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The Term Limits Case

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THE TERM LIMITS CASE

Leon Lazer:

Now that term limits have been mentioned, we will get a little more detailed discussion of the Term Limits Case. To speak to us on that subject, we have Professor Bennett L. Gershman of Pace Law School, a scholar of very distinguished background and also one who has rendered public service, so I suppose he has a somewhat experienced view of term limits. He has written two books. He came to my attention when I saw what I thought was an excellent article in the New York Law Journal on the question of term limits and also on gun control. Of course, I thought it was one which I agreed with, but in any event, we now have the pleasure of his company and the education he will give us. Professor Gershman.

Professor Bennett L. Gershman:*

It is a pleasure to be here. The revival of the Tenth Amendment[1] to counter various exercises of national power has been one of the preeminent themes of the Supreme Court's recent jurisprudence. Once regarded as a mere "truism" that reflected a governmental balance of power decidedly favoring the federal government, the Tenth Amendment, as interpreted by the Court's current majority, has produced a radical transformation toward broader state sovereignty over matters that previously seemed reasonably well-settled as within Congress' prerogative.[2] Indeed, the majority's somewhat tendentious "states' rights" rhetoric puts

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1. U.S. CONST. amend X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

2. *See* New York v. United States, 505 U.S. 144, 155 (1992) (rejecting contention that the Tenth Amendment is merely a truism and stating that if a power is attributable to state sovereignty reserved by the Tenth Amendment, then it is not a power conferred on Congress) (citing United States v. Darby, 312 U.S. 100, 124 (1941)).

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this group of Justices in lockstep with the so-called Conservative Revolution and the Republican Party's Contract With America.[3]

In *U.S. Term Limits, Inc. v. Thornton*,[4] a bare majority, formed only because one of the Court's strong Tenth Amendment proponents decided to switch camps,[5] rejected an iconoclastic interpretation of the Constitution that, if accepted, would have dramatically altered the way America governs itself by judicial construction. In an opinion by Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Court held that "[a]llowing 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."[6]

The idea of term limits for elected government officials is hardly new. States have imposed term limits on their own elected officials from the time of our Nation's founding.[7] This political

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3. *See* 141 CONG. REC. H182 (daily ed. Jan. 11, 1995) (Statement of Rep. Fox). The Contract with America states in pertinent part:

> Mr. Speaker, our Contract With America states on the first day of Congress a Republican House will force Congress to live under the same laws as everyone else, cut one-third of committee staffs, and cut the congressional budget. We have done that.
>
> In the next 93 days we will vote on the following 10 items:
>
> . . .
>
> Ten. Congressional term limits to make Congress a citizen legislature.
>
> This is our Contract with America.

Id.

4. 115 S. Ct. 1842 (1995).

5. *Compare* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1873 (1995) (Kennedy, J., concurring) ("[T]he National Government is and must be controlled by the people without collateral interference by the States."). *with* U.S. v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

6. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1845.

7. *Id.* at 1866, n.38. *See* Michael Slackman, *Standard Pataki State Address a Familiar Call for Cuts in Spending, Taxes*, NEWSDAY, Jan. 5, 1995, at A7. The present governor of New York, George Pataki, has proposed term

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movement has produced one major constitutional amendment relating to national office -- the Twenty Second Amendment,[8] which limits the office of President to two four-year terms.[9] Attempts by a substantial number of states to alter the qualifications for members of Congress, however, have encountered resistance by the courts. Indeed, at the time *U.S. Term Limits* was argued, no appellate court had endorsed any state effort, either by legislation or state constitutional amendment, to place limits on the number of terms that U.S. Senators or Representatives may serve.[10] Until recently, it appeared that courts and scholars were virtually unanimous in believing that the Constitution is unambiguous in establishing the fixed and exclusive qualifications for members of Congress relating to age, citizenship, and residency, and that only a constitutional amendment could alter those requirements.[11]

In *U.S. Term Limits*, the Court reviewed an amendment to the Arkansas Constitution, adopted in 1992, that made a candidate for the U.S. Senate or House of Representatives ineligible to have his or her name placed on the ballot for national election if that person had previously been elected to three or more terms as a member of the House, or two or more terms as a member of the Senate.[12] Following a taxpayer's complaint seeking declaratory relief, the state circuit court held that this amendment violated the Qualifications Clauses in Article I, sections 2 and 3,

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limits for statewide officeholders such as the governor, comptroller, and attorney general, but not for legislators. *Id.*

8. U.S. CONST. amend XXII. The Twenty Second Amendment states in pertinent part: "No person shall be elected to the office of the President more than twice . . . ." *Id.*

9. *Id.*

10. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1852.

11. *See* Mark R. Kellenbeck and Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment and the Right to Representation*, 45 HASTINGS L.J. 1121, 1141 (1994).

12. ARK. CONST. amend. 73, § 2(a). Section 2(a) states in pertinent part: "No member of the Arkansas House of Representatives may serve more than three such two year terms." *Id.*; ARK. CONST. amend. 73, § 2(b). Section 2(b) states in pertinent part: "No member of the Arkansas Senate may serve more than three such two year terms." *Id.*

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of the U.S. Constitution.[13] The Arkansas Supreme Court affirmed, in a five to two decision, with a plurality declaring that states have no authority to change, add, or diminish the requirements for congressional service enumerated in the Qualifications Clauses.[14] Such piecemeal restrictions by states, explained the plurality, would conflict with the interest of the drafters of the Constitution in qualification uniformity, since congressional representatives address national issues that affect the citizens of every state.[15]

The dissent argued from the premise that all political power emanates from the people, and that since the Qualifications Clauses contain no express or implicit restriction on a state's ability to impose additional qualifications on candidates for Congress, the people have the power to impose such restrictions through a state constitutional amendment.[16] Moreover, according to the dissent, the amendment did not alter any qualifications; it merely constituted a permissible ballot-access restriction.[17]

Writing for the majority, Justice Stevens began his discussion by referring to the Court's seminal decision in *Powell v. McCormack*,[18] in which the Court reviewed the history and text

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13. *See* U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. at 1846 (citing unreported decision of Arkansas Circuit Court for Pulaski County); U.S. CONST. art. I, § 2, cl. 2. This clause states: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and have 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.* U.S. CONST. art. I, § 3, cl. 3. This section provides: "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." *Id.*

14. *U. S. Term Limits, Inc.*, 872 S.W.2d 349 (Ark. 1994).

15. *Id.* at 265 ("Additional age restrictions, residency requirements, or sundry experience criteria established by the states would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit on Congress.").

16. *Id.* at 1875 (arguing that "where the Constitution is silent, it raises no bar to action by the States or the people") (Thomas, J., dissenting).

17. *Id.* at 1885.

18. 395 U.S. 486 (1969) (holding that the House of Representatives has no power to exclude a member-elect who meets the Constitution's membership

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of the Qualifications Clauses. *Powell*, Justice Stevens noted, traced the British experience with qualifications for membership in Parliament, and concluded that on the eve of the Constitutional Convention, qualifications for membership in Parliament were fixed, leading the Framers of the Constitution to conclude that the qualifications for membership in Congress should also be fixed and exclusive.[19] Compelling evidence of the Framers' intent that qualifications are "fixed and unalterable" is found in the writings of James Madison and Alexander Hamilton.[20] Concurring with this view, Justice Joseph Story in his respected Commentaries on the Constitution[21] drew upon the maxim *expressio unius exclusio alterius*[22] to suggest that the affirmation of the qualifications of age, citizenship, and residence "would seem to imply a negative of all others."[23]

Powell also relied on the fundamental principle of our democratic system that "the people should choose whom they please to govern them."[24] This principle, according to the majority, incorporates two other fundamental ideas: the egalitarian concept that the opportunity to be elected should be open to all persons of merit, and the postulate that sovereignty is vested in the people, conferring on the people the right to freely choose their representatives to the National Government.[25]

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requirements). Adam Clayton Powell (1908-1972) was a clergyman, politician, and Member of the United States House of Representatives from 1945-67 and 1969-71 (D-N.Y.). WEBSTER'S NEW BIOGRAPHICAL DICTIONARY 814 (1983).

19. 115 S. Ct. 1842, 1848-49 ("English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'").

20. *Id.* at 1849.

21. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858).

22. "A maxim of statutory expression meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

23. 1 STORY, § 625 at 433-34.

24. *Powell*, 395 U.S. at 541.

25. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1851.

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Although *Powell* conclusively resolved the issue of whether Congress has the power to impose additional qualifications, it did not necessarily resolve the separate question of whether the Constitution prohibits states from imposing additional qualifications. Justice Stevens noted that every federal and state court hearing the issue had struck down a state's attempt to add qualifications for membership in Congress.[26] Notwithstanding such unanimity, the majority was required to address, for the first time, the currently fashionable Tenth Amendment argument that each state has a reserved power to place additional restrictions on the choices its voters may make. The majority decisively rejected the Tenth Amendment challenge for two independent reasons. First, the power to add qualifications is not within the original powers of the states and thus is not reserved to the states by the Tenth Amendment.[27] Second, the Court argued that even if the states possessed some original power to add qualifications, the Framers intended the Constitution to be the exclusive source of qualifications for membership in Congress, and thus "divested" the states of any power to add qualifications.[28]

The crucial distinction, according to the majority, is between the people as members of the nation and the people as members of a state: "[T]he Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the states, but by the people."[29] Thus, with the adoption of the Constitution, a new National Government was created that replaced the governmental structure under the Articles of Confederation,[30] whereby the states retained complete independence as sovereign nations bound together only by treaties.[31]

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26. *Id.* at 1853.
27. *Id.* at 1854.
28. *Id.*
29. *Id.* at 1863
30. ARTICLES OF CONFEDERATION of 1781.
31. *Id.* art. 2. Article 2 states:

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The new Constitutional plan created a direct link, not between the states and the national government, but between the people of the United States and the National Government. Under this arrangement, the states would be, in effect, a conduit, rather than the fountainhead: "In the National Government, representatives owe primary allegiance not to the people of a state, but to the people of the Nation."[32] It is no original power of a state to appoint national representatives, and therefore despite the Constitution's silence, "[n]o state can say, that it has reserved, what it never possessed."[33] The people's right to elect representatives to the National Legislature was a new right, arising from the Constitution itself.

Moreover, even if the states possessed some original power over congressional qualifications, the text and structure of the Constitution, the relevant historical materials, and the basic principles of our democratic system, demonstrate that the qualifications clauses were intended to preclude the states from exercising any power over qualifications and to fix the qualifications in the Constitution as exclusive. Totally absent from the convention and ratification debates is any assertion that the states had the power to add qualifications.[34] To be sure, the question of term limits, or "rotation," was a source of some controversy, but was ultimately rejected as "an absurd species of ostracism."[35] The debates also underscored the Framers' interest in having uniform qualifications, thereby emphasizing merit over qualifications such as wealth, birth, religious faith, or civil profession.[36]

> Each state retains its sovereignty, freedom, an independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Id.

32. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1855.

33. *Id.* at 1854.

34. *Id.* at 1859.

35. *Id.* at 1860.

36. THE FEDERALIST No. 57 (Madison); *U.S. Term Limits, Inc.*, 115 S. Ct. 1842, 1847 (1995).

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The Framers were clearly distrustful of the states, expressing a profound fear of possible interference by the states with federal elections. Although the Constitution gave the states the power to regulate the time, place, and manner of holding National elections,[37] the Framers created a safeguard against state abuse by giving Congress the power to alter any state regulations relating to the holding of federal elections.[38] As the majority opinion cogently explained: "In light of the Framers' evident concern that states would try to undermine the National Government, they could not have intended states to have the power to set qualifications."[39] It is therefore "anomalous" and "inconceivable" that the Constitution would give Congress the power to assure that federal elections would be held, but then give states the power to set qualifications in such a way as to ensure that no candidate would be qualified for office.

Further, the contemporaneous state practice with respect to qualifications and term limits reinforced the majority's position. At the time of our founding, states retained property qualifications for their own state elected officials, yet placed no such qualifications on their congressional representatives.[40] Moreover, despite widespread support and use of state term limits, no state sought to impose term limits on its own federal representatives.[41]

Finally, the majority rejected the argument that the Arkansas amendment is not a true qualification, but rather, is a ballot access initiative. Constitutional rights, said the majority, are not so easily evaded; they would be of little value if they could be indirectly subverted.[42] Moreover, the clearly expressed intent of

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37. *Id.* at 1857.

38. U. S. CONST. art. I, § 4, cl. 1. This clause states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

39. *Id.* at 1858.

40. *Id.* at 1865 n.33.

41. *Id.* at 1866.

42. *Id.* at 1867.

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the Arkansas amendment is a self-acknowledged effort to disqualify long-term congressional incumbents from further service, rather than to place reasonable restrictions on access to the ballot.[43] Nor does the hypothetical possibility of a write-in campaign cure the constitutional defect. Such possibility is nothing more than a "faint glimmer."[44] Also, "allowing states to evade the Qualifications Clauses by 'dress[ing] eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses."[45]

In conclusion, observed the majority, allowing states to adopt term limits for congressional service would effect a fundamental change in the constitutional framework.[46] Whether or not such a change may be a laudable initiative, it can come about only through the Amendment procedures contained in Article V.[47] The Framers' belief that qualifications be fixed reflects their understanding that although chosen by separate constituencies,

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43. ARK. CONST. amend. 73 pmbl. (Michie Supp. 1995). The Arkansas legislature found that long-term incumbents "become preoccupied with reelection and ignore their duties as representatives of the people," leading to a system which is "less free, less competitive, and less representative than the system established by the Founding Fathers." *Id.*

44. *Id.* at 1868. *See U.S. Term Limits, Inc.*, 115 S. Ct. 1868 n.43. The Supreme Court noted that since 1913 (year that the Seventeenth Amendment was ratified), only one out of over 1,300 Senate elections have been won by a write-in candidate. *Id.* In the House of Representatives, five write-in candidates have been successful out of 20,000 elections since 1900. *Id.*

45. *Id.*

46. *Id.* at 1871.

47. U.S. CONST. art. V. Article V states in pertinent part:

> 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 the Congress; . . . .

Id.; *U.S. Term Limits, Inc.*, 115 S. Ct. at 1871, n.50 (citing to previous constitutional amendments in the area of voting rights such as direct election of senators, extension of suffrage to women, prohibition against poll taxes, lowering the age requirement to vote to eighteen).

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when people are elected to Congress they are "not merely delegates appointed by separate, sovereign states," but rather "servants of the people of the United States."[48]

In a concurring opinion, Justice Kennedy relied principally on the same fundamental democratic principles. He observed that the "whole people of the United States asserted their political identity and unity of purpose when they created the federal system."[49] The dissent's position suggesting otherwise, Kennedy said, "might be construed to disparage the republican character of the National Government."[50] The Framers, according to Kennedy, "split the atom of sovereignty," establishing two orders of government and giving citizens two political capacities, one state and one federal.[51] Although the National Government has limited powers, and must be held within those boundaries, when it intrudes upon matters reserved to the states, the converse is also true. It was the Framers' intent that there be no state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives.[52]

Moreover, said Kennedy, if the Arkansas amendment were allowed, it would have the "incongruous" result of burdening the rights of resident voters in federal elections based on the manner in which they had earlier exercised it.[53] "If the majority of voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future."[54] States may not, according to Kennedy, burden the exercise of federal rights in this manner.[55]

The dissenting opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, has been characterized as carelessly worded, and breathtakingly

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48. *Id.* at 1871.
49. *Id.* at 1872.
50. *Id.* (Kennedy, J., concurring).
51. *Id.* (Kennedy, J., concurring).
52. *Id.* at 1873 (Kennedy, J., concurring).
53. *Id.* at 1874 (Kennedy, J., concurring).
54. *Id.*
55. *Id.* (Kennedy, J., concurring).

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perverse.[56] The dissent argued, in essence, that the Constitution's silence on the power of states to prescribe eligibility requirements for membership in Congress "raises no bar to action by the States or the people."[57] Declaring that the Court's majority "misunderstands the notion of reserved powers," Justice Thomas "start[ed] with some first principles."[58] One of these "first principles" contained a remarkable passage that could have been written by Jefferson Davis or John Calhoun on the eve of the Civil War: "The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[59]

The dissent fundamentally disagreed with the majority's conclusion that the Tenth Amendment could only reserve to states those powers that existed before the Constitution's ratification. State governments were doing the reserving, Thomas maintained, and it is "incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled."[60] The dissent conceded that delegations of power to the states, or prohibitions of the exercise of state power, need not be expressly stated in the Constitution but may arise by "necessary implication."[61] The resolution of such questions depends on a fair construction of the Constitution. Thus, it is reasonable to conclude that when the federal government exercises powers expressly or implicitly granted to it, such as the power to establish a federal bank, the Court in the landmark case of *McCulloch v. Maryland*[62] correctly held that the Supremacy Clause[63] bars any state from interfering with the exercise of such

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56. Jeffrey Rosen, *Terminated: U.S. Supreme Court Overturns States' Congressional Term Limits*, NEW REPUBLIC, June 12, 1995, at 12.

57. *Id.* at 1875 (Thomas, J., dissenting).

58. *Id.* (Thomas, J., dissenting).

59. *Id.*

60. *Id.* at 1878 (Thomas, J., dissenting).

61. *See id.* at 1876.

62. 17 U.S. (4 Wheat) 316 (1819).

63. U.S. CONST. art VI, cl. 2. The Supremacy Clause states in pertinent part: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." *Id.*

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power, as would be the case if a state taxed a national bank.[64] However, nothing in *McCulloch* conflicts with the proposition that, in the absence of any express or necessarily implied delegation of power to the federal government, the people of a single state are disabled from prescribing qualifications for their own representatives in Congress.[65]

The dissent also took issue with the majority's suggestion that the Framers intended a "direct link" between Congress and the people, thereby bypassing the states. The crucial link, Thomas wrote, is between the representatives from each state and the people of that state.[66] Thus, according to the dissent, "the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress."[67]

The dissent construed the Qualifications Clauses as imposing minimum eligibility requirements. The democratic principles that contributed to the Framers decision to withhold from Congress the power to prescribe qualifications for its own members did not deprive the people of the states of their reserved authority to set eligibility requirements for their own members.[68] The text of the Qualifications Clauses is not by its terms an exclusive formulation; it merely establishes minimum standards of competence.[69] Plainly, the dissent argued, the people of other states could complain if the people of Arkansas decided to send a 6-year-old to Congress, but the Constitution gives the people of other states no basis to complain if the people of Arkansas elect a freshman representative in preference to a long-term incumbent.[70]

The dissent also attempted to draw a distinction between the action of the people in amending their state constitutions, and the

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64. *McCulloch*, 17 U.S. (4 Wheat) at 361-62.

65. *See* Gregory v. Ashcroft, 501 U.S. 452, 462-63 (1995) (citing Tenth Amendment in support of the proposition that the States can determine qualification of their own elected representatives).

66. *Id.* at 1882 (Thomas, J., dissenting).

67. *Id.*

68. *Id.* at 1885 (Thomas, J., dissenting).

69. *Id.* at 1886 (Thomas, J., dissenting).

70. *Id.* at 1887.

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action of a state legislature in prescribing qualifications: "Observing that the Framers specifically provided for Senators to be chosen by the state legislatures and for Representatives to be chosen by the people," the dissent understood this distinction as a recognition by the Framers of the "meaningful difference between direct action by the people of each state and action by their state legislatures."[71] Thus, even if state legislatures are barred from prescribing qualifications for Congress, such requirements imposed by the people themselves are perfectly constitutional.[72]

The majority's reliance on contemporary state practice is also unhelpful, according to the dissent. First, Article VI expressly prohibits states from imposing religious qualifications.[73] This reference, the dissent contended, would seem to undermine the majority's position that the Article I qualifications were meant to be exclusive.[74] Further, rotation out of office was increasingly disfavored on policy grounds because it was believed that states lacked the power to require it.[75] Third, property qualifications, although widely required for state legislators, "may simply have seemed unnecessary" for federal legislators.[76] It was much more likely that a pauper would be able to secure one of the hundreds of seats in a state legislature than that he would be able to secure one of the relatively few seats in the House of Representatives.

The dissent also chided the majority for its radical holding which would allow congressional candidates who are mentally incompetent, currently in prison, or who have vote-fraud convictions.[77] Finally, the dissent argued that the Arkansas

71. *Id.* at 1893 (Thomas, J., dissenting).

72. *Id.* at 1875 (Thomas, J., dissenting) ("Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question.").

73. U.S. CONST. art. VI, § 3. This section states: "[N]o religious Test shall ever be required as a Qualification to any Office of public Trust under the United States." *Id.*

74. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1906 (Thomas, J., dissenting).

75. *Id.*

76. *Id.* at 1908, n.37 (Thomas, J., dissenting).

77. *Id.* at 1909 (Thomas, J., dissenting).

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amendment is not really a term limit, but simply a ballot access restriction; any person can seek election through the write-in process.[78] The amendment is simply "leveling the playing field."

Even though the Court rebuffed the challenge, the significance of this case should not be underestimated. If the Court had upheld state-imposed term limits, seventy two House members from seven states could not have run for reelection after 1996.[79] More ominously, according to Professor Laurence H. Tribe, the dissenting opinion, if accepted, would have posed a significant threat to national unity. He said:

> If the Constitution's failure to nail down a given matter with absolute finality becomes an excuse for the states to adopt measures that will be upheld by the Supreme Court regardless of how much they may undermine the integrity of the union, then the ability of the country to hold together in difficult times may be seriously endangered.[80]

The majority noted, at the conclusion of its opinion, the distinction between the wisdom of term limit laws and their constitutionality. Twenty-three states had imposed term limit laws,[81] and the "movement" continues to have strong populist appeal and powerful momentum. Whether this represents a grass-roots revolt against what is perceived as a despotic Washington, or simply a recognition that voters dislike and distrust careerism in politics, the decision in *Term Limits* is probably not the last word on the subject.

The House of Representatives mirrored the action of the Supreme Court last March by failing to achieve the necessary two-thirds vote for a constitutional amendment.[82] The Republican-controlled body thereby reneged on item number ten

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78. *Id.* at 1884-85 (Thomas, J., dissenting).

79. *See* Katherine Q. Seelye, *Decision Opens Door for 72 To Seek Re-election to House*, N.Y. TIMES, May 23, 1995, at A1.

80. W. John Moore, *Pleading the 10th*, NAT. LAW JOURNAL, July 29, 1995, at 1940.

81. *See* Charles Fried, *Forward: Revolution?*, 109 HARV. L. REV. 13 (1995).

82. 141 CONG. REC. H3941-03, R3. House Republicans fell 61 votes short of passing the resolution for congressional term limits (227-204). *Id.*

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of its Contract With America. Nevertheless, the issue is very much alive. One Senator has suggested imposing term limits on the basis of residency, and barring anyone from seeking re-election who has been absent from his or her state for more than 180 days a year for twelve consecutive years.[83] It has also been suggested that states could impose mandatory pledges on congressional candidates that would require them to say how long they intended to serve.[84] Also, states might be able to indicate on the actual ballot whether a particular candidate favors or opposes term limits. There is, of course, the possibility that the states will organize a Constitutional Convention.

The Supreme Court's renewed attraction to the Tenth Amendment has aided and abetted what has been referred to as the modern American Devolution. Employing the rhetoric of federalism, Congress has moved to eliminate programs involving unfunded mandates, to shift power back to the states in the form of block grants, to abolish the 55 mile per hour speed limit, and to eliminate or soften a variety of federal environmental regulations. Inspired by the Supreme Court's decision last Term in *United States v. Lopez*,[85] a spate of lawsuits have challenged, sometimes successfully, federal statutes such as the Brady Bill,[86] the car-jacking law,[87] the abortion-clinic-access law,[88] and the motor voter registration act.[89]

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83. Kenneth J. Cooper and Helen Dewar, *Ruling Isn't End of Fight, Term Limits Backers Vow: Senate Defeat Likely, but Some See Issue for '96*, WASHINGTON POST, May 23, 1995, at A6.

84. *See* James Kuhnhenn, *Ruling Alters Tactics, But Resolve is Firm: Term-Limit Backers Consider Options After Monday's Decision*, KANSAS CITY STAR, May 23, 1995, at A1.

85. 115 S. Ct. 1624 (1995) (holding that the Gun-Free School Zones Act is invalid as beyond Congress' authority under the Commerce Clause).

86. 18 U.S.C. § 922(s), (t) (Supp. 1995); Frank v. United States, N.Y. L.J., March 26, 1996, at 25 (2d Cir. March 15, 1996) ("[T]he commerce power of the United States is almost certainly broad enough to support such legislation.") (citing United States v. Lopez, 115 S. Ct. 1624 (1995)).

87. 18 U.S.C. § 2119 (Supp. 1995). *See* United States v. Oliver, 60 F.3d 547 (9th Cir. 1995). The Ninth Circuit distinguished *Lopez*, holding that carjacking is exactly the type of economic activity which Congress may regulate under the Commerce Clause.

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Although the decision in *Term Limits* served to brake somewhat the Tenth Amendment's momentum, the Court has shown a willingness to consider, under a broadened and more flexible framework of state power, questions that seemed for generations to be settled. This suggests that the revived debate over what has been called the "oldest constitutional question" -- namely, the meaning of federalism -- is just beginning.

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88. 18 U.S.C. § 248 (Supp. 1995). *See* Pro-Choice Network v. Schenck, 67 F.3d 377, 381 (2d Cir. 1995) (upholding the constitutionality of provisions providing for a 15 foot buffer zone around the entrance of an abortion clinic where only two "counselors" may stand in the zone and speak to patients unless privacy is requested).

89. 42 U.S.C. § 1973gg (Supp. 1995). *See* Association of Community Orgs. for Reform Now v. Edgar, 75 F.3d 304 (7th Cir. 1996). Illinois argued that it cannot be forced to administer a federal law promoting voter registration. *Id.* at 793. The law was held constitutional pending the state's approval. *Id*; Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1412 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996) (denying certiorari to California Governor Pete Wilson's suit challenging the constitutionality of the Voter Registration Act).

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