73, § 2.
27. ARK. CONST. amend. 73, § 3, held unconstitutional in U.S. Term Limits v. Thornton, 115 S. Ct. 1842 (1995). Section 3 provided:
(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.
28. Hill, 872 S.W.2d at 352-53. Hill also sought a judgment declaring that the entire amendment was void because it was nonseverable and that the Amendment did not meet the Arkansas Constitution's requirement of an enacting clause. Id. Because these issues were not presented to the Supreme Court, they will not be discussed in this note.
29. Id. at 352.
30. Id. at 353.
31. Id.
32. Id.
33. Id. Specifically, the trial court found that "Amendment 73 is a restriction on the qualifications of persons seeking federal congressional offices and violates the U.S. Constitution." Id.
U.S. Term Limits appealed the trial court's ruling to the Arkansas Supreme Court. In *U.S. Term Limits, Inc. v. Hill*, the Arkansas Supreme Court discussed the historical background relating to term limits and the Constitution, but found "the history to be helpful but inconclusive regarding the issue at hand." However, the court determined that in light of the intentions of the Framers of the Constitution and the Supreme Court's ruling in *Powell v. McCormack*, Section 3 of Amendment 73 was not permitted under the Constitution.

### B. The Issues Before the United States Supreme Court

After the decision in the Arkansas Supreme Court, both U.S. Term Limits, Inc. and Arkansas Attorney General Bryant petitioned for writs of certiorari from the United States Supreme Court. The Court granted both Petitioners' requests for hearings and consolidated the cases.

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34. See id.


36. There were clearly instances of the consideration of term limits during the revolutionary period and the framing of the Constitution. A proposal for term limits, called "rotation," to be a formal provision of the Constitution was introduced and debated at the Constitutional Convention. However, it was ultimately defeated. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 420-22 (1928). Also, term limits were a part of the Articles of a Confederation, limiting delegates to a three year term. ARTICLES OF THE CONFEDERATION art. V, § 2, 1 Stat. 4, 5 (1778).

37. *Hill*, 872 S.W.2d at 355.

38. Id. at 355-56 (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION (1928) and THE FEDERALIST No. 60 (Alexander Hamilton)).


40. *Hill*, 872 S.W.2d at 357. The *Hill* court gave two dissenting opinions. In the first one, Arkansas Supreme Court Justice Hays stated his understanding that the states possess the power to add qualifications to their congressional delegation. Id. at 367 (Hays, J., concurring in part, dissenting in part) ("I find the United States Constitution does not prohibit additional qualifications for senators and representatives."). In the second one, Special Chief Justice Cracraft would have held that the Qualifications Clause issue was not implicated because Amendment 73 was merely a ballot access restriction. Id. at 368 (Cracraft, S.C.J., concurring in part, dissenting in part) ("I do not view the provisions of Amendment 73 to the Arkansas Constitution as raising a 'qualifications' issue, but rather a ballot access issue to be measured by the First and Fourteenth Amendments to the United States Constitution."). And, under that analysis, Special Chief Justice Cracraft would have held that section 3 of Amendment 73 passed constitutional standards. Id. at 370 (Cracraft, S.C.J., dissenting) ("I would hold that Amendment 73 to the Arkansas Constitution . . . is not constitutionally infirm in any respect. . . .").


43. Id.
The issues presented to the Supreme Court were "whether the Constitution forbids States from adding to or altering the qualifications specifically enumerated in the Constitution" and "if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance."

III. THE U.S. TERM LIMITS DECISION

In U.S. Term Limits, the Supreme Court affirmed the judgment of the Arkansas Supreme Court by a five to four decision. In so doing, the Court determined that state-imposed ballot access term limits on members of Congress violated the Constitution. Thus, section 3 of Arkansas Amendment 73 could not constitutionally impose any limits on Arkansas' congressional delegation.

In reaching its decision, the Court, speaking through Justice Stevens, took several analytical steps. First, the Court addressed the question of whether the Constitution sets forth the exclusive qualifications for membership in Congress. The petitioners argued that the Court's decision in Powell v. McCormack could be narrowly interpreted as a decision on the powers of Congress, not the powers of States. On this point, the Court did not distinguish or overturn its prior decision in Powell. Rather, the Court followed Powell's holding that the historical materials of the Framers showed their intent that the Qualifications Clauses were to be exclusive.

Second, because the petitioners made a Tenth Amendment argument, the Court decided to determine whether the several states, in this case Arkansas, had the power to add to or alter the qualifications.

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45. Id.
46. See id.
47. Id. at 1845.
48. Id. at 1847-52.
50. U.S. Term Limits, 115 S. Ct. at 1851. The Court noted: Petitioners argue somewhat half-heartedly that the narrow holding in Powell, which involved the power of the House to exclude a member pursuant to Art. I, § 5, does not control the more general question whether Congress has the power to add qualifications. Powell, however, is not susceptible to such a narrow reading. Our conclusion that Congress may not alter or add to the qualifications in the Constitution was integral to our analysis and outcome.
51. See id. at 1852 ("[W]e reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are 'fixed' . . . ").
given in the Constitution. On this point the Court first determined that the states were without the power because it was not a reserved power under the Tenth Amendment. In the majority's view the several States do not possess powers which did not exist prior to the framing of the Constitution. The Court then gave an alternative basis for finding an absence of state power: the Constitution precluded state power on the matter. Thus, the Court in held that the State of Arkansas did not have the power to add to or alter the qualifications of its congressional delegation.

Finally, the Court had to wrestle with the issue of whether or not section 3 of Amendment was in fact a “qualification.” The petitioners argued that section 3 was not a qualification since it did not prohibit a congressional candidate from being elected; it only prohibited a candidate who had already served three terms from appearing on the ballot. The Court did not accept this argument and found that such a distinction was not of constitutional significance.

Justice Thomas filed a dissenting opinion in which he was joined by Chief Justice Rehnquist and Justices O’Connor and Scalia. In his analysis, Justice Thomas went directly to the issue of whether the several States have the power to prescribe qualifications for their congressional delegations. First, Justice Thomas determined, in dissent, that the States retain any power not delegated to the Federal Government in the Constitution. His interpretation was that the Qualifications Clauses did not limit the powers of the several States to add

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52. See id. at 1852-66.
53. See id. at 1854 (“[T]he power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States.”).
54. See id. (“[T]he Tenth Amendment] could only ‘reserve’ that which existed before.”).
55. See id. at 1856 (“[T]he Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.”).
56. See id. at 1854.
59. See id. at 1866-67 (“Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification. . . .”).
60. See id. at 1857-71.
61. See id. at 1875-1914 (Thomas, J., dissenting).
62. Id. at 1875-84 (Thomas, J., dissenting).
63. See id. at 1876 (Thomas, J., dissenting) (“[W]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.”).
64. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.
qualifications\textsuperscript{65} and that the decision of \textit{Powell v. McCormack}\textsuperscript{66} was limited to the powers of Congress.\textsuperscript{67} Then, Justice Thomas stated his understanding that there was nothing in the text of the Constitution which precluded state power.\textsuperscript{68} In the final analysis, Justice Thomas and the Justices who joined him would have reversed the judgment of the Arkansas Supreme Court.\textsuperscript{69}

IV. Analysis

In deciding \textit{U.S. Term Limits}, the Court’s ultimate judgment was supported by many authorities. The reaffirmation by the \textit{U.S. Term Limits} majority of the holding in \textit{Powell v. McCormack},\textsuperscript{70} that the qualifications for congressional members were exclusively set forth in the Constitution and could not be added to or altered in any manner other that by amendment,\textsuperscript{71} seems to be correct. Additionally, the Court’s holding that section 3 of Amendment \textsuperscript{72} constitutes a “qualification” under the Constitution was supported.

This note’s analysis first illustrates that pure term limits imposed by states violate the Constitution because the qualifications set forth in the Constitution are exclusive. The analysis further demonstrates that state-imposed ballot access term limits violate the Constitution because they constitute qualifications.

A. The Exclusivity of the Constitutional Qualifications

As one scholar has correctly recognized, “[w]hether or not the Qualifications Clauses are exclusive is not ... a question that can be answered by parsing the language of the Constitution.”\textsuperscript{73} The Court in \textit{U.S. Term Limits} brought together a number of authorities to support its conclusion that the qualifications for membership in Congress

\begin{thebibliography}{99}
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\item 65. \textit{U.S. Term Limits}, 115 S. Ct. at 1885 (Thomas, J., dissenting) (“[The Qualifications Clauses] restrict state power only in that they prevent the States from abolishing all eligibility requirements for membership in Congress.”).
\item 68. \textit{See id.} at 1877-84 (Thomas, J., dissenting).
\item 69. \textit{See id.} at 1914 (Thomas, J., dissenting).
\item 70. 395 U.S. 486 (1969).
\item 71. \textit{U.S. Term Limits}, 115 S. Ct. at 1845 (“If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.”).
\item 72. \textit{Ark. Const. amend. 73, § 3, held unconstitutional in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995)}.
\item 73. Lowenstein, \textit{supra} note 9, at 10.
\end{thebibliography}
given by the Constitution are exclusive.\textsuperscript{74} An examination of historical authorities and prior Supreme Court decisions reveals that the Court's holding was correct.

1. Historical Support

Among the authorities which support the exclusivity of the Qualifications Clauses are the discussions of qualifications for members of the federal legislature in the Federalist Papers.\textsuperscript{75} A passage written by Alexander Hamilton sheds light on how the Framers believed the Constitution contained the exclusive qualifications for membership in the Congress.\textsuperscript{76} The Framers' fear that property qualifications could be set by the legislature motivated the creation of the Qualifications Clauses,\textsuperscript{77} and Hamilton's use of the phrase "defined and fixed in the Constitution and . . . unalterable . . ."\textsuperscript{78} Another paper written by James Madison likewise demonstrates the Framers' intent that the Qualifications Clauses be exclusive so that religious or national origin requirements would not be placed upon members of Congress.\textsuperscript{79}

Charles Warren's account of the Constitutional Convention also clearly shows the intent of the Framers that the qualifications for members of Congress were exclusively set forth in the Constitution.\textsuperscript{80} During debate over whether Congress should have the power under Article I, section 5 of the Constitution\textsuperscript{81} to set additional qualifications, James Madison emphatically opposed giving Congress this

\textsuperscript{74} See \textit{U.S. Term Limits}, 115 S. Ct. at 1847-52, 1856-66.
\textsuperscript{75} \textit{The Federalist} No. 60 (Alexander Hamilton), No. 52 (James Madison).
\textsuperscript{76} Hamilton wrote:

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 \textit{times}, the \textit{places}, and the \textit{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.


\textsuperscript{77} U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.
\textsuperscript{78} \textit{The Federalist} No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\textsuperscript{79} Madison wrote:

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

\textit{The Federalist} No. 52, at 326 (James Madison) (Clinton Rossiter, ed., 1961).

\textsuperscript{80} \textit{Warren, supra} note 36, at 412-26.
\textsuperscript{81} U.S. CONST. art. I, § 5.
power. Subsequently, the Convention defeated proposals to give Congress the power to set either general qualifications or only property qualifications. These actions support the conclusion, shared by Warren, that the Convention made age, citizenship and residency the exclusive qualifications for membership in Congress.

Another historical writer who agreed that the Qualifications Clauses were exclusive was Justice Joseph Story. He suggested that, if the qualifications enumerated in the Constitution were not exclusive, the States could dissolve the Congress by making all persons ineligible under their own qualifications. Also, Justice Story recognized that if adding qualifications were permitted, then either the States or Congress could vary those specified in the Constitution. Thus, States would be able to circumvent the age, citizenship and residency requirements of the Qualifications Clauses. Justice Story's observations, therefore, further support the exclusive nature of qualifications for membership in the Congress.

2. Supreme Court Precedents

Although the historical materials of the Framers and Justice Story's commentaries, standing alone, support the proposition that the Qualifications Clauses are exclusive, the decision of the Supreme Court in Powell v. McCormack seems to have authoritatively decided the issue. The Court in Powell found that the qualifications for membership in the United States Congress were exclusive under the Constitution. In that case, Adam Clayton Powell was elected to

82. Warren, supra note 36, at 420. Madison is quoted in Warren's text as saying: [T]he qualifications of the elected were "fundamental articles in a Republican Government and ought to be fixed by the Constitution." If the Legislature could regulate them, "it can by degrees subvert the Constitution... by limiting the number capable of being elected.... Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction."

83. Id. at 421.

84. Id. ("[A]s the Convention refused to grant to Congress power to establish qualifications in general, the maxim expressio unius exclusio alterius would seem to apply.").


86. Id. at § 623 ("A state may, with the sole object of dissolving the Union, create qualifications so high, and so singular, that it shall become impracticable to elect any representative.").

87. Id. at § 624.

88. See id.


90. See id.
serve in the United States House of Representatives from a congressional district in New York.91 The House, however, did not allow Powell to take his seat or oath because there were allegations of impropriety on his part.92 Subsequently, the House voted to exclude Powell from his seat.93 Powell then filed an action for declaratory relief that his exclusion from the House was unconstitutional.94 The district court dismissed the case,95 and the court of appeals affirmed, ruling that the case was not "justiciable."96

The Supreme Court, however, reversed the court of appeals' judgment. The Powell Court examined whether the case was "justiciable" or if it merely presented a "political question."97 In doing so, the Court determined that a decision of whether the case involved a political question must turn on whether the House had the power to add to the qualifications of its members beyond those enumerated in the Constitution.98 If the House did have such power, there would be a "textually demonstrable constitutional commitment of the issue"99 to the House.100 The decision rested on an evaluation of the various historical materials to determine the intentions of the Framers.101

In Powell, the Court considered authorities other than the Federalist Papers and Justice Story's commentaries.102 First, English legislative and court precedents prior to the Constitutional Convention were discussed.103 The Court found the English precedent of the John Wilkes case to be the most notable.104 In that case, Wilkes was not seated in the Parliament despite having been elected to it several times.105 The resolution of the dispute came in 1782 when Wilkes was finally seated.106 In the view of the Powell court, the Wilkes case

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91. Id. at 489.
92. Id. at 490. Specifically, Powell, as chairman of the House Committee on Education and Labor, was accused of making false statements on travel expenses and directing an illegal salary to his wife. Id.
93. Id. at 493.
94. Id. at 494.
95. Id.
96. Id. at 512.
97. Id. at 516-49.
98. Id. at 520.
100. Powell, 395 U.S. at 521.
101. Id. at 522-48.
102. See id.
103. Id. at 527-531.
104. See id.
105. Id. at 527-28 (citing 16 Parl. Hist. Eng. 545 (1769)).
106. Id. at 528 (citing 22 Parl. Hist. Eng. 1411 (1782)).
demonstrated the English interpretation of the fixed nature of qualifications for legislators.107

Secondly, the Court in *Powell* examined the experience of an early Congress with regard to the qualifications of its members.108 The Court cited the challenge to William McCreery's eligibility for membership in Congress in 1807.109 In that year, the state of Maryland tried to impose additional residency qualifications on its Congressional delegation.110 The House of Representatives, however, decided that McCreery should be seated because Maryland's imposition of qualifications was contrary to the Constitution.111 Such action signaled the understanding that the United States House of Representatives, in 1807, believed the Qualifications Clauses were exclusive. Due to its proximity to the Constitution's ratification, the *Powell* Court found the McCreery incident to be of significant precedential value.112 In conclusion, Chief Justice Warren found that the House only had the power to expel members for not meeting "the qualifications expressly set forth in the Constitution."113 Thus, *Powell* decided what was apparent from the intentions of the Framers.

The *Powell* decision was reaffirmed in the Supreme Court decision of *Nixon v. United States.*114 In that case, the Court was again faced with another determination of whether the case presented a political question or was justiciable.115 Chief Justice Rehnquist, speaking for the majority, found *Powell* to be controlling on the issue.116 In explaining his reliance on *Powell* the Chief Justice noted

107. Chief Justice Warren wrote:

> With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed."

Id. at 528 (quoting 16 Parl. Hist. Eng. 589, 590 (1769)).

108. Id. at 541-47.

109. Id. at 542-43.

110. Id. at 542.

111. The language used by that early Congress was:

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

Id. at 542-43 (quoting 17 Annals of Cong. 872 (1807)).

112. See id. at 547 (citing Myers v. United States, 272 U.S. 52 (1926)).

113. Id. at 548.


115. Id. at 735.

116. See id. at 739-40.
that, in Powell "[w]e held that, in light of the three requirements specified in the Constitution, the word 'qualifications' . . . was of a precise, limited nature." Thus, the Court agreed with Powell's holding that the Qualifications Clauses were exclusive.

3. Pure Term Limits Violate Exclusivity

Based on the foregoing, it seems clear that the qualifications required to be a member of Congress were intended to be exclusively those enumerated in the Qualifications Clauses. The historical materials of the Framers and the Supreme Court's precedents confirm that the Qualifications Clauses contain the exclusive requirements for membership in Congress. As a result, any attempt to create additional qualifications directly violates this exclusivity. When a state directs that an individual cannot be a member of its congressional delegation after serving a specified number of terms, the state imposes additional qualifications which are not among the exclusive qualifications enumerated in the Constitution. Therefore, state term limits are unconstitutional.

B. The Definition of "Qualification"

There have been some attempts to define exactly what constitutes a "qualification" under the Qualifications Clauses of the Constitution. If a limit on Congressional service does not constitute a "qualification," the exclusivity of the constitutional provisions would not be violated. Thus, the definition of "qualification" becomes very important in determining whether a term limit measure infringes on this exclusivity.

1. Formal Barrier to Service

One possible standard for judging which measures add to or alter the constitutional qualifications would be to define a qualification as any formal barrier for service to Congress. Under this definition,
only regulations which legally prohibit an individual elected to Congress from serving would violate the Constitution. Thus, a ballot access term limit would not be unconstitutional if it allows write-in candidates to serve.\textsuperscript{122}

Support of this view may be inferred from the Supreme Court's decision in \textit{Storer v. Brown}.\textsuperscript{123} The case involved California regulations which required an independent candidate to file nomination papers signed by at least five percent of the voters in the preceding general election, and those signing must not have voted in any primary.\textsuperscript{124} An independent candidate who sought to have his name placed on the ballot challenged California's election regulations.\textsuperscript{125} The Court addressed the appellants' claim at length under the First and Fourteenth Amendments.\textsuperscript{126} However, the Court summarily dismissed a Qualifications Clause challenge.\textsuperscript{127} Proponents of state-imposed term limits argue that the \textit{Storer} case demonstrates the proposition that some qualifications may be added if they are not formal bars to membership in Congress.

The "formal barrier" definition, however, disregards the Framers' intent that the qualifications were to be exclusively set forth in the Constitution.\textsuperscript{128} In preventing a property qualification from appearing in the text of the Constitution, the Constitutional Convention surely did not intend to allow states to put a ballot restriction on candidates who did not possess a certain amount of property.\textsuperscript{129} Clearly, ballot-access term limits are more onerous to a candidate than a requirement that a candidate obtain a number of voter signatures for nomination papers. Because "the touchstone of Qualifications

\begin{itemize}
\item \textsuperscript{122} See \textit{id.} at 861.
\item \textsuperscript{123} 415 U.S. 724 (1974).
\item \textsuperscript{124} \textit{id.} at 726-27. The regulations also prohibited a candidate from running as an independent if the candidate voted in the immediately preceding primary election. \textit{id.} at 726.
\item \textsuperscript{125} See \textit{id.} at 726-28.
\item \textsuperscript{126} See \textit{id.} at 728-37.
\item \textsuperscript{127} See \textit{id.} at 746 n.16. In this regard the Court stated:
\begin{quote}
Appellants also contend that [a California regulation] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit. [Appellants] would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election. The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.
\end{quote}
\textit{id.}
\item \textsuperscript{128} \textit{See supra} notes 75-88 and accompanying text.
\item \textsuperscript{129} \textit{See Warren}, \textit{supra} note 36, at 421.
\end{itemize}
Clause[s] jurisprudence has been how an election law affects a candidate, not why the candidate is affected,”130 the “formal barrier" definition is erroneous.

2. Analogies to the Constitutional Qualifications

Another possible standard which could be used to determine whether a limitation is a “qualification” is whether the regulation contains “unavoidable analogies to the three constitutionally enumerated qualifications.”131 Under this formulation, any regulation that does not vary the age, citizenship, and residency requirements of the Qualifications Clauses are permissible.

However, this definition belittles the intentions of the Framers that the qualifications in the Constitution were to be exclusive, not some minimal requirements.132 The historical materials discussed earlier show that the use of certain qualifications, such as religious requirements, were the impetus for the exclusivity of the constitutional qualifications. Therefore, although term limits (pure or ballot-access) could be constitutional under the unavoidable analogies definition, they would be contrary to the intent of the Framers which underlies the Qualifications Clauses would not support the limitations. Therefore, the unavoidable analogies definition is inconsistent with the Constitution.

3. Effective Disqualification

A third possible means to determine whether the qualification is impermissible is whether the regulation constitutes an “effective disqualification” for an individual to serve in Congress.133 Under this standard, a law is an unconstitutional qualification if it is “the legal equivalent of an absolute prohibition from holding office.”134 This definition, although susceptible to becoming “a judicially unmanageable standard,”135 closely follows the intent of the Framers. First, evasion of the enumerated qualifications would violate the spirit of the

130. Sullivan, supra note 11, at 870.
131. Gorsuch & Guzman, supra note 10, at 363. See also, Sullivan, supra note 11, at 870-71 (discussing the formulation set forth by Gorsuch and Guzman).
132. See supra notes 75-88 and accompanying text.
133. See Sullivan, supra note 11, at 866. See also, Thorsted v. Gregoire, 841 F. Supp. 1068, 1081 (W.D. Wash. 1994) (stating that state-imposed term limits “would . . . have the practical effect of imposing a new qualification.”).
135. Id. at 867.
Constitution. Surely the Framers did not debate and draft constitutional provisions which could be disregarded. The Supreme Court has recognized that the Constitution does not contain clauses which are "empty formalism[s]." Secondly, there is a distinction between qualifications for membership in Congress and state laws regulating election procedures by requiring candidates to show community support. An "effective disqualification" does not even allow an individual to demonstrate that support. Thus, the "effective disqualification" standard is the most appropriate means to judge whether a law constitutes a qualification.

Under the "effective disqualification" standard, Section 3 of Amendment 73 is an impermissible qualification. Section 3 does not allow anyone who has served the specified number of terms to appear on the ballot. The possibility of winning as a write-in candidate is so remote that Section 3 becomes "the legal equivalent" of a qualification. Because it is a qualification under this standard, Section 3 is an unconstitutional violation of the exclusive Qualifications Clauses.

V. IMPLICATIONS

The U.S. Term Limits decision creates some interesting questions on the current state of federal election laws and the Supreme Court's view of federalism. These possible new issues are explored below.

A. Candidacy as a Constitutional Right

One implication of the U.S. Term Limits decision could be its effect on the rights of candidates. The extent to which an individual has a right to be a candidate for public office is a question that has been

137. Id. See also, Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution... may be manipulated out of existence.").
138. See U.S. Term Limits, 115 S. Ct. at 1870.
140. See Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974) ("[A]ccess 'via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.").
141. Sullivan, supra note 11, at 866.
142. See supra notes 73-119 and accompanying text.
143. See infra notes 145-75 and accompanying text.
144. See infra notes 176-223 and accompanying text.
raised by legal scholars.45 While the right to be a candidate may exist, it was not thought to be a fundamental right.46 In Bullock v. Carter,47 the Supreme Court recognized that "the Court has not . . . attached such fundamental status to candidacy as to invoke a rigorous standard of review."48 Therefore, the Court did not subject ballot-access laws to a strict scrutiny standard of review.49 Furthermore, the rights were not individually possessed by the candidates because the right of candidacy is linked to the rights and interests of voters.50 However, the U.S. Term Limits decision implicitly goes beyond these notions of a candidate's rights and may be a step toward recognizing the right as "fundamental."

In the U.S. Term Limits decision, the Court seemed to have given the right of candidacy to the candidate personally rather than to the voters. Assuming the amendment imposed a ballot restriction rather than a qualification, the petitioners argued that Amendment 73 satisfied constitutional scrutiny.51 In response, the Court cited Harman v. Forssenius and said: "As we have often noted, '[c]onstitutional rights would be of little value if they could be . . . indirectly denied."52 Although the Court has usually recognized the right of candidacy to be connected to the rights of voters,53 the Court, by using the Harman language, seems to have given individuals the personal constitutional right to be a candidate, as opposed to the right of the candidate being linked to the rights of voters.

46. In Clements v. Fashing, 457 U.S. 957 (1982) (plurality opinion), Justice Rehnquist noted that the Court was "[f]ar from recognizing candidacy as a 'fundamental right."' Id. at 963. See also, Mark E. Dreyer, Comment, Constitutional Problems with Statutes Regulating Ballot Position, 23 Tulsa L.J. 123, 130 (1987) ("While it may be true that a right to be a candidate exists, clearly the right is not a fundamental right.").
47. 405 U.S. 134 (1972).
48. Id. at 142-43.
49. Under Bullock, the standard of review for Equal Protection challenges of ballot access laws is "that the laws must be . . . found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Id. at 144. See also, Clements, 457 U.S. at 968 ("[A]n insignificant interference with access to the ballot need only rest on a rational predicate in order to [survive].").
50. The Court has stated that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock, 405 U.S. at 143.
52. 380 U.S. 528 (1965).
54. See supra note 150 and accompanying text.
The Court went further by using language which alluded to the fact that the right to be a candidate may now be a fundamental right.\textsuperscript{155} In this instance, the Court was dealing with the petitioner's argument that the United States Constitution's Elections Clause\textsuperscript{156} permitted states to enact measures like Amendment 73. The Court's first reaction was to cite \textit{Smiley v. Holm}\textsuperscript{157} for the proposition that "[t]he Elections Clause gives States authority 'to enact . . . requirements . . . which . . . are necessary in order to enforce the fundamental right involved.'"\textsuperscript{158} The second reaction was a cite to \textit{Tashjian v. Republican Party}\textsuperscript{159} for the proposition that "'[t]he power to regulate the time, place, and manner of elections does not justify . . . the abridgement of fundamental rights.'"\textsuperscript{160} Both of these cases use the phrase "fundamental right" which implies a different view of the rights of candidates from that enunciated in \textit{Bullock} and \textit{Clements}. The cumulative effect of \textit{Harman}, \textit{Smiley}, and \textit{Tashjian}, together with \textit{U.S. Term Limits} could be that the right of candidacy is now viewed as a fundamental constitutional right. The effect of recognizing the right to be a candidate as fundamental would be to subject any regulation of that right to strict constitutional scrutiny.\textsuperscript{161} In sum, the Court's decisions in \textit{Bullock} and \textit{Clements} that ballot restrictions are not subject to strict scrutiny could be subject to attack in future cases.

\section*{B. The Hatch Act}

A second implication of the \textit{U.S. Term Limits} decision is that it may throw the constitutionality of the Hatch Act\textsuperscript{162} into question.\textsuperscript{163} The Hatch Act prohibits certain federal civil servants\textsuperscript{164} from participating in certain political activities.\textsuperscript{165} Under the Act, some federal employees are clearly prohibited from running for Congress.\textsuperscript{166}

\footnotesize{\begin{itemize}
  \item 155. \textit{See U.S. Term Limits}, 115 S. Ct. at 1869-70.
  \item 156. U.S. Const. art. I, § 4, cl. 1.
  \item 157. 285 U.S. 355 (1932).
  \item 159. 479 U.S. 208 (1986).
  \item 162. 5 U.S.C. §§ 7322-7326 (1994).
  \item 163. It has been suggested that the constitutionality of the restrictions in the Hatch Act may be determinative of the constitutionality of term limits. \textit{See}, Gorsuch & Guzman, \textit{supra} note 10, at 359; Lowenstein, \textit{supra} note 9, at 27.
  \item 164. 5 U.S.C. § 7322(1) (1994).
  \item 165. 5 U.S.C. § 7323 (1994).
  \item 166. 5 U.S.C. § 7323(a)(3) (1994).
\end{itemize}}
The constitutionality of the Hatch Act has been upheld in two Supreme Court decisions. In *United Public Workers v. Mitchell*, the Court upheld the Hatch Act against a First Amendment challenge. Balancing the liberties of the government employee against the governmental interests, the Court found that "Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." In *United States Civil Service Commission v. National Association of Letters Carriers*, the Court "unhesitatingly" reaffirmed the *Mitchell* decision. The *Letter Carriers* Court also rejected challenges to the Hatch Act based on vagueness and the overbreadth doctrine. In fact, the Court determined that nothing in the Constitution could invalidate those regulations.

The question now becomes whether the *U.S. Term Limits* decision makes the Hatch Act unconstitutional insofar as it prohibits an individual from serving in Congress who meets the age, citizenship, and residency requirements of the Constitution. Clearly, the Hatch Act is not a strict prohibition against serving in Congress since the employee could serve by resigning the position. However, the Hatch Act's restriction could constitute an effective disqualification since it forces such a resignation. If the Hatch Act were to be challenged on these grounds, it is unclear how the Supreme Court would rule. Nevertheless, the *U.S. Term Limits* decision provides greater support for a challenge than has previously been available.

C. *Whose Federalism?*

While the most important aspect of the *U.S. Term Limits* decision is its holding that state-imposition of term limits on members of Congress is unconstitutional, it is not the only substantive aspect of the
majority and dissenting opinions. Clearly, the majority could have focused solely on the exclusivity of the Qualifications Clauses. Because of this exclusivity, in light of the historical materials of the Framers and the previous Supreme Court opinions of Powell v. McCormack and Nixon v. United States, Section 3 of Amendment 73 is unconstitutional. However, in the broad scheme of constitutional law, the U.S. Term Limits decision was an important announcement by the majority and dissenting factions of the Court on their respective views of federalism. Particularly, the two factions expressed different opinions as to the extent of a reserved power under the Tenth Amendment when a state did not possess the power prior to the ratification of the Constitution.

1. The Majority's View

Although the U.S. Term Limits decision reiterated Powell's holding that the Qualifications Clauses were exclusive, the Court went beyond the issue of exclusivity. The Court went further by addressing the Petitioners' claim that the Tenth Amendment permits States to exercise their reserved powers by adding qualifications to serve as members of their congressional delegations. The Court determined that the power to establish term limits was absent since a State cannot reserve that which it did not have prior to the ratification of the Constitution.

The Federalist Papers clearly support the majority's position that States can only reserve a power under the Tenth Amendment if they possessed the power prior to the Constitution's ratification. Alexander Hamilton's writing on the powers of States under constitutional federalism espoused the view that the powers reserved to the States under constitutional federalism must be possessed prior to ratification. He specifically wrote that "as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly

176. See supra notes 70-142 and accompanying text.
179. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.
180. U.S. CONST. amend. X.
182. Id. at 1854 ("[T]he power to add qualifications is not within the 'original powers' of the States, and thus is not reserved to the States by the Tenth Amendment.").
183. THE FEDERALIST No. 32 (Alexander Hamilton).
retain all the rights of sovereignty which they before [possessed].”

Hamilton qualified the retained rights of the states by his use of “before.” Thus, the Framers of the Constitution recognized the principle stated by the majority in *U.S. Term Limits.*

The reasoning of *McCulloch v. Maryland* also clearly supports the principle that a state cannot reserve what it did not have prior to ratifying the Constitution. In *McCulloch,* the Court found that a power not mentioned in the Constitution was not reserved to the States. Chief Justice Marshall explained that when a State power never existed, “the question of whether it has been surrendered cannot arise.” Further, Chief Justice Marshall recognized that States cannot be deprived of powers “which they originally possessed.” *McCulloch* therefore recognizes the absence of reserved power by the States on issues unknown to them prior to ratification unless the Constitution specifically delegates that power to the States.

The reasoning of *Sturges v. Crowninshield* also suggests that State powers must have existed prior to ratification of the Constitution for the powers to be “reserved.” The initial issue in the *Sturges* case regarded the power of States to enact bankruptcy laws. The Court determined that States, in fact, did have the power to enact bankruptcy laws prior to the ratification of the Constitution. Thus, the issue in the case became whether, under the Constitution, the power to establish bankruptcy laws was exclusive to the federal government. In deciding the case, the Court seemed to emphasize that it would not have addressed the exclusivity issue if it had found that the States never had the power to enact bankruptcy laws.

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191. U.S. Const. amend. X.
193. Id. at 192-93.
194. Id. at 193.
195. The *Sturges* Court found: When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States.
Sturges case, therefore, implicitly recognizes the principle that states do not reserve powers under the Tenth Amendment which they did not have prior to ratification of the Constitution.

Justice Joseph Story also recognized this principle in his writings on the Constitution. Justice Story, in addressing the argument that States could add qualifications to those elected to Congress under the Tenth Amendment, wrote that States cannot reserve powers unless the powers existed before the Constitution was adopted. This principle was very clearly stated by Justice Story: “The truth is, that the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.” Thus, Justice Story’s conclusion seems to lend persuasive support for this Tenth Amendment principle.

Although the U.S. Term Limits Court did not refer to it, Carter v. Carter Coal Co. also supports its position. Carter, which focused on federal taxation of coal mining, addressed the respective powers of the national government and the governments of the several States. In implicitly adopting the principle stated in U.S. Term Limits, the Court noted that “[t]he states were before the Constitution; and, consequently, their legislative powers antedated the Constitution.” However, the Court noted that the power of the States after ratification of the Constitution extended only to those powers “then possessed by the [S]tates.”

The Carter decision was found controlling by the Court in another case not cited by the U.S. Term Limits majority, United States v. Curtiss-Wright Export Corp. Although the case involved a decision on the international powers of the federal government and the division of those powers between the Congress and the President, its...

These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.

Id. (emphasis added).

196. U.S. Const. amend. X.
197. 2 Story, supra note 85, at § 625-26.
198. Id. at § 625.
199. Id. at § 626.
201. Id. at 294.
202. Id.
203. Id.
204. 299 U.S. 304 (1936).
205. See id.
reasoning is very similar to the majority’s reasoning in *U.S. Term Limits* to the extent of States’ powers. In *Curtiss-Wright*, the Court, in making a distinction between the foreign and domestic powers of the Congress, found that the several States did not possess international powers prior to ratification of the Constitution; instead power was vested in the Union of the Colonies. In doing so, the Court emphasized the *Carter* language that the retained powers were those “then possessed by the states.”

In light of the authorities cited by the *U.S. Term Limits* majority and the *Carter* and *Curtiss-Wright* cases, in addition to the intent of the Framers, the Supreme Court has long recognized that the Tenth Amendment only reserved to the States those powers which they possessed prior to ratification of the Constitution.

2. The Dissent’s View

Justice Thomas, joined by Chief Justice Rehnquist and Justices O’Connor and Scalia, took the position that States can exercise any power that is not withheld from them by the text of the Constitution. Silence by the Constitution, in the dissenters’ view, does not take a particular power away from the States. This position, however, is refuted by the authorities which support the majority’s position.

The first argument presented by Justice Thomas was directed toward the meaning of the word “reserved” in the Tenth Amendment. He understood the term to imply nothing about whether a state possessed a power prior to ratification of the Constitution. Thus, he disagreed with the majority’s conclusion that state governments cannot “exercise . . . powers that were unknown to the States when the Federal Constitution was drafted.”

Justice Thomas also took issue with the majority’s citation of the Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*. That case involved the extent to which the power of Congress was limited by constitutional federalism, not the power of

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206. *Id.* at 315-16.
207. *Id.* at 316 (emphasis in original) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936)).
209. *Id.* (Thomas, J., dissenting).
210. *See id.* at 1878 (Thomas, J., dissenting).
211. *See id.* (Thomas, J., dissenting).
212. *Id.* (Thomas, J., dissenting).
States. Thus, the *Garcia* decision is not on point as it does not provide any guidance on the issue of the extent of the States "reserved" powers.

Justice Thomas failed to support his position on these points. He did nothing to refute the majority's reliance on the Framers intent shown in the Federalist Papers. Furthermore, the *Carter* and *Curtiss-Wright* cases, though not cited in the majority opinion, provide clear support for the majority's position. Thus, the dissenting opinion authored by Justice Thomas failed to fully address the issue concerning the reserved powers under the Tenth Amendment.

3. The Future

The *U.S. Term Limits* decision has already been recognized as an important case on the nature of federalism by the Ninth Circuit Court of Appeals. In *Voting Rights Coalition v. Wilson*, the court addressed an appeal of a permanent injunction requiring the state of California to comply with the National Voter Registration Act of 1993. The court recognized that, while the Act only directly applied to federal elections, it would have a significant impact on how state and local elections are conducted. The court upheld the permanent injunction but cautioned the district court that, in implementing the injunction, care should be taken to see that the law had no effect on how California sought to conduct its elections. This was based on Justice Kennedy’s admonition in *U.S. Term Limits* to recognize state sovereignty in state elections.

Despite this recent reference to the case, the principle discussed in *U.S. Term Limits* seems to have limited applicability since it only applies to powers not possessed by the States prior to the Constitution’s ratification. There are, perhaps, only two powers that the states did not have prior to ratification of the Constitution: they did not have any international powers and they did not have powers for...
the election of federal officers. Therefore, the principle in this case, while important in a theoretical sense, may prove to have only limited applicability. The future impact of *U.S. Term Limits* on the Supreme Court's jurisprudence is uncertain.

VI. CONCLUSION

Clearly, there are merits to having term limits on members of Congress. Term limits could open doors for minorities and women who may otherwise be excluded by career incumbents. Term limits may also reduce what some perceive as abuse of the office by Members of Congress.

However, as this note has shown, state-imposed pure term limits violate the Qualifications Clauses of the Constitution. Additionally, state-imposed ballot access term limits are unconstitutional in the same manner since they constitute qualifications. Since any form of state-imposed term limits are not permitted under the Constitution, states should work toward effectuating term limits through an amendment to the Federal Constitution.

Before the decision *U.S. Term Limits* was handed down, one scholar noted that "this is about as easy a case as the Supreme Court gets." The analysis contained in this note demonstrates the accuracy of that statement. Despite this clarity, the Court went far beyond what it had to do to decide the issue in the case. And while the narrow reading of *U.S. Term Limits* is that state-imposed term limits are unconstitutional, the broad reading may be yet to come.

*Jason M. Hans*

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