WEAPONIZING THE BALLOT

DEREK T. MULLER*

ABSTRACT

State legislatures are considering passing laws to prevent presidential candidates from appearing on the ballot if they fail to disclose their tax returns. These proposals exceed the states' power under the Elections Clause and the Presidential Electors Clause. States have no power to add qualifications to presidential or congressional candidates. But states do have constitutional authority to regulate the manner of holding elections and to direct the manner of appointing presidential electors. "Manner" regulations that relate to the ballot are those that affect the integrity and reliability of the electoral process itself or that require a preliminary showing of substantial support. In other words, they are procedural rules to help voters choose their preferred candidate. Tax disclosure requirements, like term limits or other substantive ballot access conditions, are not procedural election rules, which means they fall outside the scope of the states' constitutional authority to administer federal elections and are thus unconstitutional.

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INTRODUCTION

State legislatures are considering novel ballot access laws that would require presidential and vice-presidential candidates to disclose tax returns as a condition of securing ballot access. These laws veer sharply from traditional ballot access laws under the states' constitutional authority to regulate the "manner" of holding elections, which are rules designed to "protect the integrity and reliability of the electoral process itself."[1] Instead, states seek to use the ballot as a weapon to achieve their desired policy outcome of disclosure. States threaten that candidates will not be able to appear on the ballot and win votes from the public unless those candidates accede to the states'

1. Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983).

demands. But states have no constitutional authority to condition ballot access on their preferred policy preferences because such laws do not pertain to the regulation of the electoral process.

This Article makes three principal contributions to help understand the scope of state authority to regulate access to the ballot in federal elections. First, while states may not add qualifications to candidates seeking federal office, this Article finds that "manner" regulations may at times legitimately affect the ability of candidates to win office.[2] Second, this Article defines the constitutional scope of "manner" rules as election process rules, and it synthesizes alternative judicial formulations of state power over the "manner" of holding elections as variations of this definition.[3] Third, this Article applies this definition to proposals that compel disclosure of information as a condition of ballot access—applied here to tax returns, but applicable to other disclosures like medical records or school transcripts—and finds that they exceed the states' power to regulate the manner of holding elections.[4]

Part I of this Article examines the history and practice of presidential tax disclosures. It then examines how some states have proposed securing access to the tax returns of presidential candidates, particularly through legislation that would condition ballot access to only those candidates who accede to disclosure requirements. Part II examines whether states may add qualifications to congressional or presidential candidates beyond those enumerated in the Constitution. Qualifications are best understood broadly as any condition that would prevent an individual from serving in federal office. This Part explains that the original public meaning of the Constitution is best understood to preclude state power from adding qualifications, and it finds that Supreme Court precedent concurs in this assessment.

Part III then looks at the states' power to regulate the "manner" of holding elections and to "direct" the "manner" of "appoint[ing]" presidential electors.[5] The original public meaning of the Constitution shows that "manner" regulations extend to procedural matters relating to the electoral process. The Constitution constrains state power with this conferral. When states began to print the ballot, states took over the procedural task of determining whose names to print on the ballot. But states may not condition ballot access by grafting additional qualifications requirements for candidates.

Given the limited power of states to regulate the manner of holding elections, Part IV looks at the relationship between qualifications rules and manner regulations. This Article argues that manner rules

2. *See infra* Section IV.A.

3. *See infra* Sections IV.B & C.

4. *See infra* Section V.A.

5. U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2.

may legitimately affect the qualifications of candidates when they regulate the electoral process itself. As long as the state appropriately regulates the "manner" of holding elections—that is, when developing ballot access rules, as long as the state regulates the integrity and reliability of the electoral process itself or ensures that candidates have a preliminary showing of substantial support—the state regulation may legitimately exclude a candidate from serving in federal office.

Courts have not always so cleanly recognized this constitutional framework, and this Article identifies alternative formulations that courts have used to distinguish permissible "manner" regulations from impermissible additional qualifications. First, when courts have considered a rule a "qualification" for office, courts have said that states may not indirectly add qualifications through their ballot access rules. Second, when state legislatures choose to disadvantage a particular class of candidates through their ballot access rules, courts have found that power exceeds the scope of the constitutional grant of authority to states to regulate the "manner" of elections. Third, courts have recognized that state legislatures may not use the ballot for extraneous ends, such as compulsory disclosure of information to voters.

This Article concludes with an application to the proposed tax disclosure laws. These tax disclosure requirements do not relate to the integrity and reliability of the electoral process itself, and they do not condition ballot access to those who offer a preliminary showing of substantial support. Because they do not fit these categories, they fall outside the scope of the states' power to regulate the "manner" of holding elections. The Article then identifies possible opportunities for Congress—outside any ballot access restrictions—to secure relevant financial information from federal candidates or elected federal officials.

I. A SHORT HISTORY OF PRESIDENTIAL TAX DISCLOSURES

Presidential candidates' tax returns have long stirred controversy. The prospect of finding tantalizing information in tax returns inspired a nosy Internal Revenue Service agent to dig up political dirt on a presidential candidate.[6] A sitting president might use tax returns to develop a record against a political opponent.[7] Failure of a candidate

6. United States v. Czubinski, 106 F.3d 1069, 1071-72, 1079 (1st Cir. 1997) (overturning the conviction of an Internal Revenue Service employee who engaged in unauthorized searches of individuals' income tax returns, including returns of individuals involved in David Duke's 1992 presidential campaign).

7. Kimberly A. Houser & Debra Sanders, *The Use of Big Data Analytics by the IRS: Efficient Solutions or the End of Privacy as We Know It?*, 19 VAND. J. ENT. & TECH. L. 817, 827-28 (2017) (describing how President Richard Nixon used the Internal Revenue Service to gather information on potential Democratic presidential candidates).

to disclose tax returns might prompt hackers to secure those tax returns in an extortion scheme.[8] Presidential candidates who disclose their tax returns lose the privacy that tax records typically enjoy.[9] But the public may well have legitimate interests in learning about a candidate's tax returns that outweigh any such privacy interests, including the public concern about how a candidate's returns might inform that candidate's tax policy.[10]

Ahead of the 2016 presidential election, candidate Donald Trump refused to disclose his tax returns, defying a recent practice of most major party presidential candidates. But even this brief sentence summarizing recent practice includes important qualifications to the historical scope and practice of the disclosure of tax returns.

A. Recent Practice of Tax Return Disclosure

The first qualification is "recent practice." The contemporary tradition of disclosing tax returns traces back to 1976, when Gerald Ford disclosed ten years of summary tax data.[11] Before that, the practice was inconsistent. Another qualification is tax "returns." Gerald Ford disclosed a "summary document" of his taxes in 1976. Others, beginning with candidates like Jimmy Carter in 1976 and Ronald Reagan in 1980, disclosed at least one tax return.[12]

Still another qualification distinguishes sitting presidents, presidential candidates nominated by a party, and candidates running in a presidential primary. Since Jimmy Carter took office, sitting presidents have disclosed tax returns as they are filed each year while those presidents are in office.[13] Donald Trump broke that tradition and did not disclose any tax returns as a sitting president.[14]

Between 1980 and 2012, every Republican and Democratic Party nominee has disclosed at least one full tax return before Election Day.[15] Some disclosed few—like Ronald Reagan in 1980 (one year's return), John McCain in 2008 (two), and Mitt Romney in 2012 (two);

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8. Sarah Gruber, *Trust, Identity, and Disclosure: Are Bitcoin Exchanges the Next Virtual Havens for Money Laundering and Tax Evasion?*, 32 QUINNIPIAC L. REV. 135, 135-40 (2013) (describing 2012 extortion efforts to disclose Mitt Romney's tax returns).

9. Sadiq Reza, *Privacy and the Criminal Arrestee: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 757 n.4 (2005).

10. Benjamin A. Templin, *Social Security Reform: The Politics of the Payroll Tax*, 32 QUINNIPIAC L. REV. 1, 2 (2013); Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 92 (2014).

11. Joseph J. Thorndike, *From Nixon to Trump: A Short History of Voluntary Tax Disclosure*, TAX NOTES, Feb. 11, 2019, at 612.

12. *Id.* at 612-13.

13. *Id.*

14. Richard Rubin, *Can Trump Release His Tax Returns and What Has the President Said?*, WALL ST. J. (OCT. 1, 2020), https://www.wsj.com/articles/can-trump-release-his-tax-returns-and-what-has-the-president-said-11601568877 [https://perma.cc/VT2E-BR67].

15. Thorndike, *supra* note 11, at 613.

others disclosed far more, like Bob Dole in 1996 (thirty) and Hillary Clinton in 2016 (twenty-four).[16] Vice-presidential nominees have also typically disclosed their tax returns after being named to the ticket.[17]

Among Republican and Democratic Party presidential primary candidates, the practice of disclosure has been irregular. In 2016, for instance, while Hillary Clinton disclosed 24 returns and Jeb Bush disclosed 33 returns, others disclosed far fewer.[18] In fact, some candidates only disclosed Forms 1040 without disclosing their complete returns.[19] Still other candidates in presidential primaries, like Steve Forbes in 1996 and Jerry Brown in 1992, never disclosed any tax returns.[20]

Another qualification is "major party" presidential candidates. Business tycoon and independent candidate Ross Perot did not disclose his tax returns in 1992 nor in 1996 as a candidate of the Reform Party.[21] Other candidates, like Green Party nominee Ralph Nader in 2000[22] and Libertarian Party nominee Gary Johnson in 2012,[23] never disclosed tax returns.

For some married candidates who file separately, controversies have arisen about whether to disclose their spouses' returns. Teresa Heinz Kerry in 2004 and Cindy McCain in 2008, two women from wealthy backgrounds, filed taxes separately from their husbands.[24] Both spouses at first refused to disclose their tax returns

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16. *Id.* at 613; *see also* Ryan Kelly, *Chart: Presidential Candidates' Tax Returns*, ROLL CALL (Oct. 21, 2016), https://www.rollcall.com/2016/10/21/chart-presidential-candidates-tax-returns/ [https://perma.cc/UKU2-NXAF].

17. Thorndike, *supra* note 11, at 612 ("Major-party nominees for president and vice president . . . have released at least one complete tax return and sometimes many more.").

18. *Id.* at 614.

19. *Id.*

20. Matt Clary, *DNC Says Presidential Candidates Usually Release Tax Returns but Romney Won't*, POLITIFACT (Dec. 16, 2011), https://www.politifact.com/truth-o-meter/statements/2011/dec/16/democratic-national-committee/dnc-says-presidential-candidates-usually-release-t/ [https://perma.cc/6F7B-GCVD].

21. Leigh Ann Caldwell, *Outrage over Tax Returns a Replay of Past Campaigns*, CBSNEWS (July 17, 2012), https://www.cbsnews.com/news/outrage-over-tax-returns-a-replay-of-past-campaigns/ [https://perma.cc/8W7Y-KRZW].

22. The Associated Press, *Nader Reports Big Portfolio in Technology*, N.Y. TIMES (June 19, 2000), https://www.nytimes.com/2000/06/19/us/nader-reports-big-portfolio-in-technology.html [https://perma.cc/5XHL-GPXG].

23. Stephen Dinan & Seth McLaughlin, *Johnson to Voters: Give Libertarian a Chance*, WASH. TIMES (July 23, 2012), https://www.washingtontimes.com/news/2012/jul/23/johnson-to-voters-give-libertarian-a-chance/ [https://perma.cc/BA6R-B8LZ].

24. *See* WASH. POST ARCHIVES, *Teresa Heinz Kerry's Taxes*, WASH. POST (May 5, 2004), https://www.washingtonpost.com/archive/opinions/2004/05/05/teresa-heinz-kerrys-taxes/efe08fbc-d81b-4c25-b448-f3627534ca8c [https://perma.cc/Q92Y-ZDQW]; Michael D. Shear, *Cindy McCain Releases 2006 Tax Returns*, WASH. POST, May 23, 2008 (describing the released two-page summary of Cindy McCain's 2008 tax returns).

but ultimately disclosed portions of their tax returns late in their spouses' campaigns.[25]

And when candidates have disclosed their tax returns in the colloquial sense, it is unclear whether they have disclosed tax returns in their entirety. While Ford disclosed "summary data" and others disclosed their tax returns, the statutory definition of "return" is extraordinarily broad and perhaps broader than the colloquial use of the term "return." Under Section 6103 of the Internal Revenue Code, which pertains to confidentiality of returns, the statute defines "return" as

> any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.[26]

At the very least, "return" might colloquially refer to the filer's 1040 Form and certain schedules. A candidate might want to disclose portions of the return but not everything.

Practices since 1980 reveal some consistencies: every sitting president until Donald Trump disclosed tax returns while in office; and every Republican and Democratic candidate disclosed at least one year's tax return since 1980 and at least summary data since 1976. Other practices, including disclosures during the primaries, the number of years' returns disclosed, and minor party and independent candidate practices, are far more varied and inconsistent.

B. Legislative Action on Tax Disclosures

Because of Trump's refusal to disclose his tax returns, some wondered whether states had options at their disposal to secure disclosure of Trump's returns.[27] In New York, it was suggested that the state could disclose his state tax returns, which included federal returns filed alongside his state returns.[28]

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25. *See* WASH. POST, *supra* note 24; Ralph Vartabedian, *Heinz Kerry Tax Return Shows She Is Due Refund*, L.A. TIMES (Oct. 16, 2004), https://www.latimes.com/archives/la-xpm-2004-oct-16-na-heinzkerry16-story.html [https://perma.cc/599T-F9HG] (noting that Teresa Heinz Kerry "released a portion of her 2003 federal income tax return"); Shear, *supra* note 24 (describing the released two-page summary of Cindy McCain's 2008 tax returns).

26. I.R.C.§ 6103(b)(1).

27. There were other efforts to secure Trump's tax returns. *See, e.g.*, Trump v. Mazars U.S., LLP, No. 19-175, at 22-27 (July 9, 2020) (scrutinizing enforceability of congressional subpoenas for presidential financial records); Trump v. Vance, No. 19-635, at 1-2, 6-7, 25 (July 9, 2020) (examining authority of a state criminal subpoena issued to a sitting president).

28. *See* Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L. J. F. 62 (2017); *cf.* S.B. 02271, 2019-2020 Leg. Sess. (N.Y. 2019) (introducing a

New York also passed a law in 2019 authorizing the state to disclose tax returns to Congress upon a request from the chair of certain congressional committees.[29] The state could subsequently disclose the tax returns of the president, vice president, members of Congress representing New York, or other specific officials upon request.[30] However, litigation ensued.[31]

Several states began to consider tax disclosure rules tied to ballot access rules. States print ballots ahead of the election and distribute them to voters by mail or at polling locations. Because states print the ballots, states also control which candidates' names appear on the ballot—which candidates have "access" to the ballot.[32] Common state rules to decide which candidates' names to list often include requiring a modest showing of support, like collecting signatures from a specified number of registered voters.[33]

The proposed tax disclosure bills would require that prospective presidential candidates' tax returns be made available to the public in their entirety or be shared with a government official who will then make them public. They authorize limited redaction of private information, like the candidate's Social Security number.[34] They require the disclosure be made a period of time before the election, sometimes defined by statute and other times left to the discretion of election officials.[35]

These ballot access statutes apply broadly to any presidential candidate for all future elections. But the target of these statutes was assuredly Trump.[36] The original draft of California's SB 149 in 2017 included an express legislative finding that "Donald Trump's refusal to release his income tax returns departed from decades of established political tradition, denying voters the opportunity to fully evaluate his

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state senate bill to require disclosure of tax returns by statewide elected officials and presidential candidates); Assemb. B. 01390, 2019-2020 State Assemb. (N.Y. 2019) (introducing an assembly bill to require statewide official and presidential candidates to submit tax return information).

29. Tax Returns Released Under Specific Terms Act of 2019, N.Y. Tax Law § 697(f-1), (f-2) (2019).

30. *Id.*

31. *See generally* Trump v. Comm. on Ways & Means, 415 F. Supp. 3d 102 (D.D.C. 2019).

32. *See infra* Section III.B.

33. *See id.*

34. *See, e.g.*, CAL. ELEC. Code. § 6884(a)(1)(A)-(a)(1)(C) (West 2019) (outlining requirements regarding tax returns to be submitted as well as information regarding redactable information). The bill was held unconstitutional as discussed *infra* Section III.E & notes 39-46.

35. *See, e.g.*, *id.* at 6883(a) (requiring disclosure "at least 98 days before the presidential primary election").

36. This Article does not examine whether Donald Trump could have successfully raised any legal challenges to state laws targeting him as a particular individual but that formally apply to a broader set of candidates.

fitness for the office of President of the United States."[37] The final bill omitted this language.[38] Proponents of one ballot access bill in New York named it the Tax Returns Uniformly Made Public Act, or "TRUMP" Act,[39] and Minnesota's parallel legislation, introduced in 2019, includes the same title and acronym.[40]

Several bills were introduced in 2017 and 2018. Two states, New Jersey and California, passed such bills. Governors vetoed both bills. Governor Chris Christie's veto message[41] and Governor Jerry Brown's veto message[42] both expressly cited concerns about the laws' constitutionality. (Neither governor is in office today). In 2019, the California legislature again enacted a tax disclosure bill, which Governor Gavin Newsom signed into law.[43]

State efforts range in their scope: some extend to the primary,[44] the general election, or both; how many years' returns candidates must

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37. Presidential Primary Elections: Ballot Access, S.B. 149, Section 2, 2017-2018 Reg. Sess. (Cal. 2017) (text as introduced on Jan. 28, 2017), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB149&cversion=20170SB14999INT [https://perma.cc/JSN4-PS87].

38. *Id.*; *cf.* Presidential Tax Transparency and Accountability Act, S.B. 149, 2017-2018 Reg. Sess. (Cal. 2017) (as enrolled on Sept. 20, 2017).

39. Tax Returns Uniformly Made Public Act, S.B. 26, 2017-2018 Leg. Sess. (N.Y. 2017), https://www.nysenate.gov/legislation/bills/2017/S26 [https://perma.cc/DH4D-QH7V].

40. Tax Returns Uniformly Made Public Act, S.F. 199, 91st Leg. Sess. (Minn. 2019), https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF0199&ssn=0&y=2019 [https://perma.cc/L7YS-SXH8].

41. Governor Chris Christie, Conditional Veto of S.B. 3048, 217th Leg. Sess. (N.J. 2017), https://www.njleg.state.nj.us/2016/Bills/S3500/3048_V1.PDF [https://perma.cc/SL3Z-ABSK] ("This is clearly unconstitutional.").

42. Governor Jerry Brown, Veto Message of S.B. 149, 2017-2018 Reg. Sess. (Cal. 2017), https://web.archive.org/web/20171219002118/https://www.gov.ca.gov/docs/SB_149_Veto_Message_2017.pdf [https://perma.cc/J7P6-8959] ("[I]t may not be constitutional. . . . A qualified candidate's ability to appear on the ballot is fundamental to our democratic system.").

43. Primary Elections: Ballot Access: Tax Returns, S.B. 27, Reg. Sess. (Cal. 2019), *enacted as* CAL. ELEC. CODE §§ 6880-84, 8900-03 (West 2019), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB27 [https://perma.cc/QG4C-QC2C].

44. Whether the state is controlling the primary election or the general election, the analysis is generally the same. *See infra* note 219 and accompanying text. But primary elections may present independent First Amendment concerns beyond the scope of this Article. On the one hand, parties have the right to define their membership. Democrats may require that only Democrats seek the Democratic presidential nomination, and Republicans may require that only Republicans seek the Republican presidential nomination. No party currently requires its candidates to disclose their tax returns as a condition of securing the nomination or of appearing on the ballot. To the extent the party disapproves, federal courts have regularly struck down laws that burden the association between a willing political party and willing voters or that compel parties to associate with voters with whom they do not wish to associate. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 221-29 (1986); Eu v. S.F. Cty. Democratic Central Comm., 489 U.S. 214, 229 (1989); Cal. Democratic Party v. Jones, 530 U.S. 567, 579-86 (2000); Duke v. Massey, 87 F.3d 1226, 1234-35 (11th Cir. 1996); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 826-27, 830 n.59, 836 (2001). If the party, the candidate, and the voters desire

disclose varies;[45] whether presidential electors are purportedly bound under the statute and forbidden to cast votes for candidates who fail to disclose their tax returns differs;[46] whether the disclosure requirement extends to minor-party and independent candidates varies;[47] and whether the statute extends to offices apart from the president fluctuates.[48]

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to associate with one another by means of the ballot, the state must overcome this significant associational interest—which it has typically been unable to do.

On the other hand, parties are free to ignore the results of presidential primaries in the event they are conducted in violation of party rules. *See* Cousins v. Wigoda, 419 U.S. 477, 487-91 (1975); Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 108, 121-26 (1981); *cf.* Vikram David Amar, *Why Challenges to California's Tax-Return-Disclosure Law Should Fail (Putting Aside Whether They Will)*, JUSTIA, (Aug. 12, 2019), https://verdict.justia.com/2019/08/12/why-challenges-to-californias-tax-return-disclosure-law-should-fail-putting-aside-whether-they-will [https://perma.cc/X4BX-LVA3] ("[T]here is no First Amendment right of individual candidates or their backers to obtain presidential office.").

45. *Compare* S.B. 94, 30th Leg. Sess. (Haw. 2019), https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=94&year=2019 [https://perma.cc/8SV4-DSHF] (requiring the most recent tax return), *and* Primary Elections: Ballot Access: Tax Returns, S.B. 27, 2019-2020 Reg. Sess. (Cal. 2019), *enacted as* CAL. ELEC. CODE §§ 6880-84, 8900-03 (West 2019) (requiring five years of tax returns); Presidential Primary Elections: Ballot Access, S.B. 149, 2017-2018 Reg. Sess. (Cal. 2017) (also requiring five years of tax returns but vetoed by the governor).

46. The scope of state power to bind presidential electors is a matter of independent debate. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020) (emphasizing broad state discretion in upholding a $1000 fine levied on electors who cast votes for candidates other than the one they pledged to support, who received the most votes in the state). *But see,* Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123, 125 (2001) (highlighting the "difficult" constitutional question of the power to bind electors); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 667-73, 684-90 (1996).

47. The proposed statutes typically treat all candidates alike. That is, all presidential candidates who want to appear on the primary ballot or general election ballot must disclose their tax returns as a condition of ballot access. But disclosure laws sometimes make concessions to minor-party and independent candidates, and the Supreme Court has found that such candidates may have greater privacy concerns at stake. *Cf.* Buckley v. Valeo, 424 U.S. 1, 68-74 (1976) (noting that minor parties might, in some circumstances, provide evidence of "threats, harassment, or reprisals" that could exempt them from otherwise generally applicable campaign disclosure requirements). But all candidates, even minor-party and independent candidates, must provide financial disclosures consistent with the Ethics in Government Act. *See infra* Section V.B. Whether minor-party or independent candidates have unique privacy interests at stake that implicate their First Amendment rights and preclude disclosure is another matter.

48. *See, e.g.*, S.B. 1097, 2019 Gen. Assemb. Sess. (Conn. 2019) (requiring tax disclosures for presidential, vice presidential, gubernatorial, and lieutenant gubernatorial candidates); H.B. 440, 2019 Reg. Sess. (N.H. 2019) (requiring tax disclosures for presidential, vice-presidential, and federal congressional candidates). This Article focuses exclusively on the federal Constitution and its constraints on state activity. State constitutions may also independently limit the ability of states to exclude candidates from the ballot. *Cf.* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (defending independent state constitutional limitations on state activity); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (same); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 120-21 (2014) (describing the right to vote in state

The proposed statutes commonly refer to the Internal Revenue Code's Section 6103(b)(1) and its definition of "return."[49] Section 6103(b)(1) is deliberately an extremely broad definition of "return" to include "any" tax information filed with the Internal Revenue Service "with respect to any person" and "any amendment or supplement," including "schedules, attachments or lists."[50] In Section 6103, "[r]eturns and return information shall be confidential," subject to statutory exceptions.[51] As a matter of confidentiality, a broad definition of "return" makes sense. But states defining tax returns by reference to Section 6103(b)(1) and its repeated reference of "any" turns the broad scope of privacy into a broad disclosure requirement—disclosure that may not track historical practice.[52]

Regardless of the variations that may exist from proposal to proposal, a fundamental question exists for all these bills: may a state limit ballot access to only those presidential candidates who disclose tax returns? The next Part takes up the legal issues that arise in framing this question—including whether states can add qualifications to candidates seeking federal office.

II. QUALIFICATIONS FOR FEDERAL CANDIDATES

To win an election, a candidate must receive the largest number of votes. To do that in today's elections, a candidate must first ensure that her name appears on the ballot so that voters can cast votes for her to help her secure the most votes. Candidates can also win by write-in campaigns in many jurisdictions, but appearing in print on the ballot is the preferred option.

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constitutions that can provide additional guarantees to citizens in the respective states). In California, for instance, the state constitution requires that in a presidential primary, "the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit of noncandidacy." CAL. CONST. art. II, § 5(c); *see* Patterson v. Padilla, 451 P.3d 1171, 1172, 1179-85, 1190-92 (Cal. 2019). State constitutions might provide another constraint on adding qualifications to candidates.

This Article does not extend its logic to any state candidates. The Court's ballot access jurisprudence has treated state candidates differently—to the extent the state has defined the qualifications for its candidates, this debate over the scope of the State's power to regulate the "manner" of elections simply does not apply. *See infra* note 374 and accompanying text (describing "resign to run" statutes); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835-36, 836 n.48 (1995).

49. *See, e.g.*, Assemb. B. 4520, 217th Legis. Sess. (N.J. 2017) (requiring "a copy of the candidate's federal income tax returns, as that term is defined in section 6103(b)(1) of the Internal Revenue Code").

50. 26 U.S.C. § 6103(b)(1) (2018).

51. *Id.* § 6103(a).

52. *Id.* § 6103(b)(1).

But just because a candidate receives the most votes does not mean she is eligible to hold the office. There are sometimes qualifications for office that act as independent conditions on the candidate taking office, qualifications like minimum age requirements, inhabitancy requirements, or citizenship requirements. A candidate might get the most votes on the ballot and still be ineligible to serve in office.

The Framers of the Constitution placed few restrictions on the qualifications for those seeking federal office.[53] To serve as a member of House of Representatives, representatives must be at least twenty-five years of age, seven years a citizen of the United States, and an inhabitant at the time of election of the state from which the representative is elected.[54] For Senators, they must be at least thirty years of age, nine years a citizen, and an inhabitant of the state.[55]

There are other conditions to serving in office, too.[56] A member of Congress must be selected to serve in that office, "chosen"[57] or "elected"[58] by the people of the state, or a governor may make a "temporary appointment[]" of a Senator to office to fill a vacancy.[59] Members of Congress cannot serve in Congress and simultaneously serve in any "Office under the United States."[60] Candidates are ineligible for office if they previously took an oath of office to support the Constitution of the United States but "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof," without a two-thirds vote of Congress to remove that disability.[61]

Presidents have similar qualifications for office. The President must be a "natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution."[62] She must reach "the Age of thirty five Years"[63] and have been "fourteen Years a resident within

53. Jordan Steiker, Sanford Levinson, & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 238 (1995); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 64-72 (2005).

54. U.S. CONST. art. I, § 2, cl. 2.

55. *Id.* art. I, § 3, cl. 3.

56. *See* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 581-84 (2015) [hereinafter Muller *Scrutinizing*] (identifying constitutional qualifications and conditions for presidential and congressional candidates).

57. U.S. CONST. art. I, § 2, cl. 2.

58. *Id.* amend. XVII.

59. *Id.*

60. *Id.* art. I, § 6, cl. 2.

61. *Id.* amend. XIV, § 3.

62. U.S. CONST. art. II, § 1, cl. 5.

63. *Id.*

the United States."[64] A President is limited to two four-year terms in office.[65]

At the very least, three qualifications are widely agreed upon: age, inhabitancy, and citizenship.[66] There is some dispute as to what other conditions, constitutional or otherwise, placed upon elected officials are formally "qualifications." This is a question the Supreme Court has not addressed but a distinction it has found immaterial to this point.[67]

The Constitution provides, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . . ."[68] Congress has exercised that power often over the years, including scrutiny over whether elected members qualify to serve in the office.[69]

If states may add qualifications to candidates seeking federal office, then a requirement that all federal candidates must disclose tax returns would be within the appropriate bounds of state authority[70] subject to other constitutional limitations—for instance, a state could not add a qualification that only white candidates could be elected to federal office. But if a state lacks the power to add qualifications, the state would need to justify the condition under some other constitutional provision. The best understanding of the Constitution, consistent with judicial precedent in this area, is that a state lacks the power to add any qualifications to congressional or presidential candidates. And if that is the case, states must justify a condition placed upon a candidate under some other provision of the Constitution.

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64. *Id.*

65. *Id.* amend. XXII, § 1; *see also id.* ("[N]o person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.").

66. Powell v. McCormack, 395 U.S. 486, 489, 520 n.41 (1969).

67. *Id.* ("It has been argued that each of these provisions . . . is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2. . . . We need not reach this question, however . . . ."); U.S. Term Limits v. Thornton, 514 U.S. 779, 787-88 n.2 (1995) ("We similarly have no need to resolve that question today: Because those additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution.").

68. U.S. CONST. art. I, § 5, cl. 1.

69. *See generally, e.g.*, Chester H. Rowell, A HISTORICAL AND LEGAL DIGEST OF CONTESTED ELECTION CAUSES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, FROM THE FIRST TO FIFTY-SIXTH CONGRESS, 1789-1901 (1901) (reporting Congress's handling of hundreds of contested elections); HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES chs. 13-40 (compiling precedent of the House of Representatives in its handling of disputes concerning the elections, returns, and qualifications of its members); Muller *Scrutinizing*, *supra* note 56, at 581-84 (examining Congress's practice of judging the qualifications of its members).

70. *See* Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL'Y 1, 7-12 (1994) (discussing the possibility of adding qualifications).

The sheer quantity of original sources would threaten to overwhelm an Article like this. This Part selects some of the most salient sources to understand the text, structure, and original public meaning of the Constitution, along with how others have interpreted the Constitution.[71]

A. Congressional Candidates

The Constitution enumerates specific qualifications for federal offices. The text of the Constitution does not expressly state that the qualifications are exclusive. But the Constitution's structure and the contemporaneous understanding of the language of the Constitution at the time of the founding support a conclusion that the qualifications are exclusive. As originally understood, qualifications were any condition that would prevent a person or a class of people from serving in federal office. The Supreme Court has also concluded that neither Congress nor state legislatures may add to the qualifications of congressional candidates. And while the focus of this Article concerns presidential candidates, the bulk of discussion and litigation on qualifications surrounds congressional candidates, which provides a useful starting point and an appropriate analog before examining presidential candidates.

1. Constitutional Text and Structure

Under Article I, Section 2 of the Constitution, "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."[72] Whether phrased in the positive or the negative, neither version expressly provides that the qualifications are exclusive.[73]

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71. There are extensive discussions about the drafting convention and alterations to the constitutional text that are omitted here, both for the sake of space and because they are less persuasive of original public meaning. For more about them, see generally JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 174, 362-63, 372-76, 386, 426-28, 437-38 (1966) (1787); 2 THE RECORDS OF THE FEDERAL CONVENTION 225 (Max Farrand ed. 1911); Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON L. REV. 321, 351-52 (1993); MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 129 (2015) ("Madison's comments in the Notes reflected his growing conviction that the Constitution should avoid unnecessary specifics."); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT L. REV. 97, 120-21 (1991); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 224-27 (1996).

72. U.S. CONST. art. I, § 2, cl. 2.

73. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 792 n.8 (1995) (rejecting argument that the "negative phrasing" of the clause meant very much); *Id.* at 867 (Thomas, J., dissenting) ("The majority is quite correct that the 'negative phrasing' of these Clauses

Notably, the Constitution does not use the word "qualifications" when it enumerates these conditions on federal candidates.[74] The word "qualifications" appears in the context of each house of Congress's power to "Judge [] the Elections, Returns and Qualification of its own Members."[75] Qualifications were understood as the conditions on certain individuals who may serve in federal office, consistent with contemporary usage describing these conditions as "restrictions" or "prerequisites" to serving in office.[76]

While the text does not expressly provide that enumerated qualifications in the Constitution are exclusive, the structure of the Constitution is a more persuasive basis to conclude that qualifications are outside the scope of states' and Congress's power to regulate elections.[77]

When it comes to elections for members of the House of Representatives, it is useful to consider different categories of election-related regulations and how they relate to one another. First, the qualifications of members of the House are enumerated.[78] Second, the qualifications of voters for members of the House are specified in the Constitution. Eligible voters are those who "in each State shall have

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has little relevance. . . . The Qualifications Clauses would mean the same thing had they been enacted in the form that the Philadelphia Convention referred them to the Committee of Style . . . ."). Instead of recognizing that this choice of language meant very much, the Supreme Court in *Powell v. McCormack* sought to disregard the text of the Constitution in preference for the language used before the Committee on Style, which rephrased the draft that the delegates to the Convention had agreed upon. *See* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. (forthcoming 2021), (manuscript at 63-66) (available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3383183 [https://perma.cc/LU5F-JMK2]). The *Powell* Court went so far as to approvingly quote research from Charles Warren: "The Committee had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention . . . ." Powell v. McCormack, 395 U.S. 486, 539 (1969) (internal quotation and alterations omitted). Whether the qualifications are enumerated positively or negatively, the difference tells readers today little about whether the qualifications are exclusive—and the Supreme Court appears to recognize that the methodology applied in *Powell* is not persuasive. *See Term Limits*, 514 U.S. at 867-68 (Thomas, J., dissenting) (comparing variations of language that would indicate whether the qualifications are exclusive).

74. *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. OF CONST. L. 1, 22 (2010); Lowenstein, *supra* note 70, at 26.

75. U.S. CONST. art. I, § 5, cl. 1.

76. *See, e.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 175-76 (George Sharswood ed., 4th ed. 1893) ("qualifications of persons to be *elected*" in the context of "standing restrictions and disqualifications"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) (defining "qualification" as "[t]hat which makes any person or thing fit for any thing"); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 613 (3d ed. 1833) (noting that "qualifications" are "prerequisites of office" without a "common standard" in the common law); *id.* § 614 (acknowledging "positive" and "negative" qualifications).

77. *See* Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 88-91 (1995) (describing structural debate in *U.S. Term Limits, Inc. v. Thornton*).

78. U.S. CONST. art. I, § 2, cl. 1.

the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[79] Third, States may prescribe the "Times," the "Places," and the "Manner" "of holding Elections," subject to Congress's decision to "make or alter such Regulations."[80] Finally, each house of Congress is given the power to judge the qualifications, elections, and returns of its members.[81]

The requirements for the Senate are somewhat different. First, before the Seventeenth Amendment, the state legislatures chose Senators.[82] The Seventeenth Amendment changed that to "[t]he electors in each State," with qualifications identical to voters for candidates for the House.[83] Second, Congress lacks the authority to "make or alter" the "Places of chusing Senators."[84]

Robert Natelson argues that the "manner of holding Elections" is an express description of the states' scope of authority, and it excludes the power to regulate things that fall outside the clause.[85] Because the qualifications, times, and places are specified elsewhere in the Constitution, he argues the "manner" excludes those powers.[86] Natelson explains, "The Constitution withheld from both state and congressional control the qualifications and terms of office for Senators and Representatives."[87] He also helpfully notes that certain activities in the states can fall within their ordinary police power and may incidentally affect elections—for instance, states might change the composition of their state legislatures, which could have affected the selection of senators before the Seventeenth Amendment.[88]

As a structural matter, the Expulsion Clause precludes Congress from adding qualifications to congressional office. Each House of Congress is empowered to judge the "Elections, Returns and Qualifications of its own Members."[89] It makes these decisions by majority vote.[90] Each House also has the power to "expel a Member" "with the Concurrence of two thirds."[91] It is incongruous for Congress

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79. *Id.*

80. *Id.* art, I, § 4, cl. 1.

81. *Id.* art. I, § 5, cl. 1.

82. *Id.* art. I, § 3, cl. 1.

83. U.S. CONST. amend. XVII.

84. *Id.* art. I, § 4, cl. 1.

85. Natelson, *supra* note 74, at 22. *But see* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 92 (1997) (arguing that "it is hard to derive anything meaningful from silence" in the Elections Clauses).

86. Natelson, *supra* note 74, at 20-22.

87. *Id.* at 23.

88. *Id.* 22-23.

89. U.S. CONST. art. I, § 5, cl. 1.

90. LEWIS DESCHLER, 2 DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES ch. 7, §§ 9.3, 13 n.9 (1977).

91. U.S. CONST. art. I, § 5, cl. 2.

to have the power to add qualifications and exclude candidates on that basis when its expulsion power requires a two-thirds vote. Instead, if Congress concludes that a member has engaged in "disorderly Behaviour"[92] and merits expulsion, it may do so. While states do not have the power to expel candidates from Congress, the scope of the Elections Clause extends to both states and Congress, and what appears to be a structural limitation on Congress would also work symmetrically as a limitation against the states.[93]

Finally, there is no enumerated authority in the Constitution for states or Congress to regulate the qualifications of candidates. Congress may only act pursuant to the legislative powers granted in the Constitution. The States entered into the constitutional government without any preexisting authority to regulate the qualifications of candidates for Congress—that is because there was no Congress as defined by Article I of the Constitution until the states ratified the Constitution.[94] Other provisions of the Constitution do not authorize the addition of qualifications, either.[95] From an enumerated powers perspective, then, states and Congress have power over certain things, like the "manner" of holding elections, but not others, like qualifications of candidates.

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92. *Id.*

93. *See infra* Section II.A.4.(a) (describing similar structural observation in *Powell v. McCormack*).

94. *See infra* notes 125-130 and accompanying text (describing Justice Story's views); Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 849 (2015) ("States lack inherent power to regulate federal elections."); *cf.* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CALIF. L. REV. 1311, 1342 (1997) (citing to candidate qualifications as an example among "other types of cases, such as those involving individual rights or certain fundamental structural issues, in which neither the federal government nor the states have any power over the subject.").

95. *See infra* notes 125-130 and accompanying text; U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803-05 (1995) (noting that "no such right existed" before the creation of the Constitution for states to set qualifications and that the election of members of Congress "was a new right, arising from the Constitution itself"); Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 103 (2016); Vicki C. Jackson, Cook v. Gralike*: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 302-05 (2001) (noting a structural claim that "states had no reserved powers to regulate federal elections but only those powers specified in the Constitution"); *cf.* Neil M. Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 354 n.60 (1991). *But see* John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution's Qualifications Clauses*, 73 DENVER U. L. REV. 89, 130-36 (1995) (arguing that Tenth Amendment provides a "rule of interpretation" because the power of adding qualifications was not "delegated" to the United States nor prohibited to the states either "expressly or by necessary implication"); *Term Limits*, 514 U.S. at 846-65 (Thomas, J., dissenting) (arguing that the state holds "reserved powers" to prescribe the manner of holding elections).

2. Ratification Debates

The structure of the Constitution suggests that the qualifications for congressional candidates are an exclusive list and that states cannot add to them. The original public understanding of election clauses also reflects a widespread belief that the enumeration of qualifications reflected their exclusivity and that states lacked the power to add to them.

In Federalist 62 for instance, Publius examined the nine-year citizenship requirement for Senators:

> The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.[96]

In Publius's view, writing to the people of New York, the nine-year requirement is not simply a floor. It also serves as a ceiling, one that does not permit the "total exclusion of adopted citizens."[97] It would be odd to make this claim only to discover that the states or Congress could later enforce "total exclusion" on their own.[98]

The Constitution's fixed qualifications for candidates differed from the qualifications for voters. The right to vote was defined differently in each state, often defined by state constitutions.[99] The right to vote then was left to the states, and the voters for the House of Representatives would be those with "[q]ualifications requisite for Electors of the most numerous Branch of the State Legislature."[100]

In contrast, as Publius in Federalist 52 explained, "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention."[101] The "uniformity" of candidate qualifications had been "regulated" by the Convention.[102] Publius continued, "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."[103]

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96. THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison).
97. *Id.*
98. *Id.*
99. *See generally* Douglas, *supra* note 48.
100. U.S. CONST. art. I, § 2, cl. 1.
101. THE FEDERALIST NO. 52 (Alexander Hamilton or James Madison).
102. *Id.*
103. *Id.*

The state ratification debates accepted that these qualifications would be exclusive. In Massachusetts for instance, delegates lamented that there were no property qualifications for federal representatives. The response was that the system was "democratic," leaving to the people "at large" to decide whether property was an important qualification.[104] "[W]hy should we bridle the people?" one delegate asked.[105] Another answered that there did not need to be an "exclusion of men of advanced years," either.[106] A ready answer for these concerns might have been that the legislature of Massachusetts could add property qualifications or an age limitation. But in my research, it appears that answer was never argued. Admittedly, implying a public understanding from silence may be of limited value, but it remains a point of evidence of the public understanding of what the enumeration of certain qualifications meant.

Nevertheless, others worried that the power of Congress to judge the qualifications of its members included a power to define those qualifications. A letter in the newspaper *American Herald* addressing the Massachusetts ratifying convention reflected this fear:

> The Federal House of Representatives are to be sole judges of the qualifications of your Representatives in that House; and it does not appear but that they are to define what qualifications are necessary; so when you have chosen Representatives, you are by no means certain they will possess such qualifications as they may judge needful.[107]

During the ratification debates in New York, the qualifications for members of Congress were understood to be "fixed and designated."[108] One delegate remarked, "They have a right to be elected by the constitution, and the electors have a right to chuse them."[109] The new Constitution permitted "Christians, Pagans, Mahometans, or Jews," of "any colour, rich or poor, convict or not" to serve in Congress.[110] It might therefore extend to a class of citizens who were not eligible to vote but who were eligible to serve in federal office.[111] Some perceived a defect in the Constitution if qualifications "cannot be narrowed by

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104. The Massachusetts Convention (Jan. 17, 1787), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 1240 (John P. Kaminski et al. eds., 2000).

105. *Id.* at 1241.

106. *Id.* at 1240-41.

107. The Massachusetts Convention (Jan. 14, 1788), *in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 712 (John P. Kaminski et al. eds., 1998).

108. Letter XII, The New York Convention (May 2, 1788), *in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK 1020 (John P. Kaminski et al. eds., 2004).

109. *Id.*

110. *Id.*

111. *Id.*

the state legislatures, or congress."[112] Similar concerns arose in Rhode Island.[113]

In the debates in New York, Richard Harison explained that the Constitution fixed the qualifications of elected officials.[114] The bulk of debate in New York concerned a proposed constitutional amendment to divide states into congressional districts and to permit an additional qualification that candidates be inhabitants of that district.[115] According to Alexander Hamilton, Congress's "authority would be expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."[116]

In Virginia, delegate George Nicholas remarked,

> It has ever been considered as a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their State.[117]

Likewise, this statement from the pseudonymous Freeman II appeared in the Pennsylvania Gazette: "The elections of the President, Vice President, Senators and Representatives, are exclusively in the hands of the states, even as to filling vacancies. The smallest interference of Congress is not permitted, either in prescribing the qualifications of electors, or in determining what persons may or may not be elected."[118]

Both the Federalist Papers and comments raised during the ratification debates largely recognized that the enumeration of

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112. *Id.* at 1021.

113. Providence United States Chronicle, The Rhode Island Convention (March 27, 1788), *in* 24 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: RHODE ISLAND 246 (John P. Kaminski et al. eds., 2011) (noting that "a Jew, or an Infidel" might serve in federal office, "as neither are exempted from holding any office under said Constitution, as nothing but age and residence are required as qualifications").

114. Convention Debates and Proceedings, The New York Convention (June 26, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK 1909 (John P. Kaminski et al. eds., 2008).

115. *Id.* at 1910, 1916.

116. THE FEDERALIST NO. 60 (Alexander Hamilton).

117. Convention, Debates, The Virginia Convention (June 4, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 918-19 (John P. Kaminski et al. eds., 1990).

118. A. Freeman II (Jan. 30, 1788), *in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE: 18 DECEMBER 1787 TO 31 JANUARY 1788, 509 (John P. Kaminski et al. eds., 1984).

qualifications in the Constitution precluded either Congress or the states from adding to those qualifications. Some comments focused on Congress and others on the states. And some of these statements are admittedly ambiguous in their language. Consider Hamilton's statement that qualifications are "unalterable by the legislature"—such language appears to emphasize the power of Congress rather than the state legislatures. Or Freeman II's letter: Congress may not interfere with qualifications.[119] But the comments taken as a whole, best reflect the public understanding that there was no power to add to these qualifications.

3. Post-Ratifications Practices and Understanding

After the Constitution was ratified, some states did in fact add qualifications for federal candidates.[120] Virginia for instance, required that members of Congress be a "freeholder."[121] St. George Tucker believed that the added qualification "may possibly" be unconstitutional:

> [T]he people have an undoubted right to judge for themselves of the qualification of their delegate, and if their opinion of the integrity of their representative will supply the want of estate, there can be no reason for the government to interfere, by saying, that the latter must and shall overbalance the former.[122]

Five other states required that members of Congress reside in the district from which they were elected.[123] And states occasionally sought to enforce the district-specific requirement.[124]

In Justice Joseph Story's Commentaries on the Constitution of the United States, Story extensively examined whether states could add qualifications. Story acknowledged that some laws at that time required that representatives own property or reside in the district from which he was elected.[125] He wondered whether states could add any "mischievous" qualifications they desired—limiting representatives to particular occupations, religious backgrounds,

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119. Hamilton, *supra* note 116.

120. *See* Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493-94 (1996).

121. Acts Passed at a General Assembly of the Commonwealth of Virginia, ch. 2, § 2 (Richmond, 1788).

122. ST. GEORGE TUCKER, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA ed. app. at 213 (St. George Tucker, ed., 1803).

123. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 826-27 & n.41 (1995).

124. *See infra* notes 138-141 and accompanying text (describing controversy surrounding Maryland election and enforcement of district residency requirement).

125. STORY, *supra* note 76, § 624.

wealth, and so on.[126] Under the "plainest principles of interpretation," the enumeration of qualifications "meant to exclude all others."[127] Story concluded that the states had no reserved powers that "spring out of the existence of the national government, which the Constitution does not delegate to them."[128] That is, the states lacked power to appoint representatives before the Constitution was adopted, because there were no congressional representatives before the ratification of the Constitution.[129] The power to choose representatives resides with the people, not with the state, and the state has no power to add qualifications to limit the power of the people.[130] His argument tracks the structural enumerated-powers claim that the states lack certain powers in federal elections if the Constitution does not delegate that power to them.[131]

4. Supreme Court Precedent

The original public meaning of the text of the Constitution and its structure best establish that the enumerated constitutional qualifications for members of Congress are an exhaustive list. Consistent with this understanding—if not always with this precise reasoning—the Supreme Court has held explicitly that neither Congress nor states may add qualifications to candidates seeking congressional office. Three cases are useful to consider: *Powell v. McCormack* in 1969, *Buckley v. Valeo* in 1976, and *U.S. Term Limits, Inc. v. Thornton* in 1995.

(a) Powell v. McCormack

Adam Clayton Powell was elected to serve in the 90th Congress with a term beginning in January 1967. He had served in the 89th Congress, during which the Special Subcommittee on Contracts of the Committee on House Administration found that Powell had deceived the House about travel expenses and likely had illegal salary payments made to his wife at his direction.[132] When the 90th Congress gathered in January 1967, it asked Powell to step aside as the other members took the oath of office.[133] The House by a 363-65 vote refused to seat him until the House could act on allegations about Powell. After an investigation, a report was presented to the House on March 1,

126. *Id.*

127. *Id.* § 625.

128. *Id.* § 627.

129. *Id.* § 626.

130. *Id.* § 627; *see* George Steven Swan, *The Political Economy of Congressional Term Limits:* U.S. Term Limits, Inc. v. Thornton, 47 ALA. L. REV. 775, 783-84 (1996).

131. *See supra* notes 94-95 and accompanying text.

132. Powell v. McCormack, 395 U.S. 486, 490 (1969).

133. *Id.*

1967.[134] Ultimately, by a 307-116 vote, the House adopted a resolution that excluded Powell and directed the Speaker of the House to notify New York that Powell's seat was vacant.[135] Powell sued claiming that Congress lacked the power to exclude him.[136]

The Court in *Powell v. McCormack* examined much historical precedent—some of which has been surveyed in this article. It concluded that there were occasional instances in Great Britain where the House of Commons had excluded a member on a case-by-case determination of his qualifications, but this precedent had been "denounced by the House of Commons and repudiated by at least one State government" by the time of the ratification of the Constitution.[137]

Of note, the Court also examined the historical practices of Congress in seating members. In 1807, Congress seated William McCreery of Maryland, even though he may not have met Maryland's requirement that he reside in the district from which he was elected.[138] Congress hotly debated whether the state had the power to add qualifications but ended up expressly avoiding an answer to the question and seated him without a legal conclusion.[139] The Supreme Court, however, took from this debate and vote a conclusion from Congress that states could not add qualifications to their members,[140] an inference not necessarily supported by Congress's actual decision.[141]

In 1868, however, the House excluded two members for giving aid to the Confederacy.[142] The Court would go on to note that Congress's practice had been "erratic." Ultimately, the Court concluded that "both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system

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134. *Id.*

135. *Id.* at 490-93.

136. *Id.* at 493.

137. *Id.* at 538.

138. *Id.* at 541-43. McCreery had formerly lived in Baltimore, the district from which he was elected, and he slept in Baltimore for a few days before the election. CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF CONTESTED ELECTION CAUSES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO FIFTY-SIXTH CONGRESS, 1789-1901, at 56 (1901).

139. ROWELL, *supra* note 138, at 57 (noting that "an explicit decision of the constitutional question was avoided"). The digest of the proceeding notes: "It seems probable, however, that a majority of the House believed the law to be unconstitutional, but hesitated to declare it so by the action of the House." *Id.*

140. *Id.* at 543 ("At the conclusion of a lengthy debate, which tended to center on the more narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution, the House agreed by a vote of 89 to 18 to seat Congressman McCreery.").

141. ROWELL, *supra* note 138, at 57; Eastman, *supra* note 95, at 91-94 (parsing ways to view the McCreery precedent).

142. *Powell*, 395 U.S. at 544 (citing 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES s 414 §§ 449-51 (1907).

persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote."[143]

Much of the reasoning of *Powell* turns on general purposes of the Framers[144] and inconsistent precedential actions in Congress. Its result, however, fits the structural claims and the original public meaning articulated earlier: Congress lacked power under the Elections Clause to add qualifications to its members.

(b) Buckley v. Valeo

Campaign finance law may not be the usual place to think about qualifications laws, but a provision at issue in *Buckley v. Valeo* is instructive.[145] After the Watergate scandal, Congress considered how to regulate campaign finance. Early proposals included mechanisms to disqualify candidates who violated new campaign finance regulations. Professor Albert Rosenthal reflected on a proposal that would deny federal office to individuals who exceeded spending limits.[146] He wondered whether Congress could do so in a manner consistent with its power to determine the "Qualifications" of its members given *Powell*.[147] He suggested that Congress by a two-thirds vote might have the power to expel members who exceeded campaign finance limitations, but he doubted that Congress could bind future Congresses with such a rule.[148] Finally, he was unsure whether Congress could reject votes cast by presidential electors for candidates who exceeded Congress's articulated campaign finance limitations.[149]

When Congress enacted the Federal Election Campaign Act Amendments of 1974, it included a candidate disqualification provision. Congress required that anyone who

> while a candidate for Federal office, failed to file a report required by . . . this Act, and such finding is made . . . such person shall be disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate.[150]

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143. *Id.* at 548.

144. *See, e.g.*, *supra* note 73 and accompanying text.

145. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

146. ALBERT J. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 39 (1972).

147. *Id.*

148. *Id.*

149. *Id.*; *see also* Michael T. Bierman, Note, *Federal Election Reform: An Examination of the Constitutionality of the Federal Election Commission*, 51 NOTRE DAME L. REV. 451, 459-61 (1976) (examining the disqualification clause in the Federal Election Campaign Act Amendments and concluding that it imposed "a new qualification").

150. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 407(a), 88 Stat. 1263, 1290 (codified as amended at 2 U.S.C. § 456 (2006)).

Disqualifying a candidate from running for office was deemed of dubious constitutionality in 1974.[151] There were practical concerns, like whether there was adequate guidance for the Federal Election Commission to make a "finding" that a candidate "failed to file a report."[152] The Supreme Court in *Buckley* concluded addressing the constitutionality of this disqualification clause was not ripe for review but questioned whether it fit Congress's power to judge qualifications.[153] The Court suggested Congress might also amend the statute to remedy this problem. Congress repealed the disqualification provision in 1976.[154]

(c) U.S. Term Limits, Inc. v. Thornton

In the late 20th century, term limits became a popular proposal designed to limit elected officials from serving in office for extended periods of time. Some states developed terms limits for members of Congress, too. The state of Arkansas approached the matter through a ballot access restriction as a state constitutional amendment ratified by the voters. Candidates would not be eligible to appear on the ballot if they had been elected to three or more terms to the House of Representatives or two or more terms to the Senate from the state of Arkansas.[155] The candidate could still seek election, and even win, as a write-in candidate.[156]

In *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court concluded that states could not add term limits to candidates for congressional office.[157] Tracing much of the history above, the Court concluded that the qualifications enumerated in the Constitution were exclusive.[158] States lacked the power to add any qualifications under the Elections Clause, and there was no reserved authority under the Tenth Amendment for states to add to them, either.[159]

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151. *See, e.g.*, Brief of the Appellants, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437), *reprinted in* 84 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 221-23 (Philip B. Kurland & Gerhard Casper eds., 1977).

152. *Id.*

153. Buckley v. Valeo, 424 U.S. 1, 137 n.175 (1976) (citing U.S. CONST. art. I, § 5, cl. 1); *see also* Buckley v. Valeo, 519 F.2d 821, 892-93 (D.C. Cir. 1975) (noting that "candidate disqualification powers on the Commission raise very serious constitutional questions"); *cf.* Shelby Cty. v. Holder, 570 U.S. 529, 550-51, 555 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009), which found "serious constitutional questions" arising from the Voting Rights Act Reauthorization of 2006, as a "conclu[sion]" of the Court).

154. Pub. L. No. 94-283, § 111, 90 Stat. 486 (1976).

155. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 784 (1995).

156. *Id.* at 786.

157. *Id.* at 827.

158. *Id.* at 802-06.

159. *Id.*; *see* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1230 (2012) ("The Court observed that the power to add qualifications was not within the original powers of the states, and, even if it were,

Unhelpfully, the Court never defined what made the term-limits rule a "qualification." It noted a plurality opinion of the Arkansas Supreme Court recognized that "States have no authority 'to change, add to, or diminish' the requirements for congressional service."[160] The Court later recognized the "right of the people to vote for whom they wish"[161] as a way to think about the effect of a rule that prevents a candidate from taking office. Later, the Court declined to decide whether a "narrow" definition of qualifications ought only include a "legal bar to service."[162] Arkansas also sought to justify its rule as a ballot access restriction and not an additional qualification, which the Court also rejected.[163]

Justice Clarence Thomas dissented on behalf of four members of the Court. He highlighted much of the ambiguity from the historical precedents described above. The ratification debates, he argued, were principally about Congress's power to add qualifications, not states' power.[164] The text of the Constitution did not expressly preclude the ability to add qualifications,[165] and without such preclusion, states retained power under the Tenth Amendment to add qualifications.[166] Some states, he noted, added qualifications shortly after the ratification of the Constitution.[167]

But his opinion reflected a fundamentally different structural claim pertaining to federal elections. Justice Thomas concluded that while Congress might lack the power to add qualifications to members of Congress consistent with *Powell*, states still held that power under the Tenth Amendment, and the Elections Clause did not take it away from them.[168] But he would have found that Congress could have the power

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this power was stripped from the states with the ratification of the Constitution."); Michael T. Morley, *Rethinking the Right to Vote under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 199 (2014); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 45 (2004) ("The Court has already invalidated state efforts to regulate national elections when the state's purposes were outside those the Elections Clause permits.").

160. *Term Limits*, 514 U.S at 785 (quoting *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (Ark. 1994)).

161. *Id.* at 820.

162. *See id.* at 828-29; *see also* Swan, *supra* note 130, at 787.

163. *See infra* notes 273-280 and accompanying text.

164. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 886-96 (1995) (Thomas, J., dissenting).

165. *Id.* at 868.

166. *See id.* at 846-65. Justice Thomas also rejected the analysis of Justice Story, "a brilliant and accomplished man, and one cannot casually dismiss his views." *Id.* at 856.

167. *See id.* at 905-10.

168. *Id.* at 848-49.

to "make or alter" laws if state laws erected disqualification statutes that proved insurmountable.[169] The power to add qualifications resided in the Tenth Amendment for states and in the Elections Clause (under some circumstances) for Congress.[170]

5. Summary and Inferences

Neither states nor Congress may add qualifications to those enumerated in the Constitution. "Qualifications" are conditions placed upon candidates that prevent the candidate from serving in office, because it is ultimately reserved to voters to select their preferred candidate. Certain regulations of elections can function like this definition of "qualifications"—a matter this Article will return to in examining the power of states to regulate the "manner" of holding elections.[171]

B. Presidential Candidates

There is far less history and litigation behind whether states may add to the qualifications of presidential candidates, but the evidence is likely stronger against the claim that states may add qualifications to presidential candidates. While some plausibly argued that individual states could add qualifications to their own representatives, the claim becomes much more difficult to make for the President, who is not a representative of any one state. And if states may not add qualifications to members of Congress, it seems even less likely they could add them for the President.

1. Constitutional Text and Structure

The language of the qualifications for president is much like the language for congressional candidates. Qualifications are phrased in the negative:

> No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.[172]

The allocation of authority to regulate the presidential election differs from that of congressional elections. Presidential elections

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169. *Id.* at 806-08.

170. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 848-49, 895-97 (1995) (Thomas, J., dissenting); *see also* Chiafalo v. Washington, 140 S. Ct. 2316, 2333-35 (2020) (Thomas, J., concurring in the judgment) (advancing views that the Tenth Amendment is the source of state authority to regulate presidential electors).

171. *See infra* Section IV.A.

172. U.S. CONST. art. II, § 1, cl. 5.

include a two-step process. First, state legislatures "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[173] Second, the electors meet and cast votes for president and vice president.[174]

The first step offers little textual guidance. There is no Times, Places, and Manner Clause. Instead, "Congress may determine the Time of chusing the Electors."[175] The state legislature may "direct" how to "appoint" the electors, with no conditions or qualifications placed on those voters who choose the presidential electors.[176] Presidential electors cannot be a Senator, Representative, or "Person holding an Office of Trust or Profit under the United States."[177]

The second step offers different detail. Congress may fix the "Day on which [presidential electors] shall give their Votes; which Day shall be the same throughout the United States."[178] The place is fixed: electors "shall meet in their respective states."[179] The voters are defined as the presidential electors choosing in the several states.[180] The qualifications for the president are enumerated in the Constitution.

There are no established qualifications for voters, either. Instead, because each "State shall appoint, in such manner as the legislature thereof may direct, a number of electors," the state has discretion to choose who participates in the appointment of electors.[181] And there is no clause authorizing anyone to judge the elections, returns, and qualifications of the President, a matter that is likely left to the states in administering presidential elections and to Congress in counting electoral votes.[182]

Finally, the power of Congress to act is limited. Unlike the Elections Clause, which empowers Congress to "make or alter" the rules for the "manner" of holding elections, Congress's role is limited to determining the times of the appointment of presidential electors and nothing

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173. *Id.* art. II, § 1, cl. 2.

174. *Id.* amend. XII; *cf. id.* art. II, § 1, cl. 3.

175. *Id.* art. II, § 1, cl. 4.

176. *Id.* art. II, § 1, cl. 2.

177. U.S. CONST. art. II, § 1, cl. 2.

178. *Id.* art. II, § 1, cl. 4.

179. *Id.* amend. XII; *cf. id.* art. II, § 1, cl. 3.

180. *Id.* amend. XII; *cf. id.* art. II, § 1, cl. 3.

181. *See* McPherson v. Blacker, 192 U.S. 1, 9 (1892). Other constitutional provisions also come into play with congressional elections. *See supra* Section II.A.1.

182. *See* Muller *Scrutinizing*, *supra* note 56, at 571-75 (examining history of states disqualifying ineligible candidates from the ballot or Congress refusing to count votes cast for deceased candidate as evidence of power to scrutinize the qualifications of presidential candidates).

else.[183] In the selection of the President by presidential electors, Congress may determine a uniform day and ultimately counts the electoral votes. These categories help separate the various kinds of election rules that the Constitution sets forth—even if those categories may not always result in the cleanest legal distinctions.[184]

Viewed this way, an alternative way to think about the Presidential Electors Clause might be to consider what constitutes the "manner" that the state legislature may "direct" the "appoint[ment]" of presidential electors. That clause includes the power to define the body of voters that chooses presidential electors, determine the time of holding elections, determine the places of holding elections, and regulate the manner of holding elections.[185] It also likely includes the power to add qualifications to presidential electors.[186]

2. Ratification Debates and Early Post-Ratification Understanding

The ratification debates spent little time discussing the scope of the qualifications of the president. Consider one brief statement from the pseudonymous Freeman II appearing in the Pennsylvania Gazette: "The elections of the President, Vice President, Senators and Representatives, are exclusively in the hands of the states, even as to filling vacancies. The smallest interference of Congress is not permitted, either in prescribing the qualifications of electors, or in

183. *See* Derek T. Muller, *The Electoral College and the Federal Popular Vote*, 15 HARV. L & POL'Y REV. 301, 310-13 (forthcoming 2020) (available at https://ssrn.com/abstract=3528268 [https://perma.cc/QR3R-EVFB]) (describing scope of federal power over presidential elections). *But see* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. (2020) (manuscript at 15 n.45) (summarizing Supreme Court precedent as holding that "Congress's authority over presidential elections and congressional elections is coextensive").

184. *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 373-81 (2019) (noting that regulation of voter qualifications and "manner" regulations under the Elections Clause can overlap); *see also infra* Section IV.A. (describing the interplay between clauses).

185. This comparison of congressional and presidential elections might be deemed to artificially categorize distinctive types of elections, but there is good evidence of relationship between the clauses. The enumeration of particular procedures for presidential electors choosing the president is good evidence of what other procedural "manner" regulations look like. Natelson, *supra* note 74, at 21-22. The common word "manner" in both the Presidential Electors Clause and the Elections Clause suggests some relationship between the two. *See infra* Section III.E. And when the state legislature decides to hold a popular election for the choice of presidential electors, the Supreme Court has held that states are constrained in their laws in similar fashion to the popular election of members of Congress. *See infra* notes 302-313 and accompanying text.

186. *See* Muller *Scrutinizing*, *supra* note 56, at 571-72; Kesavan, *supra* note 46, at 140-41.

determining what persons may or may not be elected."[187] Or consider a concern from an anti-Federalist, the Federal Farmer:

> It is doubtful whether the vice president is to have any qualifications; none are mentioned; but he may serve as president, and it may be inferred, he ought to be qualified therefore as the president; but the qualifications of the president are required only of the person to be elected president.[188]

The scattered statements reflect the understanding that the Constitution enumerated a few requirements for presidential candidates and that the vice president ought to meet them.

Story's Commentaries on the Constitution assume that the enumerated qualifications are an exclusive list for both members of Congress and the president: "They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president."[189] His understanding about the Constitution's structure for presidential candidates and congressional candidates was the same: the Constitution authorized Congress or states to regulate elections, but that power did not extend to the power to add qualifications.[190]

3. Litigation and Academic Examination

The Supreme Court's decisions in *Powell* and *Term Limits* have been extended by lower courts to presidential candidates. Lower courts have consistently agreed that the states and Congress cannot add qualifications to the office of president.[191] Even in *Term Limits*, Justice Thomas's lengthy dissenting opinion on behalf of four justices argued

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187. A. Freeman II, *supra* note 118, at 509.

188. Letter IV (Oct. 14, 1787), *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE, 8 NOVEMBER TO 17 DECEMBER 1787, 42 (John P. Kaminski et al. eds., 1983).

189. STORY, *supra* note 76, § 626.

190. *Id.*

191. *See, e.g.*, Herman v. Local 111, United Steelworkers of Am., 207 F.3d 924, 925 (7th Cir. 2000) ("The requirement in the U.S. Constitution that the President be at least 35 years old and Senators at least 30 is unusual and reflects the felt importance of mature judgment to the effective discharge of the duties of these important offices; nor, as the cases we have just cited hold, may Congress or the states supplement these requirements."); Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc., 868 F. Supp. 2d 734, 741 (W.D. Tenn. 2012) ("Article II of the Constitution, which is the exclusive source for the qualifications for the Presidency, sets forth the natural born citizenship requirement."); LaRouche v. Fowler, 152 F.3d 974, 988 n.15 (D.C. Cir. 1998) ("Although the DNC rule may have added a qualification for the position of Democratic candidate for President, it did not and was not intended to add a qualification for the Office of President itself any more than would any political party's basic requirement that its nominee be a member of the party."); Nat'l Comm. of the U.S. Taxpayers v. Garza, 924 F. Supp. 71, 75 (W.D. Tex. 1996); *see generally* Seth Barrett Tillman, *Who Can Be President of the United States?: Candidate Hillary Clinton and the Problem of Statutory Qualifications*, 5 BRITISH J. AM. LEG. STUDIES 95, 114-16 nn.56-58 (2016) (compiling federal and state cases).

that states had the reserved power to add qualifications for congressional candidates and recognized that "individual States have no 'reserved' power to set qualifications for the office of President."[192] Indeed, state-based ballot access restrictions in presidential elections have attracted greater scrutiny from the courts because they "implicate a uniquely important national interest"[193] and because rules affecting them "cut[] across state lines."[194]

In 2020, the Supreme Court's decision in the "faithless electors" cases confirmed this understanding of the Presidential Electors Clause—that state authority stems from this provision of the Constitution and is fixed in scope.[195] The Court in *Chiafalo v. Washington* examined whether a state could fine presidential electors who cast a vote for a candidate other than the candidate they were pledged to support—the candidate who received the most votes in the state.[196] In an opinion authored by Justice Elena Kagan, eight justices agreed that the source of the states' authority to control the "manner" of presidential electors resides in this clause and in the Twelfth Amendment.[197] Justice Thomas wrote separately to argue that these constitutional provisions were not a source of state authority but "an affirmative duty," consistent with his opinion in *Term Limits*.[198]

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192. U.S. Term Limits v. Thornton, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting); *see* Rocco Luisi, Note, *Constitutional Law-Qualifications Clause-Imposition of Additional Qualifications by Arkansas Constitutional Amendment That Denied Congressional Candidates the Right to Appear on the General Election Ballot if They Served More Than Three Terms in the House of Representative or Two Terms in the Senate Violated the Qualifications Clauses*—U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995)*, 26 SETON HALL L. REV. 1711, 1730 n.112 (1996). *But see* Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401, 427 (2018) (citing *Term Limits* for the proposition that "states may have much less leeway to regulate congressional elections than they do presidential selection procedures").

193. Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983); *see also* Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 594 (6th Cir. 2006).

194. Cousins v. Wigoda, 419 U.S. 477, 490 (1975).

195. Chiafalo v. Washington, 140 S. Ct. 2316, 2329-31 (2020) (Thomas, J., concurring in judgment).

196. *Id.* at 2320 (2020).

197. *Id.* at 2324 ("Article II, § 1's appointments power *gives* the States far-reaching *authority* over presidential electors . . . .") (emphasis added); *id.* at 2328 ("Article II and the Twelfth Amendment *give* States *broad power over electors* . . . .") (emphasis added).

198. *Id.* at 2329 (Thomas, J., concurring in the judgment). In a part of the opinion joined by Justice Neil Gorsuch, Justice Thomas also would find that the Tenth Amendment allocates power to the states to regulate presidential electors. *Id.* at 2333-35.

Admittedly, the matter of whether states may add qualifications to presidential candidates is not entirely settled.[199] But scholarly consensus aligns with the structural argument that that qualifications for presidential candidates may not be added to those enumerated in the Constitution.[200] Indeed, a footnote in *Chiafalo* hinted as much.[201]

III. THE "MANNER" OF ELECTIONS AND BALLOT ACCESS LAWS

This Article has argued that states lack power to add qualifications to candidates for federal office. Qualifications rules could extend to classes of individuals who are or who are not eligible to serve in elected office, like minimum age requirements. But states also have the power to control the rules pertaining to elections. Rules about who may appear on the ballot, for instance, could include routine elements about the election process, like filing deadlines for a candidate to appear on the printed ballot. Candidates must meet ballot access rules to appear on the ballot, the only way to win an election barring a write-in campaign; and candidates must also meet the qualifications for an office to serve in that office.

The ballot access rules fit within the state legislatures' power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" in the Elections Clause[202] or to "direct" the "Manner" of "appoint[ing]" presidential electors under the

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199. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 289 (2012) (suggesting that states could have excluded women from presidential tickets prior to the ratification of the Nineteenth Amendment); *see also* Tillman, *supra* note 191, at 115 n.58 (aggregating sources).

200. *See, e.g.*, Jackson C. Smith, *Thornton & the Pursuit of the American Presidency*, 43 OHIO N.U. L. REV. 39, 48 (2017) ("As with members of Congress, the Constitution is the exclusive source of the qualifications to serve as President of the United States, and states are divested of power to add qualifications to those already fixed within the Constitution."); Tillman, *supra* note 191, at 114-16; David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1156 (2006); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 785-86 (2001) (citing *Term Limits* for the proposition that "the state's power over the manner of the selection of presidential electors cannot go far beyond procedural matters," which supports the reasoning in Bush v. Gore, 531 U.S. 98 (2000) (per curiam)); Eastman, *supra* note 95, at 126-27 (noting that "the President is a national officer in a way that neither Representatives nor Senators are," a reason why states cannot add qualifications to the office of president).

In a previous article, the Author was more ambivalent about the possibility that states could add qualifications to presidential candidates as a contingent for ballot access. *See* Muller *Scrutinizing*, *supra* note 56, at 571. But now, given this analysis, the Author concludes with an increased degree of confidence that states may not add qualifications to presidential candidates.

201. Chiafalo v. Washington, 140 S. Ct. 2316, 2324 n.4 (2020) ("[I]f a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, see Art. II, § 1, cl. 5.").

202. U.S. CONST. art. I, § 4, cl. 1.

Presidential Electors Clause.[203] But the Supreme Court has explained that this power to regulate the "manner" of holding elections is not unfettered. In a line of ballot access cases, the Court articulated the contours of voters' and candidates' right to associate with one another by means of the ballot, which limited state power over the ballot.

A. Defining "Manner": Constitutional Text, Ratification Debates, and Constitutional Structure

The "Manner of holding Elections," which applies to congressional elections, received relatively little debate during the drafting convention. James Madison emphasized that the states ought to be given "great latitude" in setting the rules pertaining to the "manner" of elections:

> Whether the electors should vote by ballot or viva voce [by voice], should assemble at this place or that place; should be divided into districts or all meet at one place, sh[ould] all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. and might materially affect the appointments.[204]

During the ratification debates, the bulk of critiques of this clause concerned giving the power to Congress as opposed to reserving the power exclusively to the states.[205] Federal Farmer, for instance, worried that the "manner" of election might be used to create at-large elections instead of single member districts.[206] Brutus worried that Congress would permit at-large elections of members of the House of Representatives and fix the place of election in the capital city.[207] In doing so, "none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class."[208] It could operate, he noted, as an indirect way of controlling the qualifications of the electorate.[209]

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203. *Id.* art. II, § 1, cl. 2.

204. MADISON, *supra* note 71, at 423-24.

205. *See, e.g.*, Essays by Vox Populi, *in* 1 THE COMPLETE ANTI-FEDERALIST 42 (Herbert J. Storing ed., 1981) ("Why the Convention, who formed the proposed Constitution, wished to invest Congress with such a power, I am by no means capable of saying . . . ."); *see also* RAKOVE, *supra* note 71, at 188, 223-24; Safranek, *supra* note 71, at 331-38 (noting concerns from ratification delegates about the "potential for abuse of the power given by the term" "manner"); Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1592 n.65 (1997) ("The Antifederalists saw tyranny rising from relatively innocuous clauses, like the clause permitting Congress to 'make or alter such Regulations' the states adopted for the election of representatives.").

206. Letters from the Federal Farmer, No. 3 (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 235 (Herbert J. Storing ed. 1981).

207. Essays of Brutus, No. 4 (Nov. 29, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 386 (Herbert J. Storing ed. 1981).

208. *Id.*

209. *Id.*

Some did discuss the scope of the clause and what "manner" might entail. Thomas McKean in the Pennsylvania debates identified the differing manners of election as Madison had: "In some states the electors vote viva voce, in others by ballot."[210] James Wilson defended the rule as "necessary" to ensure that Congress could act in the event that the state makes "improper regulations."[211] And during the debates in the New York ratifying convention, proposals arose to give greater specificity to the clause. For instance, Delegate Smith moved to require that each state be divided into districts and that representatives be chosen by a majority vote.[212]

States enact a wide variety of statutes pursuant to this "manner" power, rules that frequently apply to both federal elections under the United States Constitution and state elections. States must determine the order of listing multiple offices on a single ballot[213] and the order of names for each office.[214] States may offer voters the opportunity to vote for a "straight party" ticket or to vote for all nominees of one party for all offices by marking one box.[215] The type of paper used for the ballot and the typeface used to print the words on the ballot are subject to state law.[216]

Scholars have identified some broad categories that fall within the "manner of holding" elections. Robert Natelson lists "voter registration, appointment and qualifications of elections administrators, delineation of the form of the ballot and the method of voting, notices and deadlines, rules of decision (majority or plurality), procedures for resolving contests, and punishment of crimes in election administration."[217] Neil Gorsuch and Michael Guzman note the Manner of holding Elections "allows states to shape districts, restrict access to the ballot, determine a runoff system, and otherwise regulate congressional elections."[218] Such rules could extend to both primary

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210. JONATHAN ELLIOT, Pennsylvania: Harrisburg Proceedings, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 60 (1901).

211. *Id.* at 440-41.

212. *Id.* at 410.

213. *See, e.g.*, CAL. ELEC. CODE § 13109 (West 2003) (requiring that ballots list candidates President and Vice President first, followed by statewide offices, followed by United States Senator, followed by United States Representative, and followed by other offices).

214. *Id.* § 13112 (creating a randomized alphabet for the listing of candidates' names).

215. *See, e.g.*, TEX. ELECTION CODE ANN. § 52.071 (West 2020).

216. *See, e.g.*, GA. CODE ANN. § 21-2-286 (2019) (providing for paper ballots "at least six inches long and four inches wide," with designated margins and typeface not smaller than "eight-point body"); MASS. GEN. LAWS ch. 53 § 33 (2002) (requiring ballot "printed on paper of a different color from that on which the ballots for any other party are printed").

217. Natelson, *supra* note 74, at 44.

218. Gorsuch & Guzman, *supra* note 95, at 351.

contests and the general election.[219] And the Supreme Court in *Smiley v. Holm* offered its own take on these words of "great latitude":

> [T]hese comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[220]

Professor Franita Tolson has summarized the Supreme Court's view of state power under the Elections Clause as "being limited to procedural regulations."[221]

Structurally, "Manner" is placed alongside "Times" and "Places," which suggests, noscitur a sociis, the kinds of procedural rules that pertain to holding elections.[222] Additionally, as *Powell* and *Term Limits* help illustrate, because the qualifications of voters and the qualifications of the elected are enumerated elsewhere, "Manner" regulations are not qualifications regulations.[223] Manner rules are, simply put, procedural rules.

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219. *See* Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973) (scrutinizing voters' opportunities to register with a political party to participate in a presidential primary); Smith v. Allwright, 321 U.S. 649, 661-62 (1944); United States v. Classic, 313 U.S. 299, 313 (1941); *cf.* Perry v. Judd, 471 Fed. App'x 219, 224 (4th Cir. 2012) (examining ballot access deadlines for Republican presidential primary under typical ballot access cases); Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996) ("Common sense dictates that states must regulate elections and that the regulations will necessarily impose some burden upon voters and parties."); Natelson, *supra* note 74, at 44; Lisa K. Parshall & Franco Mattei, *Challenging the Presidential Nomination Process: The Constitutionality of Front-Loading*, 26 HAMLINE J. PUB. L. & POL'Y 1, 37-38 (2004) ("Thus, it is our view that rules that establish the timing of nominating contests are better characterized as part of the mechanics of an election than as an associational activity exercised by the parties and thus meet the requirements for state action.").

220. Smiley v. Holm, 285 U.S. 355, 366 (1932); *see also* Cook v. Gralike, 531 U.S. 510, 523-24 (2001); *cf.* Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 776-77 (2016) (describing breadth of scope for Congress to preempt state law).

221. Tolson, *supra* note 159, at 1231; *see infra* Section IV.B; *cf.* Jamal Greene, *Judging Partisan Gerrymanders under the Elections Clause*, 114 YALE L.J. 1021, 1040 (2005) ("When post-Revolutionary state constitutions discuss the 'manner' of holding elections, they almost always refer to Election Day procedural matters.").

222. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 195-98 (2012) ("When several nouns . . . are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar."); *see also* Natelson, *supra* note 74, at 22.

223. *See supra* Section II.A.1.

B. Ballot Access History

Voting in the United States originally took place viva voce or by ballot,[224] one area where states could dictate the "manner" of holding elections. The viva voce practice, or voters orally identifying which candidate they supported, was a common early practice.[225]

Other jurisdictions used the ballot. In its earliest form, the ballot consisted of dropping an object like a ball into a box to signify support for a particular candidate, or a piece of paper indicating support for a candidate.[226] The written ballot quickly overtook this form of voting. The ballot was a slip of paper or a ticket that listed the candidate or candidates the voters supported. Sometimes that ballot was an "open" ballot, where the identity of the voter could be traced back to the ballot.[227] Ballots might also appear on colored slips of paper, and observers could identify a voter's preferences from afar.[228]

In the early nineteenth century, voters, candidates, and political parties urged States to adopt a modest change to this approach. "Printed" ballots would be as permissible as "written" ballots.[229] A voter could enter the voting place and cast a ballot by means of this printed list of candidates.[230] States either amended their statutes to permit this practice or interpreted the requirement for a "written" ballot to extend to "printed" ballots, too.[231]

Political parties could print their own "tickets," a list of all candidates from the party.[232] Parties would distribute these tickets to voters and encourage them to deposit these tickets in the ballot box.[233] Partisan tickets allowed smaller parties to flourish, as they could selectively cross-endorse candidates on tickets along with those

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224. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 28 (2000); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 14 (2011).

225. *See* Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1286-88 (2005) (recounting history).

226. *See, e.g.*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1781) (To Ballot: "to vote for, or chuse a Person into an Office, by means of little Balls of several Colours, which are put into a Box privately according to the Inclination of the Chuser or Voter, or by writing the Name or Names of the Candidates upon small Pieces of Paper, and rolling them up, so that they can't be read, which are put into a Box &c. and when the Time limited for the Election is over, an indifferent Person takes them out one by one, and upon reading the Name or Names some body takes down the Number of Votes, the greater of which are declared duly elected.").

227. L.E. FREDMAN, THE AUSTRALIAN BALLOT: A STORY OF AN AMERICAN REFORM 23-27 (1968).

228. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 489 (2003).

229. *See* Brown, *supra* note 225, at 1287-88.

230. Burson v. Freeman, 504 U.S. 191, 200-04 (1992).

231. *See* Brown, *supra* note 225, at 1288-89.

232. *See* Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 118 (1997).

233. *Id.*

smaller parties' preferred candidates for other offices.[234] "Fusion" parties were made possible by the party-driven ticket process.[235]

Tickets often had party slogans, political cartoons, or patriotic illustrations to encourage and persuade voters to cast the party's ticket.[236] They were often printed in paper tinted with a particular color, often a light red, yellow, or light blue, allowing for easy visual identification of the ticket.[237] Control over the written ballot was primarily in the hands of candidates and political parties. Voters could then use party tickets, scratch off names on tickets, or add names to them.[238]

But printed tickets had their own weaknesses. Political parties distributed tickets, and voters could "stuff" the ballot box by placing more than one ballot into the box at a time.[239] Parties usually printed tickets on paper dyed different colors or cut in visibly different sizes from one another.[240]

The Australian ballot in the United States in the early nineteenth century was designed to minimize these problems.[241] Tickets would be printed by the state.[242] In doing so, they could be uniform in size and shape, and voters would mark the ballot in the privacy of a voting booth.[243] These changes made it more difficult to intimidate voters or watch how they cast votes.[244]

Prior to this moment, states did not regulate the content of the ballot. Indeed, no one had control over the content of the ballot except the voter himself, aided by political parties.[245] But once the state took control of the ballot, it had to determine which names to permit to appear on the ballot.[246] This was an inherent consequence of adopting the fraud-prevention features of the Australian ballot. State laws concerning ballot access initially were quite generous—indeed, for

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234. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 355-57 (1997).

235. *Id.*

236. *See* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 712-14 (2016) [hereinafter Muller *Ballot Speech*].

237. *Id.*; *see also* Fortier & Ornstein, *supra* note 228, at 488-89.

238. Fortier & Ornstein, *supra* note 228, at 489.

239. *See* L.E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 119-34 (1968).

240. Burson v. Freeman, 504 U.S. 191, 200-02 (1992).

241. FREDMAN, *supra* note 239, at 2, 31; *see also* Peter Brent, *The Australian Ballot: Not the Secret Ballot*, 41 AUSTL. J. POL. SCI. 39, 44 (2006).

242. FREDMAN, *supra* note 239, at 2, 31.

243. *See* KEYSSAR, *supra* note 224, at 142.

244. XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE & NORTHERN REPUBLICANS, 1860-1910, at 234 (1997); KEYSSAR, *supra* note 224, at 142-43.

245. Muller *Ballot Speech*, *supra* note 236, at 734.

246. *See* J. DAVID GILLESPIE, CHALLENGERS TO DUOPOLY: WHY THIRD PARTIES MATTER IN AMERICAN TWO-PARTY POLITICS 25-26 (2012); *see also* Muller *Ballot Speech*, *supra* note 236, at 732-33.

previously marginalized candidates, their opportunities rose significantly. In the past, candidates and parties needed to get their ballots into as many voters' hands as possible ahead of election day. Now, a simple process, such as paying a modest fee or securing a few signatures from eligible voters, could place a candidate's name on every ballot in the jurisdiction.[247]

But states soon adjusted their practices. In an era of two-party political control, some Democrats and Republicans drafted laws that were so onerous that they kept most other parties and independent candidates off the ballot.[248] The Court would develop a test for when ballot access rules were appropriate.

C. Ballot Access Jurisprudence

State power over the ballot prompted the Supreme Court to consider external limitations on the state's power to influence the election process.[249] It would begin with the "freedom of association." A decade after articulating the doctrine of associational freedom in *NAACP v. Alabama*,[250] the Supreme Court found that the state-administered ballot included an associational right.[251]

By the 1960s, the Court had already begun to inject itself into traditionally state-administered areas of election law.[252] In 1968, the Court examined a challenge to Ohio's ballot access law. Ohio required presidential candidates nominated by new parties to secure voter-signed petitions totaling at least 15% of the ballots cast in the previous gubernatorial election.[253] Republican and Democratic candidates qualified for ballot space if their parties secured just 10%.[254] In its decision in *Williams v. Rhodes*, the Court identified "two different, although overlapping, kinds of rights—the right of individuals to

247. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 435-36 (1992) (describing three ways to appear on the ballot in Hawaii: file a party petition with registered voters; develop an established party; or participate in the designated nonpartisan ballot by filing nominating papers with 15 to 25 signatures).

248. *See* GILLESPIE, *supra* note 246, at 26-28.

249. *See* Muller *Ballot Speech*, *supra* note 236, at 716-23.

250. *See* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 451 (1958).

251. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968); *see generally* Daniel P. Tokaji, *Voting is Association*, 43 FLA. ST. U. L. REV. 763 (2016).

252. *See, e.g.*, Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J.L. & PUB. POL'Y 371, 376-78 (2016) (discussing federal courts' use of the Equal Protection Clause to invalidate state election laws); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 607-08 (2001) (noting developments in how the Supreme Court has found election disputes to be justiciable).

253. *Rhodes*, 393 U.S. at 24-25.

254. *Id.* at 24-26.

associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[255]

Since *Williams v. Rhodes*, the Supreme Court has developed a line of jurisprudence about ballot access laws. The Court has sometimes referred to speech rights, associational rights, and the Equal Protection Clause in its ballot access cases in rather generic terms.[256] But these cases all stand for the proposition that a state's regulation of the electoral process—including who is eligible to appear on the ballot—is subject to judicial scrutiny.

Ballot access disputes led the Court to develop the balancing test that dominates today. A leading case in the area is *Anderson v. Celebrezze*.[257] There, the Court scrutinized an Ohio law that required independent candidates running for president to file a nomination petition and statement of candidacy the March before the November election.[258] The Court determined that the appropriate test required "weighing" a series of factors.[259] These included the "character and magnitude" of the injury to the constitutional rights at issue, the interests of the state in creating the burdens that impact those constitutional rights, and the extent to which the burdens are necessary to achieve the state's interests.[260] It went on to conclude that the March filing deadline did not further the state's proffered interests: educating voters, treating parties equally, and political stability.[261]

In federal elections, these ballot access cases begin after the state has exercised its authority under the Elections Clause. That is, once a state has enacted a law regulating the "Times, Places and Manner of holding Elections," a challenger might successfully argue that the regulation unnecessarily burdens her right to associate with candidates on the ballot. But if the regulation is not an appropriate

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255. *Id.* at 30.

256. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 971 (1982) ("As an alternative ground . . . appellees contend that § 19 and § 65 violate the First Amendment. Our analysis of appellees' challenge under the Equal Protection Clause disposes of this argument."); Am. Party of Tex. v. White, 415 U.S. 767, 788 (1974) (examining the signature requirement and concluding that it did not run afoul of "the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment"); Lubin v. Panish, 415 U.S. 709, 710 (1974) (identifying a dispute over ballot access filing fee as one concerning "the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment," but ultimately only meaningfully addressing the Equal Protection Clause claim).

257. Anderson v. Celebrezze, 460 U.S. 780, 786-806 (1983).

258. *Id.* at 782-83.

259. *Id.* at 789.

260. *Id.* at 789.

261. *See id.* at 793-804; *see also* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202-03 (2008) (plurality opinion) (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992)); *id.* at 204-05 (Scalia, J., concurring in the judgment); *Burdick*, 504 U.S. at 429.

"Manner" restriction in the first place, there is no need for an *Anderson-Burdick*-style balancing test—the state has simply exceeded its authority under the Elections Clause.[262]

D. Indirect Qualifications Through Ballot Access Rules

To this point, this Article has elided one important distinction concerning qualifications for federal office. A state may enforce a qualifications rule in different ways. A state might choose to exclude ineligible candidates from the ballot.[263] It might refuse to count votes cast for an ineligible candidate, whether that candidate appears on the ballot or received votes as a write-in candidate. Or it might refuse to certify the results of the election and declare a vacancy in the office in the event the ineligible candidate wins.[264] Congress, upon receiving a candidate's credentials, may choose to exclude the member from the House by judging his qualifications improper.[265] So far, these methods conflate the distinction between actions that prevent a candidate from winning an election and actions that prevent a winning candidate from taking office. But conflating these categories is appropriate. States lack the power to add qualifications to members of Congress or the President, whether directly or indirectly and whether the candidate has won the election or is merely seeking the office.

When Congress exercises its power to judge the qualifications of its members, it is actually making a judgment about whether the candidate is qualified for the office, as it did in *Powell*.[266] But the state's actions that might impact the qualifications of elected officials are more nuanced. Is it actually disqualifying a candidate by refusing to print his name on the ballot? In *Term Limits*, after all, the candidate could still theoretically win election by a write-in campaign, and the state would still certify a write-in winner of the election.[267]

Citing cases in other contexts on the scope of constitutional guarantees, the Court in *Term Limits* noted that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied."[268] The Court approvingly quoted the Arkansas Supreme Court, which rejected the term limits amendment as an "effort to dress eligibility to

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262. *See infra* Section IV.B.

263. *See* Jason M. Hans, U.S. Term Limits, Inc. v. Thornton*: State-Imposed Term Limits Are Unconstitutional, But What Else Did the Court Say?*, 31 TULSA L.J. 585, 600-02 (1996) (describing debate over the "right to be a candidate").

264. Muller *Scrutinizing*, *supra* note 56, at 595-96 n.296.

265. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 486-495 (1969).

266. *Id.* at 492-93 (1969) (excluding a member from Congress and declaring his seat vacant).

267. U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779, 828 (1995).

268. *Id.* (citing Harman v. Forssenius, 380 U.S. 528, 540 (1965) (alteration in original) (citation omitted)).

stand for Congress in ballot access clothing."[269] If a candidate was eligible for office, the state cannot go about "handicapping a class of candidates,"[270] making it "significantly more difficult"[271] for certain disfavored candidates. There was no power to "favor or disfavor a class of candidates or to evade important constitutional restraints."[272] The Court recognized that whether states directly or indirectly implement rules adding qualifications, the Constitution's existing restraints—including the scope of state authority to regulate the "manner" of holding elections—remain in effect.

At times, the Supreme Court has found that the government may indirectly regulate an activity that it lacks the power to directly regulate in another context. Consider *South Dakota v. Dole*, where the Supreme Court concluded that while Congress lacked the constitutional power to regulate a minimum drinking age, it could condition state receipt of federal highway funding on establishing a minimum drinking age.[273] Or consider the individual mandate in the Patient Protection and Affordable Care Act of 2010,[274] in which the Supreme Court concluded that Congress lacked the power under the Commerce Clause to compel individuals to purchase health insurance but had the power to penalize individuals who failed to purchase insurance under its taxing power.[275] In each of those cases, the government lacked the power under one clause but held the authority under another.

In contrast, if the government is forbidden from doing something, it cannot do it regardless of where it attempts to shift the exercise of its authority. The unconstitutional conditions doctrine, for instance, forbids the government from conditioning receipt of public funds on the recipient foregoing constitutional rights. The government generally may spend freely as it sees fit.[276] But it has a "pre-existing obligation not to violate constitutional rights," and the government may not "deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights."[277]

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269. *Id.* at 829 (citing U.S. Term Limits, Inc. v. Hill, 872 S. W.2d 349, 357 (Ark. 1994)).

270. *Id.* at 831.

271. *Id.*

272. *Id.* at 834.

273. South Dakota v. Dole, 483 U.S. 203, 210-11 (1987).

274. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

275. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 527, 549-557 (2012).

276. *See, e.g.*, *Dole*, 483 U.S. at 206-07 (describing breadth of the scope of the spending power).

277. Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 911 (6th Cir. 2019).

The doctrine has robust academic literature examining what conditions are unconstitutional.[278]

The line between direct and indirect regulation has extended to the election context, too. In its 1927 decision in *Nixon v. Herndon*, the Supreme Court held that Texas's state law disenfranchising African Americans from participating in the Democratic primaries flouted the Fourteenth Amendment.[279] Texas repealed the statute and empowered political parties to determine who was qualified to vote in the primary. The party passed a rule that excluded African Americans from participating.[280] In *Nixon v. Condon*, the Court recognized that the legislature acted through a "diversity of method," simply lodging the authority to discriminate on the basis of race in the political party rather than in state statute.[281]

Term Limits held that states cannot achieve through indirect means, like ballot access rules, what they cannot do directly—if the Constitution forbids states from adding qualifications to candidates, then they cannot use the ballot to effectively add qualifications to candidates. *Term Limits* spoke of congressional elections. But the same principle holds true for presidential electors. If states cannot add qualifications for presidential candidates, once they decide to hold a popular election, states cannot use either ballot access rules or its process of appointing presidential electors to add qualifications to presidential candidates—that is, states may not achieve indirectly what they may not achieve directly.[282]

E. "Manner" for Presidential and Congressional Elections

The Constitution uses the word "manner" for both presidential and congressional elections, but the context is somewhat different. States and Congress may prescribe the "Manner of holding Elections" for congressional offices.[283] In the choice of presidential electors, however, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[284] As an intratextual matter, some

278. *See generally, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993) (focusing on the substantive conditions that make such conditions unconstitutional and proposing a utilitarian view of whether conditions are unconstitutional); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989) (finding that the unconstitutional conditions doctrine ought to be viewed through the "systemic effect of conditions on the distribution of rights in the polity as a whole" rather than individual- or legislative-oriented versions of the doctrine); *cf. Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2237-38 (2006).

279. Nixon v. Herndon, 273 U.S. 536, 540-41 (1927).

280. *Id.*

281. Nixon v. Condon, 286 U.S. 73, 83 (1932).

282. *See infra* Section IV.C.1.

283. U.S. CONST. art. I, § 4, cl. 1.

284. *Id.* art. II, § 1, cl. 2.

have argued that the phrases may mean roughly the same thing.[285] The better argument is that they are similar but not identical: the clauses do different things. But even though the two clauses do different things, the similar treatment of the two types of elections (when it comes to regulating the electoral process) makes sense as a structural matter, even if courts have not always been explicit about this structural argument.

"Manner" in the Presidential Electors Clause refers to the appointment of electors. As Robert Natelson explains, this term "permitted states to dispense with election of presidential electors entirely in favor of another mode of choice, such as designation by the governor."[286] The state could determine whether the legislature or the people elected electors, and it could decide who among the people were qualified voters to cast votes for presidential electors.[287]

There is language from *McPherson v. Blacker* and *Bush v. Gore* that offers strong support for the legislature's plenary power to direct the mode of appointment of electors.[288] But that power is not unlimited, and it does not extend to the power to add qualifications to presidential candidates.

McPherson concerned Michigan's decision in 1892 to divide the state into districts when awarding presidential electors rather than using the winner-take-all method that the state had used in past elections.[289] The Supreme Court upheld the statute because the state legislature "possesses plenary authority to direct the manner of appointment."[290] That appointment could occur in the legislature, which "might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated," or it could hold a popular election "by general ticket," or by districts.[291]

The Court in *Bush v. Gore* agreed that the decision to hold a popular election or to allow the legislature to choose electors resides in the state legislature: "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral

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285. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1750-51 (2002) (claiming that there is "little reason" to believe the "manner" clause for presidential and congressional elections are "substantially different"); *cf. infra* note 300 and accompanying text.

286. Natelson, *supra* note 74, at 22.

287. *Id.* at 20-22.

288. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam); McPherson v. Blacker, 146 U.S. 1, 25-26 (1892); *accord* 3 STORY, *supra* note 76, at § 1466 ("[T]he appointment of electors has been variously provided for by the state legislatures.").

289. McPherson v. Blacker, 146 U.S. 1, 1-3 (1892).

290. *Id.* at 25.

291. *Id.* at 25-26; *see also id.* at 28-29.

college."[292] But the decision to hold a popular election necessarily attaches conditions: "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[293] That is, the state legislature has plenary authority to decide whether it chooses the electors or the people choose the electors and whether the rules are winner-take-all or district-by-district. But once the legislature makes a decision—say, the decision to hold a popular election—other constitutional restrictions on the state legislature may come into play.

Thus, the best way to think about the "plenary" power of the legislature to "direct" the "manner" of "appoint[ing]" presidential electors is that the "manner" of appointment is similar to the scope of authority of the Elections Clause, with caveats. The "manner" in presidential elections need not be exercised by the people as other constitutional provisions command, because the states choose the mode of appointment.[294] The state may add qualifications to the office of presidential elector.[295] The state may fix the qualifications of the voters.[296] And the state might investigate the qualifications of candidates.[297] The Presidential Electors Clause includes items similar to those from the Elections Clause: the power over the times, places, and manner of appointing presidential electors, subject to Congress's power to determine the time of choosing electors.[298] It is the source of authority over regulation of presidential primaries, too.[299] This

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292. *Bush*, 531 U.S. at 104.

293. *Id.*

294. *See* McPherson v. Blacker, 146 U.S. 1 (1892) (Other constitutional provisions also come into play as with congressional elections); *supra* Section II.A.1; *supra* notes 289-291 and accompanying text.

295. *See supra* note 186 and accompanying text.

296. *See supra* note 185 and accompanying text.

297. *See supra* note 182 and accompanying text.

298. U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 4.

299. *See, e.g.*, Thomas Durbin, *Presidential Primaries: Proposals before Congress to Reform Them and Congressional Authority to Regulate Them*, 1 J.L. & POL. 381, 393-97 (1984); Eugene Gressman, *Uniform Timing of Presidential Primaries*, 65 N.C. L. REV. 351, 353-54 (1987); Richard L. Hasen, *Too Plain for Argument: The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2016-19 (2008) (describing, among other things, Congress's power under Article II to regulate presidential primaries); John M. Quinn, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution*, 62 GEO. L.J. 1621, 1625, 1645-46 (1974); Antonin Scalia, *The Legal Framework for Reform*, 4 COMMON SENSE 40, 46-47 (1981) (noting that Article II grants Congress power to set a uniform date for the general election, which, by the Necessary and Proper Clause, includes the power to set the date for the nomination of presidential candidates); *see also* Leonard P. Stark, *You Gotta Be on It to Be in It: State Ballot Access Laws and Presidential Primaries*, 5 GEO. MASON L. REV. 137, 188-89 (1997) (acknowledging constitutional grant of power to Congress to regulate the presidential nominating process); Leonard P. Stark, *The Presidential Primary*

division of election authority fits with the structural relationship in the Constitution between congressional elections and presidential elections.[300]

Another reason the state's power is "plenary" within its sphere of enumerated power is the absence of congressional power to override the state's decisions in the Presidential Electors Clause. Congress may set the time for choosing electors.[301] But unlike the Elections Clause, which grants Congress power over the times, places, and manner of holding elections, Congress has essentially no other say in the process.[302]

If the state lacks the power to add qualifications to presidential candidates, it is difficult to say that the state has the power to add qualifications to presidential candidates indirectly by virtue of its power to direct the manner of appointment of presidential electors. Of course, the state legislature could keep the choice of presidential electors to itself and subjectively assess candidates based on its preferences—legislators might insist that they would never vote for a candidate who refused to disclose his tax returns, who supported abortion rights, who opposed gun rights, or whatever it might be.[303] Voters subjectively express preferences and translate those subjective preferences into votes regularly.[304]

But once the state decides to hold a popular election for the selection of presidential electors, the state cannot add qualifications to candidates through its regulation of this process. The ballot access cases are consistent with the understanding that the ability to regulate the "manner" of presidential elections faces constraints

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and Caucus Schedule: A Role for Federal Regulation?, 15 YALE L. & POL'Y REV. 331, 375-76 (1996).

300. *See supra* Section II.B.1; *see also* Michael T. Morley, *The Framers' Inadvertent Gift: The Electoral College and the Constitutional Infirmity of the National Popular Vote Compact*, 53 HARV. L. & POL'Y REV. (forthcoming 2021) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546546 [https://perma.cc/AZR9-FPMZ]) (describing the Elections Clause as a provision construed by the Supreme Court "*in pari materia*" with the Presidential Electors Clause); Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 82 (2016).

301. U.S. CONST. art. II, § 1, cl. 4.

302. Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 496 (2016) ("The Constitution gives the federal government a role in presidential elections, but that role is a limited one.").

303. *Cf.* Hills, *supra* note 71, at 108 ("[T]he electors had the power to add qualifications for federal Senators simply by virtue of their power to choose who would be Senator.").

304. *See, e.g.*, Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 94 (1990) ("[T]he electorate votes its subjective preferences."); Muller *Scrutinizing*, *supra* note 56, at 579 ("The Constitution does not adopt a specific political theory about how those voters ought to behave; rather, it is an essentially plenary authority for voters to decide how to vote on whatever basis they want, unchecked by the judiciary."); Hills, *supra* note 71, at 139 ("The voters could reject Old Timer [i.e., a long-term incumbent] by voting for an opposing candidate in a normal election . . . .").

similar to the "manner" of congressional elections. If the Constitution constricts the states' power, then states cannot exercise that power directly or indirectly.

Back in 1968, in the significant ballot access case of *Williams v. Rhodes* that involved presidential elections, the Court squarely addressed that issue.[305] It held that the state does not have "absolute" power over presidential electors.[306] Instead, "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[307] The state, for instance, may not abridge the right to vote on the basis of race, sex, or ability to pay a poll tax in federal elections.[308] In *Williams*, the Court extended the First and Fourteenth Amendments to limit the power of the state in burdening the choice of presidential electors.[309]

Furthermore, the litigation history of the presidential ballot access cases suggests that states cannot add qualifications indirectly through their power to direct the manner of appointing presidential electors. In the landmark ballot access cases since the 1960s, none was successfully defended on the basis that states could add qualifications to the office of president. When the state holds a popular election for presidential electors, it lacks the power to add qualifications as a condition of ballot access.

Many of the notable ballot access cases in this area arose concerning presidential elections, like *Williams v. Rhodes*,[310] *Moore v. Ogilvie*,

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305. Williams v. Rhodes, 393 U.S. 23, 24-26, 29 (1968).

306. *Id.* at 28 (1968); *see also id.* at 50 (Stewart, J., dissenting) ("I agree with my Brethren that, in spite of the broad language of Art. II, § 1, a state legislature is not completely unfettered in choosing whatever process it may wish for the appointment of electors.").

307. *Id.* at 29.

308. *Id.*

309. *Id.* at 30-31 ("In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course, this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.").

310. In *Williams v. Rhodes*, the Ohio Independent Party and the Socialist Labor Party each sought to secure ballot access for their presidential candidates. Despite the plaintiffs raising the claim that the law might serve as an additional qualification on candidates, the Court never addressed this argument. *See* Statement as to Jurisdiction at 66, Williams v. Rhodes, 393 U.S. 23 (1968) (No. 543), 1968 WL 129460 ("It is appellants' position that additional presidential qualifications imposed by a state are in derogation of the Constitution of the United States and therefore void.").

Communist Party of Indiana v. Whitcomb,[311] *Storer v. Brown*,[312] and *Anderson v. Celebrezze*. In any of these cases, the Supreme Court could have easily swept aside the ballot access concerns by holding that the legislature's power under Article II, Section 1, to direct the "manner" of elections included the power to add qualifications—effectively deferring to the state legislature as it did in *McPherson*.[313] Admittedly, the Court's failures to expressly address the issue—or the Court's decisions to ignore the issue raised in brief—does not definitively resolve the matter. But it is at least some evidence as to how the Court treats the Constitution's two "manner" clauses. Once the state legislature decides to hold a popular election as the mode of appointing presidential electors, it is constrained to regulating the "manner" of holding that presidential election.[314]

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311. In *Whitcomb*, Indiana required that political parties swear an oath that they did not advocate the overthrow of the government. Prospective federal candidates challenged that "the oath can be no broader than the one prescribed by the Constitution for the office." Br. of Appellants at 27, Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (No. 72-1040), 1973 WL 172627 (1974). "In the case of the office of President, the Constitution specifies the words required." *Id.* at *28. The Court declined to address this issue. Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 446 n.5 (1974). The oath formally applied to political parties, not presidential candidates. *See id.* at 452 n.3 (Powell, J., concurring in the result). But if the state had the unfettered right to attach conditions to political parties seeking to nominate presidential candidates, it would moot any other analysis.

312. In *Storer v. Brown*, Gus Hall and Jarvis Tyner were members of the Communist Party seeking to appear on the ballot as independent candidates for president and vice president. They claimed California's onerous ballot access requirements, including timing and signature requirements, operated as an additional qualification for presidential candidates. The bulk of the brief is dedicated to Hall's congressional counterparts seeking office, but it raises the same arguments for presidential candidates. *See, e.g.*, Br. of Appellants at 37 n.23, Storer v. Brown, 415 U.S. 724 (Nos. 72-812, 72-6050), 1973 WL 173853 (1974). The Appellee's brief focused on congressional candidates, and the Court never attempted to defend the additional qualifications as within the state's power to add qualifications.

313. Dean Vik Amar construes *Bush v. Gore*'s "plenary" language to extend so broadly as to find all these presidential ballot access cases essentially inapposite. *See* Amar, *supra* note 44 ("The people have no such right under Article II to pick the electors who represent their state in the electoral college (much less any right to pick the actual President)."). But, as this Article has argued, once the legislature vests the election in the people, other restraints on the state legislature come into play. *See supra* notes 284-309 and accompanying text. Furthermore, the structure of the Constitution suggests that the "manner" of directing the appointment of presidential electors is not so broad. *See supra* Section II.B.1.

314. *Cf.* Nader v. Blackwell, 545 F.3d 459, 473-76 (6th Cir. 2008) (examining a requirement that circulators of petitions for independent presidential candidates are registered voters in the state); Nader v. Brewer, 531 F.3d 1028, 1035-38 (9th Cir. 2008) (scrutinizing law that required petition circulates for presidential candidate to be a resident of the state); *id.* at 1038-40 (finding a June deadline insufficiently tailored to the interest of meeting state deadlines of printing the ballots for the early November general election).

IV. STATE REGULATION OF THE ELECTORAL PROCESS

This Article has established two principal premises. First, qualifications are rules—individual traits or conditions on individuals—that prevent a candidate from serving in federal office. States may not add qualifications to candidates seeking congressional or presidential offices. They may not add qualifications indirectly by denying ballot access to candidates. And they may not add qualifications indirectly to presidential candidates by denying ballot access in a popular vote for presidential electors.

Second, the qualifications of candidates and the "manner" of holding elections are exclusive categories. States may not add qualifications, but they may add regulations related to the manner of holding elections, subject to a balancing test developed by the Supreme Court's contemporary jurisprudence. That power to regulate the "manner" of holding elections extends to both congressional elections and popular elections for presidential electors.

But these two categories, while seemingly exclusive of one another, can overlap. An overlap may at first blush appear irreconcilable. But even in situations where an overlap occurs, there remains a cogent solution to address whether states have power. This Part demonstrates that "manner" regulations may, at times, legitimately affect the qualifications of candidates, but only if the regulation affects the electoral process itself.

A. The Relationship Between Qualifications and Manner Restrictions

States cannot add qualifications to candidates seeking office. But states may impose legitimate ballot access rules on candidates as a condition of appearing on the ballot, which is a condition for winning an election.[315] Distinguishing the line between ballot access rules and candidate qualifications has long been notoriously unclear.[316] Sometimes they are cleanly categorized: a rule that congressional elections occur in single-member districts is squarely a "manner" regulation, and a provision that no one is eligible to serve as a member of Congress unless she is twenty-five years of age is squarely a qualification. But the two categories can blend on other occasions.

Consider a case when a ballot access rule looks like a qualification for a candidate. That is, if a candidate fails to meet Condition X, then the candidate cannot serve in the office. That might be true whether Condition X is an age minimum or whether Condition X is a

315. *See, e.g.*, Muller *Scrutinizing*, supra note 56, at 571.

316. *See, e.g.*, Ronald D. Rotunda, *The Aftermath of* Thornton, 13 CONST. COMMENT. 201, 202 (1996) (identifying uncertainty in the majority opinion in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995), and the lack of clarity concerning the definition of qualifications).

requirement to file paperwork ahead of Election Day to appear on the ballot. Viewed this way, anything that would prevent a candidate from winning office could be construed as a qualification. It would be a broad principle, but one consistent with a fixed and limited set of constitutional qualifications.[317] It would also be consistent with the notion that restricting the choice of voters, whether guaranteed to them by the Constitution or offered to them by the state legislature, is a narrow power of the state.[318]

To start with an uncontroversial proposition, a state might enact a statute requiring that a candidate must win a plurality of the vote to win an election. Or it might enact a statute requiring that a candidate must win a majority of the vote to win an election and that in the event no candidate receives a majority, the top two vote-getters will proceed to a runoff. Both are means by which the state may direct the "manner" of holding an election and reflect that the people can choose a candidate. And no one would say that the state has added a qualification to the office by selecting one method over the other, despite the fact that a candidate who receives the second-most votes is prevented from winning that election or the candidate who receives the most votes but falls short of a majority may need to proceed to a runoff.[319]

The choice of a rule that the election is won by a majority or a plurality pertains to the electoral process. That is, once the decision to hold an election is made, either by the Constitution for Congress or by the state legislature in the selection of presidential electors, a rule to determine a winner necessarily arises from that decision. That relates to the "manner" of holding the election. And there are numerous rules that naturally fall under this category of "manner" regulations, as identified earlier in this Article—whether to draw single-member districts or hold the elections at large, where to set up polling places, and so on.[320]

Courts have insisted that this is not a qualification—even though it is a condition placed upon the office that would prevent an individual from serving in that office. But courts should simply accept that legitimate manner regulations can affect whether a candidate is qualified to serve in the office, even if they are not categorical rules that disqualify candidates from office.

In the same vein, the state's decision to print a ballot, rather than accept the printed or written ballot from the voter, is another "manner" of the election. The ballot falls within the state's purview to regulate

317. *See supra* Part II.

318. *See supra* Section III.D.

319. No one may be an overstatement—litigants have tried. *See* Public Citizen, Inc. v. Miller, 992 F.2d 1548 (11th Cir. 1993).

320. *See supra* Section III.A.

the "manner" of holding elections or how it goes about issuing ballots and counting votes.[321] But decisions about how to print the ballot always return to the same question as the state's decision that winners occur by majority or by plurality: does this decision pertain to the integrity and reliability of the electoral process itself?

1. Manner Rules May Legitimately Affect Qualifications When They Pertain to the Electoral Process

Suppose we return to 1840, where parties printed tickets and distributed them to voters or where voters wrote the names on ballots and cast them in ballot boxes. Suppose a state in 1840 said, "We refuse to count any tickets cast for a candidate who has failed to secure signatures of 1% of registered voters ahead of the election." Such a statute is likely impermissible. The rule does not regulate the "manner" of holding elections: there is no basis for adding this requirement as a condition of counting votes cast for this candidate.

The state might argue, "We only want to count votes from serious candidates, and the 1% requirement is to ensure that only serious candidates' tickets are counted." But the state would have to go count the tickets anyway and would then decide which ones were from candidates who had secured 1% of registered voters' signatures and which were from candidates who had not secured those signatures.

The rule prevents a candidate from winning an election, and the rule also has no relation to the electoral process itself. In 1840, the state has no basis for pre-screening candidates as a "manner" of regulating its election, when Election Day is the very process that is supposed to screen those candidates. Instead, it is an extra hoop for a candidate to jump through, a condition on the candidate before the candidate can serve in the office—an additional qualification on securing the office.

But suppose instead we were not in 1840 but in 1900. The state has taken over printing the ballot for convenience of counting votes, to prevent voter fraud, and the like.[322] And the state said, "We refuse to let your name appear on the ballot if you have failed to secure signatures of 1% of registered voters ahead of the election." The condition is identical in 1840 and 1900. But the basis for the condition has changed. The state is no longer abstractly looking at the seriousness of the candidate and placing a new condition on the candidate. The state is tasked with deciding which candidates' names to print on the ballot, and the manner of holding an election now involves printing a ballot.

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321. *Cf. supra* note 204 and accompanying text.

322. *See supra* Section III.B.

A rule can act as one thing in one context and another elsewhere. In the freedom of speech context of the First Amendment, for instance, an appropriate time, place, or manner restriction can limit a speaker's ability to speak, but the same restriction that discriminates on the basis of content would not be permitted.[323] The context of a regulation determines whether that regulation is permissible. To return to the ballot example, the decision to print a ballot comes with necessary tradeoffs. As a practical matter, the ballot cannot include every name in the jurisdiction; otherwise, it would be too long for voters to review, too confusing for them to comprehend, too costly to print, and too difficult to tabulate. The persuasiveness of these reasons may vary, but they are each more persuasive than the 1840 example—these reasons are tied to reasons relating to the state-printed ballot, relating to the electoral process itself. The state's decision to require support of 1% of registered voters is a demonstration that the candidate has a preliminary showing of substantial support as it proceeds with the electoral process. That decision is a factor related to the regulation of the electoral process.[324] And that decision is a winnowing process similar to the decision to hold a primary election or to require a runoff in the event that no candidate receives a majority of the vote.[325]

Thus, the state must make decisions. When it changes the manner of elections, as it did from written ballots or party-printed tickets to the state-printed ballot, new regulations attach to the new manner of elections. And what might have been an impermissible additional qualification becomes a permissible ballot access rule as a "manner" of holding elections. As Professor Dan Lowenstein put it, such manner rules, even if "qualifications" in some sense, are actually "subordinate to the overriding qualification of being elected . . . ."[326] The legitimacy of the regulation turns on whether the rule is one of "manner."[327]

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323. *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 37-39 (2003) (noting judicial distinctions between impermissible viewpoint-based legislation and permissible content-neutral legislation); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99, 115 (1996) (asking if the relationship between the doctrines is "so rife with exceptions and so often articulated in fuzzy language that merges the two concepts").

324. *Cf.* Gorsuch & Guzman, *supra* note 95, at 354 ("[O]ne could conclude that any election regulation creates a qualification; for example, a requirement that a candidate gather a given number of signatures before gaining access to the ballot could be cast as imposing a fourth qualification that he demonstrate popular support for his candidacy.").

325. The "preliminary showing of substantial support" functions much like a pre-Australian ballot process. It requires candidates to go get registered voters to indicate their support for a candidate. In a state with a primary and a general election ballot, the petitioning requirement functions like a pre-primary process, the first of winnowing step to ensure some public support.

326. Lowenstein, *supra* note 70, at 27.

327. Such "manner" regulations are not inherently permissible. Under the Court's contemporary jurisprudence, they must still survive a balancing test to ensure that the associational rights of voters are not unduly burdened. *See supra* Section III.C.

2. Manner Rules May Legitimately Affect Both Voter Qualifications and Candidate Qualifications

This analysis holds true in a different context. States have the exclusive power to define the qualifications of voters for Congress, subject to a constitutionally mandated floor that "[t]he electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[328] Congress has no power to decide "who may vote" in federal elections.[329] But Congress's power over the "manner" of congressional elections undoubtedly may affect whether voters are able to cast a vote. Rules over voter registration—squarely within the domain of "manner" regulations[330]—can affect the eligibility of voters.[331] Voter identification laws may well be a means of enforcing qualifications laws, but they are "manner" regulations—electoral process rules.[332]

It may be an overstatement to say that states cannot add "qualifications" to candidates or voters, at least as simply understood—that is, if we think of "qualifications" as anything that would prevent the candidate from serving in office or the voter from casting a vote. Instead, states may exercise the power to regulate the "manner" of holding elections, which may, at times, affect the ability of candidates to win office—and at times may prevent their ability entirely. Whether one defines these conditions as "qualifications" or not, they are within the scope of state authority.[333] But the

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328. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

329. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16, 16 n.8 (2013) (noting the limited precedential value of Oregon v. Mitchell, 400 U.S. 112 (1970)); Kalt, *supra* note 302, at 475.

330. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77, (codified as amended at 52 U.S.C. §§ 20501-20511 (2012 & Supp. 2015)); Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21145 (2012 & Supp. 2015)); *see also supra* Section III.A.

331. *See* Tolson, *supra* note 184, at 382-83 (noting how procedural rules can affect voter participation). Political science literature is filled with examples of how procedural rules affect voter turnout. To choose a couple, see Ellen Selian, Paul Gronke & Matthew Yancheff, *Happy Birthday: You Get to Vote!*, ANNUAL MEETING OF THE AM. POLITICAL SCI. ASS'N, WASH., D.C., 2019, at 5-6, https://evic.reed.edu/research/happy-birthday-you-get-to-vote/ [https://perma.cc/27UB-6CCW] (describing how automatic voter registration systems are correlated with slightly increased voter turnout); *see generally* Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 99-104 (2012) (identifying costs and benefits of voter registration, early voting, and voter identification statutes, including effect on participation of otherwise-eligible voters). *But see Inter Tribal*, 570 U.S. at 17-18, 18 n.9 (noting argument that "registration is itself a qualification to vote" but declining to address the question); *id.* at 43 (Alito, J., dissenting) (expressing concern that "a federal law that frustrates a State's ability to enforce its voter qualifications would be constitutionally suspect").

332. *See* Tolson, *supra* note 184, at 382-83; Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 316 (2014).

333. *See supra* Section IV.A.

permissibility of the rule turns on whether it is a permissible "manner" regulation—that is, a regulation relating to the electoral process itself.

Therefore, anything that is a "manner" is an appropriate matter of regulation, and anything that is not a "manner" and serves to prevent a candidate from winning the office is a qualification. And by "manner," the rule must pertain to the electoral process itself. This definition, too, is the cleanest way that courts have articulated the distinction between qualifications and manner—but not always.

B. Manner Regulations as Electoral Process Rules

"Manner" restrictions, then—even appropriate manner laws that regulate electoral process rules—may at times affect the ability of candidates to win an election. Consider what the Supreme Court said in *Anderson v. Celebrezze* about the kinds of rules that are "manner" restrictions:

> We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. The State also has the right to prevent distortion of the electoral process by the device of "party raiding," the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election.
>
> We have also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values.[334]

The classifications of ballot access categories in *Anderson* pertain to particular aspects of the electoral process. The first is the category of the "integrity and reliability of the electoral process," including keeping frivolous candidates off the ballot and protecting the integrity of political parties in primaries (which has its own independent First Amendment concerns that protect the associational rights of parties).[335] The second category includes "restrictions on candidate eligibility," which is not applicable here—if states cannot add qualifications to presidential candidates, and if the regulations at issue are not defended as candidate eligibility concerns, then restrictions on eligibility are not a possible defense.[336] The only applicable category, then, is the "integrity and reliability of the electoral process" to keep "frivolous candidates off the ballot."

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334. Anderson v. Celebrezze, 460 U.S. 780, 788-89 n.9 (1983) (internal citations omitted).

335. *See, e.g.*, *supra* note 46 (noting rights of political parties in primary elections).

336. Clements v. Fashing, 457 U.S. 957, 964-65 (1982) (concerning an additional qualification for state office); *see infra* note 374 and accompanying text.

Given the state's history in seizing control of the ballot,[337] this list is an exhaustive list. The state's justifications for taking control of the ballot turned on matters like preventing "voter confusion, ballot overcrowding, or the presence of frivolous candidacies."[338] State objectives that do not advance the "electoral process" are not a justifiable "manner" regulation under the Constitution.

One aspect of the integrity and reliability of the electoral process itself includes states conditioning ballot access on a "preliminary showing of substantial support."[339] In cases like *Jenness v. Fortson*,[340] *American Party of Texas v. White*,[341] *Anderson v. Celebrezze*,[342] and *Munro v. Socialist Workers Party*,[343] the Court upheld requirements that candidates make some preliminary showing of substantial support before appearing on the ballot or advancing from the primary ballot to the general election ballot. Often, the Court spoke in language emphasizing the importance of the state's interest, one side of the *Anderson-Burdick* balancing test, but the language also implicates the state's power to regulate the "manner" of holding elections: "manner" regulations include the choice of who to place on the ballot, which includes the power to require some preliminary showing of substantial support.[344]

The Supreme Court also sought to articulate distinctions between "qualifications" from ballot access rules. Consider one footnote in *Storer v. Brown*: there, candidates sought ballot access and challenged the signature and timing requirements to appear on the ballot.[345] They also challenged a party "disaffiliation" requirement that prohibited independent candidates from seeking ballot access as presidential candidates unless they had been unaffiliated with a political party for at least a year.[346]

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337. *See supra* Section IV.A.

338. Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986); *see supra* Section III.A.

339. *See* Hills, *supra* note 71, at 108 n.41.

340. 403 U.S. 431, 442 (1971) (acknowledging "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election").

341. 415 U.S. 767, 782 n.14 (1974) (noting importance of "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion").

342. 460 U.S. 780 (1983); *see supra* note 334 and accompanying text.

343. 479 U.S. 189, 193 (1986) ("States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office.").

344. *See supra* Section IV.A.

345. 415 U.S. 724, 726-28 (1974).

346. *Id.* at 727-28.

The Court reasoned:

> Appellants also contend that [California law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. . . . Storer and Frommhagen 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.[347]

Thus, the ballot access cases are consistent with this understanding from *Anderson* and *Storer*. Ballot access restrictions fall into two camps: the electoral process rules, like the form of the names appearing on the ballot, the order of candidates being listed, and a deadline to file to appear on the ballot; and the preliminary showing of substantial support procedural rules, like signature requirements, filing fees, or "sore loser" laws that prohibits candidates who lose a primary election from appearing on the general election ballot for the same office.[348]

This distinction was promulgated prior to the decision in *Term Limits*. Professor Lowenstein recognized, "Election regulations and procedures may have the effect of eliminating some candidates at various stages."[349] In his view:

> Such regulations, so long as they are reasonable and have as their purpose the facilitation rather than the frustration of the voters' ability to choose the representative they prefer, should be regarded as regulations of "times, places and manner" of elections, not as qualifications for office separate from the basic qualification of being elected.[350]

By emphasizing the power of states under the Elections Clause, Professor Lowenstein distinguished proper "manner" restrictions as

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347. Storer v. Brown, 415 U.S. 724, 746 n.16 (1974).

348. *See infra* notes 363-379 and accompanying text. Others have argued for a broader reading of the "manner" clause. *See* Gorsuch & Guzman, *supra* note 95, at 362-68. They argue that improper qualifications beyond the state's power to regulate the "manner" of holding elections should be determined under two considerations. First, "judicial considerations" offer the view of the "vast majority of election restrictions as manner regulations" unless they present "unavoidable analogies to the three constitutionally enumerated qualifications," a "framework" that "makes good sense," "[a]t least to a legal realist." Second, the "invidious potential" to fix qualifications, a problem that exists when Congress may directly fix the qualifications but that is "present only indirectly, if at all" when the state sets them. *Id.*

349. Lowenstein, *supra* note 70, at 22.

350. *Id.*

those that facilitate voters' ability to choose candidates—in essence, electoral process rules.[351]

Troy Andrew Eid and Jim Kolbe reached a similar conclusion: "The first step is to determine whether the state law at issue is designed to regulate election procedures."[352] Laws that regulate procedures are subject to an *Anderson-Burdick* balancing test. Laws that do not regulate procedures, Eid and Kolbe argue, are then examined to determine whether they impose additional qualifications.[353] Professor Johnathan Mansfield agreed: The Election Clause extends to state regulation that places "procedural restrictions on candidacy."[354] And Professor Tolson has summarized the Court's understanding of the Elections Clause as being limited to procedural rules.[355]

The Court in *Term Limits* noted that its Elections Clause precedents extended to procedural rules, emphasizing that point in an italicized word and repetition of some version of the word "process":

> The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process.[356]

Lower courts developing tests after *Term Limits* have employed a similar test. California, for instance, required that candidates for federal office reside in the state and register to vote in the state before

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351. *Cf.* Eric T. Tollar, Note, *Playing the Trump Card: The Perils of Encroachment Resulting from Ballot Restrictions*, 51 SUFFOLK L. REV. 695, 717 (2018) (describing tax return disclosure requirements as bills that "directly interfere with a voter's right to select the candidate of their choosing").

352. Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DEN. L. REV. 1, 48 (1992).

353. *Id.* It is not clear that the second step is necessary—if the rule is not procedural (that is, if the rule is not a "manner" regulation), then it would fall outside the state's authority under the Elections Clause, regardless of whether it was an additional qualification on candidates.

354. Johnathan Mansfield, *A Choice Approach to the Constitutionality of Term Limitations*, 78 CORNELL L. REV. 966, 988 (1993).

355. *See supra* note 221 and accompanying text; *accord* Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 589-90 (2015); David A. Chase, Clingman v. Beaver*: Shifting Power from the Parties to the States*, 40 U.C. DAVIS. L. REV. 1935, 1958, 1958 n.165 (2007).

356. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995); *see* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 367 (2007) ("The technical question in these cases concerned the outer limits on 'Manner' regulations under the Elections Clause of the U.S. Constitution.").

filing nomination papers.[357] A Nevada resident tried to run for Congress. A Ninth Circuit opinion by Judge Diarmuid O'Scannlain found that the regulation was an additional qualification and not a "manner" of holding the election because it "neither regulates the procedural aspects of the election nor requires some initial showing of support."[358] In another case, Colorado required candidates for office be a registered voter, and the plaintiff in a case—a resident of Colorado—was not registered to vote.[359] The court held that because Colorado failed to show that the law "protects the integrity or regularity of the election process,"[360] the law exceeded the state's power under the Elections Clause.

Defining appropriate "manner" regulations as electoral process rules may call for a new definition of what a procedural rule is.[361] But these have not been difficult questions for courts to determine in the context of electoral process rules. The long list of common "manner" restrictions identified by James Madison during the debates at the drafting convention and similar lists identified by commentators ever since are widely accepted as procedural rules.[362] Signature requirements are commonly described as "procedural,"[363] as are filing fees,[364] both of which help determine whether candidates have a preliminary showing of substantial support. Courts have recognized that the classes of procedural rules for ballots are narrow and much easier to apply than abstract notions of "process": "manner" rules that

357. Schaefer v. Townsend, 215 F.3d 1031, 1037 (9th Cir. 2000).

358. *Id.* at 1038.

359. Campbell v. Davidson, 233 F.3d 1229, 1231 (10th Cir. 2000).

360. *Id.* at 1234.

361. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure . . . .").

362. *See supra* Section III.A.

363. Libertarian Party of Ill. v. Rednour, 108 F.3d 768, 777 (7th Cir. 1997) ("As explained above, these procedural requirements merely assure that candidates meet a minimum threshold of voter support in order to maintain the integrity and regularity of the electoral process. They do not pose a substantive handicap that systematically excludes the Libertarian candidates from office."); Cartwright v. Barnes, 304 F.3d 1138, 1142-43 (11th Cir. 2002) ("The requirement that candidates demonstrate some measure of support before their names appear on the ballot generally is viewed as a legitimate exercise of a state's authority to regulate the manner in which elections are held. . . . *Storer* and *Term Limits* identify certain types of ballot access restrictions that are election procedures and not substantive qualifications, and we conclude that Georgia's 5% requirement is likewise an election procedure and not a substantive qualification.") (internal citations omitted).

364. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 140-41, 145 (1972) (describing "filing-fee requirement" as within the "breadth of power enjoyed by the States in determining voter qualifications and the manner of elections," as a means to "regulating the number of candidates on the ballot," "avoiding overcrowded ballots," and preventing "frivolous or fraudulent candidacies"); Lubin v. Panish, 415 U.S. 709, 715 (1974) ("A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process.").

relate to the ballot are for the integrity and reliability of the electoral process itself or they are rules to require a preliminary showing of substantial support. And this clean definition of "manner" helps make any fine-tuned definitions about qualifications much less important.

In contrast, other conditions on candidates have been found to exceed a state's power to regulate the manner of elections, often held to be an additional qualification: requiring candidates to file affidavits or take an oath that they are not subversive persons,[365] prohibitions on ex-felons from seeking federal office,[366] congressional district residency requirements,[367] added residency requirements,[368] or requiring candidates to register to vote.[369]

One more recent example: in 2020, plaintiff-voters challenged the appearance of Brenda Jones on the ballot. Jones was a former member of Congress challenging Congresswoman Rashida Tlaib of Michigan in the Democratic Party primary.[370] Plaintiffs alleged that Jones falsely attested under state law that she had no unpaid campaign finance fines when she apparently had outstanding fines.[371] Setting aside any procedural hurdles to the litigation, disqualifying a candidate for a false attestation about campaign finance laws, or disqualifying a candidate for failing to pay campaign finance fines, would be impermissible additional qualifications.

While candidates might easily comply with a law,[372] like moving to a jurisdiction before an election, signing an affidavit, or registering to

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365. *See, e.g.*, Shub v. Simpson, 76 A.2d 332, 340 (Md. 1950) ("Candidates for Federal offices must comply with state election laws before their names can be placed upon the ballot, but this does not authorize the State to include in the election or other laws of the State any requirement which would add additional qualifications to the office. There is nothing in the United States Constitution which in terms prevents a member of Congress from being a subversive person who seeks to overthrow the government of the United States by force or violence.") (internal citation omitted).

366. *See, e.g.*, Danielson v. Fitzsimmons, 44 N.W.2d 484, 486 (Minn. 1950) ("The provisions of [the Elections Clause], permitting the states to regulate the time, place, and manner of holding elections for members of congress, do not permit the state to add qualifications for such office not contained in the United States constitution.").

367. *See, e.g.*, Hellmann v. Collier, 141 A.2d 908, 911-12 (Md. 1958) (finding that "states have no authority to require a residence by a candidate for Representative in any particular district, so long as he be an inhabitant of the state").

368. *See, e.g.*, Dillion v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972).

369. Schaefer v. Townsend, 215 F.3d 1031, 1037 (9th Cir. 2000); Campbell v. Davidson, 233 F.3d 1229, 1231 (10th Cir. 2000).

370. Pl.'s Compl. at 5-8, Davis v. Wayne Cty. Election Comm'n, (E.D. Mich. July 6, 2020) (No. 2: 20CV11819), 2020 WL 3729449.

371. *Id.*

372. *See, e.g.*, Danielle Lang, *Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure*, 65 UCLA L. REV. DISCOURSE 46, 55 (2017) (characterizing permissible rules as those that "any candidate could do"); *see also* Matthew M. Ryan, *Releasing the 1040, Not So EZ Constitutional Ambiguities Raised by State Laws Mandating Tax Return Release for Presidential Candidates*, 47 HASTINGS CONST. L.Q. 19, 27 (2019) (describing "substantive characteristic[s]" as things that "cannot be changed" or

vote if they are currently an inhabitant of a state, ease of compliance does not make the rule a legitimate "manner" regulation. Some candidates simply do not want to register to vote. Others do not want to move. Others may not wish to resign from a present office.[373]

Courts have navigated the distinction between appropriate electoral process rules in difficult contexts. For instance, many states have "resign-to-run" statutes, which require state elected officials (often judges) to resign from office before they may run for Congress. These rules indirectly add qualifications to federal office—candidates are ineligible for the office unless they comply with a state term. But these statutes are understood to be conditions on the state office, not the federal office, which means they fall outside the scope of the Elections Clause and merely regulate state offices.[374]

"Sore loser" laws dictate that when a candidate loses a party's primary contest for nomination for an office, that candidate is not eligible to run for the office as where the losing candidate in a primary election cannot seek the same office in the general election.[375] Because the candidate has already had the opportunity to win the office and lost under rules that prevent them from advancing to the general election, the rule is not a qualification. It is a version of the preliminary showing of substantial support condition—the candidate lacked support in the primary election and fails to advance to the general election.

"inherent" in the candidate, something that cannot "easily change while running for office"); Constitutionality of Possible Legislation Requiring That Candidates for President and Vice President of the United States Disclose Their Federal Tax Returns as a Condition of Appearing on the Ballot, No. 2 Wash. Op. Att'y Gen. 8 (Mar. 12, 2019), https://www.atg.wa.gov/ago-opinions/constitutionality-possible-legislation-requiring-candidates-president-and-vice [https://perma.cc/3MQP-MJNF]. ("[A] requirement that a candidate disclose his or her federal tax returns would not pose an 'absolute bar' to candidates who would otherwise qualify."); Tribe, Painter, & Eisen, *infra* note 380 ("[T]hey do not create an insurmountable barrier in advance to any set of individuals otherwise qualified under Article II of our Constitution.").

373. Signorelli v. Evans, 637 F.2d 853, 858-59 (2d Cir. 1980) ("The fact that Signorelli has it within his power, by his own choosing, to satisfy this fourth requirement does not answer his objection that the requirement is an additional qualification beyond the exclusive trio specified by the Constitution.").

374. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835-36, 836 n.48 (1995) (emphasizing that resign-to-run statutes are "a permissible attempt to regulate state officeholders"); *see generally* Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983); Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980); *cf.* Merle v. United States, 351 F.3d 92 (3d Cir. 2003) (concluding that the Hatch Act gives a citizen the choice of serving in existing federal employment or resigning before running for federal office, a condition placed upon federal employment and not on the office); *see also* Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1, 53-54 (1991); *supra* note 334 and accompanying text.

375. Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL'Y 415, 451 (2016) (examining prevalence and impact of "sore loser" laws); Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1042-43 (2011) (identifying scope of "sore loser" laws); Muller *Scrutinizing*, *supra* note 56, at 566 (noting accepted constitutionality of "sore loser" laws).

Dual office seeking prohibitions prevent candidates from running for multiple offices simultaneously in the same election.[376] The state understandably prefers not to hold a special election if the candidate wins more than one office and must vacate one.[377] States rarely place the burden on federal candidates, much like how "resign-to-run" statutes often burden only the state officeholder.[378] And when it might affect a candidate for multiple federal offices, the issues have been avoided through political solutions rather than litigation.[379]

While some commentary has emphasized that burdens like tax return disclosures or term limits may be slight,[380] the slightness of the burden has no bearing on whether the law is a legitimate "manner" regulation. To restate a portion of the definition from Professor Lowenstein, does the rule facilitate voters' ability to choose candidates? That is the threshold inquiry, one that occurs before any examination of burdens.

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376. *See, e.g.*, Burns v. Wiltse, 102 N.E.2d 569, 572 (N.Y. 1951) ("Prohibition of a dual nomination is not a denial of the right of the electors to nominate persons of their own selection nor does it constitute interference with the functioning of the Election Law respecting nominations. Such a ruling is not disfranchisement yet that is exactly what would happen whenever electors vote for a candidate who may not legally qualify, if elected, to take and hold both offices to which he had been nominated.").

377. *See id.* ("When the People adopted this constitutional provision to assure the full and effective exercise of the elective franchise we believe they intended that 'officers . . . elective by the people' were those who at the time of election could, if elected, take and hold the office.").

378. *See, e.g.*, Riley v. Cordell, 194 P.2d 857, 861-62 (Okla. 1948) (upholding prohibition on candidate from seeking United States Senate nomination and state Supreme Court position by precluding candidate from seeking judicial position).

379. *See, e.g.*, Ashley Killough, *Rand Paul Proposal for Caucus Moves Forward*, CNN (Mar. 8, 2015), https://edition.cnn.com/2015/03/07/politics/rand-paul-caucus-hurdle/ [https://perma.cc/V8E2-G7VF] ("The plan allows the first-term U.S. senator [Rand Paul], who's running for re-election and making a likely bid for president [in 2016], to get around a Kentucky law that prohibits candidates from appearing on the same ballot twice.").

380. *See, e.g.*, Erwin Chemerinsky, *California's New Law Requiring Presidential Candidates to Disclose Tax Returns Is Constitutional*, L.A. TIMES (July 31, 2019), https://www.latimes.com/opinion/story/2019-07-31/california-law-candidates-tax-returns-constitutional [https://perma.cc/U6U2-NDFC] (describing law as an "additional simple requirement that almost all presidential candidates already do"); Laurence H. Tribe, Richard W. Painter, & Norman L. Eisen, *Candidates Who Won't Disclose Taxes Shouldn't Be on the Ballot*, CNN (Apr. 14, 2017), https://www.cnn.com/2017/04/14/opinions/state-laws-requiring-tax-return-disclosure-legal-tribe-painter-eisen/index.html [https://perma.cc/2VRW-DM6Z] (characterizing the law as "a relatively minor process"); Hills, *supra* note 71, at 148 (noting that a term limits law "places no burden on weak or new parties or independent or poor candidates."); *id.* at 149 (describing a term limitation as a "temporary disability on present office holders."); Gorsuch & Guzman, *supra* note 95, at 357 ("[A] distinction based upon severity cannot withstand scrutiny. Upon closer inspection, the constitutionally enumerated qualifications prove not to be particularly difficult to attain.").

C. Alternative Formulations of Qualifications Restrictions

Courts have acknowledged that states cannot add qualifications to candidates seeking federal office. The analysis offered by this Article offers a coherent way of thinking about the relationship between "qualifications" and "manner." Manner regulations are electoral process rules, which may legitimately affect qualifications. Courts in other ballot access cases sometimes put the rule differently—and sometimes, in a belt-and-suspenders approach, make multiple arguments for the same claim. At times, courts claim that states may not achieve indirectly what they cannot do directly.[381] At other times, courts point out that states may not handicap a class of candidates through ballot access rules.[382] And at still other times, courts find that the ballot cannot be used to achieve the state's preferred policy outcome.[383]

1. States Have No Power to Indirectly Add Qualifications Through Ballot Access Rules

Some commentators have floated the idea that qualifications are insurmountable barriers of the type that preclude a class of candidates—those under twenty-five, non-citizens, and non-inhabitants are excluded from securing office, and restrictions of like kind are qualifications.[384] That may be true as far as it goes, but it tends to narrow the original understanding of qualifications as any condition placed upon candidates that might prevent voters from choosing that candidate.[385] It also fails to recognize that certain "manner" restrictions can legitimately function as a disqualification rule. It is more appropriate to say that states lack the power through the "manner" clauses to add qualifications. This is true for both congressional and presidential candidates.

But if the state's rule is avowedly another qualification—some condition placed upon candidates that falls outside of any definition of

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381. *See infra* Section IV.C.1; *cf. supra* Section III.D.

382. *See infra* Section IV.C.2.

383. *See infra* Section IV.C.3.

384. *See, e.g.*, Biener v. Calio, 361 F.3d 206, 212 (3d Cir. 2004) (confusing the "choice" placed upon candidates in resign-to-run statutes); Dominic A. Iannicola, Jr., *People v. Constitution: The Congressional Term Limit Debate and A Constitutional Definition of Qualification*, 1994 U. ILL. L. REV. 683, 716 (1994) (proposing definition of "qualification" as "any government-imposed bar to candidacy that relies upon an attribute of an individual's candidacy that is not readily changeable."); *see also* David A. Soley, *The Invalidation of the Maine Congressional Term Limits Law: A Vindication of Democracy*, 48 ME. L. REV. 313, 322-25 (1996) (arguing that "qualification" "is an insurmountable bar to running for federal office."); *supra* note 374 and accompanying text discussing Merle v. United States, 351 F.3d 92 (3d Cir. 2003) (with "choice" to decide whether to pay a filing fee).

385. *See supra* Section II.A.1.

the "manner" of holding elections—courts could find that the state may not add that same type of qualification indirectly, either.

In *Term Limits*, the Court offered its explanation that "manner" restrictions are electoral process rules.[386] But it also offered an alternative line of reasoning: constitutional rights could not be "indirectly" denied,[387] and the ballot access condition was an indirect qualification. Elsewhere, the Court noted that the Elections Clause authorized states to regulate "election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position."[388] Upon finding that the term limits rule was a "substantive" qualification, it necessarily fell outside the scope of state power under the Elections Clause.[389]

This Article has already recognized that states may not use ballot access rules to accomplish indirectly what they cannot do directly.[390] But this holding from *Term Limits* simply restates the conclusion of the last subpart of this Article in a slightly different form: legitimate "manner" regulations of the ballot affect the reliability and integrity of the electoral process itself or require a preliminary showing of substantial support.[391] If a court finds that a qualification is substantive, it can easily reject a state's attempt to accomplish the same thing through ballot access rules rather than outright disqualification because the ballot access rule does not affect either of these two legitimate categories of manner regulations.

2. States Have No Power to Handicap a Class of Candidates Through Ballot Access Rules

Courts have also considered whether a ballot access rule handicaps a set of candidates. After its holdings that "manner" rules were procedural and that states could not use the ballot indirectly to place substantive qualifications on candidates, this holding was a third way that the *Term Limits* Court articulated its rule.

In *Term Limits*, the Court recognized that the "sole purpose" of the term limits restriction—accepting the Arkansas Supreme Court's understanding of the state legislature's intent—was "to attempt to achieve a result that is forbidden by the Federal Constitution."[392] The term limits requirement had the "avowed purpose and obvious effect

386. *See supra* notes 356-357 and accompanying text.

387. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995); *see supra* notes 268-272 and accompanying text.

388. *Term Limits*, 514 U.S. at 835.

389. *Id.* at 837. *But see* Ryan, *supra* note 372, at 26 (identifying "no clear resolution" for definition of a "qualification" in *Term Limits*).

390. *See supra* notes 268-272 and accompanying text.

391. *See supra* Section IV.B.

392. *Term Limits*, 514 U.S. at 829.

of evading the requirements of the Qualifications Clauses by handicapping a class of candidates."[393] The Court stated that a ballot access condition could not stand "when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses."[394] And it finally concluded what it purported to "hold": "[A] state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."[395]

This "handicapping" language has attracted significant support from lower courts.[396] For instance, Texas sought to disqualify a candidate for office when that candidate demonstrated he was not an inhabitant of the state after he filed for election.[397] The Fifth Circuit rejected the effort to disqualify the candidate, concluding that inhabitancy is measured on Election Day and any other requirement was an additional qualification.[398] Citing the Ninth Circuit, the Court found that the law "violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause."[399] The Tenth Circuit, addressing Colorado's voter registration requirement, held the requirement handicapped felons or non-residents who were unable to vote.[400]

These lower court opinions reflect some of the sloppiness from the Court in *Term Limits*.[401] Whether a law "handicaps" a class of candidates is one way to determine whether it is an appropriate "manner" restriction, but it is not the only way. Instead, manner restrictions are pertinent to the electoral process. If they are manner restrictions, they are subject to a balancing test, which may include a look at whether they handicap classes of candidates too severely. And if they are not manner restrictions, they fall outside the scope of the state's authority, whether or not they handicap a class of candidates.

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393. *Id.* at 831.

394. *Id.* at 835.

395. *Id.* at 836.

396. Swan, *supra* note 130, at 787.

397. Tex. Democratic Party v. Benkiser, 459 F.3d 582, 585 (5th Cir. 2006).

398. *Id.* at 589-90.

399. *Id.* at 590.

400. Campbell v. Davidson, 233 F.3d 1229, 1234 (10th Cir. 2000); *accord* Woodruff v. Herrera, No. CV 09-449 JH/KBM, 2010 WL 11507393 (D.N.M. 2010), *aff'd*, 623 F.3d 1103 (10th Cir. Oct. 13, 2010).

401. *See* Todd Cornelius Zubler, *Federal Preclusion of State-Imposed Congressional Term Limits:* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), 19 HARV. J.L. & PUB. POL'Y 174, 187 n.74 (1995) ("The Court was incredibly sloppy in announcing its holding.").

Some courts—and commentators[402]—have overread *Term Limits* and looked exclusively for laws that "handicap" a class of candidates. A Third Circuit opinion, for instance, concluded that a filing fee is generally applicable to candidates and not designed to handicap a class.[403] It is not entirely clear that this is true,[404] but even so, it is an unnecessary conclusion—Supreme Court precedent repeatedly acknowledges that filing fees are legitimate "manner" restrictions to ensure that candidates have a preliminary showing of substantial support before appearing on the ballot.[405]

3. States Have No Power to Use the Ballot for Extraneous Ends

A pair of Supreme Court cases also demonstrate that states lack the power to use the ballot to achieve their preferred policy objectives—disclosing particular information to the electorate—simply because they have control over the ballot itself. Both cases used reasons different from those articulated here, but they make far more sense when understood through the lens that the power to regulate the "manner" of holding elections is confined. Specifically, states may not weaponize the ballot to achieve extraneous ends.

(a) Anderson v. Martin

The first is *Anderson v. Martin*.[406] In the early 1960s, Louisiana displayed the race of candidates on the ballot.[407] In 1964, in *Anderson v. Martin*, the Court rejected this ballot notation.[408] The notation had "nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise."[409] Put another way, the Court recognized this was not a regulation about the electoral process itself.

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402. *See, e.g.*, No. 2 Wash. Op. Att'y Gen., *supra* note 372, at 8 ("A tax return disclosure requirement does not appear to affect any constitutionally relevant 'class of candidates.' The only people impacted would be those who do not wish to disclose financial information."); Lang, *supra* note 372, at 55-57; *cf.* Gorsuch & Guzman, *supra* note 95, at 362 ("Clever politicians have used many tools to preclude individuals or an identifiable type of individual from running or winning.").

403. Biener v. Calio, 361 F.3d 206, 212 (3d Cir. 2004).

404. *See, e.g.*, Brown, *supra* note 225, at 1284-85 (arguing that ballot access fees are akin to property ownership requirements and impermissible qualifications and recognizing that most states have abolished them or created exceptions or alternative means of securing ballot access in lieu of filing fees).

405. *See supra* note 364.

406. 375 U.S. 399 (1964).

407. *Id.* at 401.

408. *Id.* at 400-02.

409. *Id.* at 402.

Concededly, the Court's reasoning was not based on the Elections Clause. That is because the ballot notation extended to state and local elections, not federal elections.[410] Instead, the Court's reasoning was based on the Fourteenth and Fifteenth Amendments.[411] By "placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another."[412] Drawing voters' attention to race may "decisively influence" the political process, an inappropriate role for the state when administering the ballot.[413]

(b) Cook v. Gralike

The second is *Cook v. Gralike*.[414] On the heels of the Court's decision in *Term Limits*, Missouri tried a new tactic: a law that compelled members of Congress and congressional candidates to declare their support or opposition for term limits.[415] Congressional candidates who refused to answer the question would have the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appear beside their names on the ballot.[416] Members of Congress who opposed term limits would have the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed beside their names.[417]

The Court rejected these ballot notations as running afoul of the Elections Clause.[418] The Court concluded that the power to regulate the "Times, Places and Manner of holding Elections," provided the "exclusive delegation of power" to the states.[419] But that power did not include the power to "dictate electoral outcomes."[420] The ballot notation was not a "procedural regulation," because it bore "no relation to the 'manner' of elections as we understand it."[421] This recognition of "manner" as an electoral process rule tracks the ballot access cases, and the notion that state power comes from the Elections Clause and

410. *Id.* at 399-402 n.1 (quoting statute extending to "state or local" elections).
411. *Id.* at 401-02.
412. *Id.* at 402.
413. *Id.*
414. 531 U.S. 510 (2001).
415. *Id.* at 514-15.
416. *Id.*
417. *Id.*
418. *Id.* at 522-23; *see* Muller *Ballot Speech*, *supra* note 236, at 736-38.
419. *Cook*, 531 U.S. at 523 (2000).
420. *Id.* at 523 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833-34 (1995)).
421. *Id.* at 523-24.

not elsewhere fits the findings from Justice Story's Commentaries[422] to the Court in *Term Limits*.[423]

The Court went on to hold that the ballot notations were "plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal."[424] And the Court agreed that the labels were "pejorative," "negative," "derogatory," "intentionally intimidating," "particularly harmful," "politically damaging," "a serious sanction," "a penalty," "official denunciation," and "the Scarlet Letter."[425] "Adverse labels" that "handicap candidates" were "not authorized by the Elections Clause."[426] The state was using the ballot to penalize certain views of members of Congress or congressional candidates, which exceeded the scope of its authority.

In both *Anderson v. Martin* and *Cook v. Gralike*, candidates had full access to the ballot and were not excluded from it—a feature that in one sense makes them more permissible than tax return disclosure requirements, which exclude candidates outright.[427] State laws conditioning ballot access on particular disclosures are not related to the integrity of the electoral process. Whether excluding candidates from the ballot as a penalty or printing words like "FAILED TO DISCLOSE HIS TAX RETURNS" beside the name, such disclosure requirements fall outside the scope of the state's power to regulate the manner of elections.

V. TAX RETURNS AND BALLOT ACCESS

States may not add qualifications to presidential candidates and may only restrict ballot access to ensure the integrity and reliability of the electoral process itself or upon a preliminary showing of a candidate's substantial support. How does this framework apply to the proposed tax disclosure requirement laws that states are considering enacting?

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422. *See supra* note 94 and accompanying text.

423. *See supra* Section II.A.4.(c); *cf.* Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1512 (2003) ("And when it prevented Missouri from placing potentially vote-skewing ballot notations next to certain candidates' names based on their position on term limits, did it enforce a fairness norm (i.e., the state should treat all candidates equally), or did it trespass into proscribing permissible structures?").

424. *Cook*, 531 U.S. at 524.

425. *Id.* at 524-25 (internal quotations omitted).

426. *Id.* at 525-26.

427. *See supra* Section I.B.

A. Tax Return Disclosure as a Condition of Ballot Access Exceeds State Power Under the Elections Clause

Simply put, a requirement that a candidate disclose his tax returns before securing ballot access does not regulate the "manner" of holding the election because it does not regulate the integrity and reliability of electoral process itself or require a preliminary showing of substantial support.[428] Whether one styles the disclosure requirement as a "qualification" is immaterial: it functions as a qualification when it excludes candidates under a rule that exceeds the state's power under the Presidential Electors Clause.[429]

At this point, the analysis ends. The disclosure of tax returns is not about the integrity and reliability of the electoral process. That is, they are not about the "manner" of holding elections. States had no difficulty tabulating votes cast for Gerald Ford, Ross Perot, or Donald Trump, even though the candidates did not disclose their tax returns. States found no fraud in our electoral process as a result of John McCain or Mitt Romney choosing to disclose just two years' worth of returns. And the same analysis would hold true if the compelled disclosure was a candidate's medical records or school transcripts.[430]

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428. The proposed legislation is often not styled as ballot access legislation but inserted as penalties placed upon uncooperative candidates. *See* Conn. Substitute H.B. Substitute 6575, 2017 Gen. Assemb. Sess. (Conn. 2017) (amending CONN. GEN. STAT. § 9-175 (2012) concerning balloting, not §§ 9-381 et seq. concerning nomination procedures); CAL. ELEC. CODE §§ 6880-84 (West 2019) (codifying "Income Tax Return Disclosure Requirements" in Chapter 7 of the Elections Code, rather than amending presidential primary nomination papers provisions of the Elections code); CAL. ELEC. CODE §§ 6101-46 (Democratic Party nomination papers); *id.* §§ 6360-6406 (Republican Party nomination papers, et al.); Yates v. United States, 574 U.S. 528, 529 (2015) (plurality opinion) (noting the "position within" a codified statutory chapter as evidence of meaning). This is some—perhaps slight—evidence that state legislatures do not view these provisions as ordinary ballot access rules but as some additional category of restrictions placed upon candidates.

429. *Accord* Griffin v. Padilla, 408 F. Supp. 3d 1169, 1179 (E.D. Cal. 2019) ("To the extent the Act mandates disclosure of tax returns to qualify for the presidential primary, it does none of those things and, despite Defendants' best efforts, it simply cannot be characterized as procedural. Its provisions do not pertain to the administration of an election (e.g., reducing ballot clutter by excluding candidates without sufficient electoral support). Nor can it be considered an even-handed restriction to 'protect the integrity and reliability of the electoral process itself' or to ensure 'orderly, fair, and honest elections' by providing financial information to voters.").

430. *See* Edmund G. Brown, Veto Message of S.B. 149, 2017-2018 Reg. Sess. (Cal. 2017), https://web.archive.org/web/20171219002118/https://www.gov.ca.gov/docs/SB_149_Veto_Message_2017.pdf [https://perma.cc/6S4C-DQUJ].

Could a state require a candidate to disclose a birth certificate to ensure that the candidate is a "natural born citizen" or at least 35 years of age? Some states exclude ineligible presidential candidates from the ballot. *See* Muller *Scrutinizing*, *supra* note 56, at 602-08 (compiling cases and practices); *see also* Lindsay v. Bowen, 750 F.3d 1061, 1063 (9th Cir. 2014); Hassan v. Colorado, 495 F. App'x 947 (10th Cir. 2012). States might ask candidates to affirm that they meet the constitutional qualifications for candidates, and such regulations would be measured under the standard *Anderson-Burdick*-style balancing test, with the recognition that the state interest in requiring production of a birth certificate is slight. Muller *Scrutinizing*, *supra* note 56, at 610-11. Others have argued that birth

Indeed, the invasion of privacy can act as a substantive deterrent to running for political office.[431]

Such rules also do not relate to requiring a preliminary showing of substantial support. Conditions like filing fees and signature requirements are designed to winnow out frivolous candidates or prevent ballot overcrowding. Not so for tax disclosure rules, which exclude candidates who ignore the state's preferred disclosure regime.

The analysis works under the alternative forms of defining "manner" rules. Tax return disclosure rules do handicap a class of candidates—those who prefer not to comply with disclosure, like Donald Trump, Ross Perot, or Jerry Brown. It is admittedly a choice, but so too is the choice not to register to vote if one is eligible, not to move to a district, or not to take an oath.

This result still may not be terribly satisfying to some. What if there are some other instances beyond the integrity and reliability of the electoral process that states may deem important enough to condition ballot access? Simply put, states lack power under the Elections Clause and the Presidential Electors Clause to condition ballot access on this basis. They may not condition ballot access or restrict the opportunity of the voters to select the preferred candidate of their choice if their conditions are not related to the electoral process itself.

The "electoral process" is a subset of the political process. That is, the electoral process deals with the actual mechanics of the ballot and its administration, like easing the voter's ability to read the ballot, the voter's process marking the ballot, and the tabulation of votes. Ballot rules advance the state's interest in helping the electoral process. But ballot access rules are not used to further some political interest, such as generic descriptions like "voter transparency" or "voter

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certificate requirements would be flatly prohibited. *See* Laura Gottesdiener, *Arizona Birther Bill Is Unconstitutional, Legal Scholars Say*, HUFFINGTON POST (Apr. 15, 2011), https://www.huffpost.com/entry/arizona-birthers-bill-is-unconstitutional_n_849871 [https://perma.cc/VS7S-BCXW] (noting that Professor Laurence Tribe argues that a birth certificate disclosure as a condition for ballot access "wouldn't hold up for a nanosecond," that he's "not even sure if it's intended seriously," and that "[i]t's not up for a state to decide who is qualified to run for president"); *but see supra* note 380 and accompanying text (noting that Professor Tribe argues that the tax disclosure requirement is constitutional).

431. *See* JENNIFER L. LAWLESS, BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE 170-74 (2012) (identifying "loss of privacy" as a matter "so negative as it would deter me from running" among a significant cohort of eligible candidates, a deterrent more likely to be found among women than men); David H. Flaherty, *Reflections on Reform of the Federal Privacy Act*, 21 CAN. J. ADMIN. L. & PRAC. 271, 316 (2008) (describing Canadian politicians' lack of interest in privacy concerns); Rebecca Green, *Candidate Privacy*, 95 WASH. L. REV. 205, 231-32 (2020). *But see* Plante v. Gonzalez, 575 F.2d 1119, 1126 (5th Cir. 1978) (noting in the context of state elected officials—not candidates—being required to file financial disclosures: "Disclosure requirements may deter some people from seeking office. As the Supreme Court has made clear, however, mere deterrence is not sufficient for a successful constitutional attack.").

awareness."[432] A freewheeling interest in voter education does not fall within the scope of "manner" regulations—indeed, *Cook v. Gralike* disclaims any such interest, and such efforts are best described as attempts to use the ballot for extraneous ends.[433] States may not wield the ballot as a weapon, demanding a public disclosure of information from candidates useful for political discourse to secure ballot access.

Undoubtedly, courts have cited "voter education" as a state interest when it comes to the ballot. In *Anderson v. Celebrezze*, for instance, the Court recognized "the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."[434] But that interest comes into play only after the state has exercised a legitimate manner regulation and the court is balancing the interests at stake. In *Anderson*, the state argued over the length of time for a filing deadline. The deadline to file to appear on the ballot is unquestionably an electoral process rule squarely within the state's power to regulate the "manner" of an election.[435]

B. The Possibility of Disclosure Through Federal Law

This Article specifically examines whether states might condition ballot access to obtain a presidential candidate's tax returns. As mentioned earlier, it does not discuss other ways the state might disclose a candidate's tax returns, such as disclosing a candidate's federal tax returns in a state's possession that the candidate filed alongside state tax returns.[436] To the extent there are interests at stake, like enforcement of the Emoluments Clause,[437] an alternative avenue for the disclosure of tax returns for federal elected officials might come through Congress.

While the Constitution does not expressly allow Congress to compel the production of documents, the Supreme Court acknowledged that

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432. *See, e.g.*, Tribe, Painter, & Eisen, *supra* note 380 ("Tax returns also provide various other kinds of information that voters might reasonably want to know when choosing their president."); *see* CAL. ELEC. CODE § 6881 (West 2019) ("[T]he State of California has a strong interest in ensuring that its voters make informed, educated choices in the voting booth."); *cf.* Miles C. Cortez, Jr., & Christopher T. Macaulay, *The Constitutionality of Term Limitation*, 19 COLO. LAW. 2193, 2194 (1990) (arguing for a "flexible standard" in evaluating term limits laws "in which legitimate state interest protected by the law in question are weighed against the interests of persons adversely affected by the qualification.").

433. *See supra* Section IV.C.3.

434. 460 U.S. 780, 796 (1983).

435. *See supra* notes 339-344.

436. *See supra* notes 28-31 and accompanying text.

437. U.S. CONST. art. I, § 9, cl. 8. *But see* Seth Barrett Tillman, *Originalism & the Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 97-100 (2014) (arguing that the Foreign Emoluments Clause does not extend to the President of the United States); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013).

Congress has inherent investigatory authority.[438] Congress's implicit authority to compel production of materials might arise from several provisions of the Constitution. The Vesting Clause grants Congress "[a]ll legislative Powers herein granted."[439] The Sweeping Clause permits Congress to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution."[440] The Impeachment Clauses suggest that Congress must determine whether the President has committed "Treason, Bribery, or other high Crimes and Misdemeanors" before impeaching and convicting him.[441]

These are starting points for the Supreme Court's articulation of the scope of Congress's authority.[442] The Court has explained that Congress has the inherent constitutional authority to inquire into all matters that potentially may be the subject of legislation, including "to expose corruption, inefficiency or waste,"[443] and broad constitutional authority to investigate and induce cooperation.[444] "[T]he power of inquiry," the Court explained in one case, "is an essential and appropriate auxiliary to the legislative function."[445] Congressional investigations must advance a valid legislative purpose and mere semblance of legislative purpose would not justify an inquiry.[446]

Prominently, Congress passed the Ethics in Government Act of 1978, which requires disclosures of financial information of certain government officials to the public.[447] Within thirty days of assuming office, the President and Vice President must file financial disclosures about their sources of income, payments to charitable organizations,

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438. *See* Anderson v. Dunn, 19 U.S. 204, 224-25, 228-29 (1821) (affirming Congress's power to compel a witness's attendance at a hearing and enforce a contempt order for failure to attend); Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

439. U.S. CONST. art. I, § 1.

440. *Id.* art. I, § 8, cl. 18.

441. *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 7; *id.* art. II, § 4.

442. The 1992-93 Staff of the Legis. Res. Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. LEGIS. & POL'Y 1, 1-3 (1995).

443. Watkins v. United States, 354 U.S. 178, 187 (1957).

444. *See, e.g.*, McGrain v. Daugherty 273 U.S. 135, 175 (1927) (relying on the necessary and proper clause to condone Congress's use of the investigatory power for a legitimate legislative purpose).

445. *Id.* at 174.

446. *Id.* at 175-76; *see* Amandeep S. Grewal, *The President's Tax Returns*, 27 GEO. MASON L. REV. 439, 476 (2020).

447. Ethics in Government Act of 1978, Pub. L. No. 95-521, Title 1, 92 Stat. 1824-36 (codified as amended by*, inter alia*, Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716).

property they hold, debts they owe, and more.[448] The President and Vice President continue to file these reports annually, including identifying gifts, reimbursements, sale of property and stocks, the cash value of blind trusts, and other disclosures for spouses and dependent children.[449] In 2012, Congress added to these disclosures and required that they be made available online.[450] While disclosures are published for the President and Vice President, reports for most other government officials require a specific request.[451] Certain information might be kept confidential for lower-level officials or if the information might compromise the national interest of the United States.[452]

Presidential and congressional candidates also must file similar statements within thirty days of declaring as a candidate.[453] Federal law also requires disclosure of certain activities of campaigns, including disclosure of contributions to the campaign and expenditures from the campaign.[454] In short, there are potential opportunities for Congress to supervise the financial activities of the President and even of presidential candidates. Federal law currently requires extensive financial disclosures, but current law does not require the disclosure of tax returns. Congress might choose to amend these statutes to compel greater disclosure,[455] and there might be

448. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 202, §§ 101-02, 103 Stat. 1716, 1724-29 *reprinted in* 5 U.S.C. app. §§ 101-02 (2012) (amending Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824); *Id.* §§ 101-02.

449. *Id.* §§ 101(d), 102(a), 102(e), 102(f).

450. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No, 112-105, 126 Stat. 291, 293-94, 298, §§ 6(a), 11(a) (2012), *reprinted in* 5 U.S.C. §§ 103 note, 105 note.

451. *See* U.S. OFF. OF GOV. ETHICS, PRESIDENTIAL AND VICE PRESIDENTIAL FINANCIAL DISCLOSURE REP., ONLINE OGE FORM 201, TRUMP, DONALD J. WHITE HOUSE OFFICE, RESIDENT & PENCE, MICHAEL R. OFFICE OF THE VICE PRESIDENT, VICE PRESIDENT, https://extapps2.oge.gov/201/Presiden.nsf/President%20and%20Vice%20President%20Index [https://perma.cc/2KL8-C6JQ].

452. Ethics in Government Act, Pub. L. No. 101-94, 103 Stat. 1716 at 1737-38, 1740-41, §§ 105(a)(1), 107 (1989).

453. *Id.* § 101(c).

454. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 60-64 (1976).

455. The House of Representatives, for instance, passed the For the People Act of 2019, H.R. 1. The bill includes Title X, "Presidential and Vice Presidential Tax Transparency," which would require major party presidential and vice presidential candidates to disclose ten years' tax returns within fifteen days of becoming the party's nominee in the general election, and for sitting presidents and vice presidents to disclose the same. For the People Act of 2019, H.R. 1, 116th Cong. § 10001 (2019). If a candidate or official fails to disclose the tax returns, the chair of the Federal Election Commission may request the tax return from the Secretary of the Treasury and make it available. *Id.* Major parties are those whose parties have secured at least twenty-five percent of the popular vote in the preceding general election. I.R.C § 9002(6) (2012).

questions about how far Congress can go to compel disclosure.[456] But these disclosure laws are not tied to ballot access rules: they must be tied to other federal sources of Congress's authority, authority unrelated to preventing candidates from seeking office.

CONCLUSION

States understandably want political candidates to disclose certain relevant information to the public. Voters are free to punish candidates who refuse to disclose their tax returns.[457] Competing candidates, party leadership, and media entities can urge candidates to disclose relevant information. Congress even has legislative and investigative tools at its disposal to require certain disclosures.[458] But the ballot is not the means to exact such disclosures. The ballot is not a weapon to compel candidates to do things that states want them to do. It is the means for the people to choose the preferred candidate of their choice. The Constitution constrains how states go about administering the ballot, and conditioning ballot access on disclosing information, including tax returns, simply exceeds the scope of that authority.

456. *Cf. Buckley*, 424 U.S. at 64-68 (noting costs of campaign finance disclosure and government interests in securing disclosures); U.S. Dep't of Justice, Office of Legal Counsel, Opinion Letter on Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f) (June 13, 2019) (identifying bounds of a "legitimate legislative purpose" in disclosing tax returns); *see* Grewal, *supra* note 446 (describing that Congress's requests must relate to a "legitimate legislative purpose").

457. *See supra* notes 303-304 and accompanying text.

458. *See supra* Section V.B.