JUSTICE CLARENCE THOMAS: THE EMERGING "NEW FEDERALIST" ON THE REHNQUIST COURT

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> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.[1]

According to James Madison, "the purpose of the [American] Constitution's mechanics—separation of powers, bicameralism, representation, and so forth—was to hedge against an all too-predictable human nature."[2] A government could not stand on the mere hope that future leaders would make "right" decisions.[3] Thus, the Constitution was written to "offset 'the defect of better motives.' Good *intentions* were to be replaced by good *institutions*."[4] Yet, contemporary American politics and jurisprudence have strayed from the principles espoused in *The Federalist Papers* and other formational documents which warned that unbridled governmental power at any branch or level would inevitably rob individuals of their inalienable freedoms.[5] Since the New Deal, such governmental power has created a "federalized" administrative state, in

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[1] THE FEDERALIST NO. 51, at 262 (James Madison) (Clinton Rossiter ed., 1982).

[2] Edwin Meese, *The Moral Foundations of Republican Government*, IMPRIMUS, 1 Sept. 1986, at 4, *quoting* Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 988–89 (1987).

[3] *See, e.g.*, HERBERT J. STORING, WHAT THE ANTIFEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 52 (1981). "The irony is that whereas 'the primary object of government' is 'to check and controul the ambitious and designing,' government tends to become itself the tool of these very men." *Id.* Thomas Jefferson said that "confidence is everywhere the parent of despotism—free government is founded in jealousy and not in confidence; it is jealousy, and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power . . . ." *Id.* at 94 n.23.

[4] Meese, *supra* note 2 (emphasis added).

[5] *See, e.g.*, Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267 (1992).

which an unelected judiciary has acted legislatively.[6] Furthermore, traditional concepts of federalism that preserved States' powers have become a legal fiction.

Commentators have opined how and why such events have occurred over the last 60 years.[7] During that time period, conservative critics have chided the Supreme Court for being too deferential to unchecked administrative agency discretion.[8] Others have argued that Congress delegated this broad power to the agencies; as a consequence, the Court has liberty to effect agency policy as law.[9] Without requiring Congress to write specific legislation, however, the unelected judiciary has generously filled in legislative gaps rather than merely applying the letter of the law.[10] In so doing, they have acted in a quasi–legislative fashion to accomplish a broad social agenda that an elected legislature did not intend or enact.[11] Lastly, other legal analysts are concerned that pure textual application will lead to a rigid legalism that will not meet the nation's social needs as it enters the next millennium.[12]

In contrast, strict constructionists assert that the text and first principles of the Constitution must wholly control interpretation of the

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[6] See, for example, R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994), for a discussion about how modes of textual interpretation can affect legal decision–making.

[7] For a thorough discussion of legal analysis, modern politics, and the need for judicial restraint, see, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). *See also* Eric J. Segall, *The Skeptic's Constitution*, 44 UCLA L. REV. 1467 (1997) (review of LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996)).

[8] For a broad spectrum of articles capturing these concepts, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); John P. Frantz, *Recent Development, The Reemergence of the Commerce Clause as a Limit on Federal Power:* United States v. Lopez, 19 HARV. J.L. & PUB. POL'Y 161 (1995); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Mark Burge, Note, *Regulatory Reform and the* Chevron *Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085 (1997); and Kevin F. Burke, Note, *Taming the Impetuous Vortex:* Lopez *Attempts to Confine Congress' Commerce Power*, 21 S. ILL. U. L.J. 185 (1996).

[9] *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997); Burge, *supra* note 8, at 1086–90.

[10] *See* sources cited *supra* note 8.

[11] *See, e.g.*, Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679 (1997); Abner S. Greene, *Discounting Accountability*, 65 FORDHAM L. REV. 1489 (1997).

[12] *See, e.g.*, William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329 (1985).

law.[13] All legal decisions must embody the "original intent" of the Constitution to ensure inalienable freedoms.[14] Amid this heated dialogue, Associate Justice Clarence Thomas of the United States Supreme Court has established himself as a voice of reason, demanding judicial restraint and a return to fundamental principles that restore freedom and personal responsibility to individuals and political power to the states in which they live.[15]

This article demonstrates that Justice Thomas is the Rehnquist Court's most ardent supporter of today's version of "New Federalism," a movement to return a balance of authority to state governments *vis–a–vis* the federal government.[16] Part I of this article analyzes Justice Clarence Thomas's pre–confirmation writings regarding traditionally conservative themes as a harbinger to his current jurisprudence. The second section of this article demonstrates that Justice Thomas's federalism jurisprudence embodies the spirit of the "New Federalism" that the Federalists and Antifederalists agreed upon during the ratification of the Constitution.[17] To illustrate this point, a trio of Thomas's opinions from the 1994–95 Supreme Court Term will be analyzed, using Federalist and Antifederalist arguments. The final section of the article suggests that since Justice Clarence Thomas will likely have a decades–long tenure with the nation's highest Court, his advocacy of "New Federalism" may lead the Court to return genuine political power to the States.

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[13] For a thorough discussion of legal analysis, modern politics, and the need for judicial restraint, see BORK, *supra* note 7.

[14] *See, e.g.*, LYMAN A. GARBER, OF MEN AND NOT OF LAW 94 (1966); FREDERICK P. LEWIS, THE NATIONALIZATION OF LIBERTY 55–67 (1990); RICHARD NEELY, HOW COURTS GOVERN AMERICA (1981); CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SCRUTINY? (1991); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (1989).

[15] *See* Christopher E. Smith, *Bent on Original Intent*, A.B.A. J., Oct. 1996, at 48, 50–51.

[16] The term "new federalism" has been used in this article to generally describe the return to examining the balance of state and federal political powers. It does not specifically refer to President Ronald Reagan's "New Federalism" plan outlined in his 1982 State of the Union address, in which he wanted to return the control of a number of federally administered programs back to the states. *See, e.g.*, Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987). Reagan's Exec. Order No. 12,303, 46 Fed. Reg. 21,341 (1981), established the Presidential Advisory Committee on Federalism.

[17] *See, e.g.*, 1 THE COMPLETE ANTI–FEDERALIST 24–37 (Herbert J. Storing ed., 1981); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996). Despite the Federalists' desire for a national government, the Antifederalists questioned its potential to gain unbridled control.

I. THE FEDERALISM JURISPRUDENCE OF THE RECENT SUPREME COURT

Prior to Thomas's nomination to the Supreme Court, members of the Rehnquist Court had begun to re-examine the constitutional limitations on federal power and the return of political power to the States.[18] Chief Justice Rehnquist led the charge and was dubbed the "Lone Federalist" when he joined the Court in 1972.[19] Since then, Justice O'Connor has often been cited for her States' rights orientation.[20] Now, Justice Thomas has taken the reins and become the Court's latest proponent of States' rights against the unchecked federalization of governmental power. Justice Thomas began to make his judicial mark by the 1994–95 Supreme Court Term. He has discovered his independent voice—a conservative philosophy grounded in constitutional text and scholarship that anchor him to law, not the whims of social policy.[21] While he is not the only conservative on the Court, Justice Thomas's federalism jurisprudence is distinctive in its analysis of constitutional text, its meanings, and the processes that formed our nation.[22] His burgeoning federalist jurisprudence has revitalized the use of Publius' letters and the text of the ratification debates to return to our nation's first principles.[23] His opinions have challenged the once-unchallenged

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[18] *See* Linda Greenhouse, *A Remade U.S. Supreme Court Shifts the Fulcrums of Power*, CHI. DAILY L. BULL., July 8, 1991, at 2.

> [T]he [C]ourt has made clear its desire to withdraw, not completely but measurably, from roles it has played for many years. As seems clear from a series of recent decisions, the [C]ourt no longer wants to be the constitutional cop on the beat, policing the way government treats individuals, or the referee of the federal regulatory state, defining the moment at which the executive branch has exceeded its [C]ongressional mandate.

Id. Greenhouse continues that the "shift in federal-state power may be the most notable legacy of the court's new federalism, in which it seeks to elevate the role of state courts and state legislatures." *Id. See also* THOMAS JAMES NORTON, LOSING LIBERTY JUDICIALLY 6–25 (1931). "The question of which type of governmental structure best preserves man's liberties and freedoms has been one of continual debate through the ages. The American Experiment was not created in a vacuum; it was born from the great tradition of man's search for personal liberties, to be secured by his government." *Id.*

[19] *See* David Savage, *Supreme Court Rulings Herald Rehnquist Era*, L. A. TIMES, July 2, 1995, at A1. *See also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

[20] *See* Powell, *supra* note 19, at 634.

[21] *See id.*

[22] A general word search that connected Justice Thomas with constitutional analysis and the concept of federalism or states' rights revealed that since mid-1994, there have been more than 500 articles printed in the popular press.

[23] The Supreme Court has quoted *The Federalist Papers* in 179 cases from 1935 to 1991, averaging 3.14 cases per year. Since Justice Thomas joined the Court in late 1991, the Court has more than doubled its use of *The Federalist Papers*, referring 33 times to them for an annual average of 7.33. Justice Thomas's desire to curb federal control and

power of the post–New Deal federal government, signifying the nation is ready to return power to the States.[24] As one of the youngest justices ever appointed to the Court, Thomas's jurisprudence is likely to impact States' rights well into the Third Millennium.[25]

II. THOMAS, THE "NEW FEDERALIST," PRIOR TO CONFIRMATION

Traditionally conservative themes, such as federalism and less government, political representation through a republican form of government, self–reliance, and a host of individual liberties and responsibilities, are not novel themes in Justice Thomas's life or in his writings. He wrote dozens of letters and articles while chairman of the Equal Employment Opportunity Commission (EEOC); his views on many subjects, including affirmative action, were an open book during his confirmation hearings.[26] For example, in a 1987 letter to the *Wall Street Journal*, Justice Thomas "insisted that the Constitution be interpreted in a colorblind fashion."[27] He "emphasize[d] black self–help, as opposed to racial quotas and other race–conscious legal devices that only further and deepen the original problem."[28] His concurring opinion

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return power to the States echoes many Antifederalist fears. *See* STORING, *supra* note 3 at 7, 10-11, 15-23.

[24] Justice Thomas wrote extensively in two concurring opinions and one dissenting opinion in cases from the Spring of 1995. In *United States v. Lopez*, 514 U.S. 549 (1995), he openly challenged the Court's long–standing tradition of a broad application of the Commerce Clause. In *Missouri v. Jenkins*, 515 U.S. 70 (1995), he argued that educational standards should be decided on a state–wide basis, precluding a federal standard. And, in a vigorous dissent in *United States Term Limits v. Thornton*, 514 U.S. 779 (1995), he suggested that standards for political representation should be determined by the electorate of each state.

Some commentators even suggest that Justice Thomas had become a forceful jurist by his fourth term on the Court and has, in fact, become the "most radical" of the High Court's conservatives. *See* Aaron Epstein, *High Court Shifting Toward States' Rights*, L. A. DAILY NEWS, May 18, 1995, at N1; *see also* Joan Biskupic, *High Court Rulings Bring Federal–State Power Balance to Forefront*, WASH. POST, May 25, 1995, at A14; *High Court Defines Limits; Disarming Federal Power*, ARIZ. REPUBLIC, Apr. 29, 1995, at B6.

[25] *See* Mike Feinsilber, *After a Week of 'Living Hell,' Thomas Faces a Lifetime on Supreme Court*, CHI. DAILY LAW BULL., Oct. 16, 1991, at 1. Justice Thomas was 43 years of age at the time of his appointment. If he serves as long as his predecessor, Thurgood Marshall, he will be writing decisions until the year 2031. Born after World War II, he is the first "Baby Boomer" to serve on the Court and the second–youngest justice of the 20th century.

[26] *See* Jill Lawrence, *Thomas: Controversial, Black and Conservative*, CHI. DAILY LAW BULL., July 1, 1991. Justice Thomas is perhaps best known as an opponent of affirmative action policies, even though he benefited from them as a youth in Pin Point, Georgia. He has stated that "[r]ace–conscious remedies in this society are dangerous. You can't orchestrate society along racial lines." *Id.*

[27] *Id.*

[28] *Id.*

in *Adarand Constructors v. Pena*,[29] which denounced blanket application of affirmative action programs, echoed these earlier sentiments.

While his critics maintain that the American public never learned about the real Clarence Thomas and his true views on abortion, libertarian studies, tenets of criminal law, and constitutional analysis amid the controversy over Anita Hill,[30] his views about the role of government were easily accessible. His pre–confirmation writings and speeches[31] and well–documented stories of his upbringing in a segregated South[32] made it readily apparent that he believes in self–reliance and personal and family responsibilities, not government subsidies or federalized control. In a 1987 speech to *The Heritage Foundation*, Justice Thomas reminded his audience that he

> grew up under state–enforced segregation, which is as close to totalitarianism as I would like to get. . . . My household, notwithstanding the myth fabricated by experts, was strong, stable, and conservative. . . . God was central. School, discipline, hard work, and "right from wrong" were of the highest priority. Crime, welfare, slothfulness, and alcohol were enemies.[33]

His family provided a foundation of wisdom and ethics of self–help, an environment in which he learned the undebatable commandments "honesty is the best policy" and "what is the right thing to do?"[34] During a commencement address at Syracuse University College of Law in 1991, he noted that "[he] found the words of wisdom from [his] unlettered grandparents to be vastly more propitious than all the books, all the lectures, and all the how–to courses."[35] He recalled a story where he felt compelled to return a wallet to its rightful owner, "not to comply with ethics laws or criminal laws, but [by] a moral compass that had been drilled into [his] being."[36] His life experience formed the basis for his

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[29] 515 U.S. 200 (1995).

[30] *See, e.g.*, DAVID BROCK, THE REAL ANITA HILL: THE UNTOLD STORY (1993); TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION (1993).

[31] *See, e.g.*, CLARENCE THOMAS: CONFRONTING THE FUTURE, SELECTIONS FROM THE SENATE CONFIRMATION HEARINGS AND PRIOR SPEECHES 41–43 (L. Gordon Crovitz ed., 1992).

[32] *See id.*; Terence Moran, *Clarence Thomas: Mind and Matter; How the Supreme Court Nominee Brings His Hard Life into the Law*, LEGAL TIMES, July 8, 1991, at 1.

[33] Moran, *supra* note 32, at 10.

[34] Clarence Thomas, *Commencement Address, Syracuse University College of Law*, 42 SYRACUSE L. REV. 815, 818 (1991).

[35] *Id.*

[36] *Id.*

opposition to blanket governmental programs, which often strip individuals of personal dignity, freedom, and self–reliance.[37]

These fundamental values have forged his commitment to the ideals of a limited government and personal responsibility. Having served in all three branches of government,[38] Justice Thomas has been dubbed an independent thinker, not likely to be swayed from "first principles."[39] His views on a host of issues, such as civil rights legislation, unenumerated rights, school segregation, and antitrust law, suggest he is a "social critic" who constantly analyzes the past to find a way for the future.[40] Justice Thomas understands the political power a judge may have.[41]

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[37] *See* Moran, *supra* note 32 at 1. "Thomas has scathingly criticized government welfare programs as a kind of slow poison at work in the black community, generating a culture of dependency that has touched his own family." *Id.*

[38] *See In the Case of Judge Thomas, Let His Record Speak for Itself*, WASH. TIMES, Sept. 8, 1991, at B2. A graduate of Yale Law School, Justice Thomas worked for two years in private practice before serving as Assistant Attorney General in Missouri from 1974 to 1977, where he prosecuted a number of routine tax cases. From 1979 to 1981, he served as Senator John C. Danforth's Legislative Assistant in Washington, D.C. From 1981 to 1982, he was Assistant Secretary for Civil Rights at the U.S. Department of Education. From 1982 to 1990, he was Chairman of the Equal Employment Opportunity Commission (EEOC). Thomas then became Circuit Judge of the D. C. Circuit from 1990–91. *See id.*

[39] R. Gaull Silberman, *Personal Perspective: He Is Nothing If Not an Independent Thinker*, L.A. TIMES, July 7, 1991, at M1. In this article, Silberman, EEOC vice chairman, shares her personal perspectives after knowing Thomas for more than 10 years. Silberman wrote that "[t]he Clarence Thomas you see is the Clarence Thomas you get." *Id.* She recounted the story that in 1987, during Thomas's renomination hearings at the EEOC, so many commission employees came to see him that the line snaked through the corridors of the Dirksen Building. Some employees even took leave to support Thomas, who had already been in the position for five years. Thomas inspires those with whom he works by instilling a sense of pride and acceptance: "You count because of who you are and what you do, not because of what goods you possess or to what race (or religion) you belong." *Id.*

See also Gary L. McDowell, *Doubting Thomas: Is Clarence a Real Conservative?*, NEW REPUBLIC, July 29, 1991, at 12. McDowell suggests that Thomas may follow in the footsteps of Justices Iredell, Story, and Curtis, who did not depart from first principles in their legal analysis, but believed that the place to consider natural law was in the legislative formation of the laws, not in their judicial interpretation. *See id.*

[40] *See* Moran, *supra* note 32, at 10. It has been said that Thomas, a former Roman Catholic seminarian, can attribute much of his natural law proclivity to his Catholic educational experience. He credits his family with instilling in him a strong work ethic, which advocates a return to such old–fashioned virtues as self–reliance and neighborliness. *See id.*

Some have compared his jurisprudence and philosophies to those of Abraham Lincoln, who clearly espoused the integral principles of the Declaration of Independence, as woven into the carefully crafted words of the Constitution. *See, e.g.*, Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and the Declaration of Independence*, 65 S. CAL. L. REV. 1477, 1478 (1992). "Thomas contends that the 'Declaration is the cornerstone of our Constitution and laws, providing us with fundamental moral principles and with a model for the defense and application of those principles.'" *Id.* (quoting Thomas, *supra* note 2, at 989).

[41] *See* Thomas, *supra* note 31, at 43. In his opening statement before the Senate Committee on the Judiciary, he noted:

Therefore, he openly advocates that a judge's role is to discover and interpret the law, never to create it.[42] This credo was made plain at the confirmation hearings: "District Court and circuit judges do not have the option of roaming unfettered through judicial terrain . . . . The ultimate purpose of both statutory construction and constitutional interpretation is to determine what the authors intended."[43] He has crafted his federalism jurisprudence in a similar manner.

Unlike many individuals with political or judicial aspirations, Justice Thomas was not groomed for the High Court,[44] nor did he check his personal convictions at the judicial door.[45] Despite working within an agency, he often delivered poignant speeches about personal responsibility and worked to curb overbearing agency programs and governmental waste.[46] Nonetheless, Justice Thomas implemented an agency–driven system of goals and timetables because it was "the law of the land, whether [he] like[d] it or not."[47] In this way, he acknowledged his desire to stay within the bounds of civil law.[48] Now, as a Supreme

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> A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda, and the judge must get the decision right. Because when all is said and done, the little guy, the average person, the people of Pin Point [his childhood home town in Georgia], the real people of America will be affected not only by what we as judges do, but by the way we do our jobs.

Id.

[42] *See, e.g.*, Donald B. Ayer, *Clarence Thomas is His Own Man, An American Original of Great Character*, THE NAT'L L.J., July 29, 1991, at 17. Ayer believes "[t]he era of the unelected, life–tenured federal judge making policy out of whole cloth seems rightly to be at an end." *Id.*

[43] Terence Moran, *Getting a Read on Thomas: Circuit Nominee Says Philosophy Not Yet Formed*, LEGAL TIMES, Feb. 12, 1990, at 1.

[44] *See* Ayer, *supra* note 42, at 1. Justice Thomas had only 18 months of judicial experience in the D.C. Circuit Court before being nominated by President Bush to fill a vacancy on the Court. Many critics felt his lack of judicial experience would be detrimental to his performance. However, Justices William O. Douglas, Potter Stewart, and Byron R. White were also in their early 40's at the time of their appointments. Chief Justice Rehnquist and Justice White, on the present Court, came to the Court with no prior judicial experience. In the recent past, former Chief Justice Earl Warren and Justices Arthur J. Goldberg, Douglas, Lewis F. Powell, Jr., Hugo L. Black, and Felix Frankfurter also had no judicial experience prior to their appointment to the Court. *See id.*

[45] *See id.* On more than a few occasions, Thomas "spoke up forcefully in disagreement with proposals or decisions being made" within the Department of Justice under the Reagan administration. *Id.* In 1984, he was nearly removed from office because he was deemed an independent thinker, "concern[ed] for continuity and respect" for legal authorities. *Id.*

[46] *See id.* His eight years as EEOC Chairman provided a thorough knowledge of administrative law and the inner workings of a major agency.

[47] *Id.*

[48] *See id.*; Garry Sturgess, *Sifting through the Record; Defer to Agencies*, LEGAL TIMES, Sept. 9, 1991, at 26. As a judge on the D.C. Circuit, Thomas was a judicial conservative, espousing broad deference to administrative agencies, unless the policies

Court Justice, he has become less deferential to agencies and more concerned with stricter constitutional interpretation.[49]

His experience in federal and state government gave Justice Thomas critical first–hand experience in complex bureaucracies *before* entering the judiciary.[50] He "saw the modern oversight powers of Congress at work more intimately than virtually any other administrator in history."[51] In a speech to the Palm Beach, Florida, Chamber of Commerce in 1988, he boldly stated that "[i]t may surprise some, but Congress is no longer primarily a deliberative or even a lawmaking body . . . . To put it simply, there is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."[52] Justice Thomas went on to note that "[w]hen members of the legislature can, at crucial junctures, direct and administer bureaucracies in a manner compatible with their own interests . . . the national interest is left without powerful representation."[53]

In a February, 1991, speech at Creighton University School of Law, he expressed misgivings about ceding unchecked administrative power to agencies, without the benefit of any restrictive system of judicial review:

> One wonders what is left of the role of a reviewing court in interpreting ambiguous statutes, when an agency's interpretation must be deferred to merely because it has interpreted the ambiguous [congressional] statute, and the ambiguity itself confers the authority to do so as well as shields the interpretation from separable review by the courts.[54]

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were clearly arbitrary, capricious, or outside the agency's statutory authority. "He is concerned that the total process of agency decision–making and judicial review be disciplined and coherent," said Charles Fried, solicitor general in the Reagan administration. *Id.* "He has followed the law that the Supreme Court has been developing for well over a decade," but "[h]aving run an agency himself, he knows what the difficulties and responsibilities of running an agency are." *Id.*

[49] *See* Carl Tobias, *Examining Thomas' Ideas on Statutory Analysis*, LEGAL TIMES, Sept. 9, 1991, at 33. Tobias comments that as head of the EEOC, Thomas had broader discretion in implementing Congressional standards. That person (an agency head) "could and should view quite differently his responsibilities to interpret those same laws as a judge." *Id.*

[50] *See* Terence Moran, *Sifting through the Record; 'Little Deliberation and Less Wisdom' in Congress*, LEGAL TIMES, Sept. 9, 1991, at 26.

[51] *Id.*

[52] *Id.*

[53] *Id.* As EEOC chairman, Thomas openly "accuse[d] Congress of shifting the responsibility for making difficult policy decisions to the agencies and to the courts," rather than deliberating as elected representatives, accountable to their constituencies. *Id.* "His critique holds that after passing an ambiguous and general law, Members of Congress then administer it through the oversight process, avoiding the difficulties—and political dangers—of reaching a legislative consensus on the specific policy goals they seek." *Id.*

[54] Moran, *supra* note 50 (quoting a speech made by Clarence Thomas at the annual TePoel Lecture Series at Creighton University School of Law in Omaha, Nebraska, on Feb.

As EEOC Chairman, Justice Thomas often wrote in favor of limited government, separation of powers, and of judicial restraint.[55] His writings reflect his belief that the concept of judicial review is necessary to defend the Constitution—not to create new, unenumerated rights and unspoken liberties, but to restrain the power of government and moderate its growth and interference with personal freedoms.[56] To Justice Thomas, Americans' rights "are inalienable ones, given to man by his Creator, [they] did not simply come from a piece of paper."[57] Thus, his fundamental views for smaller government are embedded within the "spirit" of the Declaration of Independence and the "letter" of the Constitution.[58] This conceptual framework provides the scaffolding for his ideals for politics, society, and government.[59] In so relying on our Nation's formational documents, he stands resolutely behind the age–old principle: Man must govern himself by laws, not by the mere whims of other men.[60]

While some critics feared Justice Thomas would stray from the written Constitution to an amorphous natural law regime,[61] others dreaded his libertarian leanings, which favor unbridled individual choice over state power.[62] Even though he admittedly studied libertarian doctrines, Justice Thomas has nonetheless denounced himself as a pure libertarian. In 1987, Justice Thomas told *Reason* magazine, a journal affiliated with the libertarian movement: "I don't think I can [describe myself as a libertarian] . . . ."[63] He continued: "I have some very strong libertarian leanings, yes . . . . But at this point I'm caught in a position where if I were a true libertarian I wouldn't be here in government."[64] Interestingly, Thomas was EEOC Chairman at the time of the interview.

14, 1991. His prepared remarks were published in *Transition from Policymaker to Judge—A Matter of Deference*, 26 CREIGHTON L. REV. 241 (1991)).

55 *See, e.g.*, Thomas, *supra* note 2.

56 *See id.*

57 Mike Feinsilber, *Top Court Nominee Embraces 'Natural Law:' Is that Alarming?*, CHI. DAILY BULL., Aug. 16, 1991, at 3.

58 *See* Tony Mauro, *Where Does 'Natural Law' Take Thomas?*, LEGAL TIMES, Aug. 12, 1991, at 9. Thomas's natural law analysis insists on equal rights under the law for everyone. *See id.*

59 *See* Feinsilber, *supra* note 57, at 3. Thomas has also written that "[o]ur political way of life is by the laws of nature, of nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." *Id.*

60 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *436 (1768).

61 *See* Feinsilber, *supra* note 57, at 3.

62 *See* Terence Moran, *Thomas Leaves Libertarianism Behind*, LEGAL TIMES, Sept. 16, 1991, at 9.

63 *Id.*

64 *Id.*

Justice Thomas consistently espoused a deep skepticism of federal power for years prior to his appointment to the Court.[65] In 1988, he noted that

> [u]ntil recently, the American regime was centrally governed, but administratively decentralized. Congress concerned itself primarily with the general interests of the nation, and it functioned as a deliberative and representative lawmaking body. Private or specialized interests were brokered in the economic marketplace or administered at the state and local level of government. In the period between 1965 and 1975, Congress created a bureaucracy capable of centrally administering nearly all the details of American life. It attempted to solve not only the political problems of the nation, but the social and economic problems of all Americans as well. . . . It was almost inevitable once Congress ceased performing the deliberative and lawmaking functions envisioned by the Constitution. . . . As government's role was expanded and its functions increased, it became more intrusive and bigger, not stronger.[66]

When Congress shuns its defined, lawmaking role,[67] many decisions are left to the bureaucracy and the courts.[68] Even if these decisions seem wise or just, they do not substitute for the type of broad–based consensus provided when a majority of representatives collectively make policy.[69]

These arguments are not unique. They were discussed more than 200 years ago during ratification of the Constitution and revitalized during Thomas's confirmation hearings. Since coming to the Supreme Court, his opinions have shown a willingness to return to first principles in order to discover the Constitution's mandate for a balanced two–tier system.[70] By returning to a scholarly study of the Framers' intent, Justice Thomas has resurrected the concept of federalism within the Supreme Court. Since his confirmation in 1991, he has "emerged as the boldest member of the Court in half a century—a jurist committed to seeking the original meaning of the Constitution in lengthy and learned

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[65] *See id.* Critics complained that his libertarian leanings over the years were never presented during the hearings. For example, "his provocative views on separation of powers were transformed into . . . 'the tension between the branches' or 'the indiscretions of an embattled agency head.'" *Id.* Despite the rhetoric, Thomas has been quoted as saying that strict limits on power of each federal branch of government amount to profound guarantees of freedom.

[66] *Thomas: Congress Fails to Deliberate*, LEGAL TIMES, Sept. 9, 1991, at 21.

[67] *See* U.S. CONST. art. I, § 8.

[68] *See Thomas: Congress Fails to Deliberate*, *supra* note 66, at 21.

[69] *See id.*

[70] *See id.* For a discussion on concurrent state and national power, see Powell, *supra* note 19, at 633.

opinions that survey the vast scope of American constitutional history."[71] Even his potential critics applaud his legal analysis.[72]

III. THOMAS AS THE "NEW FEDERALIST" ON THE BENCH

A. *United States v. Lopez*:[73] *Congress, Power, and the Commerce Clause: The Buck Stops Here*

> In 1992, a high school senior toted a concealed .38 caliber handgun and five bullets to the grounds of his San Antonio High School. He was ultimately charged with violating the federal Gun Free School Zones Act of 1990.[74] The Act itself did not regulate a commercial activity, nor did it require that the gun possession be connected in any way to interstate commerce. For the first time in more than 60 years, the Supreme Court scrutinized broad Congressional application of the Commerce Clause, holding that the Act exceeded Congress' authority to "regulate Commerce . . . among the several States . . . ."[75]

Undoubtedly, this decision signaled a sharp conservative retreat from the Court's longtime endorsement of Congress's expansive authority to regulate an array of activities through the Commerce Clause.[76] The Rehnquist–written majority opinion, and specifically Justice Thomas's concurrence, sought to preserve state power and to restrict Congressional powers to those specifically enumerated to its charge.[77] To do otherwise, according to Chief Justice Rehnquist, would

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[71] John O. McGinnis, *Original Thomas, Conventional Souter: What Kind of Justices Should the President Pick*, POL'Y REV., Sept. 22, 1995, at 24.

[72] *See* William H. Freivogel, *Justice Thomas Getting Respect: Legal Experts Cite His Opinions as "Generally Good,"* SAN FRANCISCO EXAMINER, June 4, 1995, at A2. For example, Richard Lazarus, a law professor at Washington University, noted that

> [Thomas's] work goes a long way to refuting the notion that this is someone who does not have the breadth to be a Supreme Court justice. One can disagree with him and think he is misguided, but you cannot read these opinions and think this is someone who does not have the command of the legal argument.

Id. Jesse Choper, former Dean of University of California—Berkeley's Boalt Hall School of Law, agreed: "He is not being given sufficient recognition for what he is doing. I think his opinions are generally good." *Id.*

[73] 514 U.S. 549 (1995).

[74] 18 U.S.C. § 922(q)(1)(II)(2)(A) (1988 ed., Supp. V). The Gun Free School Zones Act of 1990 made it a federal offense "[f]or any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* "The term 'school zone' is defined as 'in, or on the grounds, of, a public, parochial or private school' or 'within a distance of 1,000 feet from the grounds of a public, parochial or private school.'" *Lopez*, 514 U.S. at 551 n.1 (quoting 18 U.S.C. § 921(a)(25)).

[75] *See Lopez*, 514 U.S. at 551; U.S. CONST. art. I, §8, cl. 3.

[76] See, for example, Chief Justice Rehnquist's lengthy majority discussion on the development of recent Commerce Clause jurisprudence. *Lopez*, 514 U.S. at 551–61.

[77] William H. Freivogel, *High Court Puts Brakes on Congress*, ST. LOUIS POST–DISPATCH, Apr. 27, 1995, at A1.

ultimately "convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[78] Such a result would be in direct conflict with the Constitution's original intent and the first century of Commerce Clause jurisprudence.[79] The majority warned about the overreaching power of the federal government and the importance of preserving and protecting States' rights.[80] The dissent desired to extend the "substantial effects" test, which has been developing over the last sixty years.[81] In this judicial environment, the *Lopez* decision was "the most important decision and discussion on federalism since 1937."[82]

The majority[83] and dissenting opinions in *Lopez* were sharply divided on their views of this federal power. Dissenting Justice Stevens called the majority opinion "radical" because it did not wholly defer to the federal legislation of the last sixty years.[84] The dissent supported the expansive reading of *Wickard v. Filburn*[85] and its progeny to broadly regulate from Washington.[86] The dissent applauded New Deal legislation that they believe corrected the "wrong turn" the Court chose during the

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[78] *Lopez*, 514 U.S. at 567.

[79] *See id.* at 584 (Thomas, J., concurring).

[80] *See* Mary McGrory, *Gun Advocates Not Deterred by Oklahoma City Bombing*, ST. LOUIS POST–DISPATCH, May 7, 1995, at B3.

[81] *Lopez*, 514 U.S. at 603–09 (Souter, J., dissenting). Justice Souter's dissenting opinion includes a brief discussion of the development of the "substantial effects" test in Commerce Clause jurisprudence over the last 60 years.

[82] Aaron Epstein, *Court Overturns U.S. School Gun Ban*, PITTSBURGH POST–GAZETTE, Apr. 27, 1995, at A10. "William Van Alstyne, a Duke University law professor and author of constitutional law texts, said [that the *Lopez* decision] was the first time in 60 years that the Supreme Court had overturned an Act of Congress that was based upon its commerce power and had a direct effect on private activity." *Id.*

[83] The *Lopez* majority consisted of Chief Justice Rehnquist, and Justices Kennedy, O'Connor, Thomas, and Scalia. *See Lopez*, 514 U.S. at 550.

[84] *Lopez*, 514 U.S. at 603 (Souter, J., dissenting). "[W]e defer to what is often a merely implicit Congressional judgment that its regulation addresses a subject substantially affecting interstate commerce 'if there is any rational basis for such a finding.'" *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); Katzenbach v. McClung, 379 U.S. 294, 303–304 (1964)). "The practice of deferring to rationally based legislative judgments is a 'paradigm of judicial restraint.'" *Id.* at 604 (Souter, J., dissenting) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993)).

> In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress' political accountability in dealing with matters open to a wide range of possible choices.

Id.

[85] 317 U.S. 111 (1942). In *Filburn*, a Midwestern farmer was found to violate the federal Agricultural Adjustment Act when he grew wheat on his farm to support his family.

[86] *See Lopez*, 514 U.S. at 602–04 (Stevens, J., and Souter, J., dissenting separately).

first 150 years of our Nation's Commerce Clause jurisprudence.[87] In strong language, Justice Souter vigorously insisted: "[I]t seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago."[88]

Justice Thomas specifically rebutted Souter's charge.[89] In fact, he argued that the majority position was not a "wrong turn" at all.[90] He wrote his concurrence to argue for a "wholesale revision of the Court's interpretation of the Commerce Clause to sharply curtail federal authority."[91] He wanted to rein in further governmental expansion under the Commerce Clause and to return police power to individual state administration.[92] In fact, he supported the focal point of the nation's first 150 years of Commerce Clause jurisprudence: that the Constitution granted Congress limited, enumerated powers.[93] To him, the Court drifted off course in the mid–1930s, when states constructively lost all regulatory power.[94]

Thus, the *Lopez* Court asked a fundamental question that has not been seriously considered since the New Deal: "From where does the federal government derive its authority, and what is its precise scope?"[95] In his concurring opinion, Justice Thomas agreed with the majority, which highlighted the need for separation of powers and constitutionally mandated division of federal authority.[96] As an illustration, he quoted James Madison: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[97] This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."[98] "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

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87 *See id.* at 593 (Thomas, J., concurring).

88 *Id.* at 608 (Souter, J., dissenting).

89 *See id.* at 593 (Thomas, J., concurring).

90 *See id.* at 593, 599 (Thomas, J., concurring).

91 Jan Crawford Greenberg, *Court Moves to Rein in Federal Control; Gun Case Ruling a Rebuke to Congress,* CHICAGO TRIBUNE, Apr. 27, 1995, at 1. Justices Kennedy and O'Connor admitted that the *Lopez* ruling was a "limited" one. *See id.*

92 *See Lopez* 514 U.S. at 584 (Thomas, J., concurring).

93 *See id.* at 593 (Thomas, J., concurring).

94 *See id.* at 599 (Thomas, J., concurring).

95 Roger Pilon, *It's Not About Guns; The Court's* Lopez *Decision is Really About Limits on Government,* WASH. POST, May 21, 1995, at C5. Pilon directs the Center for Constitutional Studies at the Cato Institute. *See id.*

96 *See Lopez,* 514 U.S. at 552.

97 *Id.* (quoting THE FEDERALIST No. 45, at 292–93 (James Madison) (C. Rossiter ed., 1961)).

98 *Lopez,* 514 U.S. at 552 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[99]

To prove his case, Justice Thomas cited a string of decisions ensuring that "there are real limits to federal power" and that "no one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers.'"[100] As author Gary L. McDowell foretold in *The New Republic*,[101] Justice Thomas borrowed the 200–year–old thoughts of Justice Iredell to emphasize his view of state sovereignty. Thomas stated in his concurring opinion, "Each state in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States has no claim to any authority but such as the States have surrendered to them."[102] Justice Thomas compared Congress's power to regulate gun possession with its inability to regulate "marriage, littering, or [even] cruelty to animals," matters that the Constitution clearly left within a state's domain.[103] Thus, Justice Thomas and the majority took the occasion to reassert the fundamental principles of limited government and enumerated authority.[104]

Justice Thomas used a strict textual approach to define the limited powers that were specifically enumerated to Congress during the ratification of the Constitution. By narrowly defining "commerce" to its 18th century meaning(s), Justice Thomas substantiated his argument that a single school boy with a lone gun should not fall within the purview of Commerce Clause jurisprudence.[105] For example, in 1789, "'commerce' consisted of selling, buying, and bartering, as well as transporting" the goods from one location to another.[106] All three authors of *The Federalist Papers* gave credence to this very point during

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[99] *Id.*

[100] *Id.* at 584 (Thomas, J., concurring) (quoting New York v. United States, 505 U.S. 144, 155 (1992); *Gregory*, 501 U.S. at 457; Maryland v. Wirtz, 392 U.S. 183, 196 (1968); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[101] Gary L. McDowell, *Doubting Thomas: Is Clarence a Real Conservative?*, NEW REPUBLIC, July 29, 1991, at 12, 15.

[102] *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (quoting Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435, (1793)).

[103] *Id.* at 585 (Thomas, J., concurring).

[104] *See* Pilon, *supra* note 97, at C5.

[105] *See Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).

[106] *Id.* In his analysis, Thomas used three dictionaries from 1773 to 1796 to find the meaning of "commerce" in the 1770s. In 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773), "commerce" was defined as "intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick." By 1796, the definition remained virtually unchanged, as noted in A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796). This understanding of "commerce" finds support in the etymology of the word, which literally means "with merchandise." *See* 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989).

Ratification, when the Federalists and Antifederalists discussed the meaning of trade under the Commerce Clause.[107] The term "'commerce' was used in contradistinction to . . . activities such as [mining], manufacturing and agriculture," as discussed in *The Federalist Papers* and state ratification conventions.[108] Therefore, when the Constitution was approved by the states' representatives, it enumerated a narrow "commerce" power "among the several States;" it did not lay the foundation for the States to cede police power to the federal government.[109]

Justice Thomas textually noted that the Court's "substantial effects" test is not part of the Commerce Clause.[110] He observed that the Article I, §8, clause 18 did not authorize Congress to "regulate matters that *substantially affect* commerce with foreign Nations, and among the several States, and with the Indian Tribes."[111] It merely gave them power to "regulate commerce . . . among the several States. . . ."[112] To Justice Thomas, the Court's sweeping "substantial effects" test used since the New Deal was but an "innovation of the 20th century" [113] that has usurped States' powers and permitted the federalization of our liberties.[114] When broadly applied, such Commerce Clause jurisprudence would make these enumerated powers "wholly superfluous."[115] For example, there would be no need for the Constitution to grant Congressional power to enact bankruptcy laws, coin money, or fix standard weights and measures if Congress had been given *carte blanche* to regulate anything that *substantially affected* interstate commerce.[116] In short, Justice Thomas said this sweeping mode of Constitutional interpretation has allowed Congress to effectively consume the

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[107] *See Lopez*, 514 U.S. at 586 (Thomas, J., concurring); THE FEDERALIST No. 4, at 22 (John Jay) (Jacob E. Cooke ed., 1961) (asserting that "countries will cultivate our friendship when our 'trade' is prudently regulated by Federal government," not separate states); *Id.* No. 7 at 39–40 (Alexander Hamilton) (discussing the ways that states would compete in commerce if left to state "regulations of trade"); *Id.* No. 40 at 262 (James Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government.").

[108] *Lopez*, 514 U.S. at 586–87 (Thomas, J., concurring) (citing THE FEDERALIST Nos. 12, 21, 36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). *See also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 57 (J. Elliott ed. 1836) (T. Dawes at Massachusetts Convention); *Id.* at 336 (M. Smith at New York Convention).

[109] *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (quoting U.S. CONST. art. I, § 8, cl. 3).

[110] *See id.* at 587–88.

[111] *Id.* (emphasis added).

[112] *Id.* at 588 n.2.

[113] *Id.* at 596.

[114] *See id.* at 591.

[115] *Id.* at 588.

[116] *See id.*

enumerated powers cited in Article I—a far cry from what the Founding Fathers intended.[117] In fact, it was the strident fear of the Antifederalists at Ratification.[118] To prove this point, Justice Thomas observed that the government was at a loss for words when asked at oral argument if there were any limits to Congressional power under the Commerce Clause.[119] "Likewise, the principal dissent[ing opinion] insist[ed] that there are limits, but it failed to muster one example."[120]

Justice Thomas also reviewed the political environment at Ratification to demonstrate that although American commerce is different today than it was in 1789, the Court must implement the Framers' original intent.[121] During this process, he reviewed texts from the Ratification period to confirm that most areas of life—even those that would have substantially affected commerce—would remain outside the reach of the Federal government.[122] The Framers did not delegate authority over all these activities to Congress, although they were quite aware that "many of the other enumerated powers in Section 8 *substantially affected* interstate commerce."[123] Alexander Hamilton, for example, "acknowledged that the Federal Government could not regulate" private actions between state citizens, "agriculture, and like concerns."[124] Even as a Federalist, Hamilton had deep concerns about a federal government that could dominate all aspects of citizens' lives. At the New York ratifying convention, Hamilton noted that the

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[117] *See id.* at 589.

[118] *See, e.g.*, STORING, *supra* note 3, at 15–23.

[119] *See Lopez*, 514 U.S. at 600 (Thomas, J., concurring) (citing Transcript at Oral Arg. 5.).

[120] *Id.* Thomas commented that the dissent implicitly conceded that the Court's reading of the Commerce Clause has no limits. "The one 'advantage' of the dissent's [broad] standard is legal certainty; it is certain that under its analysis everything may be regulated under the guise of the Commerce Clause." *Id.*

[121] *See id.* at 591.

[122] *See id.*

[123] *Id.* at 592. The bankruptcy power was "intimately connected with the regulation of commerce." *Id.* (quoting THE FEDERALIST No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961)) (internal quotations omitted).

[124] *Id.* at 591. "The administration of private justice between the citizens of the same State, the supervision of agriculture, and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." *Id.* (quoting THE FEDERALIST No. 17, at 106 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (internal quotations omitted)). Texts from the state ratification debates make it plain that substantive law was to remain within the purview of the state legislature and its courts. *See also Lopez*, 514 U.S. at 591 n.4 (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 40 (E. Pendleton at the Virginia Convention) ("the proposed Federal Government 'does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can it make a law altering the form of transferring property, or the rule of descents, in Virginia?'")).

Constitution should be justly rejected if it "enable[d] the federal government to 'alter, or abrogate . . . a state's civil and criminal institutions or penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.'"[125] Agriculture and manufacturing were not surrendered to the federal government, they remained solely within state jurisdiction.[126] So, "even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution."[127] Early Commerce Clause jurisprudence made it clear "that Congress could *not* regulate commerce 'which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.'"[128] Justice Thomas's concurrence sought to draw a clear distinction between commerce and its economic effects; the dissenting opinion did not.[129]

In his conclusion, Justice Thomas noted that "many believe it is too late in the day to undertake a fundamental reexamination of the past 60 years" and that "[c]onsideration of *stare decisis* and reliance interests

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[125] *Lopez*, 514 U.S. at 592 (Thomas, J., concurring) (quoting 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 267–268 (A. Hamilton at New York Convention)).

[126] *See id.*

[127] *Id.* (citing U. S. CONST. art. I, §1).

[128] *Id.* at 594 (Thomas, J., concurring).

> [T]he Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." . . . That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Id. (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 194, 203 (1824)).

[129] *See id.* at 624–25 (Breyer, J., dissenting). Thomas specifically referred to Justice Breyer's dissenting opinion in which Breyer finds such economic dimensions in Commerce Clause jurisprudence from the 1960s. In the well–known civil rights cases, *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Court upheld the use of the Commerce Clause, "in part because [racial] discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other states." *Lopez*, 514 U.S. at 624-25 (Breyer, J., dissenting) (quoting *Katzenbach*, 379 U.S. at 300). This Court also mentions *Daniel v. Paul*, 395 U.S. 298 (1969), where the "Court found an effect on commerce caused by an amusement park located . . . in Alabama—because some . . . food, 15 paddleboats, and a juke box had come from out of state." *Id.* at 304–05. In both cases, Breyer noted that "the Court understood that the specific instances of discrimination was part of a general practice that not only considered as a whole, caused social harm, but nationally significant economic dimensions, as well." *Lopez*, 514 U.S. at 626 (Breyer, J., dissenting).

may convince us that we cannot wipe the slate clean."[130] Nevertheless, he clearly re-emphasized and solidly reinforced the Court's responsibility to review congressional legislation against the plain text of the Constitution.[131] According to Chief Justice John Marshall, "[i]f Congress were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void."[132] James Madison asserted "that if Congress exercises powers 'not warranted by the Constitution's true meaning,' the judiciary will defend the Constitution."[133] Alexander Hamilton reinforced this foundational philosophy: "[C]ourts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments."[134] Justice Thomas followed this tradition in *Lopez*, stating:

> If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "commensurate with the national needs" or self-consciously intended to let the Federal Government "defend itself against economic forces that Congress decrees inimical or destructive of the national economy."[135]

The Constitution, which calls for limited governmental authority and a balance of powers, must be the ultimate authority for judicial decisions. Without these foundational principles, any check on federal power would be nothing but a blank check, leaving virtually no power to the States.[136]

B. *Missouri v. Jenkins*:[137] *The Judiciary Does Not Have Plenary Authority Over State-driven Issues*

In 1977, the Kansas City, Missouri, School District (KCMSD), the school board, and the children of two school board members brought suit against the State of Missouri, the surrounding school districts, and various federal agencies.[138] They alleged that all the defendants had "perpetuated a system of racial segregation in the schools of the Kansas

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[130] *Lopez*, 514 U.S. at 601 (Thomas, J., concurring).

[131] *See id.* at 601 n.9.

[132] *Id.* (quoting 3 DEBATES IN THE STATES, *supra* note 108, at 553 (John Marshall before the Virginia ratifying convention)).

[133] *Id.* (quoting THE FEDERALIST No. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961)).

[134] *Id.* (quoting THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

[135] *Id.* at 602 (quoting *id.* at 625 (Breyer, J., dissenting) (quoting North Am. Co. v. SEC, 327 U.S. 686, 705 (1946))). Thomas disagreed with Justice Breyer's reasoning.

[136] *See id.*

[137] 515 U.S. 70 (1995).

[138] *See id.* at 74.

City metropolitan area."[139] "The District Court determined that prior to 1954 'Missouri mandated segregated schools for black and white children.'"[140] Thirty years later, in 1984, the district court ruled that the school board had failed to "eliminate the vestiges of the state's dual school system . . . ."[141] It ordered remedial measures designed to bolster test scores, to improve educational quality in the KCMSD schools, and to force and enforce the State of Missouri to do the following: (1) fund massive expenditures on school facilities, (2) bus students intradistrict to magnet schools, and (3) increase faculty salaries to maintain high quality personnel.[142] Through the early 1990s, the district court retained full control over all these remedies, which cost the state and city hundreds of millions of dollars annually.[143] The district court prescribed the plan and, in doing so, commanded Missouri to exceed its constitutional limits.[144]

Missouri has litigated this case in the federal district and appellate courts for more than eighteen years, including more than ten appeals.[145] In late 1994, the Supreme Court granted certiorari to settle the well-known remaining issues of the case.[146] In broad terms, the court posed these questions: Does a federal court have full power to order salary increases as a remedy to combat racial segregation in schools? Does a federal court have plenary power over all local school district decisions?

For the first time in more than thirty years, the Court said no to each of these questions. The Supreme Court, under Chief Justice Rehnquist's leadership, unequivocally held that the district court had exceeded its remedial authority in prescribing measures "simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation."[147]

Just as in *Lopez,* the majority in *Jenkins* drew the line in the judicial sand by reasoning from segregation case law.[148] Justice Thomas, however, distinguished his concurrence by returning to constitutional

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[139] *Id.*

[140] *Id.* (quoting Jenkins v. Missouri, 593 F. Supp. 1485, 1490 (W.D. Mo. 1984)).

[141] *Id.* (citation omitted).

[142] *See id.* at 74–78.

[143] *See id.* at 78–79.

[144] *See* Martha M. Canan, *High Court Ruling Limits Federal Role in Desegregation,* THE BOND BUYER, June 13, 1995, at 3.

[145] *See* Joan Biskupic, *Desegregation Remedies Rejected; Justices Say School Solutions Must Address Specific Discrimination,* WASH. POST, June 13, 1995, at A1, A7.

[146] *See Jenkins,* 515 U.S. at 70.

[147] *Id.* at 100.

[148] *See id.* at 70–103. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas sided with the majority. Justices Thomas and O'Connor filed separate concurring opinions. Justices Souter, Stevens, Ginsberg, and Breyer comprised the dissent, which approved broad remedial authority for the District Court. *See id.* at 138.

principles rather than relying on social remedies[149] or a paternalistic "jurisprudence based upon a theory of black inferiority."[150] "[F]ederal courts also should avoid using racial equality as a pretext for solving social problems that do not violate the Constitution."[151] "[T]he judiciary is not omniscient, and . . . all problems do not require a remedy of constitutional proportions."[152]

According to Justice Thomas, the federal court system, in its attempt to implement its version of a colorblind society, has disregarded all principles of legal tradition and American constitutional history[153] since the school desegregation decisions began in the 1950s.[154] The courts have grabbed unprecedented power.[155] They have molded equitable remedies that exceed traditional bounds of legal precedent to restructure entire institutions with little regard for constitutional or legal limitations.[156] In sharp contrast to this trend, the majority in *Jenkins* questioned whether control of local schools should rest solely in the hands of the judiciary, even when it attempts to remedy past discrimination.[157] Justice Thomas wrote that "even a deserving end does not justify all possible means" under the law.[158] "Only by remaining true

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[149] See *id.* at 103, where Thomas states that

> the Court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.

[150] *Id.* at 122. Thomas opened his analysis by noting that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." *Id.* at 114.

[151] *Id.* at 138. *See also* Adarand Constr. v. Pena, 515 U.S. 200, 204 (1995) (Thomas J. concurring). ("Government cannot make us equal, it can only recognize, respect, and protect us as equal before the law.").

[152] *Jenkins*, 515 U.S. at 138 (Thomas, J., concurring).

[153] *See id.* at 131. To emphasize this concept, Justice Thomas cited cases in *Jenkins* from the last 20 years in which "[l]ocal autonomy of school districts [was] a vital national tradition." *Id.* at 131 (citing Dayton Bd. of Ed. v Brinkman, 433 U.S. 406, 410 (1977); *Lopez*, 514 U.S. at 580; Milliken v. Bradley, 418 U.S. 717, 741–42 (1974); and San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)). In American history, education has traditionally remained within the purview of local and state authority. *See, e.g.*, Clint Bolick, *Buses to Nowhere*, WALL ST. J., July 11, 1995, at A14 (reviewing DAVID J. ARMOR, FORCED JUSTICE (1995)).

[154] *See Jenkins*, 515 U.S. at 139 (Souter, J., dissenting) (citing Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*)). The dissent wholly supported the extension of broad remedies to prescribe programs for Missouri schools. "The deficiencies from which we suffer have led the Court effectively to overrule a unanimous constitutional precedent of 20 years standing . . . ." *Id.*

[155] *See id.* at 125 (Thomas, J., concurring).

[156] *See id.*

[157] *See id.* at 101–02.

[158] *Id.* at 138.

to the concepts of federalism and limited government can the judiciary ensure that its desire to do good will not tempt it into abandoning its limited role in our constitutional Government."[159] According to Justice Thomas, now is the time "to put the genie back in the bottle."[160]

In *Jenkins,* Justice Thomas was disquieted with the district court's remedies that forced Missouri to spend "$3,000 to $4,000 a year more per pupil than any other jurisdiction to carry out" court-ordered desegregation measures.[161] In detailing remedies for Missouri schools and in enjoining any state laws preventing the school board from collecting the revenue, the majority believed the district court overstepped its constitutional authority.[162] In particular, Justice Thomas believed that the district court's ruling blurred the definitive lines drawn by the separation of powers and federalism doctrines.[163] He was troubled by an unelected branch of government, without constitutional authority, which commanded local and state taxation and prescribed educational programs.[164] In stark contrast, the Court in *Jenkins I* held that "a court order directing a local government body to levy its own taxes [was] plainly a judicial act within the power of a federal court."[165]

Justice Thomas critiqued the dissent's sweeping approval of broad remedial power by examining the text, context, and intent of the Founding Fathers.[166] To his thinking, the Framers never intended for the judicial branch to have such broad equitable powers.[167] In fact, Thomas argued that the Antifederalists anticipated these modern problems and balked against constitutional ratification because the federal courts would grab too much remedial power.[168] In response, the defenders of the Constitution "sold" the idea to the citizenry by espousing a much narrower interpretation of the equity power and by ensuring state control against run-away powers of a federal judiciary.[169] Amid such jockeying for power, "the appropriate conclusion is that the

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159 *Id.* at 136.

160 *Id.* at 123.

161 Canan, *supra* note 144.

162 *See Jenkins,* 515 U.S. at 130–33 (Thomas, J., concurring). The judiciary lacks the constitutional authority to directly tax a state's citizens. "These functions [namely legislative power to tax, school budgeting, staffing, administration and facilities] involve a legislative or executive, rather than a judicial, power." *Id.* at 133 (Thomas, J., concurring).

163 *See id.* at 122–35 (Thomas, J., concurring).

164 *See id.* at 133 (Thomas, J., concurring).

165 *Id.* at 126 (Thomas, J., concurring) (citing Missouri v. Jenkins, 495 U.S. 33, 55 (1990) (*Jenkins I*)).

166 *See id.* at 124–31 (Thomas, J., concurring).

167 *See id.* at 124–25 (Thomas, J., concurring).

168 *See id.* at 126 (Thomas, J., concurring).

169 *See id.*

drafters and ratifiers of the Constitution approved the more limited construction" of the judiciary's power.[170]

Returning to first principles, Justice Thomas noted that the breadth of Article III of the Constitution was a point of major contention during the ratification of the Constitution and the drafting of the Judiciary Act of 1789.[171] Antifederalists were wary that the language granting "federal judicial power to 'Cases, in Law and Equity,' arising under the Constitution and federal statutes," was too expansive.[172] It would give judges ultimate "discretion to deviate" from the fundamental principles and "requirements of the law."[173] In support, Justice Thomas referenced Alexander Hamilton's explanation of the Federalist's conciliatory position regarding Article III's "narrow" delegation of judicial powers. Hamilton sided with the traditional Blackstonian approach that even equity courts were bound by the same "strict rules and precedents." Thus, Hamilton reasoned, "'[T]he great and primary use of a court of equity is to give relief in extraordinary cases,' and that 'the principles by which that relief is governed are now reduced to a regular system.'"[174]

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[170] *Id.* (citing McIntyre v. Ohio Elections Comm., 514 U.S. 334, 367 (1995) (Thomas, J., concurring in judgment)).

[171] *See id.* at 128; *see also* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM, 62–64 (1993).

> In principle, the strong Federalist broad-construction view was that the Constitution had given wide powers to the federal courts and that Congress, once it had established such courts, was not entitled to withhold any of these powers from them. On the other hand, a strong strain of the Antifederalist criticism of the Constitution, ever since the Convention, had concentrated on this very point.

Id. at 63.

[172] *Jenkins*, 515 U.S. at 128 (Thomas, J., concurring). *See, e.g.*, STORING, *supra* note 3, at 10–11 (quoting Brutus I 2.9.5). The Antifederalists "saw in the new Constitution a government with authority extending 'to every case that is of the least importance' and capable of acting (preeminently in the crucial case of taxation) at discretion and independently of any agency but its own." *Id.*

> The fact was that a national judiciary as a branch of government was still something of an abstraction. . . . Far more real to Federalist and AntiFederalist alike were the already existing legal institutions of the states, going well back into colonial times and having been little altered by the Revolution, and the strong vested interests they had accumulated through time and tradition.

ELKINS, *supra* note 171, at 64.

[173] *Jenkins*, 515 U.S. at 128 (Thomas, J., concurring). Such a fear was expressed in FEDERAL FARMER No. 15, Jan. 18, 1788, *in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 17, at 322–23. "[B]y thus joining the word equity with the word law, if we mean anything, we seem to mean to give the judge a discretionary power." *Id.* The Federal Farmer "hoped that the Constitution's mention of equity was not 'intended to lodge an arbitrary power or discretion in the judge, to decide as their conscience, their opinions, their caprice, or their politics might dictate.'" *Id.*

[174] *Jenkins*, 515 U.S. at 129 (Thomas, J., concurring) (quoting THE FEDERALIST No. 78, at 569 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

With such reasoned restraint, Hamilton argued that America's equity court system would complement England's established model at the time.[175] The court's equity power was to be applied in a limited number of cases, rather than creating full remedial power in the federal judiciary.[176]

Justice Thomas noted the Framers' knowledge of the rich tradition of English common law and the historical development of the equity system.[177] "By the mid–18th century, equity had developed into a precise legal system," which allowed specific remedies for narrowly tailored harms, not a blanket system of "fairness."[178] Quoting a number of the Framers to frame his argument, Justice Thomas emphasized the need for legal applications, rather than subjective "fairness."[179] For example, William Blackstone recognized that a remedy would not be available in equity if one was available in law.[180] If equity were not corralled, it would "produce an arbitrary government" that would defy our national goals of being led by law, not men's discretionary will.[181] Alexander Hamilton argued that strict rules and established practices should control the judicial power to prevent authoritarian control.[182] Likewise, Thomas Jefferson approached equity courts with suspicion: "Relieve the judges from the rigour of text law, and permit them, with pre[a]torian discretion, to wander into it's [sic] equity, and the whole legal system becomes [u]ncertain."[183] Brutus, an ardent Antifederalist, argued that broad equity power would allow federal courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[184] Judicial power results in the growth of federal power and the "entire subversion of the legislative, executive,

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[175] *See id.* at 129–30.

[175] *See id.*

[176] *See id.*

[177] *See id.* at 126.

[178] *Id.* at 127.

[179] *See id.* at 131.

[180] *See id.* at 127 (citing 3 BLACKSTONE, *supra* note 60, at *436).

[181] *See id.* at 127–28 (citing 3 BLACKSTONE, *supra* note 60, at *436); 1 BLACKSTONE, COMMENTARIES *61–62 n.3 (1768)).

[182] *See Jenkins*, 515 U.S. at 129 (Thomas, J., concurring) (citing 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 18–20 (I. Redfield ed. 1866)).

[183] *Id.* at 128 (citing 9 PAPERS OF THOMAS JEFFERSON 71 (J. Boyd ed., 1954)).

[184] *Id.* at 129 (citing Brutus No. 11 (Jan. 31, 1788), *in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 17, at 244.

and judicial powers of the individual states," as first noted by Brutus.[185] In such a system, not a "spark of freedom" can be found.[186]

Armed with this historical perspective, Justice Thomas was well aware that the "spark of freedom" is extinguished when district courts refuse to seize complete control over school administrative decisions, thus stripping state and local governments of their autonomy and responsibility to their citizenry.[187] State and local officials are better able to make qualitative decisions about a school's day–to–day policy, curricular and budgetary choices; a federal government is too far removed.[188] The independence and dignity of the judiciary vanishes when the court presumes to have the institutional ability to set such local policies, and it ventures into areas where it has no expertise or constitutional authority.[189] Judges must be constrained to reduce judicial discretion and to increase predictability in the law.[190] Justice Thomas, echoing the fears of Alexander Hamilton, noted that if the court gains too much power "we transform the *least* dangerous branch into the *most* dangerous one."[191]

For Justice Thomas, *Jenkins II* was not merely a case of one branch of government encroaching on another. It demonstrated the pure power of the Federal Government to encroach upon the power of the States. Federal courts have recently begun to question whether the judiciary has begun to tolerate a blending of functions that would never be tolerated in another branch of government.[192] This fusion was precisely what the Antifederalists feared.[193] In response, James Madison observed that if judicial power were joined with the legislative and executive, the judge

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[185] *Id.* (citing Brutus No. 11 (Jan. 31, 1788), *in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 17, at 419-20. *See, e.g.*, G. MCDOWELL, EQUITY AND THE CONSTITUTION 43–44 (1982).

[186] *Id.* at 129 n.4 (citing Federal Farmer No. 3 (Oct. 10, 1787), *in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 17, at 244.

[187] *See id.*

[188] *See id.* at 131–32.

[189] *See id.* at 133 (citing Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978)).

[190] *See id.* at 124.

[191] *Id.* at 131-32 (emphasis added). *See also* THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[192] *See* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661 (1978). Nagel cited cases in which the federal district court has assumed administrative duties of a state mental health system, state prisons, and a city government. In *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977), a court even placed a public high school directly under judicial control.

[193] The Antifederalists vehemently objected to the loss of states' rights at Ratification. *See* STORING, *supra* note 3, at 7 (The Antifederalists "saw in the Framers' easy thrusting aside of old forms and principles threats to four cherished values: to law, to political stability, to the principles of the Declaration of Independence, and to federalism.").

"might behave with all the violence of an oppressor."[194] During the ratification of the Constitution, states like Massachusetts dissented because its representatives feared the national government would swallow States' rights: "We dissent because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several States, and produce from their ruins one consolidated government, which from the nature of things will be an iron handed despotism."[195]

Justice Thomas voiced the same fears against today's unbridled judiciary. Two hundred years ago, a fear of an arbitrary judiciary forced a ratification of the Tenth Amendment that ensured that the States would have autonomy from the national judiciary, as well as the legislative and executive branches.[196] Given the Framers' overriding concern over separation of powers and federalism principles, it would be anomalous if the Framers intended to vest the federal courts with powers over state functions that might rightly be defined as executive or legislative at the federal level.[197] Alexander Hamilton reminded his generation, as Justice Thomas does ours, that the judiciary should

> always be the least dangerous [of the branches] to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.[198]

In *Jenkins,* Justice Thomas specifically appealed to Hamilton's writings to explain the limited authority of courts.[199] "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the

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[194] THE FEDERALIST No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961).

[195] *See* Nagel, *supra* note 192, at 668. In Virginia, George Mason warned that Congressional authority might lead to "unlimited authority, in every possible case." *Id.* at 668 n.48.

[196] *See id.* at 672. The Antifederalists wanted the Bill of Rights by "insisting that it would serve 'to secure the minority against the usurpation and tyranny of the majority.'" STORING, *supra* note 3, at 40 (quoting Agrippa XVI, 4.6.73).

[197] *See* Nagel, *supra* note 192, at 670. The connection between the Tenth Amendment and separation of powers doctrine has been well documented by the Supreme Court. For example:

> The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits . . . . [B]y the [Tenth] amendment the powers not delegated to the United States . . . are reserved to the States respectively or to the people . . . . And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people.

Gordon v. United States, 69 U.S. 561, 561 (1864).

[198] THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[199] *See Jenkins*, 515 U.S. at 133 (Thomas, J., concurring).

substitution of their pleasure to that of the legislative body."[200] But what the federal courts cannot do at the federal level, Hamilton emphasized, they must not do against the States.[201] There are certain things that courts, in order to remain courts and not quasi–legislative bodies, cannot and should not do.[202] Justice Thomas vigorously argued that the equitable programs of the last forty years lie outside the judiciary's responsibilities defined in Article III of the Constitution.[203] Only when the judiciary is committed to limiting its equitable powers and respecting other branches or tiers of government will it ensure that its desire to do "good" will not allow it to forsake its role in limited government.[204] Perhaps this restraint will allow the "spark of freedom," about which the *Federal Farmer* wrote, to burst into a healthy flame.[205]

C. *United States Term Limits, Inc. v. Thornton*:[206] *Under Traditional Views of Federalism, "We the People" in the States Have the Constitutional Right to Choose Our Representatives.*

In 1992, the voters of Arkansas voted to adopt "Amendment 73" to their State Constitution.[207] More than 60% of the electorate approved the "Term Limitation Amendment," which prohibited the name of an otherwise–eligible Congressional candidate from appearing on the general election ballot if he had already served three terms in the House of Representatives or two terms in the Senate.[208] When the Amendment was challenged, the Arkansas trial court ruled that the term limits amendment violated Article I of the Federal Constitution.[209] The Arkansas and Federal Supreme Courts affirmed, ruling that §3 of Amendment 73 to the State Constitution violated the Federal Constitution.[210]

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200 *Id.* (Thomas, J., concurring) (citing THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

201 *See id.*

202 *See id.* at 131; FELIX MORLEY, FREEDOM AND FEDERALISM 229–34 (1981). Without taking care to ensure that the Supreme Court binds itself reasonably to the principled tenents of the Constitution, the "organic law" of the nation becomes insignificant and the political form of our federal republic is undermined. *Id.* at 229. Morley noted "[i]n recent years the Supreme Court has seemed to many almost an instrument in the effort to shift the United States away from a federal form of government." *Id.* at 231–32.

203 *See Jenkins*, 515 U.S. at 132 (Thomas, J., concurring).

204 *See id.* at 136 (Thomas, J., concurring).

205 *See id.* at 129 n.4 (citing Federal Farmer No. 3 (Oct. 10, 1787), *in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 17, at 244.

206 514 U.S. 779 (1995).

207 *Id.* at 783.

208 *Id.* at 784.

209 *Id.* at 785.

210 *Id.* at 785–87.

Term Limits brought the issue of federalism into the fray for a third time during the 1994–1995 Supreme Court term.[211] It shed light on the current Supreme Court's view of who will ultimately "govern the governed" in a free society. Like the *Lopez* decision,[212] some scholars believe *Term Limits* was the most important decision on federalism in nearly two centuries since *McCulloch v. Maryland.*[213] The Justice Stevens–led majority[214] viewed "We the People" as a national, popular sovereignty, and consequently restricted the political autonomy of voters within a state.[215] In stark contrast, Justice Thomas, who wrote the voluminous dissenting opinion,[216] articulated a state–centered, Tenth Amendment approach that focused on the reserved powers of the States and individuals within those states.[217] In short, he noted that "our system of government rests on one overriding principle: All power stems from the consent of the people" through the States.[218]

In fact, Justice Thomas's opinion voiced the very concerns of patriot Patrick Henry and other Antifederalists at the drafting of the

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[211] *Id. See also* Susan Feeney, *High Court Rejects States' Term Limits on Congress,* DALLAS MORNING NEWS, May 23, 1995, at A1. Congressional term limits were approved by Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.

See also Tony Semerad, *States' Rights Splitting the Supreme Court,* SALT LAKE TRIBUNE, June 5, 1995, at A1 (States' rights issues are also a hot topic for governors, such as Utah's Mike Leavitt). "This is a debate that will take place in the courts, the halls of Congress and it will take place in the body politic. But in the long term, to bring the right balance, you've got to have a court that will appreciate the role of the States." *Id.*

[212] 514 U.S. 549 *passim.*

[213] *See* William H. Freivogel, *Term Limit Decision Numbs States' Rights,* ST. LOUIS POST–DISPATCH, May 24, 1995, at B5.

[214] *See Term Limits,* 514 U.S. at 781. Justices Stevens, Kennedy, Souter, Ginsberg, and Breyer comprised the majority. In *Lopez* and *Jenkins,* Kennedy joined the majority.

[215] See, for example, *id.* at 794–95, for a thorough discussion on this issue.

[216] *See id.* at 781. Justice Thomas wrote the dissenting opinion, in which the traditional bloc of Chief Justice Rehnquist and Justices Scalia and O'Connor joined.

[217] *See* Linda Greenhouse, *Court Leans Towards States' Rights; Term–Limits Case Raises Wider Constitutional Debate,* MINNEAPOLIS–ST. PAUL STAR–TRIBUNE, May 25, 1995, at A4. Critics claim Thomas "would have deposed the federal government from its primary role in the constitutional system and resurrected the states as the authentic organs of democratic government." *Id. Compare* STORING, *supra* note 3, at 41–42, where Alexander Hamilton warned of a wholly national system:

> It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

[218] *Term Limits,* 514 U.S. at 846 (Thomas, J., concurring).

Constitution, who feared unbridled power that would be exercised by a powerful national government.

> [W]hat right had they to say, "We the People?" My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of "We, the People," instead of "We, the States?" States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government by the people of all the states.[219]

Even with a national government, the States were to be the bulwark of freedom upon ratification of the Constitution:

> The principle characteristic of that 'venerable fabrick' [sic] was its federalism. The Articles of Confederation established a league of sovereign and independent states whose representatives met in Congress to deal with a limited range of common concerns in a system that relied heavily on voluntary cooperation. Federalism means that the states are primary, that they are equal, and that they possess the main weight of political power. The defense of the federal character of the American union was the most prominent article of Antifederalist conservative doctrine.[220]

The original Federalists wanted a strong, unified central government to guide a nation, whereas the Antifederalists feared that a the centralized government would strip away all individual freedoms. These freedoms were to be more properly protected within the purview of the state governments that ratified the Constitution.[221] Writing in *The Federalist Papers,* James Madison expressed his profound understanding of the need for governmental representation to come through the States: "The State Governments may be regarded as constituent and essential parts of the federal [g]overnment; whilst the latter is nowise essential to the operation or organi[z]ation of the former."[222] The traditional political process—and especially the role of the States in the composition and selection of the central government—is intrinsically well suited to retard the growth of centralized bureaucracy.[223] As was the case more than 200 years ago, the continuing existence of states as distinct political entities secures political freedom and defends against centralization of the federal bureaucracy.

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[219] STORING, *supra* note 3, at 41–42 (quoting language from Elliot IV, 15–16, 23–24).

[220] *Id.* at 9.

[221] *See, e.g.,* FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Richard Leffler, ed., 1989); SAVING THE REVOLUTION (Charles R. Kesler ed., 1987); Jack Rakove, *The Nation Term Limits Reading Today's Bias Into "Original Intent,"* L. A. TIMES, May 28, 1995, at M2.

[222] THE FEDERALIST No. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

[223] *See* Herbert Wechsler, *The Political Safegaurds of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543, 543 (1954).

Term Limits continued this 200–year–old debate between the ideals of the Federalists, who emphasized the pre–eminence of the national government, and the Antifederalists, who feared the oppressive power of a centralized regime and, therefore, reserved political power in the States.[224] In *Term Limits,* the majority and the dissent used constitutional text and precepts of "original intent" to argue their respective positions.[225] Both argued sentiments found in *The Federalist Papers.* Amid this backdrop, the majority in *Term Limits* refused to do what it had done in *Lopez* and *Jenkins*; they did not rein in federal power by re–affirming fundamental States' rights.[226] Inapposite, Justice Clarence Thomas's dissenting opinion revitalized the strength of the Tenth Amendment, enabling citizens to determine the specific qualifications under which a national representative may be elected from their state.[227] As he did in his *Lopez* and *Jenkins* concurrences, Justice Thomas returned to "first principles," to constitutional text, and to traditional readings of "original intent" to support his view of federalism.[228]

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[224] *See* Rakove, *supra* note 221, at M2. *Cf.* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding,* 94 MICH. L. REV. 615 (1995).

[225] *See id.* Some legal scholars note that there are two theories of "original intent" within the bounds of constitutional analysis. The Court's decision in *Term Limits* suggests that we will see a continuing debate in the coming years over which of the two old "stories" gives the best account of originalism. The *Term Limits* decision affirms what the Court deemed appropriate since the Civil War and through the New Deal. Thomas's dissent focuses on the very concerns expressed by the Antifederalists, who espoused many States' rights theories in the 1790s. The dissenting view in this case mirrors the dominant views of Congressional rhetoric for smaller government.

[226] *See Term Limits,* 514 U.S. at 845 (Thomas, J., dissenting).

[227] *See* Linda Greenhouse, *Debate about Federal Power: Court's Narrow Decision on Term Limits Puts States' Rights on the Front Burner,* FORT WORTH STAR TELEGRAM, May 27, 1995, at 8AA. Some commentators were startled by the 5–4 decision that came close to "rewriting the script of modern constitutional law and of long–dominant political thought." *Id.* Greenhouse was concerned that the dissent would re–incorporate the ideals of the Articles of Confederation, rather than focus on the national system instituted in 1789. *See id.*

[228] *See* Meese, *supra* note 2, at 6. To secure a nation guided by law, not the whims of men, a written Constitution was essential. Today, courts too often ask the question of *whether* to read the Constitution, not *how* to interpret it. Yet, a return to its fundamental principles will steer us away from tyranny and non–representational government. The Constitution is to be the check on all political power—legislative, executive, and judicial. Former Attorney General Meese wrote:

> The preservation of liberty required a document of clear and common language that created limited powers. Such a document would be the only way to enable fundamental principle to curb political power. A *written* constitution was to serve as an external and tangible check on any arbitrary exercise of government power.

Id.

Justice Thomas began his dissent with irony. To him, the majority's reasoning was illogical because, while Arkansans could still "choose" who they wanted to send to Washington, they were precluded from defining the very terms by which their representatives were to be elected. The people of Arkansas were denied the opportunity to validate a voter–driven referendum that won sixty percent of direct votes and carried every congressional district in the state.[229] Justice Thomas noted:

> It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves [acting by ballot initiative] may prescribe any qualifications for those representatives.[230]

Thomas argued that a state and its people have full rights, unless the Constitution expressly prohibited them.[231] "The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people."[232] Justice Thomas sought to revitalize the viability of the Tenth Amendment and the voting power of the individuals living within their respective states.

Unlike the majority in *Term Limits,* the original Federalists never wanted a nation of individuals within an undifferentiated whole.[233] The Federalists wanted to build a centralized government, strong but bounded by multiple tiers of delegated authority.[234] Far from attempting to create an "indivisible central organ to wield all national power" in an undifferentiated mass,[235] the Federalists labored to retain the sovereignty of the People through their separate state governments.[236] Thus, the Constitution was ratified with the intent that its authority was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[237] When the people adopted the Constitution through their states, they surrendered a limited amount of authority to the Federal government.[238] All rights not enumerated were to be

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[229] *See Term Limits,* 514 U.S. at 845 (Thomas, J., dissenting).

[230] *Id.* (citation omitted).

[231] *See id.*

[232] *Id.*

[233] *See, e.g.,* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1439 (1987).

[234] *See id.*

[235] *Id.* at 1442.

[236] *See id.*

[237] *Term Limits,* 514 U.S. at 846 (Thomas, J., dissenting) (citing THE FEDERALIST No. 39, at 243 (James Madison) (C. Rossiter ed., 1961)).

[238] *See id.* at 847 (Thomas, J., dissenting).

retained by the States and the People living within them.[239] In this way, a tyrannical government was to be kept at bay.[240]

Rather than limiting States' rights to those allowed by the federal government, Justice Thomas strongly affirmed the vigor of federalism. "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States"[241] are in the hands of state government itself or in the hands of individuals within these States.[242] A state does not gain its rights from the Federal Government.[243] On the contrary, "the Federal Government enjoys no authority beyond what the Constitution confers. . . ."[244] To Justice Thomas, states may define their powers in new and varied ways, if there is no express prohibition found in the Federal Constitution.[245] A state's citizens have full discretion to act upon their reserved powers.[246] To Justice Thomas, this reasoning formed the principle enshrined in the Tenth Amendment, which served as a concession to the Antifederalists who feared the crippling effects created by a centralized, national government.[247]

Since the ultimate source of the Constitution's authority rests in the consent of "We the People," it was imperative for the Court to define who these "People" were.[248] The majority held that "We the People" meant the persons of the United States under national, popular sovereignty.[249] In response, the dissent argued that if all citizens merely were part of an undifferentiated mass, there would be no need to perpetuate delineated rights and reserved powers among the States.[250] "The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation," wrote Justice Thomas.[251] He continued, "In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks

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239 *See id.*

240 *See id.*

241 *Id.* (applying U.S. CONST. amend. X).

242 *See id.*

243 *See id.*

244 *Id.* This principle remained intact for more than 150 years of American jurisprudence. Even Justice Black noted that "the United States is entirely a creature of the Constitution. Its power and authority have no other source." Reid v. Covert, 354 U.S. 1, 5–6 (1957).

245 *See Term Limits*, 514 U.S. at 847–48 (Thomas, J., dissenting).

246 *See id.*

247 *See id.*

248 *See id.* (discussing the application of the U. S. CONST. Preamble).

249 *See id.* at 848 (Thomas, J., dissenting).

250 *See id.*

251 *Id.* In his basic reasoning, Thomas noted that all representatives to national offices are elected through the states and the electoral college process. Despite the effects of the Seventeenth Amendment, which made wholesale changes to the electoral process, representatives are not elected to national office by popular vote and direct election. *See id.*

them."[252] Even in *McCulloch v. Maryland*,[253] the watershed case that tested the boundaries of federal–state relations in the early 1800s, Justice Marshall wrote that "[n]o political dreamer was ever wild enough to think of breaking down . . . [states' boundaries to compound] the American people into one common mass."[254]

Bit by bit, Justice Thomas's dissent critiqued the majority's disregard for the Tenth Amendment, the position that has been largely held in constitutional jurisprudence since the New Deal.[255] To the *Term Limits* majority, the States only possess the powers that the Constitution affirmatively grants or that they openly enjoyed before the Constitution's ratification.[256] The majority's ruling presumed an overtly nationalistic perspective, while the dissent focused on States' rights and original constitutional principles.[257]

Justice Thomas returned to traditional Federalist principles in asserting the need for state–driven representation. From the framing of the Constitution, the selection of representatives and senators from each state has indeed been left entirely to the people of that state or to their state legislature.[258] The Constitution guarantees that the people of each

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[252] *Id.* at 849. (Thomas, J., dissenting).

[253] 17 U.S. (4 Wheat.) 316 (1819).

[254] *Term Limits*, 514 U.S. at 840 (Kennedy, J., concurring) (quoting *McCulloch*, 17 U.S. at 403). Justice Thomas noted that the concurring opinion read Justice Marshall's statement inapposite to the dissent. *See id.* at 849 n.2 (Thomas, J., dissenting). The concurrence held that "the people" meant an undifferentiated whole, while the dissent read the same text to delineate "the people" from "the State governments." *Id.*

[255] *See id.* at 851–52 (Thomas, J., dissenting). *See also* Timothy M. Phelps, *Power of States May Get Big Boost from High Court*, SEATTLE TIMES, June 4, 1995, at A1. Proponents of the decision, such as Roger Pilon of the Cato Institute, were pleased by the decision. "It means we may be coming out of the era of laws for technicians and into the era of law in all its majesty." *Id.* Pilon, like Thomas, is unabased in suggesting a return to federalism concepts that have been discredited since 1937.

[256] The dissent does not find this reasoning persuasive. *See Term Limits*, 514 U.S. at 851 n.3 (Thomas, J., dissenting). At the framing of the Constitution, the States had already operated under the Articles of Confederation for more than 10 years. The States unquestionably had the power to establish qualifications for their representatives. *See id.* In his dissent, Thomas noted that, as an example, several states had specific prescriptions for qualifications. *See id.* at 826–27 (Thomas, J., dissenting).

[257] *See id.* at 849–59 (Thomas, J., dissenting). Instead of returning to first constitutional principles, the majority continued to rely on developing case law and eminent jurists' opinions to expand its powers for beyond what the original drafters had intended. The dissent argued vigorously against the majority's premise that a nationalist approach, as illustrated in *McCulloch*, 17 U.S. 316 *passim*, and *Garcia v. San Antonio Transp. Auth.*, 469 U.S. 528 (1985), should be used when applying Tenth Amendment principles. *Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting). In these cases, taxation and commerce issues were enumerated in the Constitution. In contrast, the Constitution is silent on the term limits issue. *See id.*

[258] *See Term Limits*, 514 U.S. at 857. U. S. CONST. art. I, §2, cl. 1 clearly calls for members of the House of Representatives to be chosen by "the People of the Several States." U. S. CONST. art. I, §3, cl. 1 originally called for Senators to be chosen "by the

state may choose the Congressional representatives to serve them.[259] Under the principles of agency, these representatives are bound solely to do the will of their respective constituency, rather than serve the nation as a whole unit.[260] Justice Thomas noted that the Framers wanted to establish a "direct link" to Washington, not create an undifferentiated nationwide election system.[261] The election of federal representatives is "indisputably an act of the people of each State, not some abstract people of the Nation as a whole."[262] The dissent boldly observed that the majority's position would not permit the people of Arkansas to "inject themselves into the process by which they themselves select [their] representatives in Congress."[263] When the governed may no longer choose the manner by which they may be governed, their power has been usurped.[264]

Despite these tenable arguments, the majority asserted that because Congress is a nationally elected body, the individual members of the Congress "owe primary allegiance not to the people of a State, but to the people of the nation."[265] Surely, they reasoned, the Framers could not have intended for a single state to prescribe qualifications for a representative who becomes part of a nationwide constituency when he

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Legislature thereof." This was later amended in the Seventeenth Amendment to enable the Senators to be directly elected "by the People" themselves. *See Term Limits*, 514 U.S. at 857 (Thomas, J. dissenting).

[259] *See id.*

[260] This concept was still alive 100 years ago. *See* In re Green, 134 U.S. 377, 379 (1890).

[261] *See Term Limits*, 514 U.S. at 859 (Thomas, J. dissenting).

[262] *Id.* at 848 (Thomas, J. dissenting). Even though the Fourteenth Amendment delineates a national citizenship, which individual States may not infringe upon, the Constitution itself does not call for the Members of Congress to be elected by the undifferentiated national citizenry; "it does not recognize any mechanism [at all] (such as a national referendum) for action by the undifferentiated people of the Nation [as a whole]." *Id.* While citizens have national citizenship, they retain their local political identity within their home states. For example, a person from Georgia may not vote in an election in Massachusetts, either for state or federal representatives. State boundaries remain intact in all elections. *See id.*

[263] *Id.* at 859 (Thomas, J. dissenting).

[264] *See* STORING, *supra* note 3, at 52.

> Were the people always attentive, they could call unfaithful lawmakers home and send others; but they are not always attentive. Thus, except under the rare circumstances of the small, homogeneous republic (and perhaps even then) rigorous provision for popular responsibility is not sufficient. "Virtue will slumber," Patrick Henry warned, "the wicked will be continually watching. Consequently, you will be undone." . . . The natural progress of things is for liberty to yeild [sic] and government to gain ground.

Id. (Thomas Jefferson to Edward Carrington, May 27, 1788).

[265] *Term Limits*, 514 U.S. at 857 (Thomas, J. dissenting) (quoting majority at 803).

goes to Washington.[266] The majority rested its case on the Qualifications Clauses of the Constitution, holding that they prescribe the exclusive requirements for federal representatives.[267]

In contrast, Justice Thomas harkened back to the basic constitutional premise that each state has the right and responsibility to elect and send qualified representatives.[268] To this end, he found no justification for such an exclusive reading of the Qualifications Clause,[269] given Thomas Jefferson's writings on the matter:

> Had the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications. . . . But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony . . . nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for. . . . Of course, then, by the [T]enth [A]mendment, the power is reserved to the State[s].[270]

Concerned with the overarching power of the federal government, Justice Thomas's dissenting opinion noted a distinction between a "self–

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[266] *See id.* at 857–67 (Thomas, J., dissenting). The majority argued that because the representatives are federal, their selection must fall within the "exercise of federal authority," and that if a State reserved autonomous powers to qualify its representatives, it would constitute "state interference with the most basic relations between the National Government and its citizens." *Id.* at 842 (Kennedy, J., concurring). The three reasons for this are as follows: One, since Members of Congress drew a federal salary they fell under federal jurisdiction. Two, no State has reserved power to establish the basic qualifications for the office of President. Three, the Constitution — under the Time, Places and Manner Clause of Article I—delegated specific powers over Congressional elections to the States. By inference, all others are prohibited. *See id.* at 800–01.

[267] *See id.* at 865–71 (citing U.S. CONST. art. I, § 2, cl. 2 and art. I, § 3, cl. 3).

[268] *See id.*

[269] *See id.* at 806–19 (majority), 913 (Thomas, J., dissenting). In his dissent, Thomas noted that the majority argued four Congressional prohibitions to analogize to term limits. Beginning on page 1896, Thomas read the majority as looking to the Framers' unstated intent to design a system by which states could not interfere with federal elections. The majority argued that the States have no power to determine Congressional Compensation, Elector–Qualifications, an eligibility requirement, and the "Times, Places and Manner of Holding Elections." *Id.* Thomas did not find intent by analogy. Absent specific text or a prohibition, Thomas held for the people of Arkansas to be able to qualify their votes. The majority also argued that the dismantling of the provisions requiring property ownership or affiliation to a particular religion also suggest exclusivity. On the other hand, Thomas argued that several States had specific term limits provisions in the Articles of Confederation and other States voted for additional requirements in their first elections after ratification. *See id.*

[270] *Id.* at 874, 875 n.14 (Thomas, J. dissenting) (quoting a Letter to Joseph C. Cabell (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON 82–83 (A. Lipscomb ed., 1904)).

imposed constraint and a constraint imposed from above."[271] The "authority of the people of the States to determine the qualification of their most important government officials" is "an authority that lies at the heart of representative government."[272] Thus, when the people of a state willingly restrict the field of political candidates that they can send to Washington, they cannot be held to violate the republican principle that "the people should choose whom they please to govern them."[273] To Justice Thomas, the majority's egalitarian concept that the opportunity to be elected should be open to all without qualification is flawed; a republican form of government, under a written Constitution, is not hindered when a state's citizens have chosen to restrict the eligibility of who they elect.[274] In fact, the authority to elect representatives may very well include the constitutional right to winnow the field of candidates.[275]

As he had done in *Lopez* and *Jenkins II*, Justice Thomas returned to constitutional principles first delineated during the extensive debates to ratify the Constitution.[276] Then, after reviewing the debates for the Seventeenth Amendment which allow some direct elections, he returned to the original intent of the Framers and the obvious intent of the voters in Arkansas, who wanted to choose *who* would govern them and to prescribe *how* they would be governed.[277] Such is the basis of America's republican government.

His dissent dissected each of the majority's arguments to prove that a state has a "reserved" constitutional right to set requirements for

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[271] *Id.* at 878 (Thomas, J. dissenting). Thomas constantly returned his focus to the direct consent of the people, even above the political decisions of a legislature. The principles of self-government enable the body politic to constrain itself, without allowing a nationalistic government to set constraints for them. *See id.*

[272] *Id.* at 879 (Thomas, J. dissenting) (quoting *Gregory*, 501 U.S. 452, 463 (1991) (refusing to read federal law to preclude States from imposing a mandatory retirement age on state judges who are subject to periodic retention elections)).

[273] *Id.* at 793 (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969) (quoting 2 ELLIOTT, DEBATES AT THE FEDERAL CONVENTION 257 (remarks of Alexander Hamilton at the New York Convention))).

[274] *See id.* at 793–95.

[275] *See* Roderick M. Hills, Jr., *A Defense of the State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 107-09 (1991).

[276] *See Term Limits*, 514 U.S. at 800–05. He did not submit to case precedent or adoption of the 17th Amendment in 1913. Before the Seventeenth Amendment, there was no constitutional prohibition against state legislators from prescribing qualifications for State representatives to Washington.

[277] *See id.* at 822–25 (majority), 883 (Thomas, J. dissenting). "Amendment 73 is not the act of the State legislature; it is the act of the people of Arkansas, adopted at a direct election and inserted into the State Constitution." *Id.* at 883. Thomas admitted he could not understand how the majority found this process to violate democratic principles. Thomas noted that "[a]ctions taken by a single House of Congress in 1887 or in 1964 shed little light on the original understanding of the Constitution." *Id.* at 915.

candidates, given the Constitution's silence.[278] The Qualifications Clauses merely established the minimum requirements a federal representative must possess.[279] A state may set additional standards, as long as the minimum age, national citizenship, and residence requirements for Congress are met.[280] Each state retains its right to choose its representatives and the terms for which they will serve.[281] The Framers wanted to ensure a minimum level of competence for

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[278] *See id.* at 870 n.12 (Thomas, J., dissenting). There are three reasons for this. One, individual States at Ratification retained the power to supplement a Representative's federal salary. U.S. CONST. art. I, §6, cl. 1; 1 FARRAND 215–216, 219, 315 (remarks by James Madison and George Mason at the Virginia Ratifying Convention). Two, States were able to set qualifications for those in the electoral college. *See Term Limits*, 514 U.S. at 870 n.12 (Thomas, J. dissenting). By example, Thomas cited the principles from *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), and *McPherson v. Blacker*, 146 U.S. 1, 27–36 (1892). *See Term Limits*, 514 U.S. at 870 n.12 (Thomas, J. dissenting). Three, each State has a prescribed duty and power to hold an election for representatives to be sent to the national government. *See id.*

See also THE FEDERALIST No. 59, at 299 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Alexander Hamilton observing that the federal government should have some power to regulate and check the time, manner, and places of State elections to ensure a successful Federal government). *See Term Limits*, 514 U.S. at 863 n.10 (Thomas, J. dissenting). Without this check, the States "could at any moment annihilate [the federal government] by neglecting to provide for the choice of persons to administer its affairs." *Id.* Thus, the "make or alter" power in this Clause, discussed at the New York Ratifying Convention, was not to cede plenary authority to the federal government. *See id.* Congress was to merely ensure that the States did not dissolve the Union. *See id.* at 863 (Thomas, J., dissenting). John Jay spoke: "[E]very government was imperfect, unless it had a power of preserving itself. Suppose that, by design or accident, the state should neglect to appoint representatives; certainly there should be some constitutional remedy for this evil. . . . Congress should have [the] power . . . [to] prevent the dissolution of the Union." *Term Limits*, 514 U.S. at 863 (emphasis omitted) (quoting 2 DEBATES IN THE STATES, *supra* note 108, at 326).

[279] *See Term Limits*, 514 U.S. at 866 (Thomas, J. dissenting). "Under expressio unius, the three federal qualifications of age, citizenship, and residency can be construed to exclude any other qualifications that might otherwise be implicitly imposed by the U. S. Constitution." Hills, *supra* note 275, at 114. In contrast, Justice Joseph Story used the *expressio unius est exclusio alterius* maxim of statutory interpretation to hold that the Framers, by stating these requirements, excluded all others. *See id.* at 112 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 624 (1833)). The majority also adopted this logic. *See Term Limits*, 514 U.S. at 793 n.9.

The majority cited the second volume of Story's COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 623–28, to define their application of the Tenth Amendment. *Term Limits*, 514 U.S. at 856 (Thomas, J. dissenting). Thomas's dissent noted that while he respected Justice Story's jurisprudence, Story nonetheless wrote his Commentaries more than 50 years after America's founding. "In a range of cases concerning the federal/state relations, moreover, this Court has deemed positions taken in Story's commentaries to be more nationalist than the Constitution warrants." *Id.* The dissent noted that Story's view of the federal–state balance of powers conflicted with the plain meaning of the text and underlying principles of federalism. *See id.*

[280] *See id.* at 914–16 (Thomas, J. dissenting).

[281] *See id.* at 865–67 (Thomas, J. dissenting).

representatives,[282] not strip the people of the individual states of their power to protect their interests by adding additional requirements.[283] States' rights are too crucial to preclude them solely by negative implication.[284] In conclusion, Justice Thomas noted that despite the majority's incorrect reading of the Tenth Amendment,[285] "the people of Arkansas do enjoy 'reserved' powers over their selection of their representatives to Congress."[286] Their decision must stand.[287]

IV. FEDERALISM INTO THE NEXT CENTURY

In the perpetual American power struggle between the States and the federal government, the States are gaining momentum—in state

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[282] *See id.* at 867 n.11 (Thomas, J., dissenting) (quoting foundational arguments regarding citizenship and inhabitancy THE FEDERALIST No. 56, at 286 (James Madison) (Jacob E. Cooke ed., 1961)).

[283] *See Term Limits*, 514 U.S. at 867 (Thomas, J., dissenting).

[284] *See id.* Since U.S. CONST. art. I, §10 contains a brief list of express prohibitions against the States, it is not logical to presume the States retain all powers not expressly prohibited by the Constitution. Even Justice Stevens suggested that in light of the Tenth Amendment and the Constitution's express prohibitions on the States, "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." Nevada v. Hall, 440 U.S. 410, 425 (1979). In footnote 12, Thomas focused on the very principle that the Constitution rests on the consent of the people. "[O]ne should not be quick to read the Qualifications Clauses as imposing unstated prohibitions that pre–empt all state qualifications laws." *Term Limits*, 514 U.S. at 871 n.12 (Thomas, J., dissenting) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 6–25, 480 (2d ed. 1988) (arguing that courts should hesitate to read federal statutes to pre–empt state law, "because to give the state–displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking . . . to protect states' interests.")).

Thomas also cited the general principles found in *Barron v. Mayor of Baltimore*, 7 Pet. 243, 249 (1833). In that case, Justice Marshall used similar logic as Thomas did in the case at bar. In the discussion regarding which constitution applied to an issue within Maryland, Justice Marshall noted the explicit prohibitions against the states in the Constitution. "The question of their application to states is not left to construction. It is averred in positive words." *Id.* at 249. Chief Justice Marshall stated that

> [i]f the original [C]onstitution . . . draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

Id.

[285] *See Term Limits*, 514 U.S. at 857–65 (Thomas, J., dissenting).

[286] *Id.* at 865 (Thomas, J., dissenting); Susan Feeney, *High Court Rejects States' Term Limits on Congress*, DALLAS MORNING NEWS, May 23, 1995, at 1A. More than 25 million Americans voted for term limit restrictions in the 1994 elections. Supporters include House Speaker Newt Gingrich, R–Ga. and others such as Paul Jacob, Executive Director of the Advocacy Group U. S. Term Limits, Inc. "Entrenched incumbents in Congress cannot stop it nor will the Supreme Court." *Id.*

[287] *See Term Limits*, 514 U.S. at 865 (Thomas, J. dissenting).

legislatures, in Congress, and now in the Supreme Court. The cases discussed above "uncorked an extraordinary torrent of erudite prose about the same bedrock issue that worries so many Americans"—the over–expansive and oppressive federal government in place since the New Deal.[288] In the 5–4 decision in *Term Limits,*[289] the Court did not rule in favor of States' rights as it clearly had in *Lopez* and *Jenkins II.* Nonetheless, there is a renewed charge for federalism, a limited federal government, and personal liberties at the Supreme Court. Roger Pilon of the Cato Institute queried: "When you ask the question, 'by what authority?' you are asking the most fundamental question in law and in politics. And it's absolutely consistent with the mood of the country that wants to get Washington off our backs."[290]

In writing for the dissent in *Term Limits,* Justice Thomas eloquently framed the terms of the federalism debate, retrieving it from the scholarly journals and think tanks to which it has been relegated for the last sixty years.[291] In these cases, the Court confirmed that it is now ready, willing and able to ponder federalism, the central issue of constitutional law.[292] Justice Thomas's separate opinions have forced the Court to return to an examination of "first principles,"[293] including limited federal powers, under the original understanding of the Constitution.

To some, this Thomas–fueled trend is an unexpected resurgence of an old idea.[294] To others, the States' rights movement within the Court is

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[288] Aaron Epstein, *High Court Helps States Pull Ahead of Feds,* HOUSTON CHRON., May 27, 1995, at A1.

[289] *See, e.g.,* Ted Gest, *Term Limits: Detour Ahead,* U. S. NEWS & WORLD REP., June 5, 1995, at 11.

[290] Linda Greenhouse, *Debate about Federal Power: Court's Narrow Decision on Term Limits Puts States' Rights on the Front Burner,* FORT WORTH STAR–TELEGRAM, May 27, 1995, at 8AA.

[291] *See id.*

[292] *See* John G. Kester, *The Bipolar Supreme Court,* WALL ST. J., May 31, 1995, at A17. The *Term Limits* case sent "four signals for the future [of constitutional law]:" 1) the Court is ready and willing to re–examine the first principle of federalism; 2) Justice Thomas has become a shaping force on the Court; 3) today's Court mirrors the New Deal Court, with politics reversed, because the politically vigorous today seek a smaller government; and 4) when the constitutional text may be unclear, Justices must apply their core beliefs to rule. *See id.* "As Roosevelt did in 1937, a wise Republican administration in 1997 might seal a revolution that is rumbling already." *Id.*

[293] *Id.* Some commentators believe Thomas's reading of States' rights should be understood to parallel the Antifederalist argument at Ratification. *Id.*

[294] *See* Greenhouse, *supra* note 290, at 8AA. No recent Supreme Court nominee has been asked more than a passing question about federalism during his or her confirmation hearings. To many, the Tenth Amendment has been constructively disarmed since the New Deal. *See id.*

truly "revolutionary"[295] or a welcome change. Chief Justice Rehnquist is no longer the "Lone Federalist" on the Court.[296] Now, a core bloc of conservatives has begun to lead the charge for States' rights and personal freedoms.[297] This Justice Thomas–led bloc of conservatives advanced the rebirth of a new era in American jurisprudence and a re–examination of basic constitutional principles during the 1994 and 1995 term.[298] As this debate rages on, there may be enough political support to return authority to the States under pre–New Deal doctrines.[299]

If this is indeed the debate, those who desire to drastically reduce federal authority over broad aspects of American life have dubbed Justice Clarence Thomas an instant hero.[300] "[T]he voice of the future is Clarence Thomas, who is speaking from conviction and in harmony with the election of 1994 and . . . the era of returning power to states and to the people."[301] His eloquent opinions truly re–establish the Tenth Amendment's intimate connection with freedom: the States as barriers to federal "busybodiness" and outright oppression.[302] This is essentially what the Framers sought to protect when ratifying the Constitution.

Justice Thomas's sole rulebook in making decisions is the Constitution. "He does not seek to advance one team or the other, but only to ensure that the rules apply equally to everyone," wrote Armstrong Williams, Thomas's long–time friend and confidante. "To do

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[295] *See* Timothy M. Phelps, *Power of States May Get Big Boost From High Court*, SEATTLE TIMES, June 4, 1995, at A1.

[296] *See* Savage, *supra* note 19, at A1.

[297] *See* William H. Frievogel, *Making Things Right*, ST. LOUIS POST–DISPATCH, July 2, 1995, at 1E. The conservative bloc usually includes Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas. Justice Kennedy is considered the swing vote, as he was in the *Term Limits* case. This article outlined the constitutional law decisions made by the Supreme Court during the 1994–1995 term. *See id.*

[298] *Cf.* Romer v. Evans, 517 U.S. 620 (1996). In *Romer*, Chief Justice Rehnquist and Justices Thomas and Scalia formed the dissent, which wholly supported the right of Colorado's citizens to protect traditional social mores by prohibiting homosexuals from gaining special rights. *See id.*

[299] *See, e.g.*, Phelps, *supra* note 295, at A1; W. John Moore, *Pleading the Tenth*, THE NAT'L. J., July 29, 1995, at 1940. Even Former Senate Majority Leader Bob Dole carries a copy of the Tenth Amendment in his pocket. *See id.* "If I have one goal for [this Session] of Congress, it is this: that we will dust off the 10th Amendment and restore it to its rightful place in our Constitution. . . . We will continue in our drive to return power to our states and our people." *Id.*

[300] *See* Epstein, *supra* note 288, at A1

[301] *Id. See also Commentary, Why the Supreme Court Vote to Block Term Limits is Wrong*, LANCASTER (PA) NEW ERA, May 23, 1995, at A12 ("The Court also has proven it is out of step with the nation's citizens, who clearly have voted for a restructuring of federal government and the politicians who run it.").

[302] *See* William Murchison, *Commentary: The Layman's Eye: The Court Puts Federalism in Focus*, TEXAS LAW., June 5, 1995, at 22.

otherwise would be to betray his principles and lose the respect of the most important judges of his character—God and himself."[303]

[303] Jennifer Ferranti, *Clarence Thomas' Excellent Year*, FOCUS ON THE FAM. CITIZEN MAG., Dec. 18, 1995, at 2.