THE *TERM LIMITS* DISSENT: WHAT NERVE

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I

Many, if not most, constitutional decisions of the Supreme Court involve rather ordinary disputes. If they seem for a moment to be connected to fundamental political ideas, it is only because intellectual hyperventilation is normal and acceptable in our field.[1] But every now and then, as with *United States v. Nixon* or *Planned Parenthood v. Casey*, the Justices try to signal that a case is genuinely worthy of the adjective "constitutional."[2] Those signals are all over *U.S. Term Limits, Inc. v. Thornton*.[3] Both the majority opinion and the dissent are substantial and detailed. Both appeal in serious ways not only to text, history, and structure, but also to first principles. Both insist that the constitutionality of state term limits legislation cannot be determined without understanding what kind of a nation we are.

At that altitude it is easy to lose your balance, and it is possible to question whether the Justices were fully in control of their material. In particular, it is curious that all the opinions dwell on the question whether the ultimate source of the authority of the Constitution was the people in the states or the undifferentiated people of the whole nation. This highly abstract issue

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1. As an illustration, consider the following passage, which is not from a brief or an op ed column but from the pages of an eminent scholarly journal:

> The structural constitutional logic undergirding temporary immunity applies with even greater force to the President. Unlike federal lawmakers and judges, the President is at "Session" twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed. We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America.

Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995). An example closer to the subject matter of this essay is the extended effort by two serious scholars to show that concern about federalism is evidence of neurosis. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 *passim* (1994).

2. In *United States v. Nixon*, the Court referred to executive privilege as "fundamental to the operation of government and inextricably rooted in separation of powers under the Constitution" and evaluated that interest "in light of our historic commitment to the rule of law." 418 U.S. 683, 708 (1974). The plurality opinion in *Planned Parenthood v. Casey* purported to protect "the character of a Nation of people who aspire to live according to the rule of law." 505 U.S. 833, 868 (1992).

3. 115 S. Ct. 1842 (1995).

does not seem tightly connected to the question presented by the case.[4] The sovereign people "of the states" could, after all, have agreed to limit their power to define the qualifications for federal office. Conversely, even assuming that the people of the nation consented to the Constitution, they could still have reserved to the states the power to set federal term limits.

Nevertheless, the derivation of constitutional authority may be relevant to the case in some less exact way, and by the end of this essay I will suggest one such possibility. My present point is merely that on the whole all three opinions succeed in linking the specific dispute about term limits to grander themes about allocation of authority.

Indeed, the Thomas dissent succeeds in this so well that many sophisticated people are aghast at the implications of his thinking. Jeffrey Rosen, for instance, wrote that the four dissenters are questioning "the legacy of Reconstruction," and Linda Greenhouse said that the Court is close to being "a single vote shy of reinstalling the Articles of Confederation."[5] Laurence Tribe commented that the Justices are approaching "something radically different from the modern understanding of the Constitution."[6] Such reactions might be dismissed as predictable journalistic excesses. They might also be dismissed as having more to do with Clarence Thomas than with his claims about federalism. It is no secret that many legal observers have long associated Thomas with a misguided political ideology and a dangerous jurisprudence. For such people, Thomas's dissent might have been disturbing in part because it is such a detailed, methodical, relentless legal argument.[7] It establishes him as an intellectually formidable presence on the Court.

Nevertheless, it remains a fact that serious commentary treats the *Term Limits* dissent as having put something fundamental at issue. Charles Fried's sober "Foreword" to the *Harvard Law Review* begins by describing the opinions of the 1994 Term as "redolent of first principles and revolutionary gesture."[8] Although generally skeptical about this odor of radicalism, he concedes that the four votes in support of Thomas's "initial manifesto" come "closest to revolutionary."[9] The Justices who joined the majority opinion apparently perceived in the dissent's position the same kind of potential. They thought it appropriate to do battle with the notion that this nation is merely "a collection of states" and to deny that the Congress is a "confederation of nations."[10] Similarly, in his concurrence, Justice Kennedy saw fit to rebut the

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> The question ...—whether the states preceded the creation of the union, or vice versa—like the riddle of the chicken and the egg, may be entertaining...but, in the end, not especially relevant. The important question is the nature of the federal Union that emerged when the Constitution was ratified and that has developed since that time.

DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 58 (1995).

5. Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1; Jeffrey Rosen, *Terminated*, NEW REPUBLIC, June 12, 1995, at 12.

6. Greenhouse, *supra* note 5.

7. Professor Kathleen Sullivan describes the two major opinions as ending in an intellectual standoff. Kathleen M. Sullivan, *Duelling Sovereignties*: U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 80 (1995).

8. Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 13 (1995).

9. *Id.* at 14–15.

10. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1855 (1995).

claim that "the sole political identity of an American is with the State of his or her residence," and to assert that "we are one people, with one common country."[11] All this raises the question: What nerve does the Thomas opinion touch?

My purpose is to explore that question. I do not intend to defend Thomas's thinking against charges of radicalism. Indeed, my interest is in trying to understand his radicalism and to depict it more accurately. Nevertheless, in a certain sense I will be defending his opinion. My view is that the dissent is deeply threatening precisely because it challenges a radical potential in the majority opinion. That potential is not generally acknowledged to be radical (or decried as dangerous) because it is consistent with nationalistic political aspirations that are widely shared among sophisticated commentators. These aspirations are, I think, the nerve that Justice Thomas struck. After describing the strong nationalism inherent in *Term Limits*, I will try to show how the dissent threatens the belief that this form of nationalism is either realistic or attractive.

II

It should go without saying that there is no chance that Justice Thomas will lead a successful campaign from the Court to turn this country into a confederation or to convince any appreciable number of Americans that their "sole political identity" is with their state governments. On the doubtful assumption that Thomas intended to pursue such objectives, there are strong reasons to believe that all the other Justices, including his fellow dissenters, are ambivalent or dubious about "states' rights" even when the issues are limited or ordinary.[12] Far more importantly, the political culture in the United States is too nationalized to permit any court to alter significantly our identity as a unified nation.[13]

Now, I recognize that under the norms for debate that govern constitutional commentary, exaggeration is often taken for granted. It is usually treated as an unimportant convention or, at worst, a regrettable tactic, and other explanations for it are not sought. But all of the comments that I have referred to are expressed in earnest terms, and I doubt that any of the critics was being intentionally propagandistic. None of the assertions comes from a person who is uninformed or imprecise. What can account for the existence of these apparently serious concerns about the revolutionary potential in Thomas's position?

One kind of explanation that immediately presents itself is psychological. The critics, it might be hypothesized, have been under stress. They have in recent years suffered a series of shocks and defeats, including the partial restoration of the doctrine of state immunity from congressional regulatory power and the first judicial finding in almost six decades that some activity is

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11. *Id.* at 1872 (Kennedy, J., concurring).

12. For some of these reasons, see Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 620 (1995). For others, see Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 655–58 (1996).

13. *See generally* Rubin & Feeley, *supra* note 1, at 944–97.

outside the commerce power.[14] Also to be taken into account are new statutes (such as the Unfunded Mandates Act) and proposed bills (such as the various efforts to "devolve" authority over welfare back to the states).[15] Fears of confederation, it might be said, are understandable overreactions to these outrages. Like all psychological explanations, this one is somewhat insulting. It assumes that a few political setbacks can cause intelligent, capable people to lose their grip on reality.

We might, therefore, prefer the conventional doctrinal explanation. This approach would involve a careful analysis of the logic employed in the Thomas dissent along with a demonstration that—if extended—that logic would have various far-reaching consequences. The doctrine of interposition, for instance, might be shown to follow potentially from the dissenters' view that sovereignty resides in the people in the states. The difficulty with this as an explanation, of course, is that all of Thomas's critics (especially the Justices) know that seldom, if ever, are all the doctrinal implications of an opinion realized. Indeed, as the cases from *National League of Cities* to *Garcia* show, sometimes those implications are not realized at all.[16] Limitations can be imposed because judges have second thoughts or because of practical realities, but they can also be imposed because jurists honestly do not agree that their decisions ever did entail the dire implications that others attribute to them. It is clear, for instance, that—right or wrong—Justice Thomas does not believe that his view of the Tenth Amendment must be pushed so far as to threaten the practice of holding congressional elections.[17]

I certainly do not mean to deny, by the way, that there is considerable amount of potential for expansion in the Thomas position nor that he might intend to try to realize some of it in future cases. There is virtually no doubt, for instance, that he would vote to approve other kinds of state-imposed qualifications. More generally, we know from his opinion in *Lopez* that Thomas takes seriously enough the idea that the national government may exercise only authorized powers that he would invalidate a range of modern Commerce Clause enactments.[18] These two possibilities, like others that I can imagine, might be thought to be unwise and even radical. But the identification of such realistic fears only intensifies puzzlement as to why Thomas's critics so often invoke unrealistic visions of confederation.

A third kind of explanation would begin by insisting that the logical implications of a judicial opinion are relevant to the terms of public debate

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14. New York v. United States, 505 U.S. 144 (1992) (immunity); United States v. Lopez, 115 S. Ct. 1624 (1995) (commerce power).

15. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.). As of this time, Congress is still considering welfare reform proposals.

16. For examples of the Court's refusal to extend the doctrine of *National League of Cities v. Usery*, see EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982). On the limited significance of *New York v. United States*, see Robert F. Nagel, *Federalism's Slight Revival*, 1993 PUB. INTEREST L. REV. 25.

17. U.S. Term Limits v. Thornton, 115 S. Ct. 1842, 1898–1900 (1995) (Thomas, J., dissenting).

18. United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring) (arguing for abandonment of the "substantial effect" test).

quite independently of their likely operational consequences. That is, aside from Thomas's beliefs or intentions and aside from predictions about the other Justices' probable voting patterns in subsequent cases, the *Term Limits* dissent might be "revolutionary" as a set of ideas. Under this view, the critics of the Thomas dissent are not really trying to stave off confederation; they are simply trying to win an argument, to defeat a particularly bad idea.

We all know that it is possible to get excited about ideas for their own sake, so this explanation is a promising one. To the extent that some of the criticisms are expressed in words, like "reinstalling," that portray the issue as operational, this might be understood (in the coy phrase Linda Greenhouse actually did use) to be "a slight exaggeration."[19] And the ideas or aspirations that underlie Thomas's dissent may well be fundamentally bad ones. But just as it is true that Thomas does not actually propose to establish a confederation, it is also true that at least on its face his opinion does not argue on behalf of the idea of confederation. So, while it is helpful to suppose that the critics are agitated by Thomas's ideas *as ideas* (because it helps account for their fervor), it is still not clear why they frame the debate in the terms that they do.

One possibility is that Thomas is arguing for the idea of a confederation whether he says so or not. To me this seems doubtful or even unfair. If I were to write in favor of one important but limited aspect of Marxism (say, the idea of alienated labor), it would seem wrong, at least absent a good deal of explanation, for you to reply that I am arguing on behalf of the inevitability of class struggle, the dictatorship of the proletariat, and all the rest. Analogously, even if Thomas likes one important component of the idea of confederation (for example, the notion that ultimate sovereignty resides in the people in the states), he is not necessarily committed to other possible components (such as the lodging of citizens' primary allegiance in state governments).

A variation on this way of explaining the extreme terminology chosen by the critics of the dissent is to focus not on the ideas that Thomas was arguing *for* but on the ideas that his opinion *undermines*. To the extent that, as I suggested earlier, the dissent is a sustained and impressive refutation, then its significance for the critics could correspond to the significance of the ideas that they see in the majority's position. The critics' terminology, that is, might be explicable as a reflection of their own commitments. To test this explanation, it is necessary to shift attention to the majority opinion. What aspirations does it stand for?

III

The majority opinion holds that at least insofar as states seek to regulate

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19. The joke, of course, is that her use of the word has to be understood to be a wild exaggeration, the verbal equivalent of a cartoon. Since just about everyone knows that "reinstalling" the Articles of Confederation would require dismantling the national government—the abolition of the House of Representatives, the Presidency, the Judicial Branch (with the exception of the maritime courts), the Bill of Rights, all regulations based on the commerce power, and all national taxation—no one at the *New York Times* (or, for that matter, at the *National Enquirer*) can believe that it is a "slight" exaggeration to attribute this program to four members of the Supreme Court. Greenhouse thus gets all the rhetorical advantage of associating the dissenters with the Articles of Confederation while making fun of anyone so ignorant as to take her seriously.

the national electoral process, they must be authorized to do so by the Constitution. It denies that the Tenth Amendment's reservation of unenumerated powers to the states is a sufficient authorization because that reservation refers only to powers in existence before the Constitution was enacted. Since the national government's electoral system was created by the Constitution, authority to regulate it could not have existed prior to ratification. Even if the power could have been reserved, the Court insists that it was not because the text of the Constitution establishes an exclusive set of qualifications.

At least in my judgment, the Thomas dissent mounts an effective challenge to these positions.[20] But if all that it challenges is the conclusion that state-imposed qualifications for national political office are unconstitutional, the ardor of Thomas's critics would be hard to understand. Such qualifications have been imposed in the past without threatening the Union,[21] and even the majority acknowledges that term limits are arguably beneficial.[22] Moreover, other qualifications that could be imagined (such as mental competency) seem sensible enough. It might be thought, therefore, that the majority's position must entail much more. For example, there presumably are many national functions besides elections that came into being only with the Constitution of 1787. The concurring opinion, accordingly, implies that states have no reserved power to regulate any exercise of federal power.[23] From this it might be extrapolated that states have no power under the Tenth Amendment to regulate substantive areas that are enumerated in the Constitution as being national powers.[24] The argument would be that national powers like that over commerce came into being with the Constitution of 1787 in the same way that the national electoral process did; therefore, the states could not have exercised this precise power prior to ratification. The conclusion would follow that there is no concurrent state authority over matters subject to congressional power, such as the power to regulate commerce.

Some people might consider the logic of these extensions to be very powerful. In fact, the logic is almost a perfect reflection of the objections that Justice Brennan, as well as various eminent law professors, made to *National League of Cities* years ago.[25] Like the state's putatively sovereign apparatus, the sovereign national political process can be thought to be significant ultimately because of the substantive regulatory decisions that it yields. Therefore (so goes the argument), it follows a fortiori from *Term Limits* that states can exercise no power over the regulation of commerce.

Of course, for the general reasons that I mentioned in connection with possible extensions of Thomas's own position, these kinds of extrapolations of

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20. For another, similar assessment, see Sullivan, *supra* note 7.

21. Immediately after ratification a few states imposed qualifications, including a property qualification and several residency qualifications. 115 S. Ct. at 1903 (Thomas, J., dissenting).

22. *Term Limits*, 115 S. Ct. at 1871.

23. *Id.* at 1873 (Kennedy, J., concurring).

24. *See* Sullivan, *supra* note 7 at 98.

25. National League of Cities v. Usery, 426 U.S. 833, 858 (1976) (Brennan, J., dissenting). *See* Frank Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Laurence Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

the majority position are hardly inevitable even if the logic were inexorable. For one thing, the consequences would be impractical. The exercise of federal authority is as pervasive as the delivery of mail and could hardly be immunized from all state regulation.[26] Moreover, now that "commerce" is thought to include almost all activities that go on within the states, abolishing or limiting the states' concurrent powers would require increasing Washington's regulatory power at a time of widespread disenchantment with centralized planning. Although versions of these doctrinal implications have been toyed with at various times, beginning with *Gibbons v. Ogden* in 1824, it seems fanciful to attribute to the *Term Limits* majority any serious intentions of these kinds. Even the more limited extrapolation—that is, to the establishment of an immunity for the exercise of certain "sovereign" national functions—would run up against the Court's frustrating experience in trying to define the sovereign functions of state governments. Having not so long ago acknowledged the morass created by these efforts,[27] it would be strange for the Court to embark on the same inquiry at the national level.

The probability that the *Term Limits* majority is not intending to initiate any broad regime of federal immunity does not mean that it does not find the idea conceptually attractive. After all, those Justices do quote approvingly from Chief Justice Marshall's opinion in *McCulloch v. Maryland*—an opinion that contains language expansive enough that it would, if taken literally, prevent states from requiring U.S. mail trucks to stop at red lights.[28] Moreover, members of the *Term Limits* majority have joined in decisions of the Court that have invalidated state laws that, even in the absence of a federal statute, are said to burden interstate commerce unduly.[29] These "dormant Commerce Clause" cases demonstrate the continuing appeal of the idea that an authorization to Congress is inconsistent with concurrent state regulatory power.

Historically, and for some today, this appeal might rest in part on an analogy to physical objects. That is, national regulatory authorization might be thought to occupy space in the same way that a cinder block does and, thus, to exclude any other government's powers. However, the modern dormant commerce cases tend to be highly functional rather than conceptualistic—they

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26. For a revealing description, see Gerald F. Seib, *Federal System: You Can Get Away from Washington—But Not Government*, WALL ST. J., June 21, 1995, at A1.

27. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

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> The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

McCulloch v. Maryland, 17 U.S. 316, 436 (1819).

29. *See, e.g.*, West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) (opinion of Court by Stevens, which was joined by O'Connor, Kennedy, Souter, and Ginsburg); C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S. Ct. 1677 (1994) (opinion of the Court by Kennedy, joined *inter alia* by Stevens and Ginsburg, with O'Connor concurring). Justice Stevens, the author of the majority opinion in *Term Limits* has had a long history of aggressively enforcing "dormant" Commerce Clause principles. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), *cert. dismissed sub nom.*, Consolidated Freightways Corp. v. Kassel, 455 U.S. 329 (1982); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

emphasize interest balancing and motive analysis rather than abstractions about the allocation of power. In fact, one of the ideas that they seem to reflect is almost the opposite of the cinder block analogy. In some of these cases what state officials seem to have done wrong is to have *not* regulated interstate commerce (or at least to have not been sufficiently attentive to the needs of that commerce).[30] Rather than being ready to shoulder an appropriate share of the costs of national commerce, they have tried to protect their own citizens' interests by sloughing off burdens onto other states.

It is possible, then, that the federal immunity created in *Term Limits* arises out of a commitment to the much larger idea that local ties and loyalties that exist within the states are dangerous because they produce policies that frustrate national policies. This may sound too self-evident to be worth mentioning, but notice something: This formulation turns federalism on its head. A principal reason for a federal system, obviously, is to allow for the vindication of local interests and values.[31] Another is to divide citizen loyalty so that political competition between the nation and the states can help enforce constitutional limitations on the central government.[32] That is, the system is built on the idea that, at least within limits, the national will should be frustrated by state-based politics. If the *Term Limits* majority is committed to the idea that local interests and divided loyalties are undesirable just because they can reflect different values and interests than those that prevail at the national level, it is opposed to federalism.[33]

Since virtually everyone agrees that federalism is a basic element of our constitutional system, I do not want to be hasty in attributing to five members of the Supreme Court a position that is profoundly hostile to that principle. Nevertheless, it should be noted that, radical as it would be, such hostility would explain the terminology utilized by the five prevailing Justices. Remember, the majority suggests they are doing battle with the position that this nation is "a collection of states" and that Congress is a "confederation of nations"; recall also that the concurrence attacks the view that "the sole political identity of an American is with the State of his or her residence." These formulations cast the issue as being between unified nationhood and confederation, between loyalty to the whole country and loyalty to a state. They leave out the possibility that multiple sovereignties and divided loyalties can be consistent with nationhood. They leave out, that is, the possibility of federalism.

Still, each of the specific sentences I have quoted could in context be read as having a meaning that stops well short of general hostility to the basic elements of federalism. Other aspects of the *Term Limits* opinion, however, support the conclusion that a radically nationalistic aspiration animates the majority.

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30. *See, e.g., Kassel*, 450 U.S. at 662.

31. *See* Rubin & Feeley, *supra* note 1, at 929.

32. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436 (1987); Robert F. Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV., 99–100 (1981).

33. Or, to put the matter more abstractly, the majority opinion strains against the fundamental demand imposed by the idea of federalism—the demand that citizens "operate mentally on more than one track." *See* Wilfred M. McClay, *The Soul of Man Under Federalism*, FIRST THINGS, June–July 1996, at 21, 25.

Consider how far the majority takes the argument that the power to define qualifications for national office is a new, non-reserved power created by the whole people when the Constitution was ratified. It is one thing to accept (as the Court does) Justice Story's claim that national officers "owe their existence and functions to the united voice of the whole...of the people."[34] If historically true, this claim would tend to support the rather formalistic conclusion that the power to determine qualifications could not have predated ratification. The majority, however, takes another step altogether and endorses the view that national representatives "owe primary allegiance...to the people of the Nation."[35] This assertion is unnecessary to the Court's Tenth Amendment argument because that argument turns on the metaphysics of "reserving" powers. Even if it were entirely clear that the power to set qualifications came into being with the new Constitution, the framers might have thought it desirable or inevitable that primary loyalty would remain with the states.[36] They did, after all, set up a system that as a practical matter leaves the people in each state free to vote for representatives whose predominant allegiance is to their state.[37] Nevertheless, the majority pushes the point further, insisting that the "salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States."[38] Here the majority does not modify "allegiance" with the word "primary" and thus appears to have extended its disapproval of divided loyalties so far as to insist on a single allegiance.

There can be doubt, of course, about whether the majority means to go this far. This stance is inconsistent with the position taken by the Court only eleven years ago that the national political process can and should be trusted to guard the role of the states in our federal system.[39] More fundamentally, it is inconsistent with the great insight of the founders that it is possible—and desirable—to have multiple sovereigns, that loyalty to the national government can coexist with, and even be partially defined by, loyalty to state governments.

The concluding paragraph of the opinion, however, tends to dispel any doubts.[40] To permit state-imposed term limits, the majority says, "would effect a fundamental change in the constitutional framework." The framers intended the qualifications for national representatives to be "fixed" and "uniform." That intention, says the Supreme Court, reflects the understanding that "Members of Congress...become, when elected, servants of the people of the United States." Thus, the theory at work in *Term Limits* is that the whole people of the United States have a legal interest in each state's representatives because the duty of those officers is to pursue the political interests of the nation. Their allegiance must be to the national interest. Again, what is left out of this version of our "constitutional framework" is the possibility that state interests may legitimately help to define the national interest. What is left out is the framers' paradoxical

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34. U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1855 (1995).
35. *Id.*
36. *See* Robert F. Nagel, *The Last Centrifugal Force*, 12 CONST. COMM. 187 (1995).
37. It is true that Article VI, paragraph 3 requires that senators and representatives take an oath "to support the Constitution." This is no practical limitation; moreover, even conceptually it is a serious limitation only if there is agreement that state interests cannot help define what "the Constitution" means.
38. *Term Limits*, 115 S. Ct. at 1855.
39. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
40. *Term Limits*, 115 S. Ct. at 1871.

idea that in a federal system officials cannot properly serve one master unless they also serve another.

In claiming that the *Term Limits* majority rejects the idea of federalism itself, I might be accused of exaggerating in the same way that the critics of the dissent exaggerated when they attributed to that opinion a commitment to confederation. Perhaps this is true, although I have tried to stay close to the language and arguments actually used by the majority. Moreover, while it is unrealistic to believe that in operation the national interest is or could be defined independently of state interests, the idea of unalloyed nationalism is not unrealistic at all.

In fact, in various guises the concept is endemic in the legal academy today. It can be seen, for example, in Bruce Ackerman's "constitutional moments," which occur when the American people, unconstrained by those inconvenient, state-based procedures in Article V, amend the Constitution by bringing the conclusions of their heightened deliberations directly to bear on national decision makers.[41] Unalloyed nationalism can also be seen in Robin West's claim that the Fourteenth Amendment embodies "an absolute, incontrovertible right not to be subject to any sovereignty other than the state."[42] Under West's "sole sovereignty" principle, state and local governments are reduced to much the same status as private organizations; "the state" is the national government, and for her it is bondage to be subject to more than this one sovereign.

Tamer manifestations of strong nationalism can be seen in the hostility of Daniel Farber, Mark Tushnet, William Eskridge, and Suzanna Sherry to the malapportionment of the United States Senate, and in the criticisms that Jack Balkin and Akhil Amar direct at the electoral college.[43] If these examples seem partial and oblique, think of Jesse Choper's full scale assault on the values of federalism.[44] Or read Edward Rubin and Malcolm Feeley's colorful argument that there is "no normative principle involved [in federalism] that is worthy of protection."[45]

To say the least, the five Justices in the *Term Limits* majority would not be entirely out of step with much prominent academic thinking if they were hostile to basic elements of federalism. Although their commitment to nationalism is not unconventional, it is, I think, radical in the sense that it represents a basic rejection of the constitutional design. At any rate, to the extent that *Term Limits* does represent a commitment to radical nationalism, the argumentative stakes are very high. It would be natural for those who support the majority position to perceive the dissent's persistent rebuttal as outrageously extreme; in fact, from the perspective of Thomas's critics the dissent is radical because it reasserts a constitutional commitment that contemporary nationalists have rather completely abandoned.

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41. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
42. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 36 (1994).
43. *See Constitutional Stupidities: A Symposium*, 12 CONST. COMM. 139 (1995).
44. Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).
45. Rubin & Feeley, *supra* note 1, at 909.

IV

My effort so far to explain the extreme terminology spawned by the Thomas dissent may strike you as unsatisfactory because the most I have shown is that the dissent threatens an idea that is *legalistically* radical. Given the loud cheers that sophisticated commentators have often raised when the modern Court has done "justice" by departing from the intended meaning of the Constitution, it would be naive in the extreme to assume that journalists or even most Justices think it crucial to adhere closely to text or original understanding. It is more likely that Thomas's critics simply believe that there is no good political or organizational reason to dilute national political allegiance and national political will. As I have already indicated, a substantial literature exists arguing in that direction. Unless Thomas's position undermines the conviction that unalloyed nationalism is a desirable system, it remains difficult to see how his dissent could seriously threaten his critics.

One extra legal reason for the kind of nationalism represented by the majority opinion is the belief that federalism is out of date. For instance, Rubin and Feeley argue that federalism can no longer secure state-based values and identifications because today "our real community is a national one."[46] No doubt there is much to support this claim empirically, and the claim itself is powerful in its implications. For one thing, if the kind of unalloyed nationalism embraced by the *Term Limits* majority is already a completely established fact, then the dissenters' ideas are radically at odds with our circumstances.

The term limits movement, however, presents a discomforting fact for empiricists like Rubin and Feeley. This movement, based in the states and springing in part from local experience with the imposition of qualifications for state legislative offices, is evidence that our political community is not yet completely nationalized. Indeed, it demonstrates that people within some states are ready to challenge national political elites both intellectually and politically. The dissent emphasizes this when it depicts that initiative as "an effort at the state level to offset the electoral advantages that congressional incumbents have conferred upon themselves at the federal level."[47] Thomas's constitutional defense thus carries with it a much larger point about the continuing role of

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46. *Id.* For people who have actually lived in local communities (as opposed to flying over them), much of Rubin and Feeley's depiction will be a hoot. The professors say, for instance, "Most of our states...are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another." *Id.* at 944. This sort of assertion demonstrates less about the nature of local political communities than about the disabilities that afflict some very smart people: "Like a foreigner or a man out of his social class, [the rationalist] is bewildered by a tradition...of which he knows only the surface.... And he conceives a contempt for what he does not understand." MICHAEL OAKESHOTT, RATIONALISM IN POLITICS 31 (1962). That Rubin and Feeley should describe those who disagree with their depiction as "neurotic" is not some insignificant rhetorical flourish. The professional, managerial class that identifies so strongly with national political institutions has long viewed mainstream Americans as "inmates of an insane asylum." *See* CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS, 447 *passim* (1991). *See also* ROBERT H. WEIBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 221 (1995).

47. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1912 (1995). Felix Morley made the general point that in an unchecked national democracy "the top echelons begin to regard themselves as a managerial elite, entitled to rule the rest of the county...." FELIX MORLEY, FREEDOM AND FEDERALISM 28 (Liberty ed. 1981). "That centralizing process," he said, "is difficult to reverse because of the vested interest in power...." *Id.* at 5.

state-based politics in shaping the national culture.[48]

The intellectual tradition of which *Term Limits* is a part does not always insist that our only real political community is national. Indeed, an alternative—and probably more widespread—basis for modern hostility to federalism is the belief that state-based political communities do exist but are morally benighted. This belief is understandable in light of the unsavory historical associations of "states' rights." It has never, however, been entirely accurate, as is demonstrated by the commonly invoked examples of state resistance to the Alien and Sedition Act and later to fugitive slave laws.[49] More to the point, in acknowledging that term limits can be defended as a method of compensating for the advantages of incumbency, the dissent undermines the moral complacency of liberal nationalists. The entrenched congressional leadership is, after all, an odd object of solicitude for progressives. Whatever the immediate partisan implications might be, the general stance of the term limits movement—it proposes institutional reform, favors political flux and accountability, and challenges the powerful—raises a significant question about where the progressive instinct is lodged today.[50]

Even if state-based political cultures do exist and can promote morally attractive policies, strong nationalists object to federalism because it frustrates the will of the national majority. Thus, state-imposed term limits would, the Court says, "be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[51] Although chosen by separate constituents, after their election national representatives should be "servants of the people of the United States."[52] Majoritarianism at the state level, in short, must not be allowed to interfere with the more important majoritarianism that occurs in our national institutions.

The moral basis for national majoritarianism might at first appear to be clear enough. If political legitimacy comes from electoral numbers, surely more is better than less, bigger more legitimate than smaller. Why should a majority in Arkansas frustrate the larger majority called "the people of the United States"? However, as Felix Morley long ago pointed out,[53] this logic can be applied to national majorities too, for the world has more people than the United States. If nationalism is not to dissolve into internationalism, it must be that the appropriate size of the governing majority depends on many factors, including the quality of the deliberation achievable at a particular scale, the moral entitlement of a certain segment of the population to control issues of special importance to them, and so on. As Thomas's dissent makes clear, once the reflexive preference for majoritarianism in larger units is set aside, the values of democracy might well support the results of the Arkansas initiative process. The term limits provision had "won nearly 60% of the votes cast in a

48. For an account of how "local America" has checked the power of the "national class" not only throughout the last century but well into this one, see WEIBE, *supra* note 46, at 215–37.

49. SHAPIRO, *supra* note 4, at 46.

50. That is, it raises the question whether self-described "progressives" are progressive. *See generally*, Robert F. Nagel, *Progress and Constitutionalism*, MICH. L. REV. (forthcoming 1996).

51. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. at 1845.

52. *Id.* at 1871.

53. MORLEY, *supra* note 47, at 42–43.

direct election and...[had] carried every congressional district in the state." The majority of Arkansas voters had thereby decided "to restrict the field of candidates whom they [were] willing to send to Washington...."[54]

There are, of course, various ways for nationalists to supplement the first, crude argument for national majoritarianism. Rubin and Feeley's claim that "the United States has one political community, and that political community is the United States" is one such effort.[55] Although their assertion would no doubt come as a surprise to the many Americans for whom participation in state political processes is important and distinctive, suppose that it were true. Even if Rubin and Feeley's claim (or others serving the same purpose) were believable, it could not be used to support the *Term Limits* decision. The reason is that no national majority had prohibited states from enacting term limits legislation. Even given the obvious incentives to do so, Congress had passed no statute on the matter.

National democracy is an unlikely explanation for the kind of nationalism represented by *Term Limits* anyway. Many nationalistic legal scholars, including some of Thomas's critics, regard the legislative process with skepticism and Congress with something close to contempt. Moreover, on significant occasions, all the Justices are quite willing to countermand the products of congressional decisionmaking. Indeed, in *Term Limits* itself the majority takes the unusual step of rearguing and reaffirming one such decision, *Powell v. McCormack*.[56] This suggests that, despite the Court's rhetoric about national representatives being "servants" of the whole people, the likely explanation for *Term Limits* is actually distrust of national democracy. And, in fact, under the majority opinion, Congress is foreclosed from either approving or disapproving state term limits legislation. It is the dissenting opinion that would allow for an expression of political will at the national level; it proposes to validate the Arkansas term limits law as a regulation of federal elections under Article I, section 4, thus presumably exposing such state laws to congressional override.[57]

While it is, I think, accurate to conclude that *Term Limits* is not animated by democratic impulses, it would be too much to say that the nationalism of *Term Limits* is thoroughly anti-majoritarian. According to its own terms, the decision blocks both the state and national political processes only where a clear and certain constitutional limitation is at stake. So if there is an attractive value behind the nationalism of *Term Limits*, it is the value of constitutionalism.

But how attractive is the aspiration for constitutionalism found in *Term Limits*? As I noted earlier, the main constitutional arguments made by the

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54. *Term Limits*, 115 S. Ct. at 1891. It might be added to Thomas's argument that cynicism and withdrawal, which can characterize politics where an elite is entrenched, might ultimately undercut the social conditions that support political participation. *See* MORLEY, *supra* note 47, at 27 (developing the distinction between social and political democracy). To the extent this is true, term limits can be seen as protecting democracy at both the state and national levels.

55. Rubin & Feeley, *supra* note 1, at 945.

56. *Term Limits*, 115 S. Ct. at 1848–52 (reaffirming Powell v. McCormack, 395 U.S. 486 (1969).

57. *Id.* at 1909–13. The dissent is not explicit on this latter point, but at a minimum it makes clear that Congress could legislate against disqualifications that worked to prevent any elections at all. *Id.* at 1900. The majority is entirely certain that the whole issue cannot be decided by legislatures, whether state or national. *Id.* at 1871.

Court and so doggedly challenged by the four dissenting Justices are: that the power to define qualifications was not an "original power" of the states and therefore could not have been reserved; and that even if the power had been original, the framers "divested" the states by listing exclusive qualifications. The effect of the majority's arguments on both issues is that the Constitution authoritatively covers the issue of state-imposed term limits. It is authoritative with respect to the first issue because the "reserved powers" are a closed set, determined by what existed at the time of ratification. It is authoritative with respect to the second issue because the qualifications listed in the Constitution were meant to be exhaustive even as against state augmentation.

Correspondingly, the specific meaning of the dissent is that both the reserved powers and the possible qualifications for Congress are open sets. The resonance of this argument goes much beyond the issue of term limits. Its larger significance is the idea that the Constitution leaves important gaps and, thus, that there are dangerous possibilities it cannot protect against. The dissenters' position, that is, insists that there are limits to constitutional control over politics—that beyond the lighted arena of constitutional interpretation lies an unbounded world of political will.

This prospect *is* radical. It cuts against the over-arching promise of modern constitutionalism, which is that a minimal level of political virtue can be assured by legal prescription. The power of this promise can be seen in the ever-expanding list of subjects that in this century have been exposed to judicial oversight.[58] The promise does not require that constitutional protections be defined at any definite level. It requires that the Constitution cover as much as possible so that as little as possible will be excluded from legal constraint (and its operational correlative, judicial supervision). For many, this idea of exhaustive constitutionalism makes possible a profound sense of security and assurance.

The dissent's willingness to challenge this promise, I think, is what makes explicable the cries of outrage. Seen in this light, the critics' references to reconstruction and confederation are allusions to the degree of political chaos that unsupervised political will can generate. It also explains the otherwise perplexing theme that I mentioned at the outset. As I said, both the majority and the dissent treat as central to the case the issue of consent—whether the people of the states or the undifferentiated people of the nation consented to the Constitution. The dissent's claim that sovereignty lies in the people of the states is troubling not because it bears very much on the scope of the Tenth Amendment, but because it is emblematic of forces not subject to constitutional control. On the other hand, the majority's repeated invocation of the "people of the whole nation" comfortingly projects the idea of a nationhood back into the pre-constitutional past. At the same time, it extends the metaphor of legal control by suggesting that the only cognizable political force that pre-dated the nation was the "whole people" who constrained themselves forevermore when they consented to the Constitution. Under this view, ultimately there is no legitimate political force outside the Constitution.

For the *Term Limits* majority, then, the trouble with federalism turns

58. *See generally* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989).

out to be the same thing that is the trouble with democracy. Both mean that the Constitution leaves much unresolved.[59] Both destroy the background assurance that things will come out all right.

An aspiration for control by legal prescription is what drives modern constitutionalism and its derivative, radical nationalism. This aspiration is a profound part of our political culture (and especially the culture of the legal elite) but it is shaky because in sober moments everyone knows that uncertainty and risk are elementary facts of political life that cannot be expunged by a written code or judicial review. The *Term Limits* dissent thus struck an exposed nerve with its unblinking insistence that the possibility of unprescribed outcomes is also perfectly legitimate.

59. As Wilfred M. McClay has written, "[T]here is in federalism a recognition of a kind of restlessness and mystery and indecisiveness at the heart of American political life—as if many of the most important questions remain open and unsettled." McClay, *supra* note 33, at 25.