

"THEY THE PEOPLE": A COMMENT ON *U.S. TERM LIMITS, INC. v. THORNTON*

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In this Comment, I aim to build upon Professor Nagel's astute observations,¹ with which I am largely in agreement. In particular, I want to focus on two ironies that I believe are at the center both of the majority's opinion in *U.S. Term Limits, Inc. v. Thornton*² and of strong nationalism generally.³ Simply stated, my thesis is this: populist pretensions notwithstanding, the only thing the *Term Limits* majority and other believers in strong nationalism fear more than the states is the People. They are not "progressives" in either the modern or the historical sense of the term.⁴ They

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1. See Robert F. Nagel, *The Term Limits Dissent: What Nerve?*, 38 ARIZ. L. REV. 843 (1996).

2. 115 S. Ct. 1842, 1845 (1995).

3. This is Professor Nagel's apt term. See Nagel, *supra* note 1, at 845.

4. As Professor Balkin has noted, "nowadays people are likely to use the word 'progressive' as a synonym (or a euphemism) for 'liberal' or 'left.'" J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1949 (1995). One might reasonably expect such persons to support the term limits movement which "proposes institutional reform, favors political flux and accountability, and challenges the powerful." Nagel, *supra* note 1, at 854. Moreover, "[t]erm limits are inclusive." Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 567 (1994). Their adoption in California, for example, forced more than a quarter of the legislature to retire, and "in the renewed competition for public office, nearly half of the new members were women and more than twenty percent were Hispanic." *Id.* (citing *Real Change*, WALL ST. J., Apr. 28, 1993, at A20; Madeleine Kunin, *Give Everyone a Turn at the Game Term Limits*, L.A. TIMES, Sept. 13, 1991, at B7). But, paradoxically, it is the modern "Right" with which the term limits movement is in fact associated, and four "conservative" justices (Clarence Thomas, William Rehnquist, Antonin Scalia, and Sandra Day O'Connor) would have found the Arkansas Amendment constitutional.

As a historical matter, the Progressives at the beginning of the 20th century implemented many of the reforms first advocated by the Populists at the end of the 19th century, including the direct election of senators, the initiative, the referendum, and the recall of office holders. See Balkin, *supra*, at 1944; Rotunda, *supra*, at 585; RICHARD HOFSTADTER, *THE AGE OF REFORM* 108 (1955); *id.* at 134 ("[A] great deal of Progressive political effort was spent enacting proposals that the Populists had outlined fifteen or even twenty years earlier.") Thus, the term limits movement is arguably a legacy of the Progressive Movement, which "was based on the assumption that the best cure for any perceived ills of democracy is more democracy." See Rotunda, *supra*, at 585; David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 983 (1996) (observing that Herbert Croly, "one of the most influential figures of the Progressive Era," *id.* at 978, championed a "monarchy of the people" to replace the "monarchy of the Law") (quoting HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 55 (1914)). But see Balkin, *supra*, at 1948 ("For progressives, democratic culture is a culture in which the

are merely elitists.⁵

The first noteworthy irony in the *Term Limit* majority's opinion appears for the first time in the second paragraph but ultimately pervades it. It is a "fundamental principle of our representative democracy," the majority observes, "that 'the people should choose whom they please to govern them.'"⁶ Some variation on this statement by Alexander Hamilton is regularly reiterated throughout the opinion,⁷ as is James Madison's celebration of meritocracy and egalitarianism in *Federalist* 57.⁸ "Who are to be the objects of popular choice?"

progressive ideal of democracy can flourish....[D]emocratic culture is an ideal which is opposed to popular culture and from which popular culture is always seen as a fall." (emphasis added).

5. Professor Balkin contends that such elitism is in fact central to Progressivism:

Although populism and progressivism share a desire for reform, they diverge most significantly in their attitudes towards the beliefs, attitudes, and actions of the mass of ordinary citizens....

...Progressivism also has a significantly different attitude towards expertise: Far from being something to be distrusted, it is something to be particularly prized. Expertise is necessary to arrive at sound policy judgments; conversely, its lack often leads ordinary citizens to misunderstand the issues and make choices that are not in the public interest. Because of its respect for expertise, progressivism has always been quite comfortable with elite discourse, and progressivism is the natural home for reformers who are members of political, academic, and social elites.

Balkin, *supra* note 4, at 1945, 1947.

6. 115 S. Ct. at 1845 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969), in turn quoting speech by Alexander Hamilton, in 2 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 257 (J. Elliot ed., 1863) [hereinafter *ELLIOT'S DEBATES*]).

7. The majority invokes Hamilton's exact quotation four different times. *See id.* at 1845 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969), in turn quoting Hamilton's speech, in 2 *ELLIOT'S DEBATES*, *supra* note 6, at 257); *id.* at 1850; *id.* at 1851; *id.* at 1862. On nine additional occasions, the majority expresses the same sentiment using other words. *See id.* at 1851 ("sovereignty confers on the people the right to choose freely their representatives to the National Government"); *id.* ("The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.") (quoting *Powell*, 395 U.S. at 541, in turn quoting speech by Robert Livingston, in 2 *ELLIOT'S DEBATES*, *supra* note 6, at 292-93); *id.* at 1860 (quoting Livingston, in 2 *ELLIOT'S DEBATES*, *supra* note 6, at 292-93); *id.* at 1851 ("The true principle of a republic is, that the people should choose whom they please to govern them.") (quoting *Powell*, 395 U.S. at 540-41, in turn quoting speech by Hamilton, in 2 *ELLIOT'S DEBATES*, *supra* note 6, at 257); *id.* at 1851 ("restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.'") (quoting *Powell*, 395 U.S. at 543, quoting statement of the Chairman of the House Committee on Elections, in 17 *ANNALS OF CONG.* 874 (1807)); *id.* ("the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution") (quoting *Powell*, 395 U.S. at 534 n.65, quoting 16 *Parl. Hist. Eng.* 589-90 (1769)); *id.* at 1852 n.12 ("in a representative democracy the people should choose whom they please to govern them"); *id.* at 1860 ("the people's right to choose"); *id.* at 1860 n.26 ("The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing....") (quoting George Washington, in 1 *DEBATE ON THE CONSTITUTION* 305, 306-07 (Bernard Bailyn ed., 1990)); *id.* at 1863 ("an aspect of sovereignty is the right of the people to vote for whom they wish").

8. The majority invokes *Federalist* 57 twice.

'Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.'

See id. at 1857 (quoting *THE FEDERALIST* NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961)); *id.* at 1862-63 (quoting *THE FEDERALIST* NO. 57, *supra*, at 351 (James Madison)). On 13 additional occasions, the majority expresses the same sentiment using other

Madison rhetorically asks.⁹ "Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."¹⁰ The majority sounds like fervent populists, and I have not even mentioned the opinion's *thirty* references to "We the People."¹¹ Indeed, when visiting the University of Arizona last fall, Justice

words. *See id.* at 1850 ("[T]he door [of Congress] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."") (quoting *Powell*, 395 U.S. at 540, quoting THE FEDERALIST NO. 52, *supra*, at 326 (James Madison)); *id.* at 1856–57 (quoting THE FEDERALIST NO. 52, *supra*, at 326 (James Madison)); *id.* at 1857 n.18 (quoting THE FEDERALIST NO. 52, *supra*, at 326 (James Madison)); *id.* at 1864 n.32 (same); *id.* at 1850 n.11 ([T]he Qualification Clauses "further the interest of the people of the entire Nation in keeping the door to the National Legislature open to merit of every description."); *id.* at 1861 n.27 ("the Framers wanted to minimize the barriers that would exclude the most able citizens from service in the National government"); *id.* at 1862 ("[T]he Powell Court recognized that an egalitarian ideal—that election to the National Legislature should be open to all people of merit—provided a critical foundation for the Constitutional structure."); *id.* at 1863 ("[N]o Government, that has ever yet existed in the world, affords so ample a field, to individuals of all ranks, for the display of political talents and abilities....") (quoting John Stevens, Jr. in 1 DEBATE ON THE CONSTITUTION, *supra* note 7, at 487, 492); *id.* ([T]he Constitution "which is proposed for the U.S. throws the door wide open for the entrance of every man who enjoys the confidence of his fellow citizens") (quoting letter from Timothy Pickering, in 1 DEBATE ON THE CONSTITUTION, *supra* note 7, at 289, 290); *id.* ("[T]he egalitarian ideal, so valued by the Framers"); *id.* at 1863 n.30 (it is "improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & rewards") (quoting Dickinson in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 123 (M. Farrand ed., 1911) [hereinafter FARRAND]); *id.* ("There are strong minds in every walk of life that... will command the tribute due to their merit.... The door ought to be equally open to all.") (quoting THE FEDERALIST NO. 36, *supra*, at 217 (Alexander Hamilton)); *id.* ("the places of senators are wisely left open to all persons of suitable age and merit") (quoting Noah Webster, in 1 DEBATE ON THE CONSTITUTION, *supra* note 7, at 129, 142).

9. *Id.* at 1857 (quoting THE FEDERALIST NO. 57, *supra* note 8, at 351 (James Madison)); *id.* at 1862 (quoting THE FEDERALIST NO. 57, *supra* note 8, at 351 (James Madison)).

10. *Id.* at 1857 (quoting THE FEDERALIST NO. 57, *supra* note 8, at 351 (James Madison)); *id.* at 1862–63 (quoting THE FEDERALIST NO. 57, *supra* note 8, at 351 (James Madison)).

11. *See id.* at 1845 ("the Framers' vision of a uniform National Legislature representing the people of the United States"); *id.* at 1851 ("sovereignty is vested in the people"); *id.* at 1853 ("each member of Congress is 'an officer of the union'") (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 [hereinafter STORY]); *id.* at 1855 (quoting 1 STORY, *supra*, § 627); *id.* ("the Framers envisioned... a direct link between the National Government and the people of the United States"); *id.* ("representatives owe primary allegiance not to the people of a State, but to the people of the Nation"); *id.* (officers of the union "owe their existence and functions to the united voice of the whole, not of a portion, of the people") (quoting 1 STORY, *supra*, § 627); *id.* ("Representatives and Senators are as much officers of the entire union as is the President."); *id.* (Constitution gives "representatives of all the people the final say in judging the qualifications of the representatives of any one State"); *id.* ("representatives owe their allegiance to the people, and not to States"); *id.* at 1857 ("that branch of the federal government which ought to be dependent on the people alone") (quoting THE FEDERALIST NO. 52, *supra* note 8, at 326 (James Madison)); *id.* at 1860 n.26 ("The power under the Constitution will always be in the People") (quoting George Washington, in 1 DEBATE ON THE CONSTITUTION, *supra* note 7, at 305, 306–07); *id.* at 1863 ("the right to choose representatives belongs not to the States, but to the people"); *id.* (Framers "conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people"); *id.* (Congress "is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people"); *id.* ("The government of the union... is, emphatically, and truly, a government of the people.") (quoting

Anthony Kennedy several times stated that the importance of the *Term Limits* decision to his mind lay in the fact that the Court came within one vote—his, presumably—of abolishing “We the People.”¹²

There are a multitude of ironies here. The dissent, for example, begins by observing the irony in the majority defending the right of the people of Arkansas to “choose whom they please to govern them” by holding “that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives.”¹³ Indeed,

Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819); *id.* at 1863 n.31 (“The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States.”) (quoting *Hawke v. Smith*, 253 U.S. 221, 226 (1920)); *id.* (“We the People”) (quoting U.S. CONST., Preamble); *id.* at 1863–64 (“Ours is a ‘government of the people, by the people, for the people.’”) (quoting Abraham Lincoln, Gettysburg Address (1863)); *id.* at 1864 (“in the House, ‘the people at large, not the States, are represented.’”) (quoting *Morris*, in 2 FARRAND, *supra* note 8, at 217) (footnote omitted); *id.* (state-imposed qualifications “would correspond little with the idea that we were one people”) (quoting George Read, in 2 FARRAND, *supra* note 8, at 217); *id.* (Constitution “provides that the qualifications of the representatives of each State will be judged by the representatives of the entire Nation.”); *id.* (Constitution “creates a uniform national body representing the interests of a single people”); *id.* (“the people of all the States”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 428–29); *id.* at 1864 n.32 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 428–29); *id.* at 1864 (“the direct link that the Framers found so critical between the National Government and the people of the United States”) (footnote omitted); *id.* at 1864 n.32 (“the people of the Nation”); *id.* (“the people of the Nation”); *id.* (“the people of the Nation”); *id.* at 1871 (“Members of Congress are chosen by separate constituencies, but...they become, when elected, servants of the people of the United States.”).

12. Two of the occasions were a conversation with the author at a cocktail party on September 28, 1995, and a meeting with the College of Law faculty (including the author) on September 29, 1995. Justice Kennedy’s disclosure is less of a revelation than it might have been if his four-page concurrence in *Term Limits*, 115 S. Ct. at 1872, had not included an additional 14 references to “We the People.” See *id.* at 1872 (“the whole people of the United States asserted their political identity and unity of purpose when they created the federal system”); *id.* (“A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it.”); *id.* (“To all general purposes we have uniformly been one people....”) (quoting THE FEDERALIST NO. 2, *supra* note 8, at 38–39 (John Jay)); *id.* (the House “derive[s] its powers from the people of America”) (quoting THE FEDERALIST NO. 39, *supra* note 8, at 244–45 (James Madison)); *id.* (“the operation of the government on the people in their individual capacities” makes it “a national government,” not merely a federal one”) (quoting THE FEDERALIST NO. 39, *supra* note 8, at 244–45 (James Madison)); *id.* (“The government of the Union...is, emphatically, and truly, a government of the people.”) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819)); *id.* (“In a republican government, like ours...political power is reposed in representatives of the entire body of the people.”) (quoting *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884)); *id.* (“It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity....”); *id.* (“[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country”) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)); *id.* at 1873 (“The people of these United States constitute one nation”) (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43 (1868)); *id.* (“when [the people] act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 403); *id.* (“The political identity of the entire people of the Union is reinforced by the proposition...that...the National Government is and must be controlled by the people without collateral interference by the states.”); *id.* at 1874 (“that federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute”); *id.* at 1875 (“there exists...a relationship between the people of the Nation and their National Government, with which the States may not interfere”).

13. *Id.* at 1875.

the majority "invalidat[ed] a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State."¹⁴

The even greater irony, though, is that the majority's "We the People" in its sundry incantations and egalitarian incarnations turns out not to include Us. I don't just mean "us, the people of the state of Arizona," although the people of the so-called "sagebrush states" are typically near the top of any strong nationalist's enemies list.¹⁵ I mean "us, the current citizens of the United States." Let me explain.

At first glance, one might understand the *Term Limits* majority to be suggesting that the will of a majority of the nation's people should take precedence over the will of a majority of any state's people.¹⁶ Professor Nagel rightly contends that this is ironic because "no national majority had prohibited states from enacting term limits legislation. Despite certain obvious incentives to do so, Congress had passed no statute on the matter."¹⁷ But the irony here runs even deeper. A majority of Congress is not the same as a national

14. *Id.* See also *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 351 (Ark. 1994) (amendment approved in the general election by a vote of 494,326 to 330,836).

15. See, for example, Bill Eskridge's argument that "the one Senator, one Vote clause is the most problematic in the Constitution," William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159, 161 (1995), because it "systematically skews national policy towards sagebrush values." *Id.* at 160. "[T]he sagebrush Senators' voting record is not distinctively libertarian or sensitive to rule of law values.... Moreover, these Senators seem relatively less sympathetic to the liberty of racial, ethnic, or sexual orientation minorities." *Id.* at 160-61.

See also Jonathan Raban, *A Reporter at Large: The Unlamented West*, NEW YORKER, May 20, 1996, at 60, 60 ("Militias, Freemen, mad bombers—why do so many extreme and dangerous individualists seem to come from one place?"); *id.* at 73 ("People...chose to come to the West at least partly because they felt themselves to be outsiders back East...."); *id.* at 81 ("No matter what the federal government did to make amends to the homesteaders...the federal government would be remembered by many in the West as a trickster, never to be trusted again."); *id.* ("With its broken fences and splayed houses...[Justus Township, Montana] looks like a landscape in an allegory—the site of Everyman's betrayal by the giants Government and Industry, which is where, or so they say, the decline of the West began.").

But see Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 664 (1996) ("The relatively enlightened views that permitted and even encouraged the enfranchisement of women in the Western states in the late 1800s were not sentiments universally shared.").

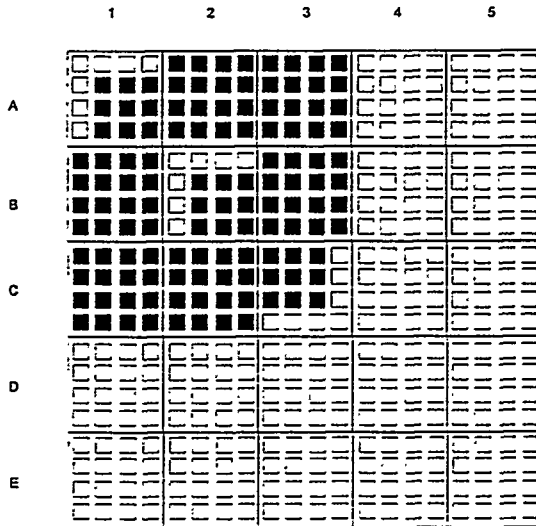
16. See, e.g., *Term Limits*, 115 S. Ct. at 1845 ("Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."); *id.* at 1855 ("In [our] National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation."); *id.* at 1864 (Constitution "creates a uniform national body representing the interests of a single people."); *id.* at 1871 (Framers understood that "Members of Congress are chosen by separate constituencies, but...they become, when elected, servants of the people of the United States."). See also *supra* note 11.

17. Nagel, *supra* note 1, at 855; see also Kathleen M. Sullivan, *Dueling Sovereignties*, 109 HARV. L. REV. 78, 100-01 (1995) (footnotes omitted):

[T]he dissent might have argued, Congress is fully able and motivated to protect itself from state-passed term limits. This argument echoes *Garcia*: just as the states can protect their autonomy politically in Congress, so Congress can protect itself politically through its power of preemption. If Congress prefers to keep itself open to experienced members, it can enact legislation prohibiting the limitation of congressional terms. Congressmen who wish to stay in office can be expected to have strong incentives to vote for such a law. If Congress voluntarily waives its powers of self-defense by leaving state term-limits laws intact, the unwritten functionalist dissent might conclude, there is little warrant for judicial second-guessing.

majority. Indeed, as Diagram One shows, legislation approved by a simple majority of both houses of Congress may in theory have the support of as little as thirty-one percent of the national electorate.¹⁸

Diagram One



18. In theory, slightly more than *one-quarter* of the voters could control a *unicameral* representative legislature: The approval of only a majority of the representatives is required to pass legislation, and each representative in the majority need be elected by only a majority of the voters in her district. The addition of a second chamber will likely increase the proportion of voters necessary to pass legislation by a representative body. The proportion of voters necessary for passage is further likely to increase as the diversity of the jurisdictions from which the members of the two chambers are elected increases. If each voter gets to elect a representative in both chambers, however, and representatives are elected on a geographical basis, as few as 31% of the voters could, in theory, pass legislation.

Consider Diagram One, which portrays a hypothetical bicameral legislature consisting of five Senators (A through E) and five Representatives (1 through 5), each of whom represents 80 voters. Assume that: (1) all legislators are elected on a geographical basis; (2) each voter gets to elect a representative in both the House and the Senate; (3) Senators A, B, and C (exactly one-half of the five-person Senate) and Representatives 1, 2, and 3 (exactly one-half of the five-person House) support the proposed legislation while Senators C and D and Representatives 4 and 5 do not; (4) exactly 50%-plus-one (41 of 80) of the constituents of Senators A, B, and C, and of Representatives 1, 2, and 3 support the proposed legislation (this is represented by the shaded area of squares A1, A2, A3, B1, B2, B3, C1, C2, and C3 in Diagram One); and (5) none of the constituents of Senators D and E nor of Representatives 4 and 5 favor the proposed legislation. If all of these conditions are met, a bill that passes each house of a bicameral legislature by a simple majority theoretically could have the support of as few as 30.8% (123 of 400) of the nation's voters.

See also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 220-22, 233-42 (1962); Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 150-51 (1995) [hereinafter *Constitutional Change*]; Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 716-17 (1991) [hereinafter *Discrimination*].

The U.S. Constitution quite simply provides no mechanism for determining the will of 50-percent-plus-one of us.¹⁹ Only pollsters regularly measure the will of We, the People of this nation. And, ironically, national surveys have consistently shown that *more than seventy percent* of us—Democrat and Republican alike—favor term limits.²⁰

It is also significant that our Constitution provides no opportunity for the nation's people to speak *as a people*. We the People are not permitted to elect our president²¹ or to amend our Constitution.²² Only *representatives* of the nation's people—senators, representatives, members of the electoral college, delegates to a constitutional convention—and unelected judges have any role to play in the federal lawmaking process.

In short, in the realm of federal lawmaking, We the People of this nation do not exist in any meaningful way.²³ And that, I believe, is not only the first great irony in the *Term Limits* majority's seemingly populist opinion, but is in fact what strong nationalists like best about the federal government. For strong nationalists, the states are so frightening not because their legislatures will too often get things wrong, but rather because the states give us, the People, too much of a voice. In sixteen states, the People may initiate and enact ordinary

19. Cf. 115 S. Ct. at 1882 ("Although the United States obviously is a Nation,...the Constitution...does not recognize any mechanism at all (such as a national referendum) for action by the undifferentiated people of the Nation as a whole.") (Thomas, J., dissenting).

20. See, e.g., Paul Jacob, *From the Voters with Care*, in THE POLITICS AND LAW OF TERM LIMITS 27, 28 (Edward H. Crane & Roger Pilon eds., 1994); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1971 nn.1, 2 & 4 (1994).

21. See U.S. CONST. art. II, § 1, cls. 2 & 3:

Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress:

The Electors shall meet in their respective States, and vote by Ballot for two Persons,...And they shall make a List of all the Persons voted for, and the Number of Votes for each; which List they shall sign and certify, and transmit sealed to...the President of the Senate....The Person having the greatest Number of Votes shall be the President....

Cf. *Term Limits*, 115 S. Ct. at 1877 ("Even the selection of the President—surely the most national of national figures—is accomplished by an electoral college made up of delegates chosen by the various States, and candidates can lose a Presidential election despite winning a majority of the votes cast in the Nation as a whole.") (Thomas, J., dissenting).

22. See U.S. CONST. art. V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress;....

Cf. *Term Limits*, 115 S. Ct. at 1877 ("[T]he amendment provision of Article V calls for amendments to be ratified not by a convention of the National people, but by conventions of the people in each State or by the state legislatures elected by those people.") (Thomas, J., dissenting). Although Article V does not appear to per se preclude a state from ratifying a proposed amendment through a "Convention of the Whole" or popular vote, the text of Article V is clear that Congress may specify the mode of ratification which the states must employ.

23. Cf. *id.* at 1876–77 ("[I]t would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.") (Thomas, J., dissenting).

legislation without any legislative participation.²⁴ In twenty-three states, the People may require the legislature to obtain the approval of the electorate before its enactments become law.²⁵ In seventeen states, the People may propose and adopt constitutional amendments without any legislative participation.²⁶ In every state except Delaware, any constitutional amendment proposed by the legislature must be submitted to the People for ratification.²⁷ In twenty-two states, the people directly elect the judges of the state's highest court.²⁸ And in all fifty states, the people directly elect their governor.²⁹ The implied message of the *Term Limits* majority and other strong nationalists is clear: We the People, unlike those we elect to office and the judges the President appoints, are simply not to be trusted.³⁰

The second great irony that I see in the *Term Limits* majority's opinion appears in the very last paragraph. There the majority observes that, notwithstanding its decision, those who favor term limits for members of Congress may now proceed to amend the U.S. Constitution to permit or require them.³¹ Seemingly by way of encouragement, the majority notes that "other important changes in the electoral process" have been adopted "through the Amendment procedures set forth in Article V," including the direct election of

24. See THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES, 1994-95, at 295, tbl. 5.16 (1994). The 16 states are Alaska, Arizona, Arkansas, California, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Five additional states (Maine, Massachusetts, Michigan, Nevada, and Ohio) provide an indirect initiative process in which legislative approval is required after a successful petition drive in order to place a proposed measure on the ballot. *Id.*

25. See *id.* at 294, tbl. 5.15. The 23 states are Alaska, Arizona, Arkansas, California, Idaho, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.*

26. See *id.* at 23, tbl. 1.3. The 17 states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.* Massachusetts also permits initiative amendments to its constitution, but no amendment may be submitted to the electorate for ratification without prior approval at two sessions of a successively elected legislature by not less than one-fourth of all members elected, sitting in joint session. *Id.*

27. See *id.* at 21-22, tbl. 1.2. An amendment to the Delaware constitution is adopted if approved by two-thirds of each house of the legislature in two consecutive sessions; no popular vote is required for ratification. *Id.*

28. See *id.* at 190-92, tbl. 4.4. The 22 states are Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wisconsin. *Id.*

29. See *id.* at 39, tbl. B.

30. Professor Richard Parker contends that this distrust of "the People" is at the core of elites' fears of a national constitutional convention:

Think of how skepticism about [such a contention] is expressed. Wouldn't a convention be filled with ordinary politicians? How could one of *them* possibly sit where James Madison sat? Isn't it probable such a convention would "get out of hand"? Wouldn't it respond to popular opinion, cater to immediate desires, make a big mess? Isn't it frightening that ordinary people say they don't "believe in" The Bill of Rights? Could we let *them* meddle with The Constitution?

RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 76 (1994).

31. 115 S. Ct. at 1871 ("[A]llowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come...through the Amendment procedures set forth in Article V.") (footnote omitted).

Senators and the extension of suffrage to women.³² And, indeed, there are important similarities between the term limits movement in this country and the Progressive Era campaigns that resulted in the 17th and 19th Amendments. All three are instances of national interest groups coordinating a state-by-state campaign of incremental amendment through direct democracy in order to ameliorate the difficulties posed by the Article V amendment process when the self-interest of Congress is preeminent.³³ Left to themselves, sitting members of Congress are not likely to propose an amendment to limit the duration of their service, to alter the procedure by which they were chosen to hold office, or to dilute the future efficacy of the electorate whose approval they have recently won.

Critical to the eventual proposal of the 17th and 19th Amendments by Congress was, ironically, the opportunities for direct democracy provided in a range of forms by various states. Strong nationalists who reflexively doubt the ability of the People to find and to travel the moral high ground would do well to keep this often overlooked history in mind. In a wonderful student note, Kris Kobach has persuasively demonstrated that both the 17th and 19th Amendments were ultimately able to be proposed by Congress only because of two clearly discernible preparatory stages.³⁴ First, the People of increasing numbers of states altered, respectively, the procedure for electing their Senators³⁵ and the demographics of the citizenry eligible to vote for members of Congress.³⁶ In this way, Congress itself was increasingly comprised of individuals who had been directly elected and, later, directly elected by the women as well as the men of their state.³⁷ And these members of Congress were understandably willing to propose a constitutional amendment that would ensure the continued existence of the road that had brought them to Washington.³⁸

Prior to the Court's May 1995 decision, twenty-two states had adopted some form of congressional term limits, in all but one instance through direct democracy.³⁹ At the time of the decision, 182 House members and forty-four Senators—more than forty percent of each chamber—were potentially under a

32. *Id.*

33. *See generally* Kobach, *supra* note 20.

34. *Id.*

35. *See Id.*, at 1976–80. By the time Congress proposed the 17th Amendment in 1912, 37 states had adopted measures permitting popular input in the selection of U.S. Senators, with 28 of these states providing for direct nomination by the people. *Id.* at 1979 n.34 (citing 45 CONG. REC. 7109–20 (1910) (statement of Sen. Owen)). *See also* Ronald D. Rotunda, *The Aftermath of Thornton*, 13 CONST. COMMENTARY 201, 207–09 (1996) ("By 1912, when the Senate finally approved the Seventeenth Amendment, about 60% of the Senators were already chosen by virtual elections.").

36. *See* Kobach, *supra* note 20, at 1980–83. By the time Congress proposed the 19th Amendment in 1919, 15 states had constitutional provisions permitting women to vote, and 11 states permitted women to vote for president. *Id.* at 1982–83.

37. *See id.* at 1998.

38. The most persistent advocates of the 17th Amendment in the Senate were members who had effectively been popularly elected. *See id.* at 1979; 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 107–08 (1938). Likewise, congressional advocates of the 19th Amendment were those senators and representatives elected by women as well as men. *See* Kobach, *supra* note 20, at 1983.

39. The 22 states were Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *See Term Limits*, 115 S. Ct. at 1909 n.39.

state-imposed clock.⁴⁰ As in the case of the direct election of Senators and female suffrage, we would have expected Congress—in the absence of the Court's decision—to be increasingly comprised of legislators whose terms of service were unambiguously limited. Eventually such term-limited members of Congress would be sufficiently numerous to succeed in proposing a term limits amendment to the Constitution if they so chose. And we would have expected these legislators to be not only more willing to propose such an amendment than their counterparts from states without term limits, but positively eager to do so given the disadvantages that term-limited legislators (and their constituents) face in a Congress whose rules reward seniority.

The second great irony of the *Term Limits* majority's opinion should now be clear. By precluding the People of individual states from electing term-limited members of Congress, the majority has virtually ensured that a term limits amendment to the Constitution will never be proposed. One begins to wonder how American history might have been altered if the Supreme Court early in the Progressive Era had invalidated state laws permitting women to vote for members of Congress,⁴¹ or had held unconstitutional the increasingly common practice of electing to state legislatures only those candidates who promised to vote "for that candidate for United States Senator...who has received the highest number of the people's votes...without regard to...individual preference."⁴²

To be sure, term limits proponents may still pursue a federal constitutional amendment through Article V's convention route.⁴³ But history

40. See Kobach, *supra* note 20, at 1971.

41. Since the Constitution specifies that the House "Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," U.S. CONST. art. I, § 2, cl. 1, the most likely basis for such a suit would have been if a state permitted women to vote in elections for federal, but not state, legislators.

42. The so-called "Oregon system," which was adopted in 15 states between 1905 and 1908, required candidates for the state legislature to endorse either this statement or a statement that the candidate would "consider the vote of the people for United States Senator...as nothing more than a recommendation, which I shall be at liberty to wholly disregard if the reason for doing seems to me to be sufficient." Kobach, *supra* note 20, at 1978 (citing HAYNES, *supra* note 38, at 101).

Since the Constitution prior to the adoption of the 17th Amendment specified that "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof," U.S. CONST. art. I, § 3, cl. 1, the most plausible challenge to the "Oregon system" would be that the Senators from such states had not in fact been chosen by the state legislature.

43. U.S. CONST. art. V specifies:

The Congress...on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments, which...shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....

Professor Ronald Rotunda has recently proposed a more intriguing alternative: "In the context of term limits, states should be able to authorize candidates running for federal office to volunteer to make a pledge that they will vote for term limits, or serve no more than a set number of terms." Rotunda, *supra* note 35, at 206; *id.* at 210 (proposing, analogous to ballot language prior to the adoption of the 17th Amendment, that ballots for congressional candidates specify whether "the candidate pledge[s] to vote for a federal statute and Constitutional Amendment favoring term limits...[and whether] the candidate pledge[s] to abide by term limits").

Similarly, Professor Saul Levmore has observed,

One reading of the [*Term Limits*] decision is that some Justices regard a

shows that this road has three substantial barriers that render it ultimately impassable:⁴⁴ fears of a "runaway" convention;⁴⁵ the consistent (if unsurprising) refusal of Congress to pass an implementation bill detailing the procedures for conducting and the allocation of representation at a convention;⁴⁶ and opposition to the substance of any proposed change to the Constitution. Thus, it

constitutional amendment as the only route to term limits. On the other hand, what if Arkansas passed a law allowing candidates to contract in advance not to run for a third term of office? Such a law may be doomed, but there is room to argue that the Court has not said that politicians and voters cannot precommit to the term limits idea.

Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 594 n.59 (1996). Levmore adds that "[p]olitical precommitments by individual politicians to their constituents may offset the influence of organized interest groups, counteract the realities of modern campaign finance, and be consistent with the structure of our Constitution." *Id.* at 620 (footnote omitted).

44. The states had submitted some 399 applications for a convention as of 1993. To date, the required two-thirds majority of states has never called for a convention on any particular subject. See Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 736 (1993). Professor Paulsen, however, contends that these applications should be cumulated and, by his count, "[t]here are, at present, forty-five states with their lights 'on' for a general convention—eleven more than are needed to trigger Congress' duty to call a convention." *Id.* at 756.

45. Former U.S. Supreme Court Justice William Brennan, for example, "regarded in some circles as a populist jurist, has called the prospect of a general convention of the People with plenary power to propose constitutional change 'the most awful thing in the world.'" *Id.* at 759-60 (quoting RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* viii n.1 (1988)); see also Ralph M. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921, 922 (1968) ("A general and unlimited federal constitutional convention would at least be a futility and might be a disaster."); CAPLAN, *supra*, at 161 ("Congress in modern times has by and large maintained that a convention cannot be limited. This view, however sincerely arrived at, happens also to be useful in dissuading states from submitting applications, thereby leaving Congress in exclusive control of the amendment process.").

But, as Professor Paulsen contends, the best arguments concerning the text, structure, history, and political theory of Article V's convention provisions all cohere to suggest that there can be no such thing as a "limited" constitutional convention. Those who dread a "runaway" convention thus misapprehend the very nature of a constitutional convention, which is inherently illimitable in what it may propose. In that sense, any federal constitutional convention is necessarily a "runaway" convention. Certainly, the Philadelphia Convention of 1787 fits this characterization.

Paulsen, *supra* note 44, at 742 (footnote omitted). See also Frank J. Sorauf, *The Political Potential of an Amending Convention, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 113, 118 (Kermit L. Hall et al. eds., 1981); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 199 (1972) ("The position that Article V means 'a convention for proposing such amendments as to it seem wise' does not imply that a 'runaway' convention is possible, for, if the stated position is right, no convention can be called that has anything to run away from"); William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1304 (contending that it is "[s]urely not" the case "that the only kind of appropriate (and thus legitimate) convention is one within which a complete reappraisal [sic] of the whole Constitution would be either desirable or required"); sources cited in Paulsen, *supra* note 44, at 733 n.194.

46. See, e.g., Sorauf, *supra* note 45, at 117-23, 126; Kobach, *supra* note 20, at 2002. By, inter alia, declining to "defin[e] valid petitions from the states, set[] time limits on when the two-thirds mark must be reached, and detail[] the procedures of a convention," Congress preserves "its monopoly over the power to propose amendments." *Id.*; see also CAPLAN, *supra* note 45, at 161-62 (same). But see Black, *supra* note 45, at 195 (contending that although "the advance setting of procedures for handling controversy is normal...amendment of the Constitution (let us hope!) will remain a highly unusual thing. If not, then [the bill proposed in 1971 to set procedures for state applications for a national constitutional convention] quite plainly greases the path too much.").

merits considering whether the Court should decline to invalidate state laws under the U.S. Constitution whenever the following three conditions are all met: (1) the state practice at issue directly affects the self-interest of members of Congress;⁴⁷ (2) the text of the U.S. Constitution neither expressly prohibits nor expressly permits the practice;⁴⁸ and (3) the practice imposes no negative externalities on residents of other states.⁴⁹

I suspect, notwithstanding the intensely historical nature of their opinion, that the *Term Limits* majority did not know the story of the complex process

47. Obvious examples include changes in who may vote for congressional legislators, who may be elected to Congress, the conditions of congressional service, and campaign finance regulations. Thus, female suffrage, term limits, and the direct election of Senators would all meet this condition.

48. Term limits would meet this condition insofar as the "Qualifications Clauses" of Article I do not explicitly state whether these qualifications are to be exclusive or merely a "floor." See U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

Female suffrage and the direct election of Senators are a tougher call. The language of U.S. CONST. art. I, § 2, which requires the Electors in House elections to "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" would not appear sufficiently ambiguous to include any pre-1920 state practice of permitting women to vote for members of Congress but not for members of their state legislature. Although U.S. CONST. art. I, § 3, cl. 1 prior to 1913 required the state legislatures to choose their state's Senators, the provision did not explicitly specify whether the legislature's choice might be "informed" by a polling of the electorate as occurred under the "Oregon system." Thus, the Oregon system would arguably meet this condition.

49. Female suffrage and the direct election of Senators would both meet this condition insofar as a given state's decision regarding who may vote in congressional elections or the method by which it chooses its Senators would not appear to preclude other states from enacting their own preferences on these matters.

In the case of term limits, not only are no negative externalities imposed on other states, but a state's choice to impose term limits on its congressional legislators is likely to benefit other states without such limits so long as the seniority system continues in both houses of Congress. See, e.g., Sullivan, *supra* note 17, at 100, observing that the *Term Limits* dissent might have argued that,

[r]educing the average tenure of members of Congress does not dictate any particular regulatory agenda to Congress nor blur its electoral accountability to federal voters. Unlike property or professional qualifications, term limits favor no particular ideology, and their effects should, over time, even out across lines of party, faction, and class. And, unlike state discrimination against out-of-state commerce or state taxation of a federal entity, term limits arguably impose no negative externalities on the unrepresented citizens of other states. To the contrary, as long as power in Congress depends on seniority, a state that enacts a term limits law in the absence of certainty that other states will do likewise actually disadvantages its own voters relative to citizens of other states.

Some states solved this collective action problem by stipulating that their federal legislators would become limited in the number of terms they might serve only when a stipulated number of other states adopted federal term limits. See, e.g., MO. CONST. art. III, § 45 (1945 & Supp. 1994) (Congressional term limits amendment to state Constitution "shall become effective whenever at least one-half of the states enact term limits for their members of the United States Congress"). But see Sullivan, *supra* note 17, at 101 ("the majority might have objected that term limits do impose negative, albeit intangible, externalities on citizens of other states by decreasing the level of cooperation and quality of deliberation in the Congress as a whole") (footnote omitted); Matthew Spitzer & Linda Cohen, *Term Limits*, 80 GEO. L.J. 477, 510 (1992) (contending that "term limits will increase legislators' impatience and decrease legislators' willingness to serve general constituent interests").

by which Congress came to propose the 17th and 19th Amendments.⁵⁰ They therefore could not fully appreciate the implications of their decision for the Article V amendment process itself. If I am wrong, however, and the majority was in fact conscious of the irony of their concluding paragraph, their seemingly populist concern for We the People becomes more ironic still. Their ultimate message becomes that They, the People of the United States Supreme Court, alone can be trusted to know not only what is constitutional but also when the Constitution itself should be amended pursuant to Article V.

50. It should be noted, however, that at least three briefs submitted to the Court in *Term Limits* included citations to Kris Kobach's note, *supra* note 20, detailing this history. See Brief of the States of Nebraska et al. as Amici Curiae in Support of the Petitioners, *Term Limits*, 115 S. Ct. 1842 (1995) (Nos. 93-1456 & 93-1828); Brief for the State Petitioner, *id.*; Brief of Amicus Curiae Congressional Term Limits Coalition, Inc. (Maine), et al., *id.* Moreover, one of these briefs was devoted largely to the question of whether "the method of limiting the terms of members of Congress from Arkansas that appear in this case [is] not only constitutionally valid, but demonstrated by the adoption of the 17th and 19th Amendments to the Constitution." Brief of Amicus Curiae Congressional Term Limits Coalition, Inc. (Maine), et al., *id.*

