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Scrutinizing Federal Electoral Qualifications

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Scrutinizing Federal Electoral Qualifications

DEREK T. MULLER*

Candidates for federal office must meet several constitutional qualifications. Sometimes, whether a candidate meets those qualifications is a matter of dispute. Courts and litigants often assume that a state has the power to include or exclude candidates from the ballot on the basis of the state's own scrutiny of candidates' qualifications. Courts and litigants also often assume that the matter is not left to the states but to Congress or another political actor. But those contradictory assumptions have never been examined, until now.

This Article compiles the mandates of the Constitution, the precedents of Congress, the practices of states administering the ballot, and judicial precedents. It concludes that states have no role in evaluating the qualifications of congressional candidates—the matter is reserved to the people and to Congress. It then concludes that while states have the power to scrutinize qualifications for presidential candidates, they are not obligated to do so under the Constitution. If state legislatures choose to exercise that power, it comes at the risk of ceding reviewing power to election officials, partisan litigants, and the judiciary. The Article then offers a framework for future litigation that protects the guarantees of the Constitution, the rights of the voters, and the authorities of the sovereigns.

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INTRODUCTION

Is President Barack Obama a “natural born Citizen”¹ of the United States? Is Senator John McCain? Was Vice President Dick Cheney an “inhabitant”² of Wyoming or of Texas? The consensus answer to the questions regarding Mr. Obama, Mr. McCain, and Mr. Cheney, on the merits, has been yes,³ but such answers do not come without dissent (legitimate or not).⁴ These and similar questions have been asked

1. U.S. CONST. art. II, § 1, cl. 5.

2. *Id.* amend. XII.

3. *See, e.g., Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (finding that voters’ generalized injury was insufficient for Article III standing but entering judgment that vice presidential candidate Dick Cheney was not an “inhabitant” of Texas), *aff’d*, 244 F.3d 134 (5th Cir. 2000); *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Feb. 3, 2012) (holding that a person born in the United States is a natural born citizen regardless of the citizenship of his parents and relying on *Arkeny v. Governor of Ind.*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009), which held that a person born in the United States is a natural born citizen regardless of the citizenship of his parents); Resolution Recognizing that John Sidney McCain, III, Is a Natural Born Citizen, S. Res. 511, 110th Cong. (2008) (enacted) (resolving unanimously that Senator McCain is a natural born citizen); Laurence H. Tribe & Theodore B. Olson, Opinion Letter, *Presidents and Citizenship*, 2 J.L. 509, 509 (2012) (concluding that Senator McCain is a natural born citizen); Dan Pfeiffer, *President Obama’s Long Form Birth Certificate*, WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), <http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate>.

4. *See, e.g., Jones*, 122 F. Supp. 2d at 715 (“This is an action by three Texas registered voters who allege that Richard B. Cheney . . . , nominee of the Republican Party for Vice President of the United States, is an ‘inhabitant’ of the state of Texas, and that under the Twelfth Amendment to the United States Constitution, members of the Electoral College from the state of Texas . . . are prohibited from voting for both Governor George W. Bush . . . for the office of President of the United States and for Secretary Cheney for the office of Vice President.”); JEROME R. CORSI, WHERE’S THE BIRTH CERTIFICATE?: THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT (2011); Gabriel J. Chin, Commentary, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/chin.pdf> (arguing that Congress did not confer citizenship to those born in the Panama Canal Zone prior to August 4, 1937, thus preventing Senator McCain from qualifying as a “natural born” citizen); Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137, 143–49 (2007) (describing uncertainty over the Natural Born Citizen Clause); Jonathan Turley, *Court Redux: Is McCain*

before.⁵ They are being asked today.⁶ And they will assuredly be asked again.⁷

The debate over these questions has typically been one about the substance of each qualification: pundits ask whether or not a candidate meets a qualification for federal office. But there is an underlying issue less examined: Once the candidate is listed on or excluded from the ballot, *who* has the power to resolve disputes about qualifications? This issue has generally been viewed as a question about the power of the courts to determine qualifications, or as a question about the proper parties to raise such challenges.⁸ Indeed, litigation reflects two assumptions from plaintiffs: that courts may adjudicate whether candidates should appear on the state-administered ballot and that courts have the power to order the state to add or to remove a candidate.⁹

Any attempt to answer these questions through litigation has been disastrous. Cases proceed inconsistently through administrative hearings and federal courts; they are sometimes dismissed on procedural grounds. When they reach substantive matters, judges and litigants have often thought less about the proper reasoning and

Ineligible to Be President?, ROLL CALL (Mar. 6, 2008, 12:00 AM), http://www.rollcall.com/issues/53_104/-22409-1.html (claiming that whether Mr. McCain is a natural born citizen is uncertain).

5. See, e.g., Memorandum from Jack Maskell, Legislative Attorney, Cong. Research Serv., to Cong. Offices, Qualifications for the Office of President of the United States and Legal Challenges to the Eligibility of a Candidate, at 13 n.67 (Apr. 3, 2009), available at <http://www.scribd.com/doc/41131059/CRS-Congressional-Internal-Memo-What-to-Tell-Your-Constituents-Regarding-Obama-Eligibility-Questions> [hereinafter Maskell Memorandum] (Chester A. Arthur was born to a citizen mother and a noncitizen father.); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 882 n.6 (1988) (noting the previous disputes on the constitutionality of the potential candidacies of Barry Goldwater (born in Arizona before it was a state), Lowell Weicker (born in Paris, France), George Romney (born of American parents in Mexico), Christian C. Herter (born of American parents in France), and Franklin D. Roosevelt, Jr. (born in Canada)).

6. See Transcript of Oral Argument, *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (No. 13-15085).

7. See, e.g., Hendrik Hertzberg, *Strongman: Arnold Schwarzenegger and California's Recall Race*, NEW YORKER, Sept. 29, 2003, at 42 (reporting Senator Orrin Hatch's attempt on July 10, 2002, to introduce a constitutional amendment which would make naturalized citizens eligible for the office of President); Paul West, *Questions About the Qualifications of Ted Cruz, the GOP's Newest Star*, L.A. TIMES, Aug. 1, 2012, <http://articles.latimes.com/2012/aug/01/news/la-pn-questions-about-the-qualifications-of-ted-cruz-the-gops-newest-star-20120801>; Aaron Blake, *Can Ted Cruz Run for President? And Should He?*, WASH. POST (Aug. 19, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/20/supporters-push-for-ted-cruz-for-president/> (questioning if current Senator Ted Cruz, born in Calgary, Alberta, to an American mother and Cuban father, is a natural born citizen, and comparing Cruz's circumstances to those of Governor George Romney and Senator John McCain).

8. See, e.g., Stephen Parks, *The Birthers' Attacks and the Judiciary's Article III "Defense" of the Obama Presidency*, 38 S.U. L. REV. 179 (2011); Daniel P. Tokaji, Commentary, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/tokaji.pdf>.

9. See *infra* Part II.C (identifying lack of meaningful judicial analysis of the power to review qualifications).

instead litigated on the basis of seat-of-the-pants logic that posits the “right” result with little context or constitutional scrutiny.¹⁰

But there is an assumption underlying even this inquiry that has escaped any meaningful academic inquiry: What power, if any, do states have to determine the constitutional qualifications of federal candidates? States are tasked with, among other things, administering the ballot and conducting federal elections.¹¹ But that does not necessarily mean that states are also tasked with the responsibility of evaluating whether a federal candidate meets constitutional qualifications for office and then including or excluding candidates depending on whether they meet those qualifications.

This Article examines whether states have the power to evaluate the constitutional qualifications of candidates for federal office. The Article compiles the mandates of the Constitution, the precedents of Congress, the practices of states administering the ballot, and scraps of judicial precedents in litigated cases. Finally, these multifarious concepts are synthesized to identify the proper role of the states.

This Article proceeds in five Parts. Part I examines the constitutional qualifications for candidates for the Presidency, the Vice Presidency, the House of Representatives, and the Senate. It classifies these qualifications into different categories, including whether a lack of qualification is “curable” and whether it can be cured during the term in which a candidate is elected. These categories reveal that officials may scrutinize different kinds of qualifications differently, depending on their classification.

Part II traces the judicial disputes over qualifications and how courts grapple with the merits inquiries and their own institutional roles. It identifies litigation over congressional and presidential candidates when a state has excluded them from the ballot, or when the state has included them and a party seeks to exclude them. It concludes that courts are generally highly deferential to the political process and have been reluctant to remove anyone from the ballot over a qualifications dispute, generally finding no duty for the state to investigate qualifications or to exclude arguably unqualified candidates.

Part III ascertains who has the power to scrutinize qualifications. It notes that voters and presidential electors have broad discretion in the discharge of their duties, and they may, rightly or wrongly, reach conclusions about qualifications when voting. Congress has the sole power to adjudicate the qualifications of its own members; its role in evaluating the qualifications of presidential or vice presidential candidates is more complicated, but its practice has generally been one that reflects an ability to adjudicate the qualifications of its members. Part III then concludes with an examination of the states’ power to administer the ballot, a power that postdates any prior assumption of power left in the hands of the voters or a governmental body.

Part IV examines the possible scenarios in which parties seek to include or exclude a candidate from the ballot on the basis of qualifications. It concludes that states have no role in evaluating the qualifications of candidates for the Senate and

10. *See infra* Part II.

11. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

the House of Representatives. That task is left to Congress directly, and to the people indirectly. Any such legislation in the states is constitutionally forbidden.

The Article then finds that states have no constitutional obligation to evaluate the qualifications of candidates for president or vice president. It is within their power to choose—or to allow the voters or presidential electors to choose—candidates of dubious qualification. But states do have the power to evaluate qualifications if they so desire. If a state desires to investigate the qualifications of executive candidates, then typical judicial review would apply to any decision to include them or exclude them. This Part harmonizes existing case law and explains the proper framework for considering such litigation.

Finally, Part V reviews existing state legislation, which presents a divergence of views about the proper role of states in reviewing qualifications. It concludes with a series of advisory provisions for future legislation, statutory interpretation, and litigation, consistent with the appropriate authority of states in federal elections.

I. CONSTITUTIONAL QUALIFICATIONS FOR FEDERAL OFFICE

An inquiry into how and whether states may examine the constitutional qualifications for federal office logically begins with an examination of what the qualifications are. There are four elected federal offices enumerated in the Constitution: Representative, Senator, President, and Vice President. Each has express qualifications, which this Part identifies. This Part then classifies them based on how Congress and other actors have interpreted them over the years, which will later help answer the question of who should have the power to scrutinize qualifications.

A. *Qualifications for Members of the House of Representatives*

At least twenty-five years old. Article I requires that a representative attain “the Age of twenty five Years.”¹² Ostensibly, no provision of the Constitution could be more impervious to legal challenge.¹³ And while a need to interpret this clause has not yet arisen, the possibility for such a challenge conceivably exists.¹⁴

Seven years a citizen of the United States. Aliens have often been excluded from public office.¹⁵ For a candidate to be eligible for the House of Representatives, the Constitution requires something more than mere citizenship: it requires a minimal period of time as a citizen, but a lower threshold than that required for President.¹⁶

12. *Id.* art. I, § 2, cl. 2.

13. *See, e.g., Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (“No provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of a Congress or the length of their tenure of office, are more explicit and specific than those pertaining to courts established under Article III.”).

14. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (suggesting that good reason may support alternative interpretations such as percentage of life expectancy or minimum number of years after puberty).

15. *See Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1275–76 (2012).

16. *Compare* U.S. CONST. art. I, § 2, cl. 2 (requiring seven years’ citizenship to run for

Inhabitant of that state. An individual must be an inhabitant of the state from which she is elected.¹⁷ “Inhabitant” means something less than “resident”¹⁸ and something more than “sojourner.”¹⁹ Inhabitancy is measured at the time “when elected” to avoid a lengthy temporal-residency qualification.²⁰

Not a holder of another civil office, or a recipient of increased emoluments. The Incompatibility and Ineligibility Clauses provide, “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”²¹ This prohibition is a disqualification on taking another office or receiving an emolument while serving as a representative. In 1817, for instance, Elias Earle of South Carolina was elected to the House while serving as a postmaster but resigned his office before taking his seat and was found to be entitled to it.²² Congress extensively considered the definition of “office” in 1898, ultimately finding that four members vacated their seats upon accepting commissions in the army.²³

Not disqualified from federal office after impeachment and conviction. A candidate who has been impeached, then disqualified in the discretion of the Senate, is ineligible to serve in Congress.²⁴

Not one who engaged in insurrection or rebellion. One of the lesser-known provisions of the Reconstruction Amendments is Section 3 of the Fourteenth

the House of Representatives), *with id.* art. II, § 1, cl. 5 (“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 . . .”).

17. *Id.* art. I, § 2, cl. 2.

18. See *Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000) (examining the Records of the Federal Convention and concluding that the Framers rejected an in-state residency requirement).

19. See, e.g., 1 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 369 (1907) [hereinafter HINDS’ PRECEDENTS] (reporting the conclusion of a committee of Congress that Jennings Pigott was a “sojourner” and was not an “inhabitant” of North Carolina when elected in 1862).

20. See, e.g., *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 589 (5th Cir. 2006) (quoting U.S. CONST. art. I, § 2, cl. 2) (examining history of inhabitancy requirement and noting instance when Congress seated elected representatives who had moved into a state two weeks before the election).

21. U.S. CONST. art. I, § 6, cl. 2; see also THE FEDERALIST NO. 52 (James Madison) (“during the time of his service, must be in no office under the United States”). This prohibition may not extend to the President. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 1 (2009).

22. HINDS’ PRECEDENTS, *supra* note 19, § 498.

23. See H.R. REP. NO. 55-2205, pt. 1, at 69–70 (1899); HINDS’ PRECEDENTS, *supra* note 19, §§ 493–494.

24. U.S. CONST. art. I, § 3, cl. 7. For more discussion in the context of presidential candidates, see *infra* notes 61–62 and accompanying text. But see Benjamin Cassady, “You’ve Got Your Crook, I’ve Got Mine”: *Why the Disqualification Clause Doesn’t (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209 (2014).

Amendment. It disqualifies from office those who previously took an oath under the Constitution of the United States but “have engaged in insurrection or rebellion” against the United States “or [have] given aid or comfort to the enemies thereof.”²⁵ The disability works against those who “hold any office, civil or military, under the United States,”²⁶ which presumably includes the office of the President.²⁷ Congress, however, has the power to remove the disability by a two-thirds vote.²⁸

Elected. A qualification “so basic that it is not often cited as a qualification at all” is the requirement of being elected to office.²⁹

Timing of qualifications. A candidate must possess each of these qualifications upon being seated, not necessarily at the time voted into office.³⁰

No additional qualifications. Congress’s understanding of its power to add qualifications has a checkered history, and its members’ views are often divided.³¹ For instance, the House determined in 1868 that John Young Brown of Kentucky could not take a loyalty oath prescribed by the House, because the House concluded he had given comfort to the enemy.³² The House then vigorously debated whether Congress could add to the three qualifications of age, citizenship, and inhabitancy.³³ Hinds’ Precedents concludes that “it seems to have been assumed by the Committee on Elections, if not by the House itself, that the House alone might not add to the qualifications prescribed by the Constitution.”³⁴ However, Mr. Brown was still excluded from his seat.³⁵

In recent years, however, the Supreme Court has held that these qualifications are exclusive; states may not add to them.³⁶ Congress may not refuse to seat a member

25. U.S. CONST. amend. XIV, § 3.

26. *Id.*

27. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 164–66 (2005); Akhil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 n.143 (1995).

28. U.S. CONST. amend XIV, § 3.

29. Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL’Y 1, 22 (1994); cf. *Roudebush v. Hartke*, 405 U.S. 15, 26 n.23 (1972) (“One of those qualifications is that a Senator be elected by the people of his State.”).

30. See *infra* notes 177–81 and accompanying text (describing Congress’s practice of adjudicating age based upon the time a candidate presents credentials to the chamber).

31. See generally John C. Eastman, *Open to Merit of Every Description? An Historical Assessment of the Constitution’s Qualifications Clauses*, 73 DENV. U. L. REV. 89, 91–102 (1995) (examining four historical instances in which Congress debated the power to add qualifications to the ones enumerated in the Constitution).

32. HINDS’ PRECEDENTS, *supra* note 19, § 449.

33. *Id.*

34. *Id.*

35. *Id.*

36. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) (“In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.”); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (rejecting a state requirement that a member of Congress reside in the congressional district he represents); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958) (same); accord 5 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 404 (1836) (“The qualifications of electors and elected were

for failing to meet a unilaterally imposed qualification not enumerated in the Constitution.³⁷ And judicial intervention in cases involving additional qualifications effectively precludes Congress from adding them.³⁸

Occasionally, the line between “qualifications” and mere “regulations” of election procedures is difficult to discern. For instance, “sore loser” laws, which exclude a candidate from the general election ballot if that candidate ran in another party’s political primary and lost, have been upheld as permissible regulations, not additional qualifications.³⁹ In *Storer v. Brown*,⁴⁰ affiliation with a political party before obtaining ballot access was considered a “procedural ground rule,” not an additional qualification.⁴¹ “Reasonable” election-related procedures that may limit ballot access or identify only “serious” candidates are acceptable regulations of the times, places, and manner of elections.⁴²

B. Qualifications for Members of the Senate

The qualifications for members of the Senate are largely similar to the qualifications for members of the House:

At least thirty years old. Unlike Representatives, who must be at least twenty-five years of age, Senators must be thirty years old.⁴³

Nine years a citizen of the United States. While representatives must be seven years a citizen, senators must be citizens for at least nine years.⁴⁴

Inhabitant of that state. Similar to Representatives, Senators must also be inhabitants of the state.⁴⁵

fundamental articles in a Republican Govt. and ought to be fixed by the Constitution.”); *see also* *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980) (compiling cases). *See generally* Lowenstein, *supra* note 29.

37. *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (“[S]ince [plaintiff] was duly elected by the voters . . . and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.”).

38. *See id.* at 550 (concluding that the case was justiciable and not a political question); Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2236–37 (2006).

39. *See generally* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013 (2011) (discussing prevalence of “sore loser” laws).

40. 415 U.S. 724 (1974).

41. *See* Lowenstein, *supra* note 29, at 23.

42. *See, e.g., Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (upholding Texas statute requiring signatures equal to one percent of vote from previous gubernatorial election); *Jeness v. Fortson*, 403 U.S. 431 (1971) (upholding Georgia’s requirement that third-party candidates file a petition signed by at least five percent of voters to have their names placed on the ballot in the general election); *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980) (finding “resign-to-run” statute that required state court judges to resign their position before running for Congress was not an additional qualification).

43. U.S. CONST. art. I, § 3, cl. 3.

44. *Id.*

45. *Id.*; *see also* *Strong v. Breaux*, 612 So. 2d 111 (La. Ct. App. 1992) (per curiam). In 2014, Senator Mary Landrieu was challenged on similar grounds before the election. A state court dismissed the claim, concluding that inhabitancy attached at the time of election, not before, which meant that the claim was not ripe. *See* Julia O’Donoghue, *Judge Throws out Suit*

*Not a holder of another civil office, or a recipient of increased emoluments.*⁴⁶

*Not disqualified from federal office after impeachment and conviction.*⁴⁷

*Not one who engaged in insurrection or rebellion.*⁴⁸

*Elected.*⁴⁹

Timing of qualifications. As with members of the House of Representatives, the qualifications usually must exist when the member is presented to Congress.⁵⁰

No additional qualifications. As with the House, these qualifications are exclusive.⁵¹

C. Qualifications for the Executive

Natural born citizen. Article II of the Constitution provides, “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”⁵² No federal court has squarely reached the meaning of the Natural Born Citizen Clause of Article II, as standing proves a high hurdle for such challenges.⁵³ Questions surrounding the “natural born” requirement primarily concern persons born in the territories of the United States, on American bases outside of the United States, persons born to a U.S. diplomat in another country, and American Indians born on reservations.⁵⁴

At least thirty-five years old. Article II also dictates that “neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years”⁵⁵ Like the requirement for Congress, it is fairly straightforward.⁵⁶

Challenging Mary Landrieu’s Residency, NEW ORLEANS TIMES-PICAYUNE, Sept. 5, 2014, http://www.nola.com/politics/index.ssf/2014/09/landrieu_residency_court_case.html.

46. See *supra* notes 21–23 and accompanying text.

47. See *supra* note 24 and accompanying text.

48. See *supra* notes 25–28 and accompanying text.

49. See *supra* note 29 and accompanying text.

50. See *supra* note 30 and accompanying text.

51. See, e.g., *Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972) (rejecting state-created two years’ residency requirement as unconstitutional); *Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720 (N.J. 2010) (rejecting recall mechanism for U.S. Senators as an unconstitutional additional qualification).

52. U.S. CONST. art. II, § 1, cl. 5.

53. See, e.g., *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009); *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008). But standing is not the same obstacle in state courts and could conceivably be used to deny ballot access. See *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 209 (Ct. App. 2010) (adjudicating a presidential candidate’s claim but finding no duty for the state or elector to inquire into a candidate’s qualifications). Additionally, courts have occasionally defined the meaning of the Clause. See, e.g., *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. Ct. App. 2009). Despite some uncertainty, there is some consensus as to who qualifies as a natural born citizen. It is settled that persons born in the United States qualify as natural born, but persons born to aliens outside of the United States do not qualify. Pryor, *supra* note 5, at 881–82.

54. See William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457 (2010); Pryor, *supra* note 5, at 881–82.

55. U.S. CONST. art. II, § 1, cl. 5.

56. See *supra* notes 12–14 and accompanying text.

Fourteen-year resident. An individual must also have been “fourteen Years a Resident within the United States.”⁵⁷ Authority suggests the fourteen-year residency requirement, in conjunction with the alternative to being a natural born citizen (that is, being a citizen at the time of the Constitution’s adoption), sought to qualify all fifty-five delegates of the 1787 Federal Convention.⁵⁸ In contemporary application, the residency requirement, like the age requirement, acts as a temporary bar for a natural born citizen.⁵⁹

Not term limited. The 22nd Amendment bars any person who has served two four-year terms as President, or who has served one four-year term and acted as President for more than two years of a term to which another individual was elected.⁶⁰

Not disqualified from federal office after impeachment and conviction. The Constitution provides that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States”⁶¹ The Presidency is an “Office of honor, Trust or Profit,” but the decision to disqualify an impeached official is a matter of discretion left to the Senate.⁶²

Not one who engaged in insurrection or rebellion. Also, similar to the requirements for Congress, a candidate who has engaged in insurrection or rebellion is ineligible, unless Congress removes the disability.⁶³

Not an inhabitant of the same state as the Vice President. There is one slightly unusual qualification, if it can even be properly called a qualification. A presidential elector may not cast a vote for a presidential candidate and a vice presidential candidate if both candidates are inhabitants of that elector’s state.⁶⁴ As the Electoral

57. U.S. CONST. art. II, § 1, cl. 5.

58. See Sarah Helene Duggin & Mary Beth Collins, *‘Natural Born’ in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 67 n.55 (2005). At the constitutional convention, there was a concern that even this exception was too generous, as no number of years could prepare a foreigner for the office of President; but “as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the 7th of September it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the constitution are eligible to the office of president.” *United States v. Wong Kim Ark*, 169 U.S. 649, 715 (1898) (Fuller, C.J., dissenting) (quoting 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 192 (1882)).

59. John R. Hein, Comment, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 U. PA. J. CONST. L. 423, 423 n.3 (2009).

60. U.S. CONST. amend. XXII.

61. *Id.* art. I, § 3, cl. 7; see also Amar & Amar, *supra* note 27, at 114–16.

62. *Cf. Waggoner v. Hastings*, 816 F. Supp. 716, 719 (S.D. Fla. 1992) (examining the situation concerning Alcee Hastings, elected to the House of Representatives after being impeached and removed from a federal judgeship).

63. See *supra* notes 25–28 and accompanying text; see also HINDS’ PRECEDENTS, *supra* note 19, § 454.

64. U.S. CONST. art. II, § 1, cl. 3 (“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.”), amended by *id.* amend. XII (“The Electors shall meet in their

College was originally conceived, electors cast two votes; after the votes were tabulated, the candidate with the most votes became President, and the candidate with the second-most votes became Vice President.⁶⁵ There were a number of early misfires, including “vote throwing” to ensure that John Adams would be Vice President in 1789 and 1792;⁶⁶ miscommunicated strategizing in 1796 that gave Mr. Adams the Presidency and his political enemy Thomas Jefferson the Vice Presidency;⁶⁷ and the electoral tie in 1800 between Mr. Jefferson and Aaron Burr, which then prompted a thirty-six round runoff in the House.⁶⁸

The Twelfth Amendment allowed electors to designate one candidate for President and one candidate for Vice President.⁶⁹ This small change would avoid the problems from these first four presidential elections.

But one element of the original system remained. There was a concern that each state’s electors would prefer two candidates from the electors’ home state.⁷⁰ To avoid excessive provincialism, the Constitution mandated that an elector could not vote for candidates if both were inhabitants of the elector’s state.⁷¹ Inhabitancy was measured at the time the electors cast their votes for the candidates.⁷² This would ensure that each elector would always vote for at least one candidate who was an inhabitant of another state.

It would be perfectly acceptable for an elector to vote for two candidates of the same state if that elector was not an inhabitant of that state. And this has happened—for instance, in 1792, four Kentucky electors cast votes for both George Washington and Mr. Jefferson, even though both were residents of Virginia.⁷³

And it would be entirely possible for candidates to win the Presidency and Vice Presidency as residents of the same state. After all, if a ticket obtained a majority of the electoral vote without a need for the electoral votes of the ticket’s home state, the ticket would still win the Presidency and Vice Presidency.

Accordingly, the inhabitancy provision is, strictly speaking, not a qualification, but a restriction on electors voting for certain candidates if those candidates possess certain (prohibited) qualifications.⁷⁴ But as it operates as a *de facto* qualification on presidential tickets in modern practice, and as Congress may have the power to refuse

respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . .”).

65. *Id.* art. II, § 1, cl. 3.

66. See SVEND PETERSEN, *A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS* 11 tbls.3 & 4 (Greenwood Press 1981) (1963).

67. See *id.* at 12 tbl.5.

68. See *id.* at 13 tbl.6.

69. U.S. CONST. amend. XII.

70. See, e.g., JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 368 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840).

71. See *Jones v. Bush*, 122 F. Supp. 2d 713, 720–21 (N.D. Tex. 2000); cf. *THE FEDERALIST* NO. 68 (Alexander Hamilton) (discussing how the electoral system helps oppose “cabal, intrigue, and corruption”).

72. Thomas Michael Susman, *State of Inhabitancy of Presidential and Vice-Presidential Candidates and the Electoral College Vote*, 47 *TEX. L. REV.* 779, 789 (1969).

73. PETERSEN, *supra* note 66, at 11 tbl.4.

74. See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (Jackson, J., dissenting).

to count the votes of electors who violate this voting requirement,⁷⁵ it is appropriate to consider it a “qualification” for the purposes of this catalog.

Person. Almost an afterthought, the President of the United States must be a “[p]erson.”⁷⁶ In at least one instance involving a dead candidate, there has been a serious question as to what it means to be a “person” for purposes of Article II.⁷⁷

Qualifications for Vice President. The requirements for Vice President are the same as those for President—“no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”⁷⁸ But some have argued that a term-limited President could still run for Vice President: a term-limited President would still be “eligible” for the office of President, as the 22nd Amendment restricts only persons “elected to the office of the President more than twice,” and the Twelfth Amendment only bars those “ineligible to the office” of President.⁷⁹ Accordingly, the argument goes, a term-limited President who becomes Vice President is eligible for the office of President according to the rules of succession, but he is not eligible to be elected as President. The stronger view may be that once a President has met the term limits of the 22nd Amendment, he is ineligible to be President.⁸⁰

Qualifications for presidential electors. State legislatures have the exclusive power to select the mode of appointing electors.⁸¹ Electors, however, may not be Senators, Representatives, or persons “holding an Office of Trust or Profit under the United States.”⁸² Courts have adopted a functional definition of who qualifies as an

75. *See infra* notes 225–240 and accompanying text (discussing Congress’s counting of electoral votes after the 1872 election).

76. U.S. CONST. art. II, § 1, cl. 5.

77. *See infra* notes 227–233 and accompanying text.

78. U.S. CONST. amend. XII. *But see* Jamin Soderstrom, Note, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 PEPP. L. REV. 967 (2008) (suggesting alternatives to existing vice presidential office).

79. *See, e.g.*, Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 619 (1999) (“[W]e do not believe an already twice-elected President *is* ‘constitutionally ineligible to the office of President.’” (emphasis in original) (quoting U.S. CONST. amend. XII)); Michael C. Dorf, *The Case for a Gore-Clinton Ticket*, FINDLAW (July 31, 2000), <http://writ.news.findlaw.com/dorf/20000731.html> (“[The language of the 22nd Amendment] only bars from the vice-presidency those persons who are ‘ineligible to the office’ of President. Clinton is not ineligible to the office of President, however. He is only disqualified (by the Twenty-Second Amendment) from being elected to that office.” (emphasis omitted) (quoting U.S. CONST. amend. XII)).

80. *See, e.g.*, Matthew J. Franck, *Constitutional Sleight of Hand*, NAT’L REV. ONLINE (July 31, 2007, 9:02 AM), <http://www.nationalreview.com/bench-memos/51444/constitutional-sleight-hand/matthew-j-franck> (“It follows from the 22nd Amendment that Bill Clinton, being ‘constitutionally ineligible’ to be *elected* president, is ineligible to *become* president by another route. He is, in short, ineligible to *be* president, and therefore ineligible to become vice president under the 12th amendment.” (emphasis in original) (quoting U.S. CONST. amend. XII)).

81. U.S. CONST. art. II, § 1, cl. 2; *see also* McPherson v. Blacker, 146 U.S. 1, 35 (1892) (“[I]t is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.”).

82. U.S. CONST. art. II, § 1, cl. 2. Electors themselves are not “officers or agents of the

officeholder.⁸³ They are subject to the same disqualification for engaging in insurrection or rebellion as other federal officials.⁸⁴ Congress has independently evaluated the constitutional eligibility of electors on occasion.⁸⁵

Additional qualifications. It appears that states may add qualifications for presidential candidates. For instance, Professor Akhil Reed Amar has noted that, prior to the adoption of the Nineteenth Amendment, it would have been lawful for states to prohibit women from running for federal office; since the enactment of women's suffrage, Professor Amar notes that states are effectively required to allow women to run.⁸⁶ Indeed, as the state legislature may direct the manner of selecting presidential electors, it seems that it might cabin the discretion of voters selecting presidential candidates in ways that it might not otherwise be able to do with congressional candidates.⁸⁷ But courts have occasionally treated the holding in *U.S. Term Limits, Inc. v. Thornton*,⁸⁸ which found the qualifications for members of Congress enumerated in the Constitution as exclusive, applicable to presidential elections, too.⁸⁹

States, presumably, may add qualifications to presidential electors.⁹⁰ It is incumbent upon the state legislature to select the manner in which presidential electors are selected.⁹¹ In the contemporary era, a prerequisite to winning appointment as an elector is winning the plurality of a popular vote.⁹² States condition the selection of electors in other ways, too. Michigan, for instance, requires electors to be citizens for ten years, and electors from each congressional district must reside and be registered to vote in that district for at least one year.⁹³ As long as

United States.” *In re Green*, 134 U.S. 377, 379 (1890); see also Vasan Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 128–30 (2001).

83. See *In re Corliss*, 11 R.I. 638 (1876) (finding that a commissioner of the U.S. Centennial Commission occupied an “office of trust” disqualifying him from serving as an elector).

84. U.S. CONST. amend. XIV, § 3.

85. See Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 559 n.100 (2004).

86. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 289 (2012).

87. See, e.g., Eliana Johnson, *Rand v. the State of Kentucky*, NAT'L REV. ONLINE (May 29, 2014, 12:39 PM), <http://www.nationalreview.com/article/379060/rand-v-state-kentucky-eliana-johnson> (discussing history of and dispute concerning state laws that prohibit presidential candidates from simultaneously obtaining ballot access in the same election as congressional candidates).

88. 514 U.S. 779 (1995).

89. See, e.g., Nat'l Comm. of the U.S. Taxpayers Party v. Garza, 924 F. Supp. 71, 75 (W.D. Tex. 1996); accord John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 785–86 (2001) (citing *U.S. Term Limits*, 514 U.S. 779, for 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)).

90. See Kesavan, *supra* note 82, at 140–41.

91. U.S. CONST. art. II, § 1, cl. 2.

92. Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372, 374 (2007).

93. MICH. COMP. LAWS ANN. § 168.41 (West 2008).

a state's conditions do not violate some other provision of the U.S. Constitution,⁹⁴ additional qualifications are permitted.

D. Classifications of Qualifications

The foregoing analysis of these qualifications offers insight about similarities and differences among the qualifications. These qualifications may be classified into one of two primary categories: curable and incurable.

"Curable" qualifications are those a candidate may meet if some intervening action or event occurs. They may require an action from the candidate (e.g., establishing inhabitancy, resigning an incompatible office, becoming a citizen); the passage of time (e.g., age restrictions, period of citizenship); or an act of Congress (e.g., removal of disability for candidates who engaged in insurrection or rebellion).

"Incurable" qualifications are ones that cannot be met by an intervening action. Those include being a "person" (i.e., a living human being), a "natural born Citizen," not term limited, and not disqualified from federal office after impeachment and removal. Of course, theoretically, incurable qualifications may be cured by a constitutional amendment that abolishes the qualification or makes it curable.

Curable qualifications also come in two types. The first type are qualifications that may be "cured" at some point during the term of elected office. For instance, someone who is not twenty-five years old, but will turn twenty-five within the next two years, could have the qualification cured before the end of the House term. The House, for example, has refused to seat a member until he reached twenty-five years of age, but has also refused to declare the seat vacant.⁹⁵ The second type are qualifications that may not be cured at some point during the term of elected office. A twenty-seven-year-old running for President, for example, would not turn thirty-five during that four-year term.

These classifications matter because Congress has treated unqualified candidates differently when these candidates win elections.⁹⁶ And how Congress treats qualifications is not necessarily how states might treat qualifications—or how courts might decide whether or not a candidate meets constitutional qualifications in the course of litigation, the subject of the next Part.

II. LITIGATION ABOUT QUALIFICATIONS

There has been some litigation over whether candidates the state excluded from the ballot because the state found them not qualified were improperly left off,⁹⁷ or whether candidates scheduled to appear on a state ballot actually met the qualifications enumerated in the Constitution.⁹⁸ And the judiciary, quite often, has refused to

94. See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 25 (1968) (invalidating a state law that made it "virtually impossible" for parties other than the Democratic and Republican parties to obtain ballot access for their presidential candidates in violation of the Equal Protection Clause).

95. See *infra* notes 177–81 and accompanying text.

96. See *infra* notes 173–98 and accompanying text (examining Congress's treatment of potentially unqualified candidates).

97. See *infra* Part II.A.

98. See *infra* Part II.B.

adjudicate the merits of those disputes.⁹⁹ The examination below demonstrates that the bulk of the disputes have arisen in the context of presidential elections, that they are of fairly recent vintage, and that courts have approached the question differently than Congress's treatment of the Constitution's enumerated qualifications.

A. Qualifications Litigation After the State Has Excluded a Candidate

First, there are instances when the state has refused to list a candidate on the ballot, and the candidate subsequently challenged that refusal.

William Higgs, 1968. The People's Constitutional Party nominated William Higgs to run for the House of Representatives in a district in New Mexico in 1968.¹⁰⁰ He had "recently" moved to New Mexico, but the Secretary of State had excluded him from the ballot for failing to meet the constitutional qualification of inhabitancy.¹⁰¹ The Supreme Court of New Mexico ultimately found that whether he was a "sojourner" so as to disqualify him from holding the office, if elected, [was] not for [them] to decide."¹⁰² It was a matter left to Congress, and Mr. Higgs should have been certified to appear on the ballot.¹⁰³

Eldridge Cleaver, 1968. The Peace and Freedom Party nominated thirty-three-year-old Eldridge Cleaver for president in 1968.¹⁰⁴ New York refused to list the party on the ballot because the electors could not be listed without also listing presidential and vice presidential candidates.¹⁰⁵ California refused to list him because he was ineligible, and the U.S. Supreme Court denied the petition for a writ of certiorari.¹⁰⁶

Linda Jenness and Andrew Pulley, 1972. Illinois rejected listing Linda Jenness of the Socialist Workers Party as a candidate for President in 1972.¹⁰⁷ Ms. Jenness refused to take a loyalty oath mandated by state law, but the state electoral board also informed her that because she was thirty-one years of age, she would not be listed on the ballot.¹⁰⁸ A federal court struck down the loyalty oath as unconstitutional.¹⁰⁹ Nevertheless, the court found that an "affirmation of citizenship of the United States"

99. See, e.g., *infra* notes 100–03 and accompanying text (noting courts' deference to judgment of Congress concerning qualifications of a congressional candidate); *infra* notes 132–36 and accompanying text (highlighting most courts' conclusions that claims concerning eligibility of Messrs. McCain and Obama were not justiciable).

100. State *ex rel.* Chavez v. Evans, 446 P.2d 445, 448 (N.M. 1968).

101. *Id.*

102. *Id.*

103. *Id.* at 449–50.

104. *In re* Garst, 294 N.Y.S.2d 33, 34 (Sup. Ct.), *aff'd sub nom.* Garst v. Lomenzo, 294 N.Y.S.2d 990 (App. Div.), *aff'd*, 242 N.E.2d 482 (N.Y. 1968).

105. *Id.*

106. Cleaver v. Jordan, 393 U.S. 810 (1968), as discussed in *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Ct. App. 2010). Despite this, the slate of electors for the Peace and Freedom Party still appeared on the ballot and garnered over 27,000 votes. See PETERSEN, *supra* note 66, at tbl.135.

107. Socialist Workers Party of Illinois v. Ogilvie, 357 F. Supp. 109, 112 (N.D. Ill. 1972) (per curiam).

108. *Id.*

109. *Id.*

was constitutionally valid, and that denying ballot access because of her age “violate[d] no federal right.”¹¹⁰

Abdul Hassan, 2012. Abdul Hassan was a naturalized citizen of the United States who sought ballot access to run for President in 2012. In one federal proceeding, he sought a declaration that he was eligible to run for President.¹¹¹ His argument turned on a theory that, among other things, the Fourteenth Amendment implicitly repealed the Natural Born Citizen Clause.¹¹² That court found that the claims were ripe for review but that Mr. Hassan was not eligible, dismissing the complaint.¹¹³ Federal courts found that refusals in Iowa,¹¹⁴ Montana,¹¹⁵ New Hampshire,¹¹⁶ and Colorado¹¹⁷ to put Mr. Hassan on the ballot for his failure to affirm that he met the constitutional requirements were constitutional.

Peta Lindsay, 2012. The California Secretary of State refused to list Peta Lindsay of the Peace and Freedom Party as a presidential candidate on the 2012 primary ballot because she was twenty-seven years old; a federal court upheld the refusal.¹¹⁸

B. Qualifications Litigation After the State Has Included a Candidate

The second category of cases includes those in which the state has listed a candidate on the ballot and a litigant sues to exclude the candidate from the ballot for lack of qualifications. The litigants may be taxpayers or voters, who often lack standing. When candidates running against the allegedly unqualified candidate sue, they fare better in terms of standing but still tend to lose on the merits.¹¹⁹

110. *Id.* at 113; *cf.* John Copeland Nagle, Essay, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 470 n.1 (1997) (noting that the court found that keeping an underage candidate off the ballot did not violate the 20th Amendment). In related litigation, the Federal Communications Commission found that Ms. Jenness and Mr. Pulley were not entitled to “equal time” on network television under Section 315 of the Communications Act of 1934 because they were not legally qualified candidates. *In re Complaint by Socialist Worker Party 1972*, New York, N.Y., 39 F.C.C.2d 89, 92–93 (1972).

111. *Hassan v. United States*, No. 08-CV-0938 (NG), 2010 WL 9493338, at *1 (E.D.N.Y. June 15, 2010), *aff’d on other grounds*, 441 F. App’x 10 (2d Cir. 2011) (concluding plaintiff lacked standing); *accord Hassan v. Fed. Election Comm’n*, 893 F. Supp. 2d 248 (D.D.C. 2012).

112. *Hassan*, 2010 WL 9493338, at *2.

113. *Id.* at *1, *3–4.

114. *Hassan v. Iowa*, CIVIL NO. 4-11-CV-00574, 2012 U.S. Dist. LEXIS 188213, at *3–20 (S.D. Iowa Apr. 26, 2012), *aff’d*, 493 F. App’x 813 (8th Cir. 2012).

115. *Hassan v. Montana*, No. CV-11-72-H-DWM-RKS, 2012 WL 8169887, at *1 (D. Mont. May 3, 2012), *aff’d*, 520 F. App’x 553 (9th Cir. 2013).

116. *Hassan v. New Hampshire*, Civil No. 11-cv-552-JD, 2012 WL 405620, at *4 (D.N.H. Feb. 8, 2012).

117. *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo.), *aff’d*, 495 F. App’x 947 (10th Cir. 2012).

118. *See Peace and Freedom Party v. Bowen*, No. 2:12-cv-00853-GEB-EFB, 2012 WL 1455248 (E.D. Cal. Apr. 26, 2012) (denying motion for preliminary injunction); *Peace and Freedom Party v. Bowen*, 912 F. Supp. 2d 905 (E.D. Cal. 2012); *aff’d sub nom. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

119. *See, e.g., Barnett v. Obama*, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *8–16 (C.D. Cal. Oct. 29, 2009) (finding presidential candidates as sole plaintiffs to have

But this kind of litigation is historically rare. This may in part be attributable to a rather laissez-faire attitude of election litigation until the twenty-first century.¹²⁰ It may be that the parties or ballot-seeking nominees have rarely had contestable qualifications (which cannot explain all of it, as there is an extensive history of exclusions from Congress, and a nontrivial number of unqualified candidates listed on the ballot). It may be that even modest state regulations have channeled mostly qualified members to the ballot. Or it may be that unqualified, ballot-listed candidates do not generate litigation, as many of them are third-party candidates. Regardless, research found that this litigation was of recent vintage.¹²¹

Dick Cheney, 2000. Governor George W. Bush named Dick Cheney as his vice presidential candidate in 2000.¹²² Mr. Bush and Mr. Cheney both lived in Texas.¹²³ Mr. Cheney moved to Wyoming so that Texas electors could vote for both candidates under the Twelfth Amendment.¹²⁴ After the election, voters sued to enjoin Texas electors from voting for both candidates.¹²⁵ A federal court dismissed the action for lack of standing but went on to conclude that Mr. Cheney was an “inhabitant” of Wyoming.¹²⁶ Admittedly, the lawsuit arose after the Republican slate of electors had been selected, and there may have been the additional question as to whether the court even had the power to issue an injunction binding the future votes of the presidential electors.¹²⁷ It was, nonetheless, a qualifications dispute.

Jim McCrery, 2006. In a Louisiana congressional election in 2006, Jim McCrery defeated several candidates. After losing, one candidate sued and alleged that Mr. McCrery had sold his residence in Louisiana and no longer qualified as an “inhabitant.”¹²⁸ Again, this case arose after the election, but a federal court rejected the claim as the matter was left to Congress.¹²⁹

Róger Calero, 2008. Róger Calero ran for President as the Socialist Workers Party candidate in 2004 and 2008.¹³⁰ It appears there was just one case litigating Calero’s appearance on the ballot, in New York in 2008, and the state court there rejected the claims and permitted him to appear on the ballot.¹³¹

suffered an injury in fact for purposes of Article III); *see generally infra* notes 133–36 (identifying cases, many of which were dismissed on justiciability grounds).

120. *See* Richard L. Hasen, *The Democracy Canon*, 62 *STAN. L. REV.* 69, 89–91 (2009) (assessing increase in election-related litigation).

121. *See id.*

122. *Jones v. Bush*, 122 F. Supp. 2d 713, 715 (N.D. Tex. 2000).

123. *Id.*

124. *Id.* at 720.

125. *Id.* at 715.

126. *Id.* at 720.

127. *See id.* at 718 n.9 (assuming arguendo that the plaintiffs met the requirements for obtaining injunctive relief).

128. *Cox v. McCrery*, No. Civ.A.06-2191, 2007 WL 97142, at *1 (W.D. La. Jan. 5, 2007).

129. *Id.*

130. *See Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722, 2012 WL 1205117 (Sup. Ct. 2012).

131. *Id.* at *2 (finding that plaintiff lacked standing, that plaintiff failed to state a claim, that the court lacked subject matter jurisdiction, and that plaintiff was precluded due to action filed in *Strunk v. Paterson*, Index No. 29642/08).

John McCain, 2008. John McCain was born to citizen parents in the Panama Canal Zone in 1936.¹³² When he ran for President in 2008, some challenged that he was not a natural born citizen, but courts uniformly rejected any challenges to his appearance on the ballot.¹³³

Barack Obama, 2008 & 2012. Barack Obama was born in Hawaii in 1961, though his father was Kenyan, which prompted various concerns and conspiracy theories.¹³⁴ Some suggested that Mr. Obama held Kenyan or Indonesian citizenship at some point in his life, which meant he was not a natural born citizen; others contended that he was actually born in either Kenya or Indonesia, and that copies of his birth certificate or other information to the contrary were forged.¹³⁵ Courts uniformly have rejected challenges to these “birther” suits, both preelection and postelection, in his 2008 and 2012 presidential bids.¹³⁶

132. Resolution Recognizing that John Sidney McCain, III, Is a Natural Born Citizen, S. Res. 511, 110th Cong. (2008) (enacted).

133. See, e.g., *Stamper v. United States*, No. 1:08 CV 2593, 2008 WL 4838073 (N.D. Ohio Nov. 4, 2008) (finding that plaintiff lacked standing); *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) (finding that plaintiff lacked standing, that matter was left to Congress and electors in the first instance, and that it was “highly probable” that he was a natural born citizen); *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008) (standing); *Strunk*, 2012 WL 1205117, at *2 (finding that plaintiff lacked standing, that plaintiff failed to state a claim, that the court lacked subject matter jurisdiction, and that plaintiff was precluded due to action filed in *Strunk v. Paterson*, Index No. 29642/08).

134. See, e.g., *Berg v. Obama* 574 F. Supp. 2d 509, 513 (E.D. Pa. 2008), *aff’d*, 586 F.3d 234 (3d Cir. 2009) (citing plaintiff’s allegations that “Obama is either a citizen of his father’s native Kenya, by birth there or through operation of U.S. law; or that Obama became a citizen of Indonesia by relinquishing his prior citizenship (American or Kenyan) when he moved there with his mother in 1967”).

135. See *id.*

136. *Kerchner v. Obama*, 612 F.3d 204 (3d Cir. 2010) (dismissing suit for lack of standing); *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009) (dismissing suit for lack of standing); *Grinols v. Electoral Coll.*, No. 12-cv-02997-MCE-DAD, 2013 WL 211135 (E.D. Cal. Jan. 16, 2013) (rejecting as a political question; most plaintiffs lacked standing, and the issue was moot and barred by the Speech or Debate Clause); *Liberty Legal Found. v. Nat’l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791 (W.D. Tenn. 2012) (dismissing suit for lack of standing); *Taitz v. Obama*, 707 F. Supp. 2d 1 (D.D.C. 2010) (rejecting writ of quo warranto for lack of standing); *Barnett v. Obama*, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009) (finding that plaintiffs generally lacked standing), *aff’d sub nom. Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011) (dismissing suit for lack of standing); *Cook v. Good*, No. 4:09-cv-82 (CDL), 2009 WL 2163535 (M.D. Ga. July 16, 2009) (standing); *Hollister v. Soetoro*, 601 F. Supp. 2d 179 (D.D.C. 2009) (dismissing as interpleader was an inappropriate form of action), *aff’d*, 368 F. App’x 154 (D.C. Cir. 2010) (per curiam); *Cohen v. Obama*, Civil Action No. 08 2150, 2008 WL 5191864 (D.D.C. Dec. 11, 2008) (dismissing suit for lack of standing); *Stamper*, 2008 WL 4838073 (dismissing suit for lack of standing); *McInnish v. Bennett*, CV-12-1053, 2014 WL 1098246 (Ala. Mar. 21, 2014) (per curiam) (rejecting plaintiffs’ claim with no opinion); *Lamb v. Obama*, No. S-15155, 2014 WL 1016308 (Alaska Mar. 12, 2014) (finding plaintiff lacked standing and lacked legally cognizable claim); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207 (Ct. App. 2010) (holding that the state had no duty to investigate qualifications); *Wrotnowski v. Bysiewicz*, 958 A.2d 709 (Conn. 2008) (finding no statutory standing); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. Ct. App. 2009) (finding

C. Lessons from Litigation

The majority of decisions in qualifications litigation do not reach the merits and fail to examine whether a candidate is actually qualified. Federal courts have often found Article III standing as a barrier to justiciability.¹³⁷ Indeed, the overwhelming number of cases litigated in federal court during the 2008 election regarding Mr. Obama and Mr. McCain were dismissed for lack of standing.¹³⁸ Plaintiffs were usually voters who lacked an “injury in fact,”¹³⁹ because the harm allegedly suffered was essentially shared by all voting citizens.¹⁴⁰ Third-party candidates acting as plaintiffs fared somewhat better in surviving standing and having the case decided on other grounds.¹⁴¹

Mr. Obama a “natural-born citizen” who was born within the borders of the United States); *Strunk*, 2012 WL 1205117, at *2 (finding plaintiff lacked standing, plaintiff failed to state a claim, the court lacked subject matter jurisdiction, and plaintiff was precluded due to action filed in *Strunk v. Paterson*, Index No. 29642/08); *Greenberg v. Brunner*, No. 2008-CV-1024 (Wood Cnty. Ohio Ct. Com. Pl. Jan. 14, 2009); *Neal v. Brunner*, No. 08CV72726 (Warren Cnty. Ohio Ct. Com. Pl. Nov. 17, 2008); *Paige v. State*, 88 A.3d 1182 (Vt. 2013) (finding plaintiff’s claim moot); *Petition for Writ of Certiorari, Donofrio v. Wells*, 129 S. Ct. 752 (2008) (No. 08-A407), 2008 WL 5195863. This chronicle excludes other “birther”-related litigation, such as denying that a soldier is obligated to heed the orders of an ineligible president. *Sibley v. Alexander*, 916 F. Supp. 2d 58 (D.D.C. 2013) (dismissing suit based on standing and mootness); *Reade v. Galvin*, No. 12-11492-DJC, 2012 WL 5385683 (D. Mass. Oct. 30, 2012) (finding lack of standing and finding no duty for state to investigate challenges to qualifications); *Sibley v. Obama*, 866 F. Supp. 2d 17 (D.D.C. 2012) (finding lack of jurisdiction); *Tisdale v. Obama*, No. 3:12-CV-00036-JAG, 2012 WL 7856823 (E.D. Va. Jan. 23, 2012) (finding a failure to state a claim because Mr. Obama was born in the United States; plaintiff also alleged that Mr. Romney and Ron Paul were ineligible because they had at least one noncitizen parent, and the court rejected these claims on the same basis), *aff’d*, 473 F. App’x 203 (4th Cir. 2012); *Rhodes v. MacDonald*, No. 4:09-CV-106 (CDL), 2009 WL 2997605 (M.D. Ga. Sept. 16, 2009); *Wolf v. Fuddy*, 301 P.3d 1268 (Haw. Ct. App. 2013) (finding plaintiff lacked standing to request Mr. Obama’s birth certificate to investigate the candidate’s eligibility); *Jordan v. Reed*, No. 12-2-01763-5, 2012 WL 4739216 (Wash. Super. Ct. Aug. 29, 2012) (dismissing for failure to join indispensable party, lack of subject matter jurisdiction, and lack of statutory authority for secretary to investigate); *Plaintiff’s Reply to Defendant Obama’s Memorandum of Law of June 15, 2012 in Support of His Motion to Dismiss and Plaintiff’s Second Supplemental Memorandum, Voeltz v. Obama*, No. 2012-CA-00467, 2012 WL 2524874 (Fla. Cir. Ct. June 29, 2012), 2012 WL 3195521.

137. *See generally* Tokaji, *supra* note 8 (describing justiciability barriers to federal adjudication of qualifications).

138. *See supra* notes 133, 136 (compiling cases and noting that most were dismissed on justiciability grounds).

139. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining injury in fact).

140. *See* Tokaji, *supra* note 8, at 33.

141. *See, e.g.*, *Barnett v. Obama*, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *8–10, *16 (C.D. Cal. Oct. 29, 2009) (finding that candidates for President and Vice President could potentially satisfy the injury-in-fact requirement, but ruling that plaintiffs lacked standing on redressability grounds), *aff’d sub nom.* *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011); *cf.* *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990) (concluding that a candidate could challenge certification of other candidates).

State judiciaries, in contrast, have general jurisdiction and are not bound by the Article III jurisdictional requirement, even when they adjudicate questions of federal law.¹⁴² Indeed, some states have eschewed an examination of justiciability altogether and addressed the merits of the claim.¹⁴³

These disputes, at their core, are the consequences of an assumption. Courts assume that it is within the power of the state government to adjudicate the qualifications of a federal candidate in the first place, and, subsequently, to exclude an unqualified candidate, to include a qualified candidate, or even to include an unqualified candidate. However, courts have not openly addressed this assumption.

There have been instances where courts come close to examining whether state governments have the power to evaluate qualifications, but they usually skirt just outside the subject. For instance, a New York state court concluded that the determination of the qualifications of presidential candidates was a nonjusticiable political question.¹⁴⁴ It was not an examination of whether the state *government* had the power to evaluate qualifications; it simply disclaimed any role of the state *judiciary*. However, that hardly addresses the question as to whether state legislatures and executives ought to engage in the matter.¹⁴⁵

Additionally, a California state court concluded that the Secretary of State had no *affirmative duty* to examine the qualifications of presidential candidates.¹⁴⁶ Even if the state statutory authority did not demand a “ministerial duty to investigate” constitutional eligibility of candidates,¹⁴⁷ it still did not address whether there was the constitutional authority to do so.

142. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 138 (5th ed. 2003).

143. *See, e.g.*, *Keyes v. Bowen*, 117 Cal. Rep. 3d 207 (Ct. App. 2010) (undertaking no justiciability analysis where at least one plaintiff was not a candidate or presidential elector, and solely addressing demurrer on the merits); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678 (Ind. Ct. App. 2009) (undertaking no justiciability analysis, and solely addressing motion to dismiss on the merits).

144. *Strunk v. N.Y. State Bd. of Elections*, 950 N.Y.S.2d 722, 2012 WL 1205117, at *11–12 (Sup. Ct. Apr. 11, 2012). Of note, the “political question doctrine” is a function of “separation of powers,” *see Baker v. Carr*, 369 U.S. 186, 210 (1962), which is generally a definition of power within the three branches of the federal government and of the role of the federal judiciary, *see FALLON ET AL.*, *supra* note 142. But this state court felt compelled to view itself as bound by the same principle as the federal courts, without explanation.

145. *But see Strunk*, 2012 WL 1205117, at *12 (“[The Electoral Count Act] is the exclusive means to resolve objections to the electors’ selection of a President or a Vice President, including objections raised by plaintiff Strunk. Federal courts have no role in this process. Plainly, state courts have no role. . . . If a state court were to involve itself in the eligibility of a candidate to hold the office of President, a determination reserved for the Electoral College and Congress, it may involve itself in national political matters for which it is institutionally ill-suited and interfere with the constitutional authority of the Electoral College and Congress.”); *but cf. Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (“[T]he challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance.”).

146. *Keyes*, 117 Cal. Rptr. 3d at 213–14.

147. *See id.* at 215.

Finally, these cases are slightly different from instances in which a candidate wishes to *withdraw* from the ballot and claims that his ineligibility under the Qualifications Clause is a basis for removal. The deference to the candidate's desire to withdraw has varied after the candidate claims ineligibility.¹⁴⁸

Ultimately, these cases teach us relatively little about the power of the states in adjudicating the qualifications necessary to hold office. Judiciaries tend to be hands-off when it comes to disputes involving congressional candidates and Republican or Democratic presidential candidates. They are more inclined to allow state officials the discretion to include or exclude third-party presidential candidates from the ballot. But this deference to state lawmakers lacks a theoretical underpinning, to which this Article now turns.

III. THE POWER TO ADJUDICATE QUALIFICATIONS

The Constitution, then, enumerates qualifications for federal office.¹⁴⁹ The judiciary has examined instances where a state actor has included or excluded a candidate from the ballot and litigation ensues, but the litigation has largely focused either on justiciability or on the merits—not on the power of the state actor to make that determination.¹⁵⁰

The next question is: Which authority has the power to evaluate whether a candidate meets those qualifications? After all, by the time the courts are involved in litigation, it is usually at a point in the process where some other election official has already acted (or is about to act), and a litigant is asking for the court to direct the election official to behave differently. Who the decision makers are, and what power they have, are the questions that must be answered prior to a judicial directive.

A. The Power of Voters To Scrutinize Qualifications

As originally conceived, electors would vote for President, state legislatures would vote for Senators, and the people would vote for members of the House of Representatives. The Seventeenth Amendment changed a portion of this process, allowing the people to vote for Senators as they vote for members of the House of Representatives.¹⁵¹

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.¹⁵²

148. Compare *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006) (holding that congressional candidate would remain on ballot despite moving out of state because statute permitting removal of candidate amounted to pre-election day residency requirement), with *Kryzan v. N.Y. State Bd. of Elections*, 865 N.Y.S.2d 793 (App. Div. 2008) (holding that congressional candidate who moved out of state and was disqualified could petition elections board for another candidate to appear on the ballot).

149. See *supra* Part I.

150. See *supra* Part II.

151. U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .”).

152. See, e.g., Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI.

Thus, a voter may consider the constitutional qualifications of a candidate.¹⁵³

Voters, of course, can be wrong. Voters could wrongly refuse to vote for a candidate because they believe he is not a natural born citizen, or not old enough, or not an inhabitant, even if he is. But just as a voter may vote for or against someone on a view unrelated to constitutional qualifications—for instance, on the basis of that candidate’s race or religion—there is little to prevent the voter from exercising her right in whatever way she sees fit.

There is one slight exception. Many state legislatures have cabined the discretion of presidential electors in recent history: some provide a fine or make it a crime to vote for a candidate other than the one pledged; others require oaths and call for resignation from office if an elector casts a “faithless” vote.¹⁵⁴

These pledges are something more than the kind that the Supreme Court upheld in *Ray v. Blair*, which were pledges placed upon electors by the nominating political party and which directed electors to cast ballots in accordance with the directives of the party.¹⁵⁵ While a state might add permissible qualifications to the office of elector,¹⁵⁶ the constitutionality of binding presidential electors in this fashion is a matter of some dispute.¹⁵⁷ Putting this matter aside, it is at least useful to identify this trend before discussing the power of states to independently examine the qualifications of candidates.¹⁵⁸

L. REV. 63, 94 (1990) (“[T]he electorate votes its subjective preferences.”); Jim Rutenberg, *Mormons’ First Families Rally Behind Romney*, N.Y. TIMES, July 17, 2012, at A1 (“I think for Mormons, particularly for prominent ones who already feel widely accepted and admired individually, this feels like a chance to also see their church, which they love, accepted and admired institutionally.”); Samuel L. Jackson Says, “I Voted for Barack Obama Because He Was Black!”, EBONY (Feb. 13, 2012), <http://www. Ebony.com/black-listed/entertainment-culture/samuel-l-jackson-says-i-voted-for-barack-obama-because-he-was-black> (Samuel L. Jackson explained, “I voted for Barack because he was black. ‘Cuz that’s why other folks vote for other people—because they look like them.”).

153. Cf. *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 213 (Ct. App. 2010) (“There is no obligation that the Electors first determine whether the presidential candidate is eligible for office. Similarly, the California Elections Code does not impose on the Electors any obligation to determine a presidential candidate’s eligibility.”).

154. Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121, 121–22 (2006).

155. *Ray v. Blair*, 343 U.S. 214 (1952).

156. See *supra* notes 90–94 and accompanying text.

157. See TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 113 (2d ed. 2012) (examining uncertainty surrounding loyalty oaths and pledges); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 219 (1995) (calling “the constitutionality of such laws . . . highly dubious if we consult constitutional text, history, and structure”); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 696 (1996) (concluding that “the Court’s language and reasoning in *Ray v. Blair* strongly imply that state laws directly binding electors to a specific candidate are constitutional”); cf. *Ray*, 343 U.S. at 230 (finding that a political party’s pledge for presidential electors was constitutional but reserving judgment as to whether the promises were “legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college”).

158. See *infra* Part IV.

B. The Power of Congress To Scrutinize Qualifications

Voters have the power to exercise unfettered discretion to decide for whom to vote, including the power to evaluate the qualifications of a candidate. What power does *Congress* have?

As a preliminary matter, the Constitution treats Congress's evaluation of executive and legislative qualifications quite differently. There is a "textually demonstrable commitment"¹⁵⁹ to Congress to evaluate the qualifications of its own members; there is no such express commitment for its handling of presidential candidates.¹⁶⁰ Federalism further complicates the issue, as the division between federal and state power over elections, while important,¹⁶¹ is often less than clear.¹⁶² Congress's authority in each instance—congressional elections and presidential elections—is considered in turn.

1. Congress's Power in Congressional Elections

A pair of straightforward principles arises from the Supreme Court's interpretation of the Qualifications Clauses for congressional members. First, Congress may not refuse to seat a duly elected candidate who meets all federal constitutional qualifications for office.¹⁶³ Second, the qualifications enumerated in the Constitution are exhaustive, and states cannot add to them.¹⁶⁴

The Constitution gives a robust role to Congress in its power to determine the qualifications of members of Congress. Article I provides, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."¹⁶⁵ Courts have interpreted this provision to be a power vested exclusively in the legislature.¹⁶⁶

159. *Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."); see also Franita Tolson, *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2273–74 (2013).

160. See *infra* Parts IV.C, IV.D. But see *supra* note 145 (state court finding political question doctrine applicable to presidential elections).

161. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 410 (1819) ("They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."); THE FEDERALIST NO. 82 (Alexander Hamilton).

162. See, e.g., Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310 (2014); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 405–07 (2012).

163. *Powell*, 395 U.S. at 522.

164. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

165. U.S. CONST. art. I, § 5, cl. 1.

166. See, e.g., *Sevilla v. Elizalde*, 112 F.2d 29, 38 (D.C. Cir. 1940) ("Apparently it has been fully recognized that that power is lodged exclusively in the legislative branch. Under parallel provisions in state constitutions giving state legislatures the power to determine the qualifications of their members, it is ruled that the legislative power is exclusive—that the courts have no jurisdiction."); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965) ("Accordingly, the federal courts have no jurisdiction to pass on the qualifications and the legality of the election of any member of the House of Representatives."); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934) ("[T]he power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme."). Unlike

The Founders endorsed a strong role for the legislature in evaluating the qualifications of its own members, stretching back before the American founding.¹⁶⁷ In *In re Gadsden*, a dispute in South Carolina in 1762, a Representative to the House of Commons, whose election was administered by a warden of the church, apparently had not been properly sworn.¹⁶⁸ The South Carolina House of Commons declared him elected, but the Governor refused to administer the oath of office.¹⁶⁹ The legislature was in “sharp dispute” with the Governor, noting that “the right to determine the validity of elections for seats in the legislature ‘belonged “SOLELY” and “ABSOLUTELY” to the representatives of the people.’”¹⁷⁰ The people had elected a candidate, and it was left to the peoples’ representatives—that is, the House of Commons—to decide whether to seat him, and not left to another official—in this case, a Governor appointed by the Crown.

The Founders agreed with this understanding of the scope of legislative authority. The Constitution ensured that the federal legislature would hold the power to examine the qualifications of its own members.¹⁷¹ And Congress has regularly used its power to judge the qualification of its members, as its decisions regarding unqualified or heavily disputed members are instructive.¹⁷²

Citizen. In 1794, after Albert Gallatin of Pennsylvania had been sworn in as a Senator, the Senate voted that his election was void and removed him from office.¹⁷³ He had been in the United States since 1780, but he was unable to establish that he had been a citizen for at least nine years.¹⁷⁴ The same happened to James Shields of Illinois in 1849.¹⁷⁵ After he had been seated, the Senate found that he had not been a

the Impeachment Clauses, however, the Qualifications Clauses do not include the word “sole” in assigning responsibility to Congress, which may weigh against a finding that the matter is a political question. *Cf.* *Nixon v. United States*, 506 U.S. 224 (1993) (finding a textually demonstrable commitment to the Senate to try all impeachments because the Constitution grants it the “sole Power” to do so).

167. For an excellent, detailed background on the history of legislative discretion over the elections and seating of its members, see JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW* 51–61, 162–92 (2007); see also Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241, 326–33 (2006) (relating the British Parliament’s attempts to exclude John Wilkes from his elected seat at Parliament and how this affair affected the establishment of the American rules for determining qualifications for the legislature after the Revolutionary War).

168. See Salamanca & Keller, *supra* note 167, at 271.

169. *Id.* at 272.

170. *Id.* (quoting JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776*, at 193 (1963)).

171. See *supra* notes 167–70 and accompanying text.

172. But perhaps its decisions to seat members after an investigation into their qualifications are just as instructive. See, e.g., Salamanca & Keller, *supra* note 167, at 283–95 (chronicling notable disputes when Congress ultimately seated the member). The chronicle of all incidents can be found generally in HINDS’ PRECEDENTS.

173. HINDS’ PRECEDENTS, *supra* note 19, § 428; see also CHAFETZ, *supra* note 167, at 179.

174. HINDS’ PRECEDENTS, *supra* note 19, § 428; see also Salamanca & Keller, *supra* note 167, at 282–83.

175. HINDS’ PRECEDENTS, *supra* note 19, § 429.

citizen of the United States for long enough.¹⁷⁶

Age. In 1859, John Young Brown of Kentucky had a certificate of election and appeared on the list of members-elect of the House of Representatives.¹⁷⁷ He was not sworn in until December 3, 1860, because he was not twenty-five years old until that time.¹⁷⁸ The same occurred with Rush D. Holt, elected to the Senate from West Virginia in 1934.¹⁷⁹ He was twenty-nine years old and did not present himself to the Senate until June 19, 1935, when he turned thirty.¹⁸⁰ The Senate seated him, concluding that age and citizenship “need not be satisfied until an elected Member of Congress presents himself to take the oath.”¹⁸¹

Inhabitant. In 1824, the people of Massachusetts elected John Bailey to the House of Representatives.¹⁸² The House, however, determined that Bailey had resided in the District of Columbia for several years and did not qualify as an “inhabitant” of Massachusetts at the time he was elected.¹⁸³ The House similarly rejected Jennings Pigott in 1863 for being a mere “sojourner” instead of an “inhabitant” of North Carolina.¹⁸⁴

Holder of another office. John Van Ness of New York was appointed major in the militia in the District of Columbia while serving in the House.¹⁸⁵ In 1803, Congress unanimously excluded him from Congress.¹⁸⁶ This precedent prompted a practice among later Representatives, who would resign upon acceptance of an incompatible office.¹⁸⁷

Insurrectionist. In 1870, the North Carolina legislature elected former Confederacy-era Governor Zebulon B. Vance as Senator.¹⁸⁸ He was an avowed insurrectionist, however, and his allegiance to the Confederacy ran afoul of Section 3 of the Fourteenth Amendment.¹⁸⁹ He resigned from the Senate when it appeared that Congress would not remove this disability, and Congress subsequently issued a report noting that he was not entitled to the office.¹⁹⁰

While the Supreme Court has acknowledged one potential ambiguity in the area of federal qualifications, that ambiguity—at least, to Congress, by its own practice—may not exist. The Court in *Powell* noted three “qualifications” in Article I, Section 2: age, citizenship, and inhabitancy.¹⁹¹ But it also explained that there are a number of other qualifications—or, perhaps more specifically, disqualifications—that may or may not fall under Congress’s power to determine qualifications under Article I,

176. *Id.*

177. *Id.* § 418.

178. *Id.*

179. 2 LEWIS DESCHLER, DESCHLER’S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES ch. 7, § 10.2 (1977).

180. *Id.*

181. *Id.*; see also CHAFETZ, *supra* note 167, at 180; Salamanca & Keller, *supra* note 167, at 306–11.

182. HINDS’ PRECEDENTS, *supra* note 19, § 434.

183. *Id.*

184. *Id.* § 369.

185. *Id.* § 486.

186. *Id.*

187. See, e.g., *id.* §§ 487–492, 501–502, 504, 632–634.

188. *Id.* § 463.

189. *Id.*

190. *Id.*

191. *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969).

Section 5.¹⁹² However, the Court has declined to address that question, as the issue has not been squarely presented,¹⁹³ and Congress has excluded members or members-elect based on an examination of lack of qualifications other than these three.¹⁹⁴

Congress's resolution of these disputes often resides "somewhere at the intersection of law and politics."¹⁹⁵ But Congress has developed its own internal rules governing how it adjudicates qualifications.¹⁹⁶ And the timing of the disqualification matters: Congress has concluded that inhabitancy must attach at the time of the election, but that age and citizenship may be established after the election.¹⁹⁷ And the timing of presentment matters: winning candidates may withhold presentment to Congress until they have met a qualification.¹⁹⁸ The practices of Congress influence later behavior, as candidates behave based upon how Congress has interpreted qualifications in earlier disputes. In sum, Congress's exercise of power in this area has been broad and vigorous, and largely upheld by the Supreme Court when exercised within the confines of evaluating actual constitutional qualifications.

2. Congress's Power in Presidential Elections

Congress's power to evaluate presidential candidates is more complicated and uncertain. Congress isn't evaluating the electoral choices of the people, as it does for its own members; it is instead evaluating the electoral choices of presidential electors. In the very first presidential election, the manner of the selection of presidential electors varied.¹⁹⁹ That is, in 1789, some states held popular election for presidential electors, others selected them by the legislature, and still others used a hybrid.²⁰⁰ The electors subsequently voted for a President and a Vice President.²⁰¹

But *quis custodiet ipsos custodes?*²⁰² Who evaluates whether the electors' candidates meet the constitutional qualifications for office? The electors, after all, have no inherent obligation to examine the qualifications for the candidates they elect. They have an unfettered freedom similar to those of voters in general.²⁰³ The Oath or Affirmation Clause, which requires Senators, Representatives, members of state legislatures, and executive and judicial officers to pledge "by Oath or Affirmation, to support this Constitution,"²⁰⁴ likely does not apply to presidential electors.²⁰⁵ Originally, electors were not formally bound by any legal obligation to vote for a particular

192. *Id.*

193. *Id.* ("We need not reach this question, however . . .").

194. *See, e.g., supra* notes 185–87 and accompanying text.

195. Salamanca & Keller, *supra* note 167, at 337.

196. *See supra* notes 171–90 and accompanying text.

197. *See supra* notes 173–84 and accompanying text.

198. *See supra* note 181 and accompanying text.

199. *See ROSS, supra* note 157, at 47–48.

200. *See id.*

201. U.S. CONST. art. II, § 1, cl. 3, amended by *id.* amend. XII.

202. JUVENAL, SATIRE VI, ll. 346–48 (meaning "Who will guard the guards themselves?").

203. *See supra* Part III.A.

204. U.S. CONST. art. VI, § 3.

205. *See Kesavan, supra* note 82.

candidate; they were selected by states, whether by the legislatures or by popular vote, and they voted independently for presidential candidates.²⁰⁶

So, who would evaluate their selection? Perhaps they would evaluate themselves absent any independent review. Or perhaps one would conclude it is Congress's responsibility to evaluate the credentials of presidential electors, lest there reside no other opportunity for review.

The Constitution authorizes electors to cast votes for the President and Vice President.²⁰⁷ Congress's role appears to be limited to the counting of votes: "[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President"²⁰⁸ But Congress has addressed the scope of its power in two significant historical incidents—a debate in 1800 and the counting of electoral votes in 1872—and in ensuing legislation.²⁰⁹

On January 29, 1800, Senator James Ross of Pennsylvania proposed a committee to “consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice President of the United States, and for determining the legality or illegality of the votes given for those officers in the different States.”²¹⁰ The floor erupted, reflecting two divided views.²¹¹

The first view was that Congress had no power in this area. John Brown of Kentucky noted that “Congress had no right to legislate” in this area absent constitutional amendment.²¹² Abraham Baldwin of Georgia had a similar view and expounded upon it in great detail.²¹³

Charles Pinckney of South Carolina emphasized that the “whole direction as to the manner of [presidential electors'] appointment is given to the State Legislatures.”²¹⁴ In his view, “Congress had no right to meddle with it at all,” as the Constitution took the election of the President “as far as possible” out of the hands of Congress.²¹⁵ He opposed even a constitutional amendment to that effect.²¹⁶

The second view was that Congress must have that power because it must reside somewhere. Mr. Ross asked what might happen if presidential electors “should vote for a person to be President who had not the age required by the Constitution, or who had not been long enough a citizen of the United States . . . such cases might happen

206. *Cf.* *Ray v. Blair*, 343 U.S. 214 (1952) (affirming political party's requirement that electors pledge support for presidential nominees, despite historical lack of such a pledge).

207. U.S. CONST. art. II, § 1, cl. 3, *amended by id.* amend. XII.

208. *Id.* amend. XII (amending *id.* art. II, § 1, cl. 3).

209. Indeed, the power to “count” may necessarily require Congress to determine the validity of votes in cases where two sets of votes have been submitted. See Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 392–94 (2001).

210. 10 ANNALS OF CONG. 28–29 (1800).

211. *See id.* at 29.

212. *Id.*

213. *See id.* at 30–32.

214. *Id.* at 29.

215. *Id.*

216. *Id.*

and were very likely to happen, and is there no remedy?”²¹⁷ Samuel Livermore of New Hampshire agreed that if electors “violated and disregarded” the qualifications for President, it could not be the case that the Constitution found it “nobody’s business to interpose, and make provision to prevent it.”²¹⁸

Samuel Dexter of Massachusetts cited qualifications as a concern, too.²¹⁹ He argued, “The proceedings in the election of a President may be defective in all these particulars, and can it be supposed that there is no way to correct them?”²²⁰ Citing the Necessary and Proper Clause,²²¹ he viewed such a law as “necessary to carry into effect the power of appointing the President.”²²²

Further consideration of the matter was postponed, but it does not appear that Congress ever seriously revisited the matter until necessity struck years later.²²³ Presidential elections over the first half of the nineteenth century saw Congress continue to count electoral votes without a definitive conclusion about its ability to reject votes.²²⁴

The presidential election of 1872 gave Congress the opportunity to evaluate the qualifications of a presidential candidate who received electoral votes. The popular vote on November 5, 1872, yielded a sound majority of electors pledged to the Republican ticket, Ulysses S. Grant and Henry Wilson.²²⁵ The Democratic ticket, Horace Greeley and Benjamin G. Brown, received just sixty-six of the 352 electors pledged.²²⁶

But Mr. Greeley died on November 29, 1872.²²⁷ When the Electoral College met to vote, the electors pledged to Mr. Greeley cast votes in a variety of ways. Three electors in Georgia, however, voted for the late Mr. Greeley.²²⁸ When Congress counted the electoral vote on February 12, 1873, the House and the Senate each needed to decide whether to count the votes of the three electors from Georgia.²²⁹

Representative George Frisbie Hoar of Massachusetts objected to counting the Greeley votes, as the deceased Greeley was not a “person” under the Qualifications Clause.²³⁰ Representative Nathaniel P. Banks of Massachusetts, in contrast, disclaimed any role of Congress in evaluating the qualifications of a presidential candidate, asserting that “we have no power to decide on the eligibility of any man

217. *Id.*

218. *Id.* at 30.

219. *Id.* at 29–30.

220. *Id.*

221. U.S. CONST. art. I, § 8, cl. 18.

222. 10 ANNALS OF CONG. 30 (1800).

223. There were objections raised by members of Congress about irregularities in the electoral vote counting process during this period, but none gained much traction. *See* Vasani Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1679–87 (2002) (detailing five instances before the election of 1872 when members of Congress raised objections to counting electoral votes).

224. Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 524 (2010).

225. PETERSEN, *supra* note 66, at 43 tbl.24.

226. *Id.*

227. Obituary, *Horace Greeley, Journalist*, N.Y. TIMES, Nov. 30, 1872, at 4.

228. Tokaji, *supra* note 8, at 39.

229. *See* CONG. GLOBE, 42d Cong., 3d Sess. 1297 (1873).

230. *Id.*

voted for for President.”²³¹ The House narrowly refused to count the votes by a count of 101-99 (with forty not voting).²³² Pursuant to the Twenty-Second Joint Rule, the votes were not counted.²³³

The Senate twice rejected resolutions that would have counted the votes with some qualifying language that the role of Congress was ministerial, once by a vote of 32-30 (with eleven not voting),²³⁴ and another by a vote of 32-28 (with thirteen not voting),²³⁵ before ultimately voting, by a margin of 44-19 (with ten not voting), to count the three electoral votes from Georgia for Mr. Greeley.²³⁶

Congress also had to consider that at least one Georgia elector voted for Charles L. Jenkins for President and Alfred H. Colquitt for Vice President—both Georgia inhabitants and a violation of the requirement that each elector vote for at least one candidate who is not an inhabitant of that elector’s state.²³⁷ But that objection was raised too late, and the merits were not addressed.²³⁸

There was relatively little debate over these propositions—certainly nothing as robust as the debate that arose in 1800. But this “musty precedent”²³⁹ effectively established the power of Congress to evaluate the qualifications of presidential candidates. Congress exercised its independent discretion about qualifications and refused to count electors’ votes on that basis.²⁴⁰

After the contested presidential election of 1876 between Samuel Tilden and Rutherford B. Hayes, Congress spent years debating legislation regarding the counting of electoral votes before eventually enacting the Electoral Count Act of 1887.²⁴¹ Among other things, the Act provides the exclusive mechanism for objecting to the counting of electoral votes.²⁴² The constitutionality of the Act, and Congress’s power to evaluate presidential candidates, has been tacitly approved by the Supreme

231. *Id.*

232. *Id.*

233. Kesavan, *supra* note 223, at 1687.

234. CONG. GLOBE, 42d Cong., 3d Sess. 1286 (1873) (rejecting resolution that included the phrase, “the function of the two Houses in counting the votes being ministerial merely, and this question being independent of the question of the effect of the votes or of the count”).

235. *Id.* at 1286–87 (rejecting resolution that included the phrase “the function of the two Houses in respect of the count of the votes being ministerial and independent of the question of the effect of that vote”).

236. *Id.* at 1287.

237. *See supra* notes 64–75 and accompanying text.

238. *See* Kesavan, *supra* note 223, at 1688.

239. Akhil Reed Amar, *Dead President-Elect*, SLATE (Oct. 21, 2000), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2000/10/dead_presidentelect.html.

240. *See supra* notes 225–39 and accompanying text.

241. Siegel, *supra* note 85, at 547–50; *see also* Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851 (2002) (examining Congress’s power to enact the Act and the scope of its power in other areas touching upon elections).

242. 3 U.S.C. § 15 (2012).

Court²⁴³ and robustly read by lower courts,²⁴⁴ but not without dissent.²⁴⁵ Congress would continue to debate its proper role in evaluating electors in years to come.²⁴⁶

Since then, the people have enacted the 20th Amendment, which, among other things, addresses presidential elections.²⁴⁷ The Amendment includes a mention of presidential qualifications and a potential source of congressional power:

If, at the time fixed for the beginning of the term of President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified²⁴⁸

The matter of who determines whether a President “shall have qualified” is, however, less than clear—whether such matter is left to the judiciary²⁴⁹ or to Congress. And it is possible that Congress’s power to count votes is ministerial, but its power to evaluate whether a President is “qualified” under the 20th Amendment is more robust.

Congress’s power to review qualifications of presidential candidates may arise from the Counting Clause, the 20th Amendment, or some other source like the Commerce Clause²⁵⁰ or the Fourteenth Amendment.²⁵¹ Commentators tend to have mixed views as to whether Congress has the power to refuse to count the electoral votes if ballots are cast for an ineligible candidate.²⁵² But Congress has expressed no

243. See Kesavan, *supra* note 223, at 1660 (stating that in *Bush v. Gore*, 531 U.S. 98 (2000), “each of the Justices must have reached an independent, antecedent determination that 3 U.S.C. § 5 passes constitutional muster”).

244. *E.g.*, *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (“It is clear that mechanisms exist under the Twelfth Amendment and [the Electoral Count Act] for any challenge to any candidate to be ventilated when electoral votes are counted [T]his order holds that the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance.”).

245. See generally Kesavan, *supra* note 223.

246. See, *e.g.*, *id.* at 1692–94 (recounting debate over whether Congress could refuse to count the votes of a faithless elector, including the view that counting electoral votes was solely a “ministerial act”).

247. U.S. CONST. amend. XX.

248. *Id.* § 3.

249. See Kesavan, *supra* note 223, at 1809 (“Constitutional structure strongly suggests that neither the President nor Congress makes these determinations. These determinations seem very much like judicial ones subject to the province of the judicial department.”).

250. U.S. CONST. art. I, § 8, cl. 3; see also Coenen & Larson, *supra* note 241, at 879–81.

251. U.S. CONST. amend. XIV, § 5; see also Coenen & Larson, *supra* note 241, at 881–87.

252. See, *e.g.*, Akhil Reed Amar, *Presidents Without Mandates (with Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375, 388 (1999) (“The Greeley precedent was ill-considered and should not be followed.”); Kesavan, *supra* note 223, at 1805 (finding the Electoral Count Act unconstitutional and conceding that “[t]he presidential or vice presidential ineligibility problem is perhaps the thorniest problem of the electoral count”); Ross & Josephson, *supra* note 157, at 706–07, 713 (concluding that “Congress probably has the power, when explicit constitutional requirements are violated, not to count elector votes”).

hesitation. Indeed, Congress continues to view itself as the source of evaluating the qualifications of the President. When questions arose over whether Mr. McCain was a natural born citizen, for instance, the Senate unanimously passed a resolution expressing the sense of the Senate that “John Sidney McCain, III, is a ‘natural born Citizen’ under Article II, Section 1, of the Constitution of the United States.”²⁵³ At the very least, this measure passed by the Senate suggested that no sitting Senator would object to counting electoral votes cast for Mr. McCain.²⁵⁴

C. The Power of States To Administer the Ballot

Voters and electors can evaluate qualifications. Congress can examine qualifications of its own members and probably those of presidential candidates. For states, however, their roles of evaluation would look slightly different: it would occur through the context of ballot access. Qualified candidates would obtain ballot access, and unqualified candidates would be denied. But the state-administered ballot—and the state role in controlling ballot access—is of recent vintage.

Originally, voting in England and the United States usually took place orally.²⁵⁵ But early in the United States’ history, colonies introduced the written ballot.²⁵⁶ Ballots were written, however, not by state governments, but by individual voters.²⁵⁷ Strictly speaking, ballot access at the time was “completely open,”²⁵⁸ because it was left to the voters to decide what to include on a ballot.

The first Australian ballot—a standard, government-administered ballot given to voters at the polls—arrived in the United States in Louisville, Kentucky, in 1888.²⁵⁹ It successfully curbed ballot-box corruption in a city formerly notorious for it.²⁶⁰ But once a government decides to manage and author the ballots that voters will use, it

253. Resolution Recognizing that John Sidney McCain, III, Is a Natural Born Citizen, S. Res. 511, 110th Cong. (2008) (enacted); see also James C. Ho, *Natural Born Presidents*, 2 J.L. (2 PUB. L. MISC.) 505 (2012).

254. Under the Electoral Count Act, at least one member of each House would need to object. See 3 U.S.C. § 15 (2012). As the newly elected Senators would have been seated, it is possible one of them may object; and, of course, it is possible that a Senator may change his mind when counting electoral votes.

255. L. E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* 2, 20 (1968); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF VOTING IN THE UNITED STATES* 5, 28 (2000); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 14 (2011).

256. 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).

257. *Id.*

258. James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1434 (2007); cf. David L. Permut & Joseph P. Verdon, Note, *Protecting the American Tradition of Write-in Voting After Burdick v. Takushi*, 9 J.L. & POL. 185, 190 (1992) (noting that early voting systems did not regulate candidacies for public office).

259. FREDMAN, *supra* note 255, at 31; see also Peter Brent, *The Australian Ballot: Not the Secret Ballot*, 41 AUSTL. J. POL. SCI. 39, 44 (2006).

260. See FREDMAN, *supra* note 255, at 31–32; JOHN H. WIGMORE, *AUSTRALIAN BALLOT SYSTEM* 24 & n.2, 138–43 (1889).

must also decide who appears on the ballot. Louisville, for instance, allowed candidates to be nominated by a petition and submit a twenty dollar filing fee to appear on the ballot.²⁶¹

There was a concern for this system—but not exactly a concern that the system would act as a *barrier* to ballot access.²⁶² Instead, the concern was that the publicly administered Australian ballot would give voters too many choices: when proposed in Michigan, a newspaper claimed that “it would be too cumbersome for a voter to choose from two hundred candidates.”²⁶³ When Massachusetts introduced the system in 1889, the ballot saw “more and better candidates.”²⁶⁴ Previously, a candidate had to vie for the attention of the voter *ex ante* and lobby for voters to remember the name to write on a slip of paper. Or the candidate could preprint and circulate ballots with the candidate’s name. Now, simple administrative tasks, like a petitioning requirement or a filing fee, allow a name to appear on every ballot in the jurisdiction.

Then there was a concern that these generous provisions were not sustainable. Opposition at Tammany Hall focused on “the wide powers of election officials, the gap between nominations and election day, and the use of an exclusive or official ballot containing all the candidates.”²⁶⁵ While the South Australian ballot required two signatures for a candidate to appear, and the British ballot ten, American jurisdictions quickly required tens of thousands of signatures to nominate a candidate.²⁶⁶ What had been a fairly open system became far less open.

Ballot-access rules, then, were not originally concerned with the states’ *ex ante* approval of the qualifications of a candidate. They were primarily mechanisms to cure corruption and to ease administration. But since then, in the context of disputes over qualifications of candidates, ballot access has played an important role—particularly the question of whether write-in opportunities are an adequate substitute for the state printing a candidate’s name on the ballot.²⁶⁷

261. FREDMAN, *supra* note 255, at 31.

262. *See, e.g.*, Charles Chauncey Binney, *American Secret Ballot Decisions*, 41 AM. L. REG. 101, 106 (1893) (describing Michigan ballot nomination rule as one that “does not deny the legal right of any elector to announce either himself or any one else as a candidate, but merely places reasonable restrictions upon the privilege of bringing the candidate before the voters by the convenient method of having his name printed on the official ballots at public expense”).

263. FREDMAN, *supra* note 255, at 35.

264. *Id.* at 39.

265. *Id.* at 43.

266. *Id.* at 47–48; *see also* Binney, *supra* note 262, at 108 (“[I]t is possible that under the less liberal laws . . . an application for a *mandamus*, accompanied by proof of inability to nominate . . . , might result in a decision that the legislature had exercised its power oppressively, and that its restrictions were therefore void.”).

267. *Campbell v. Buckley*, 46 F. Supp. 2d 1115 (D. Colo. 1999) (concluding that statute that restricted candidacy to individuals who resided in the congressional district, and to registered voters, which required residency for thirty days and nonfelon status, added qualifications to the constitutional requirements, and concluding that “[t]he availability of write-in votes does not provide a realistic opportunity for election”); *Plugge v. McCuen*, 841 S.W.2d 139, 149–50 (Ark. 1992) (Dudley, J., dissenting) (“[T]he intervenors argue that theirs is not a term limitation amendment, but instead is merely a procedure for electing members of Congress, and, therefore, may be governed by the state under the Times, Places and Manner

As a preliminary matter, it is probably not possible to distinguish ballot access from counting votes of those who receive votes. The Supreme Court has repeatedly found that candidates who fail to have their names printed on the ballot do not have an adequate alternative in a write-in campaign.²⁶⁸ The fact that a state may still tabulate the votes of a write-in candidate is not enough to save a refusal to list the candidate on the ballot.

This dispute arose directly in the context of qualifications. In *U.S. Term Limits*, the Supreme Court rejected the constitutionality of state-imposed term limits for members of Congress.²⁶⁹ Arkansas claimed that candidates were still eligible to be elected, but that they simply could not have their names printed on the ballot.²⁷⁰ The Court concluded that a write-in candidacy in this context was an “attempt to achieve a result that is forbidden by the Federal Constitution,”²⁷¹ and that “an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand.”²⁷² The dissent disputed that the “intent” of the ballot-access rule had no bearing on the Qualifications Clause analysis.²⁷³

But, fortunately, this element of the debate may be set aside, as the concerns in *U.S. Term Limits* are distinguishable from the present discussion. There, the dispute was over whether the additional requirements were “qualifications,” as they limited printed ballot access but authorized write-in candidacies.²⁷⁴ For purposes of this Article,

Clause. The argument is based upon the fallacious assumption that the Standing Qualifications Clauses are not the exclusive criteria for congressional service. Moreover, it is beyond doubt that the Times, Places and Manner Clause lets states regulate the procedural machinery of federal elections, but it does not empower states to deny congressional membership to persons who otherwise meet the requirements of the Standing Qualifications Clauses. The Standing Qualifications Clauses are substantive rules, defining who is eligible to serve in Congress. In contrast, the Times, Places and Manner Clause allows states to draft the procedure for their election. These clauses are part of a coherent design; each must be read in the context of the other. The intervenors’ interpretation would destroy their syntax. Parenthetically, if a candidate were qualified under the Standing Qualifications Clauses, but his name could not be placed on the ballot, he could run only as a write-in candidate. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court footnoted that the opportunity for write-in votes ‘is not an adequate substitute for having the candidate’s name appear on the printed ballot.’” (parallel citations omitted), *overruled as recognized by* *May v. Daniels*, 194 S.W.3d 771 (Ark. 2004).

268. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983) (“It is true, of course, that Ohio permits ‘write-in’ votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate’s name appear on the printed ballot.”); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (“The realities of the electoral process, however, strongly suggest that ‘access’ via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.”).

269. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

270. *Id.*

271. *Id.* at 829.

272. *Id.* at 831; *accord* *Cook v. Gralike*, 531 U.S. 510 (2001).

273. *U.S. Term Limits*, 514 U.S. at 920–21 (Thomas, J., dissenting). The majority and dissenting opinions also disputed the factual record developed below as to whether write-in candidates had an effective alternative. See *id.* at 830–32 (majority opinion); see also *id.* at 921–24 (Thomas, J., dissenting).

274. *Id.* at 783.

however, ballot access is restricted because the state itself has made an independent determination about the existing constitutional qualifications of a candidate. If the state has no independent role in evaluating qualifications, then the issue of ballot access on the basis of qualifications is moot. Or, if the state has an independent role in evaluating qualifications, then whether it excludes the candidate is irrelevant.

IV. THE POWER OF STATES TO SCRUTINIZE QUALIFICATIONS

Before this Article examines the power of states to evaluate the constitutional qualifications of federal candidates, it is useful to summarize the power of other actors discussed above. Voters (and presidential electors) have largely unfettered discretion to independently evaluate whether federal candidates meet the constitutional qualifications for office.²⁷⁵ Congress has an exclusive role in judging the qualifications of its own members;²⁷⁶ its power to evaluate the qualifications of presidential candidates is less clear, but practice suggests that it has at least some independent power to do so.²⁷⁷ And the states' role in administering elections and regulating ballot access is fairly well established and broad.²⁷⁸

This state power to administer elections, while broad, is not unlimited.²⁷⁹ The Supreme Court has repeatedly emphasized that states "have no reserved powers with respect to the elections of a federal government."²⁸⁰ States cannot "violate express constitutional commands," such as by discriminating on the basis of race or sex in elections.²⁸¹

The inquiry, then, is whether a state has the power to regulate its ballot in such a way that it evaluates the qualifications of candidates for federal office. May a state make an inquiry and exclude candidates it deems unqualified? Must it make such an inquiry? May a state permit unqualified candidates to appear on the ballot? And if it can make an inquiry, how burdensome can that inquiry be, and what is the recourse for candidates?

275. *See supra* Part III.A.

276. *See supra* Part III.B.1.

277. *See supra* Part III.B.2.

278. *See supra* Part III.C.

279. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

280. Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 304 (2001) (citing *Cook v. Gralike*, 531 U.S. 510 (2000); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805; *Newberry v. United States*, 256 U.S. 232, 280–81).

281. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote 'for electors for President or Vice President.' Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall . . . deny to any person . . . the equal protection of the laws.'").

This Part structures the legal issues into four parts, answering each of the following questions. First, may a state *include* a congressional candidate on the ballot whom Congress may later conclude is not qualified? Second, may a state *exclude* a congressional candidate from the ballot because it concludes she is not qualified? Third, may a state *include* a presidential candidate on the ballot whom electors or Congress may later conclude is not qualified? Fourth, may a state *exclude* a presidential candidate from the ballot because it concludes he is not qualified?

*A. Whether a State May Include a Possibly Unqualified Candidate
for a House of Congress on the Ballot*

Suppose a state took no action investigating the qualifications of a candidate and simply listed the candidate on the ballot. And suppose that Congress went on to conclude that that candidate was not qualified. There are numerous instances where this has occurred, primarily before the Australian ballot.²⁸² Some even occurred when state legislatures elected Senators.²⁸³

Suppose, continuing the hypothetical, that upon finding that the elected candidate was not qualified, Congress declared the seat vacant and informed the state to hold a new election. There was no electoral crisis, no demand that states only send prescreened qualified members to Congress. Instead, Congress took upon itself the responsibility to make an independent evaluation of the candidate's qualifications and, if the candidate was not qualified, sent the matter back to the state for a new election.

In the framework of whether states can, or must, scrutinize the qualifications of candidates for federal office, this situation is the most straightforward. A state's failure to examine—or refusal to examine—the qualifications of a congressional candidate is wholly consistent with Congress's role to evaluate the qualifications of its members. The state is under no affirmative constitutional obligation to independently investigate the qualifications of candidates, and it is under no obligation to enact a statute that mandates investigation of qualifications. The people—the voters—have the opportunity to vote for the candidate of their choice, and it is left to Congress to decide whether to seat the winning candidate.

If a party, or a voter, or another candidate sues and wants to remove a purportedly unqualified candidate from the ballot that the state has included, the court's answer is simple: The state has no constitutional duty to investigate the qualifications of candidates for Congress. And a court cannot, on its own, reach the conclusion that a candidate fails to meet constitutional qualifications without infringing upon the proper role of Congress.²⁸⁴

282. Candidates who failed to meet federal qualifications have obtained ballot access in the modern era, too. Consider Róger Calero (a 2006 Senate candidate in New York). See N.Y. STATE BD. OF ELECTIONS, US SENATE ELECTION RETURNS NOV. 7, 2006 (2006), available at http://www.elections.ny.gov/NYSBOE/elections/2006/general/2006_ussen.pdf.

283. See *supra* notes 173–176 and accompanying text.

284. If Congress determines erroneously that an elected official is or is not qualified—perhaps even for purely political reasons—the nonjusticiability of a political question may be called into question. Cf. *Nixon v. United States*, 506 U.S. 224, 239 (1993) (White, J., concurring in the judgment); *id.* at 252 (Souter, J., concurring in the judgment). But this Article concludes that Congress holds the exclusive role to evaluate qualifications. See *supra* Part

Whether the court's role differs *before* the election is a slightly more challenging issue. One could make the argument that Congress has no power to evaluate qualifications until *after* the candidate has been elected; that the power to evaluate qualifications *before* the election is not committed to any branch or party; and that it may well be within the purview of a court to independently examine qualifications. But there is no *affirmative duty* on the state to do so before the election. A state statute might allow the state to make that investigation and exclude a candidate, a subject this Article considers next; but if the state has made the determination not to exclude the candidate, then there is nothing in the Constitution to force a state to exclude the candidate from the ballot.

In the event a litigant argues that there is a state statute that compels an election official to investigate a congressional candidate's qualifications, then that state statute would be held up to the standards in Part IV.B below. But there is no independent constitutional obligation for a state to make such an investigation. Whether a state statute requires it, and whether that statute is constitutionally permissible, is the subject of the next Part, which will establish that there is no power for the state to exclude a candidate from the ballot based on an investigation of her qualifications.

B. Whether a State May Refuse To Place a Candidate for a House of Congress on the Ballot Because It Concludes that the Candidate Is Not Qualified

Does a state have any role in evaluating the qualifications of candidates for Congress? What if it examines a candidate's qualifications, concludes she is ineligible, and wishes to exclude her from the ballot: May the state do so?

The litigation discussed earlier involving William Higgs and Jim McCrery suggests that the state has no role in preventing an allegedly unqualified candidate from appearing on the ballot.²⁸⁵ In each case—one instance when an allegedly unqualified individual was excluded from the ballot, the other when the individual was included—the court erred on the side of allowing the candidate to appear on the ballot and of deferring to Congress. It is Congress that holds the sole role in determining qualifications; the state has no role. Therefore, the state could not deny ballot access to a candidate on the basis of his qualifications.

The case of Gerald Carlson is in accord. In an effort to fill a seat in a special election in 1981, Gerald Carlson filed as a candidate of the "White Majority Party" in a Pennsylvania congressional district.²⁸⁶ Although he listed a Philadelphia, Pennsylvania, address on his nomination papers, he had also listed a Michigan residence in a Michigan congressional election the same year and testified that he "might" "make Philadelphia his permanent residence."²⁸⁷

III.B.1.

285. *See supra* notes 100–03, 128–29 and accompanying text.

286. *In re* Nomination Papers of Carlson, 430 A.2d 1210, 1211 (Pa. Commw. Ct. 1981).

287. *Id.* at 1211. *But see In re* Nomination Petition of Driscoll, 847 A.2d 44, 53–54 (Pa. 2004) (allowing candidate to amend nomination form to correct address that erroneously claimed he lived in the congressional district in which he was running, because candidate did not need to reside in the district to run for office, which rendered the error immaterial, and because candidate did not intentionally falsify affidavit).

The state court avoided the “inhabitant” question even though it “dispute[d] Carlson’s Pennsylvania inhabitancy.”²⁸⁸ It found, instead, that nominees for Congress must truthfully submit affidavits in compliance with the Election Code; that the Election Code required a statement of residency; that Carlson was not a resident of Pennsylvania; that Pennsylvania had an interest in “prevent[ing] fraud and preserv[ing] the integrity of the election process”; and that Carlson’s defective nomination papers would keep him from the ballot.²⁸⁹ There is a tacit recognition that the court—and the state—could not exclude the candidate solely because of his qualifications (or lack thereof).

This reasoning is consistent with the Supreme Court’s logic in *Roudebush v. Hartke*.²⁹⁰ In a close election contest in Indiana, Senator R. Vance Hartke was declared the winner over Richard L. Roudebush by a margin of 4383 votes.²⁹¹ Indiana law authorized a recount, which Mr. Roudebush sought; but Mr. Hartke claimed that the recount procedure ran afoul of the Senate’s power to be “the Judge of the Elections, Returns and Qualifications of its own Members.”²⁹²

The Court reasoned that the state has a broad power to regulate the election of Senators.²⁹³ Unless Congress acts, it is left to the states as to the manner of election regulation. And a state-authorized recount, the Court concluded, did not usurp the power of the Senate to evaluate the “Elections” or “Returns”:

[A] recount can be said to ‘usurp’ the Senate’s function only if it frustrates the Senate’s ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.²⁹⁴

This power is a narrow one; states cannot interfere with Congress’s ability to make an independent judgment, and states can only engage in a ministerial manner, not an adjudicative manner.²⁹⁵

If a state refuses to put a candidate on the ballot because it believes the candidate for a house of Congress is not qualified, that state is effectively usurping the function of Congress. When the state makes its own independent evaluation, it is preventing the House or Senate from evaluating that candidate in the event she is elected.²⁹⁶

288. *Carlson*, 430 A.2d at 1211.

289. *Id.* at 1212.

290. 405 U.S. 15 (1972).

291. *Id.* at 16–17.

292. U.S. CONST. art. I, § 5, cl. 1.

293. *Roudebush*, 405 U.S. at 24 (citing U.S. CONST. art I, § 4, cl. 1); *accord* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013).

294. *Roudebush*, 405 U.S. at 25–26; *see also* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 24–26 (2013) (describing Congress’s power to evaluate elections and state accommodation of Congress’s role).

295. Kristen R. Lisk, Note, *The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work*, 83 N.Y.U. L. REV. 1213, 1223 (2008).

296. This is in contrast to a *vacancy*. In the House, “When vacancies happen in the

Admittedly, it is a somewhat unusual concept: Congress does not have the power to adjudicate the qualifications of *candidates*; it has the power to adjudicate the qualifications of its own *members*. But an individual becomes a member through an election, and any adjudication about whether someone is qualified to become a member, before or after that election, would effectively usurp Congress's role and prevent it from independently evaluating the qualifications of its members.

Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. art. I, § 2, cl. 4. The Senate provision originally stated, "if Vacancies happen by Resignation, or otherwise," *id.* art. I, § 3, cl. 2, until amended: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . ." *Id.* amend. XVII. These provisions contemplate a much more active role for the states. And that is consistent with the practices of Congress. *See, e.g.*, JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, at 9-13 (2011) (interpreting U.S. CONST. art. I, § 2, cl. 4) ("Vacancies are caused by death, resignation, declination, withdrawal, or by action of the House in declaring a vacancy as existing or causing one by expulsion. . . . It was long the practice to notify the executive of the State when a vacancy was caused by the death of a Member . . . [I]t is now the practice for State authorities to take cognizance of the vacancies without notice."). The trend for those elected but who died before being seated has been to declare a vacancy after the certificate of election has been presented. *See* DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, § 4.6 (1976).

States have frequently reached their own conclusion that a vacancy exists. Consider Mel Carnahan, the Governor of Missouri who was posthumously elected to the Senate in 2000. Lieutenant Governor Roger B. Wilson named Mr. Carnahan's widow, Jean Carnahan, to the seat. But instead of submitting the certificate of election to the Senate and allowing the Senate to declare a vacancy, Mr. Wilson submitted a "certificate of appointment" to the Senate on January 3, 2001, the first day of the term. 147 CONG. REC. 3 (2001). The Senate accepted this certificate and seated Ms. Carnahan. A similar event occurred after Clement Woodnut Miller was posthumously elected to the House in 1962. California did not transmit a certificate of election to the House for the first day of the session in 1963. *See* 109 CONG. REC. 10-11 (1963). Instead, it simply seated Donald H. Clausen on January 28, 1963, after California held a special election. 109 CONG. REC. 1120 (1963).

In uncertain cases, Congress has played a more active role. Nick Begich of Alaska and Hale Boggs of Louisiana were posthumously elected in 1972, after they had died in a plane crash in Alaska. Their bodies had not been found by the first day of the congressional session and they were presumed dead. But as the State of Louisiana expressed uncertainty about what ought to occur, it was left to Congress to decide whether the seats were vacant, and the House ultimately concluded that they were. 119 CONG. REC. 11-16 (1973).

And even in the event that a state acts unilaterally with regard to a perceived vacancy, Congress can reverse that decision. In 1808, Charles Turner, Jr. did not win a majority of votes for a seat in Congress because Massachusetts concluded that votes cast for "Charles Turner, junior, esq." were distinct from votes cast for "Charles Turner, esq." Massachusetts declared a vacancy because no candidate obtained a majority of the vote as required under state law. In the second election, William Baylies won. But after Mr. Baylies was seated, the House of Representatives examined the election returns from the first election and concluded that votes for "Charles Turner, junior, esq." and "Charles Turner, esq." should both count. HINDS' PRECEDENTS, *supra* note 19, § 646. Congress rejected the results of the second election and seated Mr. Turner.

It would be an overstatement to invoke the breadth of the right to vote provided in *Reynolds v. Sims*: “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”²⁹⁷ But the argument is not far from the principles that drove the Founders to ensure that the legislature would be the sole examiner of the qualifications of its members—it would protect the right of the people to elect the representatives of their choice without meddling from other actors.²⁹⁸

Dicta from the Supreme Court is not entirely consistent with this view. In *Storer v. Brown*, the Court considered California’s version of a “sore loser” law that prevented a candidate from running as an independent in the general election if he had affiliated with a party in the prior year.²⁹⁹ Congressional candidates Thomas Storer and Laurence Frommhamen were barred from the ballot, and the law was upheld as constitutional.³⁰⁰ When Messrs. Storer and Frommhamen tried to challenge other provisions of the election law, the Court rejected them: they had been validly barred from the ballot, so other provisions relating to their candidacy or the candidacy of others could not be challenged.³⁰¹ It reasoned that the statute

is an absolute bar to candidacy, and a valid one. The District Court need not have heard a challenge to these other provisions of the California Elections Code by one who did not satisfy the age requirement for becoming a member of Congress and there was no more reason to consider them at the request of Storer and Frommhamen or at the request of voters who desire to support unqualified candidates.³⁰²

The Court’s dicta cannot be correct. The lesser problem is that this example is purely hypothetical and unrelated to the case before the Court: the parties met the age requirement; there was no evidence that California ballot-access law allowed the exclusion of underage congressional candidates; and the example was used in the context of explaining why the Court would not consider other challenges once a valid exclusion applied, not the context of explaining the validity of the exclusion itself.

But the greater problem is that it flatly belies the practice of the states and of Congress examining the qualifications of potentially unqualified candidates, including candidates who did not satisfy the age requirement.³⁰³ Candidates who did not meet the age requirement *at the time of election*, for instance, have had no difficulty serving in Congress, in no small part because Congress has interpreted the provision to mean that a candidate must meet the age requirement when seated.³⁰⁴ And among those who did not meet the age requirement on the first day of the term, Congress has delayed

297. 377 U.S. 533, 555 (1964).

298. See *supra* notes 167–72 and accompanying text.

299. 415 U.S. 724, 726–27 (1974).

300. *Id.* at 736.

301. *Id.*

302. *Id.* at 737.

303. See *supra* notes 171–90 and accompanying text (describing instances in which electors in states elected potentially unqualified candidates to Congress, and Congress’s role in evaluating their qualifications).

304. See *supra* notes 177–81 and accompanying text.

resolution of the matter and seated them when they presented themselves at the time they came of age.³⁰⁵ Congress's treatment illustrates that it has handled the matter of qualifications—including age—in a manner that is not readily discernible to a state administrator deciding which candidates to include on or exclude from the ballot. Nothing prevents Congress from revisiting its precedents, and this ability illustrates that the Court's example in *Storer* is not a precise statement. Reserving this role to Congress in the first instance is essential to protect Congress's power.

Finally, what of the “obviously” unqualified candidate? What if someone sought to put a pet dog on the ballot—or a corporation?³⁰⁶ The state would appear to have some interest in ballot integrity in excluding obviously unqualified candidates. Its ordinary ballot-integrity mechanisms, such as signature requirements and filing fees, would generally be adequate to ensure that obviously unqualified candidates remain off the ballot.³⁰⁷ Even then, the state's mechanisms are not about the evaluation of qualifications. They are mechanisms designed to establish a “preliminary showing of substantial support” before a candidate obtains ballot access.³⁰⁸ The state has a compelling interest in “preserving the integrity of the electoral process and in regulating the number of candidates on the ballot,”³⁰⁹ by preventing, for example, “voter confusion, ballot overcrowding, or the presence of frivolous candidacies,”³¹⁰ and it may implement that interest with a prerequisite showing of support.³¹¹ And it does not call into question the non-qualifications-based administration of elections and ballot access.

But reasonable restrictions showing a prerequisite of support are different from independent investigations by the state as to a candidate's qualifications. Admittedly, such an investigation would go toward the “frivolous candidacies” interest—but it would assume that the state has the power, the means of implementing that interest, by evaluating qualifications. Because such independent investigations would interpose the state between the voters and the ability of Congress to evaluate its own members, they are not within the scope of state power—that is a matter reserved to Congress and to the people.³¹²

305. *See id.*

306. *See* Robert Siegel, *Maryland PR Firm Runs for Congress*, NPR (Mar. 16, 2010), <http://www.npr.org/templates/story/story.php?storyId=124742358>.

307. *See, e.g.*, *Murray Hill Inc. v. Montgomery Cnty. Bd. of Elections* (Md. State Bd. Elections Apr. 21, 2010), available at http://www.elections.state.md.us/vote_act_2002/documents/Murray%20Hill%20-%20Final%20Determination%20April%2023%202010.pdf (concluding that because Murray Hill Inc. was not an “individual,” it could not register to vote, which would ultimately preclude the corporation from appearing on the Republican primary ballot for congressional office, *see* Siegel, *supra* note 306); *see also* MD. CODE ANN., ELEC. LAW § 5-202 (West 2014) (requiring a candidate for public office to be a registered voter). This statute should not be over-read, as it would, strictly speaking, add a qualification to office (registered voter), because there are potential candidates who meet the constitutional requirements but could not register to vote, such as imprisoned felons.

308. *See, e.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *Am. Party of Tex. v. White*, 415 U.S. 767, 782 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

309. *Munro*, 479 U.S. at 194.

310. *Id.* at 194–95.

311. *See id.*

312. Even if one rejects the strong version of this claim—that is, that the state lacks the

*C. Whether a State May Include a Possibly Unqualified
Presidential Candidate on the Ballot*

In presidential elections, the context changes from the first two inquiries. First, there is an intermediary electing party: The presidential electors are the ones responsible for voting for President and Vice President, not the people voting on Election Day.³¹³ And while every state currently authorizes the people to vote for the presidential and vice presidential ticket, they are actually voting for a slate of electors.³¹⁴

Second, the primary election responsibility is with the state legislature, not “the people.”³¹⁵ “The people” are the ones responsible for electing members to the House of Representatives³¹⁶ and the Senate.³¹⁷ When it comes to presidential elections, “[e]ach state shall appoint, in such Manner as the Legislature thereof may direct,” its presidential electors.³¹⁸ The Court has repeatedly recognized that this power is extremely broad.³¹⁹ At the same time, the Court has noted that there is a unique federal interest in presidential elections.³²⁰

Third, the state is actually administering two sets of elections: the state administers the vote by the people for presidential electors, and the vote by the electors for the President and Vice President.³²¹

Fourth, Congress is expressly given the role of “judg[ing]” the qualifications, elections, and returns of its members.³²² In the context of the President and Vice

power to evaluate qualifications for federal candidates—a weaker version of this claim would still stand. If the state excludes a candidate from the ballot based on its conclusion concerning the candidate’s qualifications, Congress might refuse to seat the winner of that election. Congress could independently conclude that the state’s judgment was wrong, and that the election had been tainted by the exclusion of a qualified candidate, drawing upon precedents from the Civil War and Reconstruction period. *See* CHAFETZ, *supra* note 167, at 181–87. Special thanks to Josh Chafetz for pressing me on this point.

313. *See* U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XII.

314. *Id.* amend. XII.

315. *Id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

316. *Id.* art. I, § 2, cl. 1.

317. *Id.* amend. XVII.

318. *Id.* art. II, § 1, cl. 2.

319. *E.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“[T]he state legislature’s power to select the manner for appointing electors is plenary 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”); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (accepting as a premise that “the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated”); *see also* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2269 n.2 (2013) (Thomas, J., dissenting) (“Constitutional avoidance is especially appropriate in this area because the [National Voter Registration Act] purports to regulate presidential elections, an area over which the Constitution gives Congress no authority whatsoever.”).

320. *See* *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983)).

321. *See* U.S. CONST. art. II, § 1, cl. 2, 4; *id.* amend. XII.

322. *Id.* art. I, § 5, cl. 1.

President, Congress's role is ostensibly more limited: it is tasked with the duty to "count[]" the votes of the electors.³²³

In an election for Congress, the people—in an election administered by the state—select a member of Congress, who is seated after her qualifications have been judged by Congress.³²⁴ In an election for President, the state legislature directs the manner of the election: today, by means of a popular election by the people, administered by the state, to elect electors, who later elect the President and Vice President and whose votes are counted by Congress before inauguration.³²⁵ Earlier, this Article concluded that states have no obligation to investigate the qualifications of candidates for Congress. What about for the office of President?

States have been historically generous to presidential candidates seeking ballot access. Openly unqualified candidates have regularly appeared on the ballot (admittedly, usually toiling in obscurity as minor party candidates with limited ballot access), including James B. Cranfill,³²⁶ Eldridge Cleaver,³²⁷ Michael Zagarell,³²⁸ Linda Jenness,³²⁹ Andrew Pulley,³³⁰ Larry Holmes,³³¹ Gloria La Riva,³³² Róger Calero,³³³ Arrin Hawkins,³³⁴ and Peta Lindsay.³³⁵ And in situations where the candidate is not openly unqualified, but the candidate's qualifications are contested, states have tended to permit the candidate to remain on the ballot despite such litigation challenges.³³⁶

323. *Id.* amend. XII.

324. *See, e.g., supra* Part III.B.1.

325. *See, e.g., supra* Part III.B.2.

326. 1892, Prohibition Party vice presidential candidate, thirty-three years old.

327. 1968, Peace and Freedom Party presidential candidate, thirty-three years old.

328. 1968, Communist Party USA vice presidential candidate, twenty-three years old.

329. 1972, Socialist Workers Party presidential candidate, thirty-three years old.

330. 1972, Socialist Workers Party vice presidential candidate, nineteen years old; 1980, Socialist Workers Party presidential candidate, twenty-seven years old.

331. 1984, Workers World Party presidential candidate, thirty years old; 1988, Workers World Party presidential candidate, thirty-four years old.

332. 1984, Workers World Party vice presidential candidate, thirty years old; 1988, Workers World Party vice presidential candidate, thirty-four years old.

333. 2004 and 2008, Socialist Workers Party presidential candidate, noncitizen.

334. 2004, Socialist Workers Party vice presidential candidate, twenty-eight years old.

335. 2012, Party for Socialism and Liberation presidential candidate, about thirty-three years old.

336. The instances involving Dick Cheney, Barack Obama, and John McCain, for example, varied in terms of the validity of the arguments regarding their qualifications, but states uniformly allowed them on the ballot. *See supra* notes 122–27, 132–36 and accompanying text. Admittedly, these were major party candidates for office, when the state administrative apparatus, often operated by members of those major parties, may have a lower incentive to police the qualifications of the candidates.

Further, the Federal Election Commission has explained that existing federal law does not prohibit unqualified candidates from registering as "candidates." *See Hassan v. Fed. Election Comm'n*, 893 F. Supp. 2d 248 (D.D.C. 2012); Maskell Memorandum, *supra* note 5, at 1 n.3 ("The Federal Election Commission is authorized by law to administer and seek compliance with the *campaign finance* provisions of federal law for candidates to federal office, and to administer and seek compliance with the provisions for public financing of the nomination and election of candidates for President, but has no duties or responsibilities with respect to

Accordingly, states have had a practice of generous ballot access to presidential and vice presidential candidates. That practice suggests that there is no constitutional obligation for a state to exclude a presidential candidate from the ballot who may not meet the qualifications for federal office. And that understanding of constitutional obligations is supported by the mechanism of presidential election.

First, the decision ultimately resides with presidential electors, not with the voters or the state legislature. The names on the ballot are simply a proxy for a slate of electors pledged to that candidate.³³⁷ The qualifications of the candidates, then, strictly speaking, are immaterial, and the true candidates are the presidential electors. Granted, there is an understanding that when voters vote for a presidential candidate, they expect the electors to vote for that candidate.

Second, the discretion given to the states is broad.³³⁸ The Constitution gives the state legislature the plenary power to choose the manner of the appointment of electors.³³⁹ It places no conditions or obligations on the legislature's discretion, apart from a few other constitutional provisions regarding the right to vote.³⁴⁰ A state's decision to appoint electors who are ostensibly committed to an unqualified candidate, then, is within the range of its discretion. After all, as a corollary to the first point, the state lacks direct control over the decisions of the electors themselves—and it is certainly under no obligation to direct electors to cast votes in a particular way. If the state provides a slate of electors identified as being a proxy for a pair of candidates, the state is under no constitutional obligation to ensure that the candidates are qualified.³⁴¹

judging or vetting qualifications or eligibility of candidates to federal office. 2 U.S.C. § 437c.”) (emphasis in original); Fed. Election Comm’n, Advisory Opinion No. 2011-15 (Sept. 2, 2011), available at <http://saos.nictusa.com/saos/searchao?AONUMBER=2011-15>.

337. Admittedly, if an elector is *legally obligated* to vote for a pledged candidate, the analysis may change. See *infra* notes 358–61 and accompanying text (describing state’s broad power to regulate presidential electors).

338. See *supra* Part IV.A–B.

339. U.S. CONST. art. II, § 1, cl. 2; *accord* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *McPherson v. Blacker*, 146 U.S. 1 (1892).

340. See *supra* notes 279–81 and accompanying text.

341. Perhaps the most potent judicial argument against this conclusion arose in Justice Roy Moore’s dissent in an Alabama Supreme Court case handling a “birther” lawsuit. *McInnish v. Bennett*, No. 1120465, 2014 WL 1098246 (Ala. Mar. 21, 2014) (Moore, J., dissenting). He argued that independent of any state statute, the state election administrator had an obligation to investigate the qualifications of presidential candidates. He melded the Supremacy Clause, U.S. CONST. art. VI, cl. 2, with the Oaths Clause, *id.* art. VI, cl. 3, to find a duty for executive officers to enforce the Qualifications Clauses. *McInnish*, 2014 WL 1098246, at *23. This argument is a troubling non sequitur. Taking the oath to uphold the Constitution does not indicate who is tasked with the duty of enforcing each provision. Some tasks are delegated to the states, others to the federal government, and some to different branches of government. Simply because the state officials take an oath to uphold the Constitution does not mean that they have “the duty to enforce the qualifications clause.” *Id.* at *26. While Justice Moore “would not prescribe the manner” of verifying eligibility, the duty still, in his view, remained in the elections administrator. *Id.* at *27.

As discussed, the power to review qualifications already resides with the voters, the presidential electors, and Congress. See *supra* Part III. And it may reside in a state official, if

Indeed, as Congress debated in the early days of the Republic, it was understood that Congress might be presented with votes from presidential electors who cast ballots for unqualified candidates.³⁴² But the remedy was not to throttle the state's manner of its selection of electors. Instead, it rested either with Congress or with the electors themselves to police the qualifications of candidates.³⁴³ Litigants, then, who raise "birther"-style challenges have failed to allege a cause of action: the complaint is legally insufficient.³⁴⁴ Any lawsuit filed asking a court to enforce Article II has no force,³⁴⁵ and it would have the added effect of removing federal jurisdiction from the claims.³⁴⁶

As discussed with congressional candidates, if a litigant argues that there is a state statute that compels an election official to investigate a presidential candidate's qualifications, then that state statute would be held up to the standards in Part IV.D below. But, as with congressional elections, there is no independent constitutional obligation for a state to make such an investigation. Whether a state statute requires it, and whether that statute is constitutionally permissible, are the subjects of the next Part. The answer to that question is considerably more complicated than the answer for congressional elections.

*D. Whether a State May Refuse To Put a Presidential Candidate on the Ballot
Because It Concludes the Candidate Is Not Qualified*

Finally, what about the most relevant question in the "birther" context: For candidates like Mr. McCain, born in the Canal Zone,³⁴⁷ or potential candidates like Senator Ted Cruz, born in Canada,³⁴⁸ what if a state examines the qualifications of a presidential or vice presidential candidate and chooses to exclude that candidate from the ballot? Does the state have the power to do so?

To restate earlier observations, the state legislature has a unique role in the selection of presidential electors.³⁴⁹ It also administers both the people's election of electors and the electors' election of the President and Vice President.³⁵⁰

Unlike in congressional elections, Congress is not tasked with the unique responsibility of adjudicating the qualifications of presidential candidates. It *has*

the state legislature so directs. *See infra* Parts IV.D, V. But it is not a *duty* inherent in the office of an election administrator to investigate qualifications. Indeed, to do so might usurp the power of the state legislature to select the manner of appointment.

342. *See supra* notes 207–24 and accompanying text.

343. *See supra* notes 225–54 and accompanying text.

344. It is possible that a state statute demands a different level of investigation, but that is addressed *infra* at Part V.

345. *See, e.g.*, Plaintiffs' Complaint for Declaratory and Injunctive Relief, *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) (No. 08CV03836) (alleging four of six causes of action arise under Article II of the United States Constitution).

346. Even if a state cause of action remained—for example, a state law that required presidential candidates to meet federal constitutional qualifications—a strong case could be made that there is still no federal question.

347. *See, e.g., supra* note 4.

348. *See, e.g., supra* note 7.

349. *See supra* notes 338–46 and accompanying text.

350. *See supra* note 321 and accompanying text.

done so,³⁵¹ but there is no suggestion that it must be the *sole* party to do so—particularly given the fact that its very authority to do so has been questioned.³⁵² If a state chooses to evaluate the qualifications of presidential candidates, there is no inherent power of Congress standing in its way, and no precedent similar to *Roudebush* that might cabin the choices of a state.

Just as there was historical precedent for states including unqualified candidates on the presidential ballot, so, too, is there precedent for states excluding unqualified candidates from the ballot. In fact, there has been a trend of state regulation increasingly scrutinizing the qualifications of presidential candidates, even apart from pending legislation in the “birther” context.³⁵³

Historically, unqualified candidates appeared regularly on the ballot. An underage James Cranfill was the vice presidential nominee of the Prohibition Party in 1892, when the party appeared on the ballot of forty-one states.³⁵⁴ But when noncitizen Mr. Calero sought ballot access in 2004 and 2008, he obtained access in only seven states,³⁵⁵ while a stand-in ticket naming James Harris as the presidential candidate for the electors of the Socialist Workers Party took his place in eleven jurisdictions.³⁵⁶ Underage 2012 candidate Ms. Lindsay appeared on the ballot in nine states, but was excluded elsewhere, most notably California.³⁵⁷ States, then, are divided in recent practice as to whether they will independently investigate the qualifications of members for a federal office.

Indeed, the state legislature’s increased responsibility in selecting presidential electors suggests that it has a higher degree of control over the process. State legislatures likely have the power to direct electors to support a candidate and

351. See *supra* notes 227–36 and accompanying text (discussing the case of Horace Greeley); *supra* notes 253–54 and accompanying text (discussing the sense of the Senate regarding the qualifications of Senator John McCain).

352. See *supra* Part III.B.2.

353. See *infra* notes 354–57 and accompanying text.

354. DONALD R. DESKINS, JR., HANES WALTON, JR., & SHERMAN C. PUCKETT, *PRESIDENTIAL ELECTIONS, 1789–2008*, at 249 (2010).

355. Connecticut (2004 and 2008), Delaware (2008), Minnesota (2004 and 2008), Nebraska (2004 and 2008), New Jersey (2004 and 2008), New York (2004 and 2008), and Vermont (2004 and 2008). See FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 27–39* (2005), available at <http://www.fec.gov/pubrec/fe2004/federalelections2004.pdf> [hereinafter *FEC REPORT 2004*]; FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 27–40* (2009), available at <http://www.fec.gov/pubrec/fe2008/federalelections2008.pdf> [hereinafter *FEC REPORT 2008*].

356. California (2008), Colorado (2004 and 2008), the District of Columbia (2004), Florida (2004 and 2008), Georgia (2008), Iowa (2004 and 2008), Louisiana (2004 and 2008), Mississippi (2004), Utah (2004), Washington (2004 and 2008), and Wisconsin (2004). See *FEC REPORT 2004*, *supra* note 355; *FEC REPORT 2008*, *supra* note 355.

357. Arkansas, Florida, Louisiana, Minnesota, New Jersey, New York, Rhode Island, Vermont, and Washington. See FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 27–40* (2013), available at <http://www.fec.gov/pubrec/fe2012/federalelections2012.pdf>; see also *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

penalize them (or replace them) if they fail to do so.³⁵⁸ They arguably have the power to add qualifications to candidates seeking the office of President.³⁵⁹ The less intrusive step of examining existing constitutional qualifications is likely within the purview of state control. This result differs from the process regarding congressional candidates of dubious qualifications, which is a matter not for the states to decide, but for the people and Congress.³⁶⁰ And this distinction is sensible given the difference in responsibilities granted to the state legislatures in presidential elections and congressional elections.

And just as voters—the primary party responsible for the selection of members of Congress—may independently exercise their judgment, the state legislatures have the same authority to independently exercise judgment as to the qualifications of presidential candidates (or those candidates whom electors pledge support to). And because the legislatures may choose the manner by which it selects its electors, it follows that it may restrict the discretion of the election process through an *ex ante* examination of candidates' qualifications.

At first blush, ballot-access rules have not always borne out this distinction: candidates seeking ballot access as presidential candidates are usually treated to the same protections as candidates for other federal or state offices under the First and Fourteenth Amendments.³⁶¹ But these amendments are external constraints on the states' election processes.³⁶² And these processes are not attempts by the state to *abide by* the terms of the Constitution. Unless the state's process independently breaches some other constitutional guarantee—such as an election law that severely restricts a voter's rights but is not narrowly drawn to advance a compelling state interest³⁶³—then the state's examination of a presidential candidate's qualifications is permissible.³⁶⁴

There are no constitutional provisions that would otherwise independently constrain such an examination. The 20th Amendment does not prevent a state from excluding a presidential or a vice presidential candidate who is not qualified to hold the office.³⁶⁵ It certainly gives an (unnamed) entity the *power* to evaluate the qualifications of the President-elect and Vice President-elect in the event that a candidate fails to qualify.³⁶⁶ But that power is not an exclusive power reserved to some

358. See Ross & Josephson, *supra* note 157, at 695–704 (describing bases under which electors may be bound by state law, including interpretations of the Constitution made by Congress and the Supreme Court). Indeed, state legislatures might prohibit electors from voting for an unqualified candidate, a postelection means of evaluating qualifications.

359. See *supra* notes 86–89 and accompanying text.

360. See *supra* Part IV.A–B.

361. See, e.g., *Lindsay*, 750 F.3d at 1063–65 (examining First and Fourteenth Amendment claims for presidential candidate).

362. See Muller, *supra* note 92, at 387 (noting that, despite broad discretion for states to administer presidential elections, state legislatures' decisions are still subject to other provisions of the Constitution).

363. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

364. See *supra* notes 358–60 and accompanying text.

365. See, e.g., *Lindsay*, 750 F.3d at 1065; *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972).

366. See *supra* notes 247–54 and accompanying text.

other branch of government. Unlike the robust history of the power of the legislature to adjudicate the qualifications of its own members³⁶⁷ and the textual language ensuring that each house of Congress is the “sole” judge of the qualifications of its members,³⁶⁸ the power of Congress to examine the qualifications of executive candidates is, at the very best, debatable,³⁶⁹ and certainly not exclusive.³⁷⁰

The inconsistency of the cases in this area reveals the problem with the existing legal framework. When an ineligible presidential candidate seeks ballot access, the courts defer to the state’s exclusion of the candidate on the ground that it has a legitimate basis in preserving the integrity of the ballot.³⁷¹ In contrast, when litigants seek to strip an allegedly ineligible presidential candidate of his place on the ballot, courts generally refuse to require the state to investigate this question, calling it a question for Congress in the first place.³⁷² It cannot be both—either the matter is left exclusively to Congress, outside the purview of the states, or it is within some control of states to regulate.³⁷³

The case may appear different if an *openly* unqualified candidate, like Mr. Hassan or Ms. Lindsay, demands a place on the ballot, flatly flouting constitutional qualifications and seeking to make Congress the sole judge. There, courts have upheld

367. See *supra* Part III.B.1.

368. See *Powell v. McCormack*, 395 U.S. 486, 552 (1969).

369. See John D. Feerick, Commentary, *A Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41, 58 (2010) (noting that the Twelfth Amendment requires Congress to perform the nondiscretionary act of counting electoral votes, and suggesting that the 20th amendment does not include an opportunity for congressional investigation). Indeed, the language may well suggest that “fail to qualify” refers to an issue of timing, such as a failure to resolve the winner through counting or otherwise, rather than an issue of meeting the constitutional qualifications. See also *supra* notes 223–46 and accompanying text (stating the argument predating the 20th Amendment); cf. William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 617 (2009) (discussing the timing mechanisms built into the 20th Amendment).

370. But see *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (“[T]he challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch, at least in the first instance. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course.”); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 208 (Ct. App. 2010) (“The presidential nominating process is not subject to each of the 50 states’ election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results.”); *Jordan v. Reed*, No. 12-2-01763-5, 2012 WL 4739216 (Wash. Super. Ct. Aug. 29, 2012) (“The primacy of congress to resolve issues of a candidate’s qualifications to serve as president is established in the U.S. Constitution . . .”).

371. See *supra* note 118 and accompanying text (Peta Lindsay); *supra* notes 111–17 and accompanying text (Abdul Hassan).

372. See *supra* notes 134–36 and accompanying text (Obama); *supra* notes 132–33 and accompanying text (McCain).

373. This tension may arise, in part, because the question is sometimes framed as a matter of whether there is a constitutional duty, independent of a state statute, to make such an inquiry. This Article has concluded that there is no duty. See *supra* Part IV.C. But in the event the state does have such a statute obligating an election official to investigate qualifications, and the official has either failed to enforce it or had her decision challenged in litigation, the tension is stark—either the state may make such an inquiry, or it may not.

the exclusion from the ballot.³⁷⁴ The “extremely unconstitutional” presidential candidate—like a plot to put a dog on the ballot³⁷⁵—could be excluded from the ballot by appropriate state action. But in the cases of the *arguably* unqualified candidate included on the ballot, courts are generally not adjudicating the *merits* of qualification questions (at least, those questions that survive a standing inquiry)³⁷⁶: they are adjudicating these questions on the basis of *deference to Congress*—which is the wrong inquiry. It should, instead, be based on what the state legislature has done (or failed to do) when it authorizes the investigation of qualifications.

A state inquiry into qualifications could take one of several forms.³⁷⁷ It might be simply ministerial, requiring candidates to verify that they are qualified. It could include a certification, such as a signature under penalty of perjury affirming that one meets the qualifications. It may require a low level of verification, such as an attachment of copies of documentary support for proof of residence and citizenship. Or it may require a high level of verification, such as original source documents (like a “long-form birth certificate”). The inquiry might be required as a disclosure when a candidate seeks to file for office, or as one that an election official is authorized to make under certain circumstances. Such state regulations would be permissible as long as they simultaneously existed within other constitutional boundaries.

For instance, when Mr. Hassan was excluded from Colorado’s ballot, he sued to seek ballot access.³⁷⁸ Judge Neil Gorsuch, on behalf of a panel of the Tenth Circuit, explained that “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office,”³⁷⁹ citing *Munro v. Socialist Workers Party*³⁸⁰ and *Bullock v. Carter*.³⁸¹ It is wholly within state authority to evaluate the qualifications of presidential candidates, and it may exclude such candidates as long as the means comply with the typical balancing of the state’s interest with the candidate’s burden.³⁸² In the case of an obviously unqualified candidate, the balance is relatively easy.

And when Ms. Lindsay was excluded from California’s ballot, Chief Judge Alex Kozinski, on behalf of a panel of the Ninth Circuit, found California within its right to exclude.³⁸³ It elided whether California’s statute authorized the Secretary of State to make such an inquiry,³⁸⁴ and it went on to conclude that the state’s interest in

374. See *supra* notes 107–18 and accompanying text.

375. See Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 222 (1996).

376. See *supra* notes 137–41 and accompanying text.

377. See *infra* notes 391–96 and accompanying text (discussing variety of existing state statutes).

378. *Hassan v. Colorado*, 495 F. App’x 947, 948–49 (10th Cir. 2012).

379. *Id.* at 948.

380. 479 U.S. 189, 193–95 (1986).

381. 405 U.S. 134, 145 (1972).

382. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992).

383. *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

384. California law provides that “[t]he Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced.” CAL. GOV’T CODE § 12172.5(a) (West 2013). It also states, “The Secretary of State may adopt regulations to

protecting the integrity of the ballot justified the exclusion, particularly given that Ms. Lindsay's qualifications were not in dispute.³⁸⁵

Once a state adjudicates federal qualifications, the next inquiry is the remedy for a candidate left off the ballot. As a remedy, he may go to court; after all, the state legislature, like Congress, does not have an exclusive role in adjudicating the qualifications of presidential candidates.³⁸⁶ And there is nothing that *precludes* the judiciary's role, particularly *ex ante*, when the state's regulatory apparatus has excluded a candidate from the ballot.³⁸⁷

After a state has signaled its willingness to review the qualifications of a presidential candidate, it proceeds through a state law that codifies the federal constitutional qualifications. The constitutional qualifications, as discussed earlier, do not compel a state to act upon them. Any force they have in terms of ballot access must come through a state law.³⁸⁸

In the alternative, a state may have such a statute, but the election official might examine a candidate's qualifications, conclude she meets them, and include her on the ballot.³⁸⁹ In the event that a litigant challenges the election official's judgment to

ensure the uniform application and administration of state election laws." *Id.* § 12172.5(d). Further, California law provides that a candidate "shall" be placed on the ballot if she is one generally advocated for as a candidate of the Peace and Freedom Party. CAL. ELEC. CODE § 6720 (West 2003). But the Ninth Circuit declined to address these interpretations of state law, concluding that "it has no bearing on this lawsuit, which is based entirely on federal law." *Lindsay*, 750 F.3d at 1064.

385. *Lindsay*, 750 F.3d at 1064.

386. *See, e.g., supra* Part III (describing various roles).

387. The question of judicial review may be admittedly more challenging if *Congress* is the body that finds a President-elect or Vice President-elect unqualified.

388. Whether the candidate could litigate in *federal* court is another matter. There is no obligation under the Constitution to investigate, and the cause of action arises under state law. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). But there are limited instances in which federal courts may still hear state-based causes of action that involve a substantial federal question. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *see also* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004); Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515 (2007); *cf. Gunn v. Minton*, 133 S. Ct. 1059 (2013) (finding no federal jurisdiction to hear a state-based cause of action where the federal issue in the case was not substantial). *But see supra* note 384 (Ninth Circuit declining to address questions of state law where underlying actions were based on federal law). Perhaps given a special federal interest in presidential elections, and a need for a uniform interpretation of the Constitution, a federal forum would be appropriate. The most salient presidential election disputes, however, have often begun in state court and ended in the Supreme Court under its appellate jurisdiction. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (appeal from the Florida Supreme Court); *McPherson v. Blacker*, 146 U.S. 1 (1892) (appeal from the Michigan Supreme Court). Such resolution is beyond the scope of this Article, save the advice given to courts interpreting state statutes. *See infra* Part V.

389. *See, e.g., supra* notes 132–36 and accompanying text (noting ballot access universally granted to Messrs. McCain and Obama despite litigation). Admittedly, these were major party candidates for office, when the state administrative apparatus, often operated by members of those major parties, may have had a lower incentive to police the qualifications of the candidates.

include the candidate—assuming justiciability can be met—the scenario looks slightly different. The court may potentially exclude a candidate based on its independent judgment that the candidate is unqualified—subject to limitations discussed below.³⁹⁰

States, then, have no role in adjudicating the qualifications of congressional candidates. They are not obligated to investigate the qualifications of presidential candidates. But they may enact legislation that authorizes election officials to investigate the qualifications of presidential candidates, and courts may review those decisions. What states and courts are actually doing is another matter.

V. A NEW APPROACH TO QUALIFICATIONS LEGISLATION AND LITIGATION

States' approaches to examining the qualifications of federal candidates are almost *sui generis* to each. Some states have no mechanism for their election officials to scrutinize qualifications for federal office.³⁹¹ Some have no certification mechanism for President, but require an affidavit certifying eligibility for congressional office.³⁹² Others declare in a statute that congressional candidates must meet constitutional eligibility and authorize plaintiffs to litigate the legality of a candidate appearing on the ballot.³⁹³ Some statutes leave the details of these

390. *See infra* Part V.

391. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 9-4, -175(b), -379, -465, -467, -469 (West 2009 & Supp. 2014) (no duty to evaluate qualifications, no authorization to investigate, and no requirement that candidates affirm constitutional eligibility); DEL. CODE ANN. tit. 15, §§ 302, 3184, 3301, 4307–4308 (2007 & Supp. 2012) (same); VT. STAT. ANN. tit. 17, §§ 2701–2702 (Supp. 2014) (same); *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 681 (Ind. Ct. App. 2009) (“Initially, we note that the Plaintiffs do not cite to any authority recognizing that the Governor has a duty to determine the eligibility of a party’s nominee for the presidency.”).

392. *See, e.g.*, MINN. STAT. ANN. §§ 201.221, 202A.11–.20, 208.03 (West 2009 & Supp. 2014) (no duty to evaluate qualifications, no authorization to investigate, and no requirement that presidential or vice presidential candidates affirm eligibility); *id.* § 204B.06 (requiring congressional candidates to file affidavit affirming constitutional eligibility, residency “when elected,” and age and citizenship “on the next January 3”).

393. *See, e.g.*, ARIZ. REV. STAT. §§ 16-311, -344, -351 (West 2014) (no duty to evaluate qualifications, no authorization to investigate, no requirement to affirm eligibility, *see* Ariz. Att’y Gen. Op. I01-109 (2001), but requiring candidates to file an affidavit of qualification, and permitting voters to challenge a candidate’s filing of nomination papers); COLO. REV. STAT. §§ 1-4-501(1), (3) (West 2014) (requiring candidates to affirm that they meet the qualifications of the office and authorizing eligible electors to challenge); NEB. REV. STAT. §§ 32-202 to -203, -502 to -503, -624 (2014) (no duty to evaluate qualifications, no authorization to investigate, no requirement to affirm eligibility, but requiring congressional candidates to meet constitutional eligibility and authorizing state political party committee to “institute actions to determine the legality of any candidate for a . . . congressional office”); N.J. STAT. ANN. §§ 19:13-10, :23-7, :23-15, :23-16, :29-1 (West 2014) (no duty to evaluate qualifications, no authorization to investigate, no requirement that presidential candidates affirm eligibility [see Secretary of State’s adoption of administrative law judge’s ruling in *Purpura-Moran Decision*, 2012], requiring congressional candidates to file a certificate stating “that he is qualified for the office mentioned in the petition,” and authorizing objections made to elections officer if nomination is in violation of law).

nominating declarations to an election official.³⁹⁴ Still others require declarations under penalty of perjury and leave the decision as to the adequacy of the declaration to an election official.³⁹⁵ Ambiguous statutes that discuss “constitutional qualifications” have sometimes been read to extend to federal constitutional qualifications and not simply state constitutional qualifications for state office.³⁹⁶

The interpretations of these statutes are not easily comprehensible. Consider California, which occasionally has suggested that its election officer’s duties are ministerial³⁹⁷ and preclude investigation of a presidential candidate’s qualifications.³⁹⁸ But in other contexts, election officials have excluded unqualified presidential candidates from the ballot.³⁹⁹

Since the controversies of 2008, states—whether driven by conspiracy theories or by a desire to clarify ambiguous statutes and prepare for the worst—have proposed legislation to authorize (or even require) election officials to investigate the qualifications of presidential candidates.⁴⁰⁰ So far, when disputes have arisen in

394. *See, e.g.*, MONT. CODE ANN. § 13-10-201(5)(a) (West 2013) (requiring nomination form to include “information prescribed by the secretary of state”); *Hassan v. Montana*, No. CV-11-72-H-DWM-RKS, 2012 WL 8169887, at *1 (D. Mont. May 3, 2012) (noting that the nomination form requires a candidate “under penalty of perjury to state that he is a natural born citizen of the United States”).

395. *See, e.g.*, N.H. REV. STAT. ANN. §§ 655:17, :17-B, :26, :47 (2014).

396. *See, e.g.*, N.Y. ELEC. LAW §§ 6-122, 16-102 (McKinney 2007 & Supp. 2014) (prohibiting candidates “who, if elected will not at the time of commencement of the term of such office or position, meet the constitutional or statutory qualifications therefore,” and authorizing a candidate or party to initiate litigation to enforce); *Kryzan v. N.Y. State Bd. of Elections*, 865 N.Y.S.2d 793 (App. Div. 2008) (applying statutes).

397. *See, e.g.*, *Felt v. Waughop*, 225 P. 862, 864 (Cal. 1924) (“He is not vested with the authority or burdened with the duty of ascertaining or determining, either as a matter of fact or as a matter of law, whether or not the candidates who thus offer themselves are qualified to hold and exercise the offices which they are respectively seeking.”); *Wheeler v. Hall*, 204 P. 231, 233 (Cal. 1922) (“It is sufficient to say that we do not think the clerk can raise the objection and refuse to place the name on the ballot because of his knowledge, information, or belief that the proposed candidate is not eligible to the office”); *McDonald v. Curry*, 110 P. 480, 482 (Cal. 1910) (“Under the law the Secretary of State and the several county clerks and registrars are invested with merely ministerial functions”).

398. *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215 (Ct. App. 2010) (“[T]he truly absurd result would be to require each state’s election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party’s selection of a presidential candidate.”).

399. *See supra* notes 104–06 and accompanying text (outlining Eldridge Cleaver’s removal from several states’ ballots in 1968); *cf. Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014).

400. *See, e.g.*, S. 1526, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (requiring a long-form birth certificate and other documentation to be attached to the affidavit); H.R. 2177, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (vetoed by governor, would have required attachment of relevant qualification documents to candidate’s affidavit of qualification and empowered the Secretary of State and other election officers to adjudicate qualifications); H.R. 2544, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (requiring a long-form birth certificate and other documentation to be attached to the affidavit); S. 91, 2011 Reg. Sess. (Okla. 2011); H.R. 336, 2011–2012 Leg. Sess. (Vt. 2011), *available at* <http://www.leg.state.vt.us/docs/2012/bills/Intro/H-336.pdf> (never enacted, would have required candidates for elected office to submit certified copy of

litigation, courts have erred on the side of permitting the candidate to appear on the ballot to allow Congress to sort out the matter,⁴⁰¹ except in cases of “obviously” unqualified candidates, where exclusions have been upheld.⁴⁰²

But legislative and judicial responses to qualifications controversies could be greatly simplified with a few rules.

First, any state attempt to review the qualifications of candidates for congressional office is constitutionally forbidden. Existing statutes should be construed to preclude such review; to the extent they cannot be so construed, they are invalid. Minimal regulations might pass constitutional scrutiny. For instance, a state might require that a candidate affirm that she would present herself to Congress as a candidate who meets the qualifications for office. But such regulations could not interfere with the people’s ability to elect a preferred representative and could not interfere with Congress’s ability to evaluate its members.⁴⁰³

Second, if a litigant attempts to exclude an allegedly unqualified presidential candidate from the ballot, he may only do so by citing some state law that compels investigation of qualifications and exclusion. In some jurisdictions, like California, no such mechanism may exist.⁴⁰⁴ And because there is no independent constitutional obligation to investigate, litigation in such states can end quickly.

Third, in the event a state statute authorizes or compels investigation of a presidential candidate’s qualifications, courts—particularly federal courts—should proceed with caution. These cases often involve interpretations of state law about whether the Secretary or other election administrators have the *power* or the *duty* to investigate qualifications. These are not tasks ideally suited for federal courts. Assuming a federal court has jurisdiction, the inquiry must proceed carefully. The state legislature may have the power to decide to exclude candidates from the ballot based on their qualifications, but it is not necessarily the case that it has approved rigorous review from election officials, or the courts, in the exercise of that task. And because the power to review qualifications exists in at least three other parties—the voters, the electors, and, arguably, Congress⁴⁰⁵—the reluctance to provide an additional level of review should be heightened. The political and electoral processes

birth certificate or certificate of naturalization).

401. See *supra* notes 119–36 and accompanying text.

402. See *supra* notes 307–12 and accompanying text.

403. See *supra* notes 290–94 and accompanying text (explaining the *Roudebush* case).

404. See *supra* note 397 and accompanying text. *But see* *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014) (affirming California state election official’s decision to exclude a candidate and refusing to examine state law grounds for relief).

405. See *Grinols v. Electoral Coll.*, No. 2:12-cv-02997-MCE-DAD, 2013 WL 2294885, at *13 (E.D. Cal. May 23, 2013) (citing *Gravel v. United States*, 408 U.S. 606 (1972), for the proposition that “determining a person’s qualifications to serve as President of the United States and counting electoral votes [is] within Congress’s jurisdiction”); *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 208 (Ct. App. 2010) (“Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee’s election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.”).

are the best repository for this decision making, and courts would only act in the rare event of an adjudicatory gap.⁴⁰⁶

Fourth, for state legislatures contemplating legislation to address this problem, responses should come in the form of clarification rather than additional regulation. Given that voters, electors, and Congress already examine the qualifications of candidates,⁴⁰⁷ onerous state-based regulation is not necessary. New regulations should purge any investigation of congressional candidates, clarify whether election officials are given discretionary or ministerial duties, and, at most, include minimally intrusive declarations from candidates. Indeed, the legislature may want to consider the future implications of ceding additional investigatory authority to election officers.

Finally, these tests are wholly independent of ballot-integrity tests under the First and Fourteenth Amendments. “Burdensome” legislation would still need to survive independent examination under the balancing tests articulated in cases like *Munro* and *Burdick*.⁴⁰⁸

Given the explosion of litigation from “birther”-style plaintiffs and proposed legislation from skeptical state officials, and the inevitable ongoing debates about the qualifications of other candidates for federal office, the power of states to scrutinize federal elections is a crucial starting point for any analysis. States lack any power to evaluate qualifications in congressional elections, and any power to evaluate qualifications in presidential elections arises solely from the force of its own statutes. Because of the review of qualifications that occurs in the people, electors, political parties, and Congress, the need for the state to review is slight. In many instances, they may not need to adjudicate the case at all, as there may be no relevant state statute; in others, the scope of scrutiny is small. But courts should acknowledge the proper constitutional framework before adjudicating any controversy.

406. Cf. Michael A. Helfand, *Litigating Religion*, 93 B.U.L. REV. 493, 550 (2013) (arguing that courts are the best institution for resolving a religious dispute when “no religious institution stands ready to resolve it”).

407. See *supra* note 405 and accompanying text.

408. See *Lindsay*, 750 F.3d 1061, 1064 (citing *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992)); *Hassan v. Colorado*, 495 F. App’x 947, 948–49 (10th Cir. 2012) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–95 (1986)).