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JUSTICE CLARENCE THOMAS AND THE SUPREME COURT'S REDISCOVERY OF THE TENTH AMENDMENT

David N. Mayer

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Stephen,

Here's a reprint of my Thomas/10th Am. article. Your comments would be welcome; give me a call sometime if you'd like to talk about it (or other libertarian/Objectivist matters).

David

JUSTICE CLARENCE THOMAS AND THE SUPREME COURT'S REDISCOVERY OF THE TENTH AMENDMENT

DAVID N. MAYER*

INTRODUCTION

One of the most striking aspects of the Supreme Court's 1994-1995 Term was the performance of Justice Clarence Thomas. His opinions in several key cases show that he is the most interesting and original Justice on the Court.[1] He is original in two senses: first, by taking a jurisprudential path different from that taken by the other Justices;[2] and,

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* Professor of Law and History, Capital University.

[1] Both conservative and liberal commentators have credited Justice Thomas for his originality. *See* John O. McGinnis, *Original Thomas, Conventional Souter*, 74 POL'Y REV. 24 (1995) (arguing that Thomas has "emerged as the boldest member of the Court in half a century"); Jeffrey Rosen, *The Color-Blind Court*, THE NEW REPUBLIC, July 31, 1995, at 20 (arguing that "1995 was the year that Clarence Thomas found his voice" and crediting Thomas "for helping to forge the new conservative majority" and "to shift the terms of debate for the entire court").

[2] Commentators also have noted that in the past term Justice Thomas parted company with Justice Scalia, particularly in the *McIntyre* case, discussed briefly *infra* note 10. *See* David F. Forte, *The Supreme Court's Right Turn*, THE WORLD & I, Oct. 1995, at *(continued)*

second, by espousing a theory of interpretation that seeks to be faithful to the intent of the framers and the text of the Constitution.[3]

Both aspects of Justice Thomas' originality shine in several of his opinions from the 1994 Term. For example, in two of the three key cases concerning race and the Equal Protection Clause—*Adarand Constructors, Inc. v. Pena* and *Missouri v. Jenkins*[4]—Justice Thomas' opinions advanced a "color-blind" theory[5] reminiscent of Justice John Marshall Harlan's famous dissents in the late nineteenth century[6] and embodying the analysis

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64, 67 (describing Thomas as the Justice most faithful to the founders' Constitution and contrasting Thomas' originalism with Scalia's textualism).

[3] Whether a jurisprudence of "original intent" is faithful to the intent of the framers, and whether Justice Thomas' jurisprudence is consistently originalist, and of what type of originalism, are questions briefly addressed *infra* Part IV.

[4] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (holding that race-based presumptions used in federal subcontractor compensation clauses must be analyzed under a strict scrutiny standard); Missouri v. Jenkins, 115 S. Ct. 2038 (1995) (limiting district court's remedial authority in school desegregation cases). In the third important case dealing with race, *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (invalidating Georgia's congressional redistricting plan), Justice Thomas joined in Justice Kennedy's opinion for the Court.

[5] In his concurring opinion in *Adarand*, Justice Thomas decried the "paternalism" of race-conscious government programs, arguing that "[a]s far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring). He added that such programs "also undermine the moral basis of the equal protection principle." *Id.* "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as other forms of discrimination," he argued; race-conscious programs engender attitudes of superiority or resentment among whites, while they also "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Id.* In his concurring opinion in *Missouri v. Jenkins*, Justice Thomas criticized the district court's attempt to convert a predominately black urban school district into a "magnet district" that would attract white schoolchildren. *Jenkins*, 115 S. Ct. at 2061 (Thomas, J., concurring). He argued that the district court's approach relied upon both an unwarranted assumption "that anything that is predominantly black must be inferior" and "questionable social science research rather than constitutional principle." *Id.* at 2061-62. "The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color." *Id.* at 2066.

[6] In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld a Louisiana law requiring separate railway carriages for white and black passengers, holding that the enforced separation of the races did not violate the Equal Protection Clause; Justice Harlan dissented, arguing that such legislation was "inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States." *Id.* at 555 (Harlan, J., dissenting). In famous language, Justice Harlan announced that "[o]ur Constitution is color-blind, and neither knows nor tolerates

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of *Brown v. Board of Education*[7] that Justice Thomas had expressed in his provocative earlier writings.[8] In *Missouri*, the school desegregation case, moreover, Justice Thomas espoused a highly sophisticated theory of originalism in his discussion of limits on the equity powers of federal courts.[9] The same originalist theory also served as the basis for Justice Thomas' explicit disagreement with Justice Scalia in *McIntyre v. Ohio Elections Commission*.[10] And in *Rosenberger v. Rector & Visitors of the*

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classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* at 559.

[7] 347 U.S. 483 (1954).

[8] Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 990-92 (1987) (arguing that the *Brown* decision was "a missed opportunity" and that its "great flaw" was that it relied on dubious psychological studies rather than the "color-blind Constitution" principles of Justice Harlan's dissent in *Plessy*). In his concurring opinion in *Missouri v. Jenkins*, Justice Thomas maintained that *Brown v. Board of Education* "did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race." *Jenkins*, 115 S. Ct. at 2065 (Thomas, J., concurring). At the heart of the *Brown* Court's interpretation of the Equal Protection Clause—the famous holding by Chief Justice Warren that "'[s]eparate educational facilities are inherently unequal'"—Thomas added, "lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups." *Id.* (quoting *Brown*, 347 U.S. at 495).

[9] *Jenkins*, 115 S. Ct.. at 2067-70 (arguing that the framers were suspicious of judicial discretion and thus did not intend federal equitable remedies to reach as broadly as the Supreme Court previously had permitted). In discerning the framers' intent, Thomas emphasized Antifederalist criticisms of Article III—that the extension of federal judicial power to "Cases, in Law and Equity," arising under the Constitution and federal law granted federal judges excessive discretion—and the Federalists' response, chiefly Alexander Hamilton's essays in *The Federalist Papers*. *Id.* at 2068. Hamilton replied to the Antifederalist criticisms by describing the federal equity power in the narrow terms of the English common law: a jurisdiction over certain types of cases ("'extraordinary cases'" involving claims of "'fraud, accident, trust, or hardship'") rather than as a broad remedial power. *Id.* at 2069 (quoting THE FEDERALIST Nos. 80, 83 at 539, 569 (Alexander Hamilton) (Jacob Cooke ed., 1961)). Hamilton's explanation of federal equity power ought to be definitive of the framers' intent, Thomas argued: "When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response." *Id.* at 2068. One commentator has described this example of Thomas' originalism as "strict constructionism on steroids." Rosen, *supra* note 1, at 19. Far from being radically new, however, Thomas' theory of interpretation can be described as Jeffersonian, for it accords with Thomas Jefferson's frequent admonitions that *The Federalist Papers* should be regarded as an authoritative guide to the framers' intent. *See infra* Part IV.

[10] 115 S. Ct. 1511 (1995) (holding that an Ohio law prohibiting distribution of anonymous campaign literature violated the First Amendment). In his concurring opinion,

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University of Virginia, he wrote his concurring opinion as a direct challenge to the historical interpretation advanced in Justice Souter's dissenting opinion.[11]

Justice Thomas drew upon the history of anonymous political writing in early America (including pamphlets of the Revolutionary era as well as the essays of the ratification struggle, both Federalist and Antifederalist) to demonstrate what the phrase *freedom of the press* meant to the people who drafted and ratified the First Amendment. *Id.* at 1525-30 (Thomas, J., concurring). Thomas' reliance on this "historical evidence from the framing" in his concurring opinion was a direct challenge to Justice Scalia's dissent, which denied that the freedom to speak or write anonymously could be found in the First Amendment. *Id.* at 1530. Scalia, in turn, responded to Thomas' historical analysis by arguing that "to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right." *Id.* at 1531 (Scalia, J., dissenting). Thus Thomas and Scalia entered into an interesting dialogue—one that may very well continue in the Court's cases in the current term—over the relative merits of originalism and textualism.

[11] In *Rosenberger*, 115 S. Ct. 2510 (1995), the Court held that the University of Virginia's denial of student activities funds to a Christian student newspaper was "viewpoint discrimination" prohibited by the First Amendment. *Id.* at 2525. With regard to the University's argument that funding the Christian newspaper would violate the Establishment Clause, Justice Kennedy, in his opinion for the Court, held that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 2521. Justice Souter, dissenting, argued that the Court "for the first time approv[ed] direct funding of core religious activities by an arm of the State" and that such use of public funds "for the direct subsidization of preaching the word" was inconsistent with Madison's and Jefferson's understanding of the term *establishment*. *Id.* at 2533, 2535-37 (Souter, J., dissenting). Thomas, in his concurring opinion, directly challenged Souter's interpretation of the origins of the First Amendment, arguing that although Souter's opinion "starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs." *Id.* at 2528 (Thomas, J., concurring). Even James Madison, Thomas argued, had no problem with public subsidies "that would benefit religious adherents as part of a large class of beneficiaries defined without reference to religion." *Id.* at n.1. In reply, Souter countered, in two lengthy footnotes, that Thomas had misinterpreted Madison's position and ignored counter-evidence, including Madison's later views recanting his support for congressional chaplains and other measures he had supported as a legislator. *Id.* at 2536-38 nn.1-2 (Souter, J., dissenting). This dialogue between Souter and Thomas is the most sophisticated discussion of the original meaning of the First Amendment religion clause to be found in any Supreme Court decision.

Yet another interesting opinion by Justice Thomas this past term, remarkable for its originality—in the common sense of the word, if not the jurisprudential sense—is his brief concurrence in *Capitol Square Review & Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995) (holding that the Establishment Clause did not compel the state to deny a permit to the Ku Klux Klan to display a cross on the Statehouse grounds). Thomas was the only Justice to recognize that the Klan's cross was a political rather than religious symbol and hence that the state's claim was "less . . . than meets the eye." *Id.* at 2451 (Thomas, J., concurring).

Justice Thomas' opinions in two cases in particular—*United States v. Lopez*[12] and *U.S. Term Limits, Inc. v. Thornton*[13]—reveal what is arguably his most important and permanent contribution to the Court:[14] the rediscovery of the Tenth Amendment[15] as the touchstone of the Constitution.

It is a bromide among constitutional law professors today that the Tenth Amendment states a "truism," to use Justice Stone's phrase from the Supreme Court's decision in *United States v. Darby*.[16] That characterization, by trivializing the Amendment, distorts its meaning. The Tenth Amendment, in fact, is the very essence of the Constitution: its purpose is to ensure that the federal government is truly a government of enumerated powers. It protects not only the powers of the states in our federal system but also the rights of individuals by guaranteeing that powers not given to the United States are "reserved to the States respectively, or to the people."[17] Although commonly understood by constitutional lawyers, students, and teachers alike as a safeguard of federalism, it is not solely federalism—the division of powers between the federal government and the States—that is the concern of the Amendment. Rather, the Tenth Amendment, like the Ninth Amendment,[18] ought to be understood as providing a rule of interpretation for the Constitution as a whole, with special reference to the scope of federal powers.

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[12] 115 S. Ct. 1624 (1995).

[13] 115 S. Ct. 1842 (1995).

[14] Even if Justice Thomas' views do not sway the other Justices on the Court in the near future, his dissenting and concurring opinions constitute a lasting legacy. He may be regarded as one of those "prophets with honor" who appeal to "'the brooding spirit of the law, to the intelligence of a future day'" and who "stir the sensibilities and prod the conscience of the country, eventually leading the Court—which is, in a true sense, the custodian of the country's conscience—'to correct the error into which [he] believes the court to have been betrayed.'" ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND DISSENTERS IN THE SUPREME COURT 3, 8 (1974) (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928)).

STOCK NOTE

[15] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[16] 312 U.S. 100, 124 (1941). The *Darby* case is discussed briefly *infra* Part II.B.

[17] U.S. CONST. amend. X.

[18] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. On the origin and meaning of the Ninth Amendment, see Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993).

This article argues that Justice Thomas' opinions in the *Lopez* and *Term Limits* cases open the door for the Supreme Court's rediscovery of the significance of the Tenth Amendment as a rule of interpretation providing a meaningful limitation on federal powers. Part I shows that this purpose was the "original intent" of the framers and ratifiers of the Amendment. Part II presents a brief—and admittedly simplistic—overview of the history of the Supreme Court's treatment of the Tenth Amendment, with an emphasis on the Court's efforts to limit the powers of Congress under the Commerce Clause. Part III discusses the *Lopez* and *Term Limits* cases, comparing Justice Thomas' opinion in each case with those of the other Justices and showing the role played by the Tenth Amendment in Justice Thomas' analysis. Finally, Part IV seeks to place Justice Thomas' jurisprudence within the context of the debate over originalism, suggesting that it seems closer to a Jeffersonian, or libertarian, form of "original intent" jurisprudence rather than the Hamiltonian, or majoritarian, form that other conservatives have espoused.

I. THE TENTH AMENDMENT: THE ORIGINAL MEANING

To discern the original meaning of the Tenth Amendment, one must understand two basic stories from early American political history. The first involves the debate over ratification of the Constitution: the dialogue between its Federalist defenders and its Antifederalist opponents which resulted in the addition of the Bill of Rights amendments in 1789-91. The second involves the rise of the Jeffersonian Republican opposition to the Hamiltonian Federalist party during the 1790s: the emergence of what political historians generally call the "first party system." The debate between Jeffersonian Republicans and Hamiltonian Federalists centered on questions of constitutional interpretation, questions that were resolved in favor of the Jeffersonian view—a view that stressed the importance of the Tenth Amendment—in the Republican victories in the election of 1800. Thus, to fully discern the original meaning of the Tenth Amendment, one must look beyond its legislative history in the First Congress, both to the ratification debates of the late 1780s and to the constitutional politics of the 1790s: the former explain what the framers of the Amendment intended it to mean; the latter, what the majority of the American people understood its significance to be.

The story of the addition of the first ten amendments to the Constitution—what we regard as the Bill of Rights—is a familiar one that needs to be retold here only briefly. The omission of a bill of rights from

the new federal Constitution was not accidental; as Leonard Levy has noted, it was "a deliberate act of the Constitutional Convention."[19] The framers did not oppose a bill of rights in principle; however, they regarded it, as Roger Sherman succinctly put it during the Convention's debates, as "unnecessary."[20] James Wilson, Alexander Hamilton, and other proponents of the Constitution later, during the struggle for ratification, elaborated the Federalist theory that a bill of rights was not needed because the Constitution enumerated the powers of the federal government. Rights provisions, which functioned as limits on, or exceptions to, government powers, were unnecessary, the Federalists argued, because the enumeration of powers itself served to limit them.[21]

Further, the Federalists argued, the addition of a bill of rights to the Constitution would be "dangerous" because it would undermine the enumerated powers scheme. As Alexander Hamilton explained in the *Federalist No. 84*, "a minute detail of particular rights is certainly far less applicable" to the proposed federal Constitution, "which is merely intended to regulate the general political interests of the nation," than it would be to the state constitutions, which concern "the regulation of every species of personal and private concerns."[22] A bill of rights, therefore, was "unnecessary" in the federal Constitution. Furthermore, adding a bill of rights "would even be dangerous:"

> [I]t would contain various exceptions to powers not granted; and on this very account, would afford a

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[19] Leonard W. Levy, *Bill of Rights*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION 258-59 (Leonard W. Levy ed., 1987).

[20] *Id.* at 259. According to James Madison's notes, near the end of the Constitutional Convention—on Wednesday, September 12, 1787—a motion to appoint a committee to prepare a bill of rights was unanimously defeated. Two days later—and only three days before the Convention adjourned—a motion to insert a declaration "that the liberty of the Press should be inviolably observed" was defeated, 7-4. It was in opposition to this motion that Roger Sherman declared that such a declaration "is unnecessary." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 630, 640 (Adrienne Koch ed., 1966).

[21] *See* JAMES WILSON, AN ADDRESS TO A MEETING OF THE CITIZENS OF PHILADELPHIA (1787), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 528-32 (Bernard Schwartz ed., 1971). Wilson argued that the people of the states had vested their governments with all the powers and rights "which they did not in explicit terms reserve" but that the case was different as to the federal government whose authority rested on positive grants of power expressed in the Constitution. *Id.* at 528. For the federal government, "the reverse of the proposition prevails, and every thing which is not given, is reserved" to the people or to the states. *Id.* at 529.

[22] THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 579.

> colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[23]

Even if the enumeration of specific rights did not confer a regulating power, it could "furnish, to men disposed to usurp, a plausible pretense for claiming that power."[24]

Despite these Federalist arguments, the addition of a bill of rights became a political necessity since its absence was the most important single objection to the Constitution.[25] Antifederalist opponents of the Constitution viewed with alarm the new national government that it would establish: a government which not only would possess more powers than did the Articles of Confederation government but which, by operating directly on individuals, would also exercise those powers more effectively. The "necessary and proper" and "general welfare" clauses particularly provoked concern.[26] Opponents of the Constitution saw those clauses as the potential sources of undefined and unlimited powers which would accrue to the national government in the absence of a bill of rights.[27]

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[23] *Id.*

[24] *Id.* at 581. James Wilson similarly argued that the addition of rights provisions to the Constitution would be dangerous, for it might undermine the enumerated powers scheme. Using the example of a free press clause, Wilson noted that Congress, under Article I, § 8, had no power over the press. A declaration similar to that which eventually became the First Amendment—a provision that Congress shall not abridge freedom of the press—"might have been construed to imply that some degree of power was given, since we undertook to define its extent." WILSON, *supra* note 21, at 529.

[25] For the circumstances of the ratification debate that show the importance of the bill of rights issue, see ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 (rev. ed. 1983); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 119-25 (rev. ed. 1983); and Levy, *Bill of Rights, supra* note 19, at 258-89. Rutland describes the absence of a bill of rights as "one oversight in the Constitution that bore the appearance of an Achilles' heel," RUTLAND, ORDEAL OF THE CONSTITUTION, *supra*, at 32, and "a vulnerable chink in the Federalist armor which was to become the chief target of the opposition attacks" and which put the Federalists on the defensive almost from the outset. RUTLAND, BIRTH OF THE BILL OF RIGHTS, *supra*, at 125. Levy is somewhat more explicit, arguing that in its deliberate omission of a bill of rights, the Convention "blundered by botching constitutional theory and making a serious political error." Levy, *Bill of Rights, supra*, at 276.

[26] *See* Essays of Brutus (Oct. 18, 1787 and Dec. 13, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 363, 367, 388-91 (Herbert J. Storing ed., 1981).

[27] *Id.* at 367, 391 ("Brutus," arguing that the powers given Congress by the necessary and proper clause were "very general and comprehensive" and might "justify the passing

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Many Antifederalist writers also noted that the apparent effect of the "supremacy clause" would be to make state declarations of rights useless as checks upon federal power.[28]

The Federalist argument that a bill of rights was unnecessary in a republican government did not allay these fears. The argument was, in Leonard Levy's words, "unhistorical," as the inclusion of bills of rights in many of the state constitutions made clear.[29] Moreover, the argument made little sense when it was advanced, as it was in Hamilton's *Federalist No. 84*, in conjunction with the argument that sufficient guarantees of rights were already included in the main body of the Constitution.[30] The protection of some rights in the Constitution "opened the Federalists to devastating rebuttal," as Levy notes. Their argument that a partial enumeration of rights would be dangerous, because it would imply the power to abridge other rights, "boomeranged." Article VI of the Constitution prohibited religious tests as qualifications for office; did this prohibition imply that Congress might otherwise abridge religious freedom? The right to trial by jury in criminal cases was expressly guaranteed in Article III, but did the enumeration of this particular guarantee imply that Congress could abridge other rights traditionally enjoyed by accused persons? These and other rhetorical questions raised by the advocates of a bill of rights were not readily answered; indeed, they

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almost any law" and that the necessary and proper clause, coupled with the general welfare clause, would allow Congress to "totally destroy all the powers of the individual states").

[28] *See* The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787) *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 26, at 145, 157 (arguing that "the stipulations heretofore made in favor of . . . [rights] in the state constitutions, are entirely superseded by this constitution"); Essay by One of the Common People (Dec. 3, 1787), *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 26, at 120, 121 (arguing that "[u]nless some additional guard is added to define" the supremacy clause, "here will be a fine field for ambitious or designing men to extend the federal jurisdiction" and that "[i]n the course of a few years our state legislature will be annihilated, together with our bill of rights").

[29] Levy, *Bill of Rights*, *supra* note 19, at 270.

[30] To underscore his argument that a bill of rights was unnecessary, Hamilton noted that many provisions protecting individual rights were in the body of the Constitution: for example, the Article I, § 9 provisions protecting the writ of *habeas corpus* and prohibiting bills of attainder, *ex post facto* laws, and titles of nobility; and the Article III, § 2 provisions assuring trial by jury in criminal cases and defining narrowly the crime of treason. Many of these "securities to liberty and republicanism," he observed, were not found in the New York Constitution, which also lacked a separate bill of rights. Their inclusion in the federal Constitution gave added evidence to Hamilton's overall assertion, "that the Constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS." THE FEDERALIST NO. 84, *supra* note 22, at 577, 581.

underscored the point made by "Centinel," an Antifederalist writer who answered Wilson in a Philadelphia newspaper, that the explanation for the omission of a bill of rights was "an insult on the understanding of the people."[31]

The difficult question that so dominated the debate over the Constitution in America was taken up, as one scholar has put it, "less polemically and more subtly," in Thomas Jefferson's correspondence with James Madison during the period between October 1787 and March 1789—that is, during the period between, roughly, the end of the Constitutional Convention and the actual beginning of the new government under the Constitution.[32] In his exchange of ideas with Madison on this vitally important question, Jefferson helped to convince his reluctant friend that the addition of the Bill of Rights was necessary.[33] Among his other arguments on behalf of a bill of rights, Jefferson noted that he was not convinced by the Federalist theory regarding the enumerated powers scheme of the Constitution. Conceding that it was theoretically possible to design a government of strictly enumerated powers, he doubted that the framers of the Constitution had done so perfectly. Jefferson cited as reasons for his concern, first, "strong inferences from the body of the instrument"—an apparent reference to the "necessary and proper" clause—and, second, the omission from the Constitution of a clause similar to Article II of the Articles of Confederation, which provided that every state would retain "every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States."[34]

When Madison introduced his proposed amendments in the First Congress, he justified the need for amendments by presenting, essentially, Jefferson's concern that the enumeration of federal powers in the Constitution was imperfect. He explained that, although it was true that federal powers were limited, "they are directed to particular objects, [and]

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[31] Levy, *Bill of Rights*, *supra* note 19, at 271, 274-76; Letters of Centinel, Letter II (Oct. - Nov. 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 26, at 144.

[32] Ralph Ketcham, *The Dilemma of Bills of Rights in Democratic Government*, *in* THE LEGACY OF GEORGE MASON 38-39 (Josephine F. Pacheco ed., 1983).

[33] For a discussion of Jefferson's correspondence with Madison on the subject of a federal bill of rights, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 146-55 (1994). Madison also probably recognized the political necessity of adding bill of rights amendments to the Constitution, given the pattern of ratifications—the last six states ratified with recommendatory amendments—as well as his own "pledge" to propose amendments in the First Congress. *See* RUTLAND, BIRTH OF THE BILL OF RIGHTS, *supra* note 25, at 148-81, 192-98.

[34] MAYER, *supra* note 33, at 150 (citing Jefferson to Madison (Dec. 20, 1787)).

even if the government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent." The example Madison cited was the use of general search warrants: without a prohibition similar to that which eventually became the Fourth Amendment, Congress could authorize such warrants as a "necessary and proper" adjunct to its power to collect revenues. Thus, as Madison explained it, the Bill of Rights was needed as an additional assurance against the abuse of federal powers, by identifying certain prohibited means to Congress' exercise of its legitimate ends, the enumerated powers.[35]

Included in Madison's list of proposed amendments were his original drafts of the two provisions that later became the Ninth and Tenth Amendments. The first provision was designed both to protect the enumerated powers scheme of the Constitution and to guard against a second "danger" of a bill of rights that Federalists had identified during the debate over ratification: the danger that rights not included in the bill of rights would be lost.[36] To solve both the "dangers" that might result from

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[35] James Madison, Speech in the House of Representatives (June 8, 1789), *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 21, at 1030. In his justification of a bill of rights, Madison used at least two other arguments that Jefferson had made in their correspondence: that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . [and] resist every encroachment upon rights expressly stipulated . . . by the declaration of rights"; and that "such a declaration in the federal system would be enforced . . . because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power." *Id.* at 1031-32; *cf.* MAYER, *supra* note 33, at 154 (citing Jefferson to Madison, Mar. 15, 1789). Thus Madison, following Jefferson, anticipated both judicial review and state government protests against unconstitutional federal legislation such as the Virginia and Kentucky Resolutions of 1798 that Madison and Jefferson, respectively, drafted.

[36] James Iredell, for example, advanced this "danger" argument in the Pennsylvania ratifying convention. Arguing that "[n]o man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution," Iredell spelled out—in astonishingly prophetic terms—the likely consequences of a partial enumeration of rights:

> Suppose, therefore, an enumeration of a great many, but an omission of some, and that, long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion be complained of; what would be the plausible answer of the government to such a complaint? Would they not naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given,

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the addition of rights provisions to the text of the Constitution, Madison proposed the following amendment to provide a rule of construction:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[37]

His second provision was designed to reinforce the enumerated powers scheme of the Constitution by adding a provision similar to Article II of the Articles of Confederation: "The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."[38]

Madison's inclusion of a reserved powers clause among his proposed amendments surprised no one: of all the amendments demanded by Antifederalists in the state conventions that ratified the Constitution, one calling for a reserved powers clause was the most common.[39] Following the language proposed by the Virginia ratifying convention, however, Madison omitted the word *expressly*. As he later explained to the House

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> else this bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them."

"Thus," he concluded, "a bill of rights might operate as a snare rather than a protection." James Iredell, *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148-49 (photo. reprint 1974) (Jonathan Elliot ed., 2d ed. 1836). The prophetic nature of Iredell's speech is illustrated by the arguments of modern conservative proponents of judicial restraint, who maintain that the only constitutional rights that judges legitimately may recognize are those explicitly enumerated in the Constitution. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 183 (1990) (arguing that the Ninth Amendment ought not be used to provide "a warrant for judges to create constitutional rights not mentioned in the Constitution").

[37] Madison, *supra* note 35, at 1027.

[38] *Id.* at 1028. Madison's original proposal was to insert amendments in the appropriate places in the text of the Constitution; the first provision would be added following the Bill of Rights amendments, at the end of Article I, § 9; the second, at the end of Article VI following another proposed amendment that would expressly safeguard separation of powers.

[39] Eight of the nine states proposing amendments had called for a reserved powers clause. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 21, at 1167 (table).

during a debate over a proposal to add the word and thus more closely adhere to the language of the Articles of Confederation, he argued that it was impossible to confine a government to the exercise of express powers "unless the constitution descended to recount every minutia," and that therefore Congress must have some powers by implication from the express powers of Article I, § 8.[40]

Following the referral of Madison's proposals to a special Committee of Eleven, that committee in August 1789 reported back to the House seventeen proposed amendments, including the texts of what became the Ninth and Tenth Amendments. By this time, the House had adopted an important proposal by Representative Roger Sherman that the amendments all be added by way of supplement at the end of the Constitution—a proposal that gave us the Bill of Rights as a separate document.[41] Two important changes were made in the language of the amendments that later became the Ninth and Tenth. The language of the former was simplified to its present form: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The language of the latter was changed by adding at the end the phrase *or to the people*, thereby transforming the provision from a reservation of powers to the states to a more general rule for construing federal powers.[42] Taken together, the two amendments dealt with both the dangers that Federalists argued would arise from the addition of a bill of rights to the Constitution: the Ninth Amendment would guard against the danger of

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[40] *Id.* at 842 (excerpts from records of the Virginia ratifying convention, June 1788); *id.* at 1118 (House of Representatives debate, Aug. 18, 1789). Later in the House debate, Representative Elbridge Gerry of Massachusetts—an erstwhile member of the Constitutional Convention who had been elected to Congress as an Antifederalist—renewed the motion to add *expressly* to the reserved powers clause, emphasizing that this was "an amendment of great importance," but the motion was defeated by a margin of 32 to 17. *Id.* at 1121, 1124.

[41] *Id.* at 1121 (editor's note).

[42] *Id.* at 1123 (10th and 17th proposed amendments). Debate in the Senate reduced the seventeen House amendments to twelve in number; with changes in wording agreed to in a Conference Committee, these twelve amendments were referred to the states for ratification. *Id.* at 1164-65. Apart from the first two Articles, which failed to be ratified by the requisite three-fourths of the states, these amendments (renumbered to reflect the non-ratification of the first two) now constitute the Bill of Rights. Thus, Article XII of the proposed amendments eventually became the Tenth Amendment. As no time limit was imposed for state ratification, however, the Tenth Amendment was frequently referred to as the Twelfth Amendment, or as Article XII of the amendments to the Constitution, well into the nineteenth century. The original second amendment, prohibiting any particular Congress from raising the salaries of its own members, finally was ratified by the requisite three-fourths of the states in 1992; it is now the Twenty-Seventh Amendment.

losing unenumerated rights; the Tenth, against the danger of adding to the enumerated powers.

Thus the Tenth Amendment was prompted, first, by Antifederalist fears about the imperfect enumeration of powers in the Constitution—particularly the vagueness of the "necessary and proper" clause—and, second, by the Federalist argument that the addition of a bill of rights to the Constitution would be "dangerous" because it would jeopardize the enumerated powers scheme of Article I. The Amendment was intended to provide a rule of construction against additional federal powers being inferred from the *absence* of limitations, or rights provisions—the "colourable pretext to claim more than were granted" about which Alexander Hamilton had warned in *Federalist No. 84*.[43]

Ironically, it was Hamilton's own measure as Secretary of the Treasury—a bill to establish the Bank of the United States—that prompted the first important use of the Tenth Amendment. In his opinion against the constitutionality of the bank bill, Secretary of State Thomas Jefferson considered the Amendment to be "the foundation of the Constitution." It reiterated the general principle of federal powers expressed by the language of Article I: that the legislative powers of the federal government, vested in the Congress of the United States, were limited to those "herein granted" in the Constitution. "To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless feild [sic] of power, no longer susceptible of any definition."[44]

The rest of Jefferson's opinion shows what he regarded those "boundaries drawn about the powers of Congress" to be: they were the words of Article I, the enumerations of congressional power, construed (as Jefferson would later put it) "according to the plain and ordinary meaning of its language, to the common intendment of the time and those who framed it."[45] "The incorporation of a bank, and other powers assumed by this bill have not . . . been delegated to the U.S. by the Constitution,"

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[43] THE FEDERALIST NO. 84, *supra* note 22, at 579.

[44] Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 276 (Julian P. Boyd ed., 1974) [hereinafter Opinion on the Bank Bill].

[45] Letter from Thomas Jefferson to James Madison (Dec. 24, 1825), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 352 (Paul L. Ford ed., 1899); *see also* Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 439, 449 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904) ("On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.").

Jefferson concluded, arguing that they were neither "among the powers specially enumerated" nor "within either of the general phrases" of Article I. These were the only possibilities he mentioned.[46]

With regard to the commerce power specifically, Jefferson made two simple points. First, he observed that to incorporate a bank was not "to regulate commerce." Rather, Hamilton's bill created a subject of commerce (such as the bank's notes), and "[t]o erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling." Second, he noted that, even if the bank could be deemed a regulation of commerce, its incorporation still did not fall within the scope of the Commerce Clause:

> For the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen and citizen) which remains exclusively with it's [sic] own legislature; but to it's [sic] external commerce only, that is to say, it's [sic] commerce with another state, or with foreign nations or with the Indian tribes.[47]

This view of Congress' powers as pertaining only to "external" matters, with everything "internal" reserved to the states, was consistent with Jefferson's overall theory of federalism under the Constitution.[48] It also was consistent with the explanation of federal powers given by James Madison in *Federalist No. 45*, where Madison had described the scheme of the Constitution as follows:

> 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. The former will be exercised

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[46] Jefferson, *supra* note 44, at 276-77. He considered three "specially enumerated" powers relevant—the powers to tax, to borrow money, and to regulate commerce—and argued, one by one, that none of these powers related to the incorporation of a bank and other powers assumed by Hamilton's bill. *Id.* Jefferson's fairly strict, or literal, interpretation of those powers left little room for additional powers to be implied from these specially enumerated powers; indeed, his interpretation of the "general phrases," discussed *infra* accompanying text notes 50 and 51, seems to preclude a doctrine of implied powers from Jefferson's theory of interpretation. With regard to the Article I powers clauses, Jefferson's theory is rightly regarded as one of "strict construction." As discussed *infra* Part IV, however, his overall theory of constitutional interpretation is less easily pigeonholed.

[47] *Id.*

[48] *See* MAYER, *supra* note 33, at 185-89.

> principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[49]

The two "general phrases" that Jefferson analyzed in his opinion on the bank bill were the "general welfare" phrase of the first clause of Article I, § 8—the taxing and spending clause—and the "necessary and proper" clause at the end of Article I, § 8. Jefferson understood the former to be a limitation on the taxing power—"the laying of taxes is the *power* and the general welfare the *purpose* for which the power is to be exercised"—a plain reading of the clause. To interpret it otherwise, as a "distinct and independent power" for Congress to do whatever it regarded as being for the good of the Union, "would render all the preceding and subsequent enumerations of power completely useless." Such a broad interpretation of the "general welfare" phrase thus would violate "an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to other parts of the instrument, and not that which would render all the others useless," Jefferson concluded.[50] As to the second clause, Jefferson interpreted "necessary and proper" quite strictly: "[T]he constitution allows only the means which are 'necessary'

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[49] THE FEDERALIST NO. 45 (James Madison), *supra* note 9, at 313.

[50] Jefferson, Opinion on the Bank Bill, *supra* note 44, at 277. Jefferson went on to argue that "the very power not proposed as a *means*"—i.e., the power to charter corporations—"was rejected *as an end*, by the Convention which formed the constitution." By thus using information given him by Madison, who had loaned Jefferson his confidential notes on debates in the Constitutional Convention, Jefferson was adhering to a strict form of "original intent" interpretation: he cited as authoritative the actual intent of the delegates to the Convention, who had voted against a proposal to empower Congress to charter corporations because they did not want to give Congress the power to erect banks. *Cf.* MADISON, *supra* note 20, at 638-39.

Madison too understood the "general welfare" phrase to be a limitation on the taxing and spending power, and not a separate grant of power to Congress. Late in his life, he wrote a forceful essay arguing that the terms *common defence and general welfare* in the first clause of Article I, § 8 were never intended by the framers to grant Congress additional powers beyond those enumerated in the rest of § 8. Indeed, he maintained that the terms were "explained and limited" by the enumerated powers that followed them. Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *in* 2 THE FOUNDERS' CONSTITUTION 453, 456 (Philip B. Kurland & Ralph Lerner eds., 1987).

not those which are merely 'convenient' for effecting the enumerated powers," and *necessary* means were "those means without which the grant of the power would be nugatory."[51] Because the establishment of a bank was not "necessary," in this sense, for the government to collect taxes, for example, it did not fall within the scope of the clause. To interpret the clause otherwise, Jefferson again insisted, "would swallow up all the delegated powers, and reduce the whole to one phrase," of giving Congress whatever power it wished to exercise, "as above observed."[52]

Despite Jefferson's advice against it, President George Washington signed the bill, thus creating the first Bank of the United States. Secretary of the Treasury Hamilton, of course, gave Washington an opinion in favor of the bill's constitutionality; in it, Hamilton replied point by point to the Secretary of State.[53] In response to Jefferson's Tenth Amendment argument, Hamilton conceded that the federal government had only those powers delegated to it by the Constitution, but he included among these not only the expressly enumerated powers but also "implied powers" and "resulting powers."[54] Historian Forrest McDonald has observed that, although Hamilton's "loose construction" became the model for advocates of extended congressional power, Hamilton's opinion "did not conflict with the substance of the Tenth Amendment," which to him expressed the tautological principle that all powers not given to the federal government were reserved to the states or the people. "Since Hamilton specifically

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[51] Jefferson, Opinion on the Bank Bill, *supra* note 44, at 278.

[52] *Id.*

[53] Rather than assuming that federal powers were to be construed strictly—the rule of interpretation suggested by Hamilton's argument in *The Federalist No. 84* against a bill of rights—Hamilton began with his cardinal principle, that

> every power vested in a government is in its nature *sovereign*, and includes, by *force* of the *term*, a right to employ all the *means* requisite and fairly *applicable* to the attainment of the *ends* of such power; and which are not precluded by restrictions & exceptions specified in the constitution; or not immoral, or not contrary to the essential ends of political society.

The incorporation of a bank, in his view, was one such "means." Alexander Hamilton, An Opinion on the Constitutionality of an Act to Establish a Bank (Final Version), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97-98 (Harold C. Syrett ed., 1965). Hamilton's and Jefferson's fundamentally different theories of constitutional interpretation reflected their fundamentally different views of the purposes of the Constitution: to Hamilton, it was to empower government; to Jefferson, to limit government. *See* MAYER, *supra* note 33, at 196-97.

[54] Hamilton, *supra* note 53, at 99-100.

rejected any claim that Congress could interfere in the internal affairs of a state—such concerns as the governance of the health, morality, education, and welfare of the people—his stand was not an argument against the Tenth Amendment, but against its necessity," McDonald concludes.[55]

Jefferson himself, ironically, may have helped Washington make up his mind in favor of the bank bill, for he included in his opinion on the bill's constitutionality an additional paragraph giving his opinion on the limited scope of the President's veto power. He advised Washington that the veto was given to the President as a "shield" against unconstitutional legislation and that

> unless the President's mind on a view of every thing which is urged for and against this bill, is tolerably clear that it is unauthorised by the constitution, if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favour of their opinion.[56]

The Tenth Amendment again provided the touchstone for the constitutional arguments in both Jefferson's Kentucky Resolutions and Madison's Virginia Resolutions, written anonymously to protest the Alien and Sedition Acts of 1798. Those statutes, passed by a Federalist Congress and signed into law by Federalist President John Adams, targeted the Republican political opposition.[57] Both Jefferson and Madison emphasized the general principle of the Tenth Amendment in arguing that the Alien and Sedition Acts were unconstitutional. Jefferson's Kentucky Resolutions declared that acts of Congress exceeding the powers enumerated in Article

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[55] Forrest McDonald, *Tenth Amendment*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 862 (Kermit L. Hall ed., 1992).

[56] Jefferson, Opinion on the Bank Bill, *supra* note 44, at 279-80. Jefferson's adherence to federalism, in this case, was trumped by his adherence to separation of powers, another aspect of his constitutional philosophy. *See* MAYER, *supra* note 33, at 129-31. Jefferson's view of the presidential veto power as limited to constitutional grounds only was in accord with the practices of the early American presidents, who exercised the veto sparingly. *See* Richard A. Watson, *Origins and Early Development of the Veto Power*, 17 PRESIDENTIAL STUD. Q. 401 (1987).

[57] The statutes, known collectively as the Alien and Sedition Acts, were four laws passed by Congress in the summer of 1798: the Naturalization Act (June 18, 1798); the Alien Act (June 25, 1798); the Alien Enemies Act (July 6, 1798); and the Sedition Act (July 14, 1798). *See* 1 DOCUMENTS OF AMERICAN HISTORY 175-78 (Henry Steele Commager ed., 9th ed. 1973). On the design of the Alien and Sedition Acts to silence the Republican opposition, see JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

I, § 8, were "unauthoritative, void, and of no force." Madison's Virginia Resolutions similarly declared that the powers of the federal government were "no further valid than they are authorized by the grants enumerated in" the Constitution. Indeed, in declaring unconstitutional the Sedition Act—which, among other things, made it a crime to "write, print, utter, or publish" any criticisms against the government of the United States, either house of Congress, or the President—both Jefferson and Madison first gave a Tenth Amendment argument, supplemented by a First Amendment argument. To them, the fundamental defect of the Sedition Act was that the Constitution gave Congress no power to define or punish seditious libel. The specific prohibition of the First Amendment against any law abridging freedom of speech or press was, as Jefferson put it, "another and more special provision" limiting Congress' powers "in addition to [the] general principle and express declaration" of the Tenth Amendment.[58]

The Jeffersonian Republican electoral victories in 1800—which gave the Republican party control of both the presidency and Congress—represented to Jefferson a second American Revolution: "the Revolution of 1800," he called it, "as real a revolution in the principles of our government as that of 1776 was in its form." He declared in his First Inaugural Address in 1801 the principles not only of his administration but also, he assumed, of the American people; these included federalism—the "support of the state governments, in all their rights," for the administration of domestic matters, and the "preservation of the general government, in it's [sic] whole constitutional vigour," for the administration of foreign matters.[59]

With only a few exceptions, Jefferson as president adhered to the principles of strict construction of federal powers he had espoused in his opinion on the bank bill in 1791.[60] Indeed, Jefferson's constitutional scruples came close to jeopardizing the Louisiana Purchase. An opinion on the constitutionality of the Purchase from his Secretary of the Treasury, Albert Gallatin, should have assured Jefferson that there were no Tenth

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[58] Kentucky and Virginia Resolutions of 1798, *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 57, at 178-82.

[59] MAYER, *supra* note 33, at 120-21, 185.

[60] *Id.* at 213-14. Jefferson reluctantly acquiesced in the continued existence of the Bank of the United States, which had become a fixture in the American economy. "It mortifies me to be strengthening principles which I deem radically vicious, but this vice is entailed on us by the first error," he ruefully noted. *Id.* at 209 & 361 n.51.

Amendment problems.[61] Nevertheless, he thought it necessary to amend the Constitution specifically to permit both the Purchase and the incorporation of Louisiana into the Union. As he explained to a political confidant:

> I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction . . . . I confess, then, I think it important, in the present case, . . . to set an example against broad construction by appealing for new power to the people.[62]

Jefferson eventually abandoned his attempt to amend the Constitution when his advisers warned him the effort might jeopardize the treaty. Long after his retirement, however, he remained troubled about the lost opportunity to "set an example against broad construction."

Jefferson's immediate successors in the White House, James Madison and James Monroe, both cited the Tenth Amendment when they vetoed bills appropriating money for "internal improvements" projects—roads, canals, river and harbor improvements—which today we would call "infrastructure" (or, more honestly, "pork"). Jefferson had supported such projects generally on policy grounds, but always prefaced his recommendations to Congress with the condition that first the Constitution would need to be amended to permit such appropriations.[63] Madison,

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[61] Gallatin had given Jefferson his opinion that the United States could acquire the territory pursuant to the treaty-making power and that, once acquired, the territory could be treated as existing U.S. territory. He further pointed out that if it were not the case that the power of acquiring territory by treaty was delegated to the United States, under the Tenth Amendment such power would be reserved to the people alone, since the Constitution expressly prohibited the states from making treaties. Such a construction of the Constitution would preclude the United States from ever enlarging its territory. Would it not be "a more natural construction to say that the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union," he had asked. *Id.* at 245-46. Thus, unlike the bank bill, the Louisiana Purchase did not jeopardize the principle of federalism; it did not threaten any powers reserved to the states by the Tenth Amendment. That Jefferson remained unpersuaded by Gallatin's arguments shows the seriousness of his devotion to strict construction. *Id.* at 215-16.

[62] Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 247-28 (Paul L. Ford ed., 1897).

[63] Mayer, *supra* note 33, at 218-20. After his retirement, Jefferson continued to insist that amending the Constitution would be a "wiser and safer" means of authorizing

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agreeing with Jefferson that a constitutional amendment was required, in 1817—in his last official act as president—vetoed the so-called "bonus bill" that had been introduced in Congress by John C. Calhoun. His famous veto message made clear that, despite his adherence to the doctrine of implied powers, Madison still regarded the Tenth Amendment as a cardinal rule of construction:

> Having considered the bill . . . entitled "An act to set apart and pledge certain funds for internal improvements," and which sets apart and pledges funds "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to [veto] it. . . .
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> . . . [I]t does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the government of the United States.[64]

As Jefferson had done in his 1791 opinion on the bank bill, Madison then dismissed both the Commerce Clause and the "general welfare" phrase as authority, concluding that the bill exercised a power "not expressly given by the Constitution" and not "deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents."[65]

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federal appropriations for internal improvements than interpreting it by "elaborate construction," using "a little sophistry on the words 'general welfare'" to strip the states of their reserved powers. When President John Quincy Adams advocated an ambitious federal internal improvements program, Jefferson drafted a declaration for the General Assembly of Virginia protesting such federal attempts as "usurpations" of state powers. *Id.* at 220.

[64] James Madison, Veto of Bonus Bill (Mar. 3, 1817), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 57, at 211-12.

[65] *Id.* at 212. Madison argued that the Commerce Clause could not include the power to appropriate funds for internal improvements projects "to facilitate, promote, and secure commerce," as the bill had asserted, "without a latitude of construction departing from the ordinary import of the terms." He also strenuously denied that the "general welfare" phrase could empower Congress to appropriate funds for such projects. Such a

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Finally, the importance of the Tenth Amendment in limiting the scope of federal powers also was recognized by the leading treatise writers in the early nineteenth century. Judge St. George Tucker, the Virginia Jeffersonian, interpreted the Tenth Amendment—in conjunction with the Article I, § 8, enumeration of federal powers and the Article I, § 10, limitations on state powers—to mean that the powers granted to Congress "have no relation to the domestic economy of the state." Property rights, except in the cases of authors and inventors, were "left exclusively to the state regulations," as were the rights of persons, except with regard to foreign nations. "Crimes and misdemeanors, if they affect not the existence of the federal government; or those objects to which it's [sic] jurisdiction expressly extends, however heinous in a moral light, are not cognizable by the federal courts," Tucker added.[66]

Even as ardent a nationalist as Supreme Court Justice Joseph Story, in his *Commentaries on the Constitution of the United States*, described the federal government as "one of limited and enumerated powers" and decried the enlargement of federal powers through judicial activism:

> [A] departure from the true import and sense of [the enumerated] powers is, *pro tanto*, the establishment of a new constitution. It is doing for the people, what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or

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view "would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper"; it also "would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them." *Id.* at 212. For Monroe's constitutional arguments, see James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 50, at 405-406.

In the same year he vetoed the bonus bill, Madison did sign into law a bill chartering the Second Bank of the United States; he considered its constitutionality established by "a course of precedents amounting to the requisite evidence of the national judgment and intention." Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 389, 393 (Marvin Meyers ed., rev. ed. 1981).

[66] St. George Tucker, *Appendix* to BLACKSTONE'S COMMENTARIES, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803), *reprinted in* 5 THE FOUNDER'S CONSTITUTION, *supra* note 50, at 404.

> inconvenience ought here to be of no weight. The only sound principle is to declare, *ita lex scripta est*, to follow, and to obey.[67]

Accordingly, Story observed, one of the basic rules of interpretation is "not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment."[68] With regard to the division of powers between the federal government and the states, Story described in broad terms "that immense mass of legislation, which embraces every thing in the territory of a state not surrendered to the general government." He included among the "component parts of state legislation, resulting from the residuary powers of state sovereignty" such laws as inspection laws, quarantine laws, and other health laws, as well as "laws for regulating the internal commerce of a state, and others, which respect roads, fences, &c."[69]

As Forrest McDonald has summed up early American constitutional history, "from the presidency of Jefferson to that of Abraham Lincoln, the consensus was that Jefferson had been right in calling the Tenth Amendment the foundation of the constitutional union."[70] During the Civil

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[67] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 144 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (abridged ed. 1833).

[68] *Id.*

[69] *Id.* at 355. With regard to inspection laws particularly, Story noted that they were "not, strictly speaking, regulations of commerce, though they may have a remote and considerable influence on commerce. . . . These laws act upon the subject, before it becomes an article of commerce, foreign or domestic, and prepare it for the purpose." Thus, they remain state powers and cannot be controlled by Congress unless they interfere with Congress' "acknowledged powers," such as the taxing power; hence, the Article I, § 10, prohibition on the states laying duties and imposts without the consent of Congress. *Id.*

Story did disagree with Jefferson, Madison, and Monroe with respect to the constitutionality of internal improvements legislation. Following the arguments advanced by Alexander Hamilton in his 1791 Report on Manufactures, Story denied that Congress' power to appropriate money was limited to the specific ends enumerated in Article I, § 8; rather, he saw the phrase *general welfare* as "comprehensive," embracing "a vast variety of particulars, which are susceptible neither of specification, nor of definition" and therefore "of necessity left to the discretion of the national legislature." *Id.* at 346-49. Nevertheless, Story also regarded the terms *common defence* and *general welfare* as limitations on the appropriations power—thus preventing Congress from spending money on projects of "local character" and not "of general benefit to the states." *Id.* at 453-56.

[70] McDonald, *supra* note 55, at 862.

War and the Reconstruction period that followed, however, the Tenth Amendment was virtually suspended—temporarily—as the powers of the federal government dramatically increased, particularly with regard to the defeated southern states. But, McDonald adds, this constitutional revolution was "transitory": Reconstruction ended; and the Supreme Court acted, albeit inconsistently, to uphold the Tenth Amendment in the late nineteenth and early twentieth century.[71]

II. THE TENTH AMENDMENT IN THE SUPREME COURT

A. *The First 150 Years: Meaningful Limits on Federal Powers*

Under the leadership of Chief Justice John Marshall during the first three and a half decades of the nineteenth century, the Supreme Court made a series of decisions that legal historians generally describe as exemplary of "constitutional nationalism."[72] To consider the Marshall Court as simply anti-"states' rights," however, misses the point of its nationalism. With the single, great exception of *McCulloch v. Maryland*,[73] the landmark decisions of the Marshall Court concerning state powers did not expand congressional powers at the expense of the states. Rather, the Court enforced federal constitutional limitations on the powers of the states;[74] in other words, it advanced not legislative, but judicial nationalism.

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[71] *Id.* Reconstruction itself posed the greatest threat to the Tenth Amendment in the nineteenth century, notes McDonald:

> Through armies of occupation, Congress governed those states [of the defeated south] directly, and the congressionally created Freedmen's Bureaus exercised the full range of police powers in regard to the former slaves. Of greater long-range significance, the Fourteenth Amendment opened the door for congressional action in areas that would earlier have been regarded as reserved to the state.

Id.

[72] *See* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 178 (7th ed. 1991); R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 52-55 (1968).

[73] 17 U.S. (4 Wheat.) 316 (1819) (striking down as an unconstitutional burden on a federal instrumentality—the Bank of the United States—a Maryland law imposing a tax on banks not chartered by the state).

[74] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (striking down New York's grant of a monopoly of steamboat navigation on the Hudson River as inconsistent with the federal Coasting Act of 1793); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (striking down, under the Contract Clause, a New Hampshire law annulling the College's royal charter and placing it under state control); Sturges v. Crowninshield, 17 U.S.

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From a Jeffersonian perspective, the Marshall Court's decision in *McCulloch* may be regarded as the "original sin" of American constitutional law: the case that established the precedent for a Hamiltonian "loose construction" of federal powers under Article I, § 8. In holding that Congress had the power to charter the Bank of the United States, Marshall arguably ignored the import of the Tenth Amendment[75] and instead adopted the Hamiltonian rationale that Congress may exercise any power, provided that it is a means reasonably related to an enumerated end and that it is not specifically forbidden by the Constitution.[76] Significantly,

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(4 Wheat.) 122 (1819) (striking down, also under the Contract Clause, a New York bankruptcy law); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (striking down Virginia's confiscation of loyalist property during the Revolutionary War as inconsistent with federal treaty obligations); and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (striking down a Georgia law repealing the so-called "Yazoo" land grants as inconsistent with the Article I, § 10, prohibition on state laws impairing the obligation of contracts).

[75] Marshall noted that the Constitution, unlike the Articles of Confederation, had no provision against "incidental or implied" federal powers; indeed, he emphasized that the language of the Tenth Amendment omitted the word *expressly* and thus left the question "whether the particular power which may be the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument." *Id.* at 406. He added that, "[I]n considering this question . . . we must never forget that it is *a constitution* we are expounding." *Id.* at 407 (emphasis added). By this oft-quoted phrase, Marshall meant that the document could not detail all the "subdivisions" of power; "[i]ts nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.* Using similar arguments when he was a member of the Virginia legislature, Marshall, in 1799, had defended the constitutionality of the Sedition Act of 1798 as an "indispensable" exercise of the government's power to correct the "licentiousness" of the press. John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 50, at 136-37.

[76] Although admitting that "the powers of the government are limited, and that its limits are not to be transcended," Marshall added that

> the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

McCulloch, 17 U.S. (4 Wheat.) at 421. He concluded, in famous words, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* The similarity in language to Hamilton's 1791 opinion on the constitutionality of the bank bill is not merely coincidental: Marshall, as

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however, Marshall explicitly tied such "incidental" powers to the Necessary and Proper Clause[77]—albeit construed in broad, Hamiltonian fashion.[78] As Forrest McDonald has noted, Marshall "vehemently denied afterward that he had thereby contributed to 'any extension by construction of the powers of Congress' and insisted that he had ruled only upon the legitimacy of the 'means' of carrying out a power that had been constitutionally delegated."[79] Thus, despite its apparent inconsistency with the Tenth Amendment, Marshall's opinion in *McCulloch* could be regarded as an affirmation of the Amendment's importance as the fundamental rule of construction limiting federal powers to those enumerated in Article I, § 8.

The *McCulloch* decision was widely criticized, especially by the more radical, "Old Republican" Jeffersonians in Virginia, who enlisted Jefferson himself in their campaign against the Marshall Court's attempted "consolidation" of national powers.[80] Early nineteenth century presidents, asserting their independent authority to interpret the Constitution,[81] adhered

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author of a biography of George Washington, had access to Washington's presidential papers, including both Hamilton's and Jefferson's opinions. MAYER, *supra* note 33, at 197.

[77] "[T]he constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning," noted Marshall; instead, it has expressly given Congress the power to make "'all laws which shall be necessary and proper' for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.'" *McCulloch*, 17 U.S. (4 Wheat.) at 412 (quoting U.S. CONST. art. I, § 8, cl. 18).

[78] Marshall described the word *necessary* as one with no "fixed character peculiar to itself," admitting "all degrees of comparison . . . . A thing may be necessary, very necessary, absolutely or indispensably necessary." Contrasting the unqualified use of the word in the Necessary and Proper Clause with its qualified use in Article I, § 10—which prohibited states from laying imposts or duties on imports or exports except for those "absolutely necessary" for executing their inspection laws—Marshall suggested that the framers intended the broader meaning for Article I, § 8. *Id.* at 414-15. This broad, Hamiltonian interpretation of *necessary* was what Jefferson criticized in his opinion on the bank bill as tantamount to "convenient." Jefferson, Opinion on the Bank Bill, *supra* note 44, at 278-79.

[79] McDonald, *supra* note 55, at 862.

[80] *See* MAYER, *supra* note 33, at 277-90.

[81] The so-called "tripartite" doctrine, that each of the three branches of the federal government had the independent authority to determine the meaning of the Constitution with regard to its own responsibilities, was first asserted by Jefferson, *see id.* at 268-72, and continued to be asserted by American presidents at least up to the time of the Civil War. Abraham Lincoln, for example, denied that the Supreme Court's infamous *Dred Scott* decision bound anyone but "the parties to [the] suit, as to the object of that suit." Although

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to the stricter, Jeffersonian interpretation of federal powers. As noted in Part I *supra*, both Presidents Madison and Monroe vetoed internal improvements legislation on Tenth Amendment grounds; and in vetoing the bill rechartering the Second Bank of the United States, President Andrew Jackson rejected the reasoning of *McCulloch* and instead maintained that the Bank, being neither a "necessary" nor a "proper" exercise of federal powers, was unconstitutional.[82]

The Marshall Court itself, moreover, in one of the earliest important Tenth Amendment decisions, held that the states retained the power to regulate commerce, even on navigable interstate waterways, provided that state laws did not conflict with federal regulation.[83] Some historians have interpreted this decision as a shift away from the nationalism of *McCulloch* or *Gibbons v. Ogden*,[84] indeed possibly anticipating the commerce power jurisprudence of the Court under Marshall's successor as chief justice, Roger B. Taney.[85] However, a better view is that even the Marshall Court acknowledged, in the words of one constitutional scholar, "significant limitations on the reach of federal legislation."[86]

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the Court's interpretation of the Constitution ought to be given "a very high respect and consideration in all parallel cases by all other departments of the government," Lincoln argued that to give the Court greater authority would mean that "the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal." Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 57, at 387.

[82] Andrew Jackson, Veto of Bank Bill (1832), *in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 235-43 (Melvin I. Urofsky ed., 1989).

[83] Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (upholding a Delaware law authorizing the damming of a creek to exclude water from a marsh, even though the stream was navigable and had been used occasionally in the coasting trade).

[84] 22 U.S. (9 Wheat.) 1 (1824). Like his opinion in *McCulloch*, Marshall's opinion for the Court in *Gibbons* apparently embraced a broad, Hamiltonian view of Congress' power to regulate commerce among the states. In rejecting strict construction of the Commerce Clause, Marshall argued that it would "cripple the government and render it unequal to the objects for which it is declared to be instituted." *Id.* at 188. Nevertheless, Marshall emphasized that federal power extended only to commerce with foreign Nations, and "'among the several States,'" and with the Indian Tribes and that commerce "among" the states was limited to that commerce which concerns more states than one. "The completely internal commerce of a state, then, may be considered as reserved for the state itself." *Id.* at 194-95.

[85] *See* 1 KELLY ET AL., *supra* note 72, at 197.

[86] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 170 (1985) ("It bears emphasizing that in *Gibbons*, as in *McCulloch v. Maryland*, the great exponent of national power expressly acknowledged significant limitations on the reach of federal legislation; it was Marshall's successors who were to expand the commerce power to cover virtually everything.") (footnotes omitted).

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The Taney Court in its Commerce Clause decisions changed its emphasis somewhat from the nationalism of the Marshall Court, permitting the states to regulate commerce concurrently with federal regulation.[87] These decisions were part of the broader pattern of precedents set by the Court during the antebellum era that upheld various exercises of state police powers against federal constitutional challenges.[88] Implicit in the Taney Court's police power jurisprudence was a broad view of the powers reserved to the states under the Tenth Amendment. In the words of Justice Barbour, in one of the Court's key Commerce Clause decisions,

> We choose . . . to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where

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Another scholar has observed that Marshall's opinion in *Gibbons* rejected an extreme nationalist interpretation under which all state regulation would be preempted; rather, it adopted an interpretation allowing state regulation of commerce to exist concurrently with federal regulation unless there was a direct and substantial conflict between the two—an interpretation that was palatable to states' righters. NEWMYER, *supra* note 72, at 51.

[87] *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852) (upholding a Pennsylvania law requiring ships entering or leaving the Philadelphia port to hire a local pilot to guide them through the harbor); Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) (holding that there was no conflict between the Commerce Clause and a provision in the Mississippi constitution prohibiting the importation of slaves for sale in the state); New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding a New York statute requiring ship captains to furnish local authorities with a list of passengers and to post security against any becoming public charges).

[88] *See, e.g.*, West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848) (holding that Vermont's exercise of eminent domain over a bridge franchise was not an unconstitutional impairment of the bridge company's contract); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (holding that a statute authorizing a company to build a bridge in competition with the Charles River Bridge, chartered by the Massachusetts legislature in 1785, was not an impairment of the obligation of the earlier charter in violation of Article I, § 10); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837) (holding that a negotiable instrument issued by the Bank of Kentucky, a corporation owned and controlled by the state, was not a state "bill of credit" prohibited by Article I, § 10).

> the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.[89]

Although the Taney Court was far less cohesive than the Marshall Court—and indeed, many of the disagreements between the nationalists and the states' rights Justices were clearly evident in cases involving state powers affecting commerce[90]—the Court consistently followed the rule of the Tenth Amendment that the federal government was one of limited powers enumerated in the Constitution.

Following the addition to the Constitution of the three so-called "Civil War Amendments"—the Thirteenth, Fourteenth, and Fifteenth Amendments—the Supreme Court faced the dual challenge to federalism that these amendments threatened to pose: new federal powers (for each of the three amendments granted Congress the power to enforce its provisions "by appropriate legislation")[91] and new limitations on state powers (for each, and especially the Fourteenth Amendment, limited state police power in certain respects).[92] In its first decision concerning the Fourteenth Amendment, a divided Supreme Court expressed its determination not to act as "a perpetual censor upon all legislation of the States" and therefore held that the Civil War Amendments had no purpose other than protecting the rights of freed slaves.[93] Other early Fourteenth Amendment decisions

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[89] *Miln*, 36 U.S. (11 Pet.) at 139.

[90] One scholar has identified two leading blocs on the Taney Court, apart from the sectional divisions over slavery: Justices Story, McLean, and Wayne, "all of whom sat with Marshall, tended to take relatively nationalist positions, as did the later-appointed Curtis; [Justices] Barbour, Catron, Daniel, Campbell, and Woodbury, [along with Chief Justice Taney himself most of the time,] tended to come out in favor of the states." CURRIE, *supra* note 86, at 277-78.

[91] U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2.

[92] The relevant part of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[93] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873) (5-to-4 decision) (holding that a monopoly created by the Louisiana legislature did not violate the Thirteenth or

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affirmed the desire of the Court—or at least of the majority of its Justices—to leave the exercise of state police powers to the discretion of state legislatures.[94] Although within twenty years the Court abandoned its unduly restrictive interpretation of the Civil War Amendments—particularly through a broad, substantive reading of the Due Process Clause of the Fourteenth Amendment[95]—the Court consistently limited the scope of Congress' powers under the amendments to remedial legislation responding to "state action" in violation of the substantive provisions of the amendments. As Justice Bradley explained the majority's decision in the famous *Civil Rights Cases* of 1883,[96] "[i]t is State action of a particular character that is prohibited" by the Fourteenth Amendment; therefore, the enforcement provision "does not invest Congress with power to legislate upon subjects which are within the domain of State legislation" and "does not authorize Congress to create a code of municipal law for the regulation of private rights."[97]

Fourteenth Amendments). Justice Miller's opinion for the Court made clear the majority's concern for federalism. The broad reading of the Civil War amendments suggested by the plaintiffs in error—and endorsed by Justice Field in his opinion for the dissenters—would, Miller argued, "radically change[ ] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Id.*

[94] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding state law requiring racial segregation in public transportation); Pace v. Alabama, 106 U.S. 583 (1883) (upholding a state statute imposing more severe penalties for living "in adultery or fornication" when the parties were of different races); Munn v. Illinois, 94 U.S. 113 (1877) (upholding the state's power to set maximum rates for grain elevators and other business "affected with a public interest"); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding the state's denial of bar admission to a woman). One late-nineteenth-century decision that is notable as an exception to this general rule is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in which the Court read the Equal Protection Clause of the Fourteenth Amendment broadly enough to strike down a San Francisco ordinance which, although racially neutral on its face, was discriminatory in its administration.

[95] Allgeyer v. Louisiana, 165 U.S. 578 (1897) (declaring unconstitutional a Louisiana law prohibiting insurance sales by firms not licensed to do business in the state, as a deprivation of liberty without due process of law in violation of the Fourteenth Amendment). *Allgeyer* was the first of a series of decisions in which the Supreme Court recognized, within the due process protection of the Fourteenth Amendment, a fundamental right to "liberty of contract." As noted in Part II.B. *infra*, one aspect of the so-called "New Deal Revolution" of 1937 was the Court's repudiation of its forty-year commitment to protect liberty of contract as a fundamental right.

[96] The Civil Rights Cases, 109 U.S. 3 (1883) (declaring unconstitutional the federal Civil Rights Act of 1875 which, *inter alia*, prohibited racial discrimination in access to public accommodations).

[97] *Id.* at 11. In his famous dissent, Justice Harlan disagreed, not with the scope of Congress' powers under the enforcement clauses of the Thirteenth and Fourteenth

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The late-nineteenth-century Court's concern for federalism, like the Marshall Court's concern for nationalism, may be somewhat misleading. Given the eventual explosion of federal constitutional rights guaranteed against the states through substantive use of the Due Process Clause of the Fourteenth Amendment, one might argue that, despite its apparent determination not to do so in 1873, by the end of the century the Court indeed was acting as a "censor" upon state legislation or, in other words, that the Court's deference to state discretion in the exercise of police powers was quite short-lived. In enforcing the limitations on state powers added to the Constitution by the Civil War Amendments, however, the Court simply was fulfilling its function of upholding the Constitution as supreme law; it certainly was not attempting to alter the Constitution's division of legislative powers between the states and Congress. Indeed, the legislative history of the Fourteenth Amendment shows that its framers did not intend the amendment to alter federalism or, in particular, the fundamental character of the federal government as one of enumerated powers.[98] Addition of the Civil War amendments, in short, did not change the significance of the Tenth Amendment as the foundation of the Constitution.

Nevertheless, despite its emphasis on federalism in interpreting the Civil War Amendments, the Court in the late nineteenth century paved the way for a broader federal regulatory role through the exercise of Congress' powers under the Commerce Clause. Concern that state regulation of railroad rates would impermissibly burden interstate commerce prompted the Court itself to invite Congress to enact the Interstate Commerce Act of 1887.[99] The Act, *inter alia*, created the Interstate Commerce Commission

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Amendments, but with the substantive provisions of the amendments themselves; he saw the Thirteenth Amendment as prohibiting all the "badges of slavery and servitude," including private racial discrimination, and found "state action," for purposes of the Fourteenth Amendment, in the state's latent power to regulate public accommodations. *Id.* at 26 (Harlan, J., dissenting).

[98] Responding to opponents' charges that the Fourteenth Amendment would undermine federalism, its proponents in Congress continually emphasized that the amendment was not intended to alter the basic division of legislative powers between Congress and the states. *See* Virginia Commission on Constitutional Government, THE RECONSTRUCTION AMENDMENTS' DEBATES 217 (1967) (Rep. Bingham, in a speech in the House of Representatives on May 10, 1866, argued that the amendment "takes from no State any right that ever pertained to it.").

[99] Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886) (striking down as unconstitutional an Illinois statute prohibiting long haul-short haul railroad rate discrimination and declaring that such regulation must be by "general rules and principles" applied nationally). In his opinion for the Court, Justice Miller cited the Marshall Court's

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(ICC), the first permanent federal administrative agency with quasi-judicial, quasi-legislative, and quasi-executive functions.[100] The Court upheld the creation of the ICC as a valid exercise of Congress' power to regulate interstate commerce.[101] In a series of important decisions, however, the Court limited the Commission's powers, most significantly by holding that it lacked the power to set rates.[102] Only after Congress added to the ICC's powers in the Elkins Act of 1903 and the Hepburn Act of 1906 did the Court finally acquiesce to a broad interpretation of the Commission's powers.[103]

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decision in *Gibbons v. Ogden* in support of the proposition that "commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of Congress to regulate it exists wherever that commerce is found." *Id.* at 573. Despite earlier decisions upholding state regulation of railroads in the absence of federal regulations, Justice Miller emphasized that

> it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Id. at 575. Justice Bradley, joined by Chief Justice Waite and Justice Gray, dissented, maintaining that a state retained the power "to regulate the charges of its own railroads in its own territory," even though the goods or persons transported had been brought from or were destined to a point in another state. *Id.* at 577, 580 (Bradley, J., dissenting).

[100] The ICC had functions similar to those of a court—i.e., holding hearings, taking evidence, handing down decisions that had the effect of court orders—and its administrative orders had the effect of law. Mainly, however, the ICC functioned as an executive agency, enforcing on the railroad industry the provisions of the Act, such as the prohibition of pooling and long-short haul discrimination. 2 KELLY ET AL., *supra* note 72, at 374-75.

[101] ICC v. Brimson, 154 U.S. 447 (1894) (upholding the constitutionality of a provision in the Interstate Commerce Act that authorized federal courts to compel railroads to appear before the ICC and produce books and papers). In this case, citing *McCulloch v. Maryland*, the Court held that, in exercising its power to regulate interstate commerce, Congress has a choice of means, which may include investigation by a commission established for the purpose of enforcing the law. *Id.* at 472.

[102] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry., 167 U.S. 479 (1897) (holding that the exercise of rate-fixing power, essentially a legislative power, by an executive agency violated the separation of powers); Cincinnati, New Orleans & Tex. Pac. Ry. v. ICC, 162 U.S. 184 (1896). In another important decision limiting ICC powers, *ICC v. Alabama Midway R.R.*, 168 U.S. 144 (1897), the Court held that circuit courts, hearing appeals from orders of the Commission, could investigate anew all facts in each case.

[103] ICC v. Illinois Cent. R.R., 215 U.S. 452 (1910) (holding that the 1906 Hepburn Act empowered the ICC to regulate the distribution of a railroad company's fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (holding that a provision

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Passage by Congress of the Sherman Antitrust Act in 1890 presented the Court with another challenge to the doctrine of limited federal powers. The Court responded by limiting, for a time, the reach of the Sherman Act. In its much-misunderstood decision in the sugar trust case,[104] the Court held that the government lacked the power to dissolve the American Sugar Refining Company, which through contracts with constituent corporations controlled over 90% of the nation's refined sugar. In his opinion for the Court, Chief Justice Melville W. Fuller admitted that the combination constituted a trust to monopolize the manufacture of sugar, but held that the trust was in manufacturing, not in interstate commerce, and therefore did not fall within the provisions of the Sherman Act.[105] Although commentators have criticized Fuller's opinion for introducing what appeared to be an artificial distinction between manufacturing and commerce, the distinction was not created by the Court. Rather, Congress itself made the distinction when it deliberately chose to limit the scope of the Sherman Act to marketing activities.[106] Fuller drew a further distinction between direct and indirect effects on interstate commerce, arguing that only the former fell within the scope of federal regulation. "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."[107]

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in the 1903 Elkins Act empowered the ICC to enforce observance of a railroad's published tariffs and that the federal courts must accept ICC findings of fact as conclusive).

[104] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[105] *Id.* at 17.

[106] Although Senator Sherman's originally proposed federal regulation of both manufacturing and marketing activities of corporations producing goods for interstate commerce, the Senate Judiciary Committee amended Sherman's bill to make it apply only to marketing activities. The change was made both in deference to a long-recognized constitutional distinction between commerce and manufacturing and in expectation that states would attack holding companies through use of the *ultra vires* doctrine, i.e., state prosecutions against constituent corporations for exceeding their chartered powers. Thus, in limiting the scope of the Sherman Act to marketing activities, the Court simply implemented congressional policy. 2 KELLY ET AL., *supra* note 72, at 377-79. For accounts of the legislative history of the Sherman Act, see WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53-99 (1965); Charles W. McCurdy, *The* Knight Sugar *Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 323-28 (1979).

[107] *Knight*, 156 U.S. at 16.

Although Fuller's opinion did not explicitly mention the Tenth Amendment, it is obvious that he sought to delineate federal power to regulate interstate commerce, by drawing these distinctions, in order to preserve a meaningful sphere of action for state police powers:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government . . . .[108]

"That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State," Fuller noted. "Commerce succeeds to manufacture, and is not a part of it."[109] Thus, to the Court, the distinction between manufacturing and commerce was a distinction required by federalism. The states, in the exercise of their police powers (as reserved to them by the Tenth Amendment), were to be concerned primarily with the manufacturing of articles for commerce. Congress, in exercising its power to regulate commerce among the states, was to be concerned primarily with the transport and marketing of goods in the national economy. Monopolies or other restraints on trade in the manufacturing stage might have an effect on interstate commerce, but that effect—being only incidental or indirect—was beyond the pale of congressional regulatory authority and subject rather to the police power of the states.[110]

In the early twentieth century, the Supreme Court's success in limiting the scope of federal powers continued to be mixed. In a series of closely-divided decisions, a majority of the Court upheld several federal statutes that extended national government control over American business and society through congressional power to prohibit certain articles from

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[108] *Id.* at 13.

[109] *Id.* at 12. Justice Fuller's exclusion of manufacturing from the realm of commerce was consistent with the analysis found in Story's *Commentaries*. *See supra* note 67.

[110] In later decisions under the Sherman Act at the end of the nineteenth century, the Court upheld antitrust restrictions against a combination of pipe manufacturers whose marketing practices "directly" restrained interstate commerce, and against railroads' pooling agreements. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

interstate commerce.[111] Following World War I, the Court missed one opportunity to utilize the Tenth Amendment to strike down a federal law imposing wartime price controls.[112] Most significantly, however, the Court did invoke the Amendment twice in decisions invalidating federal child-labor laws. In *Hammer v. Dagenhart*, the Court declared unconstitutional the Owen-Keating Child Labor Act of 1914, which banned from interstate commerce goods produced by child labor.[113] In his opinion for the majority of the Court, Justice Day emphasized that the Court's prior

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[111] Hoke v. United States, 227 U.S. 308 (1913) (upholding the 1910 "White Slave Traffic Act," better known as the Mann Act, which prohibited the transportation of a woman in interstate commerce for the purposes of prostitution); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding the Pure Food and Drug Act of 1906); Champion v. Ames, 188 U.S. 321 (1903) (*The Lottery Case*) (upholding an 1895 federal law prohibiting the shipment of lottery tickets in interstate commerce). Dissenting in *The Lottery Case*, Chief Justice Fuller observed that, under the guise of regulating commerce, Congress really was attempting to legislate morality—and thus was invading the police powers reserved to the states by the Tenth Amendment.

> The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive . . . .
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> . . . . To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment . . . .

Champion, 188 U.S. at 364-65 (Fuller, C.J., dissenting). Chief Justice Fuller, joined by two other justices, also dissented from the Court's decision in *McCray v. United States*, 195 U.S. 27 (1904), upholding another piece of federal police-power legislation—a prohibitive excise tax on artificially colored oleomargarine—based on Congress' taxing power, which the majority of the Court was loath to question.

[112] The Food Control Act of 1917 imposed extensive federal government controls on the production and sale of "necessaries"—defined in the Act as foods, feeds, and fuel—and empowered the President, under certain circumstances, to set prices. Although opponents of the measure in Congress attacked federal price and production controls as violations of the Tenth Amendment—arguing that the outbreak of war did not break down all the reserved powers of the states—the Supreme Court based its postwar decision invalidating Section 4 of the Act (which had made it illegal to charge "unreasonable" prices for food) on due process grounds. *See* 2 KELLY ET AL., *supra* note 72, at 434, 436; United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[113] 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

decisions permitting Congress to prohibit particular articles from interstate commerce involved goods that were harmful in themselves. The goods prohibited by the Owen-Keating Act, in contrast, were "of themselves harmless."[114] Thus, Justice Day concluded, under the guise of regulating interstate commerce, Congress in fact was attempting to control local labor conditions.[115] Accordingly, he declared, "[t]he act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend." To hold otherwise, he added, would mean that the federal system would be "practically destroyed."[116] In the later decision of *Bailey v. Drexel Furniture Company*, the Court declared unconstitutional—again, on the ground that it invaded the reserved powers of the states under the Tenth Amendment—a second federal child labor act premised on the taxing power.[117] Chief Justice Taft, in his opinion for the Court, held that Congress could not use the taxing power to do that which it could not do under the commerce power.

By the mid-1930s, as the Supreme Court considered a series of cases involving challenges to both state and federal "New Deal" legislation, the Justices divided into three identifiable voting blocs. Justices Van DeVanter, McReynolds, Sutherland, and Butler—the so-called "Four Horsemen,"[118]—adhered to a laissez-faire jurisprudence generally hostile to social and economic regulation at either the state or federal level. Justices Brandeis, Stone, and Cardozo (who had replaced Justice Holmes in 1932), the so-called "liberals" on the Court, adhered to a philosophy of judicial restraint and therefore generally upheld social or economic regulations against constitutional challenges. In the middle were the "moderates," or swing votes: Chief Justice Hughes and Justice Roberts. During the 1920s, the laissez-faire Justices had been in a majority, as several landmark liberty

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[114] *Id.* at 272.

[115] *Id.* at 273-74.

[116] *Id.* at 276.

[117] 259 U.S. 20 (1922). The new law, passed by Congress less than nine months after the *Dagenhart* decision, imposed a tax of 10 percent on the net profits of any firm employing child labor, defined in the same terms as the 1916 law. *See* 2 KELLY ET AL., *supra* note 72, at 448.

[118] "Four Horsemen" (referring to the Four Horsemen of the Apocalypse) was a derisive label given the four Justices by pro-New Deal journalists; the Justices were notorious for their uncompromising resistance to change. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 178-79, 195 (expanded ed. 1988). For a concise summary of their backgrounds and judicial philosophy, see *id.* at 182-95.

of contract cases attest.[119] In the early 1930s, however, the laissez-faire majority of the 1920s became a minority, and over the objection of the "Four Horsemen," the Court—with both Hughes and Roberts joining the Brandeis-Stone-Cardozo bloc—upheld a variety of state New Deal laws.[120] Nevertheless, when the Court considered the constitutionality of federal New Deal legislation, the "Four Horsemen" re-emerged in the majority, joined not only by Justice Roberts, but by Justice Hughes as well.[121]

In a dramatic series of decisions during the years 1935-37, the Court struck down several key pieces of President Franklin Roosevelt's New Deal program. Some of the decisions turned on separation-of-powers concerns[122] or enforcement of the Bill of Rights,[123] but the key decisions

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[119] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down an Oregon law requiring children between the ages of eight and sixteen to attend public schools, as violative of the due process clause of the Fourteenth Amendment); Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (striking down a minimum wage law for women in the District of Columbia as violative of the due process clause of the Fifth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a Nebraska law that forbade public school teaching in any language other than English, as violative of the due process clause of the Fourteenth Amendment).

[120] *See* Nebbia v. New York, 291 U.S. 502 (1934) (upholding, against Fourteenth Amendment due process challenge, a New York law setting minimum prices for milk); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding, against Contract Clause challenge, a Minnesota mortgage moratorium law); O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251 (1931) (upholding a state law forbidding the payment of excessive or non-uniform commissions to fire insurance agents). An exception to this trend was *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in which both Justices Hughes and Roberts joined Justice Sutherland's opinion striking down an Oklahoma law that limited entry into the ice business. Perhaps the monopoly created by the Oklahoma licensing scheme made this form of New Deal legislation particularly objectionable, even to the "moderates."

[121] On the voting trends in the Court during the 1930s generally, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 205-207 (1990). As Currie notes, the second chapter of the story—the Court's hostility to the New Deal—was quite short-lived, lasting only two years, from *Panama Refining Co. v. Ryan* in 1935 to *West Coast Hotel v. Parrish* in 1937. *Id.* at 206.

[122] *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (holding that the President could not remove members of independent regulatory commissions except for one or more enumerated causes in the statute); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (unanimously invalidating, as an unconstitutional delegation of legislative power, provisions of the National Industrial Recovery Act that authorized the President to promulgate codes of "fair competition" for particular industries); Panama Ref. Co. v. Ryan, 293 U.S. 388, 406 (1935) (invalidating, as an unconstitutional delegation of legislative power to the president, a provision of the National Industrial Recovery Act that authorized the President to prohibit interstate or foreign transportation of petroleum and its products "produced or withdrawn from storage in excess of the amount permitted . . . by any

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enforced the Tenth Amendment by limiting Congress' Article I commerce, taxing, and spending powers.

Acknowledging that Congress had some power to protect interstate commerce from injury due to the conduct of those engaged in intrastate transactions, the Court limited the scope of federal regulation over intrastate transactions by adhering to the distinctions that had been drawn in the *E.C. Knight* decision some forty years earlier. In his opinion for the unanimous Court in *Schechter*, Chief Justice Hughes adhered to the "necessary and well-established distinction between direct and indirect effects," holding that "where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."[124] To hold otherwise, Hughes noted, would overturn the whole scheme of the Constitution creating a federal government of enumerated powers:

> If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.[125]

Similarly, in his opinion for the majority of the Court in *Carter v. Carter Coal Company*,[126] Justice Sutherland noted that the direct/indirect

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state laws"). In *Schechter*, as discussed *infra*, the Court also held that the commerce power of Congress did not extend to intrastate transactions that only indirectly affected interstate commerce.

[123] *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (unanimously invalidating the Frazier-Lemke Mortgage Relief Act, a federal measure for the relief of insolvent farmers, as an uncompensated taking of property from creditors, in violation of the Fifth Amendment).

[124] *Schechter*, 295 U.S. at 546.

[125] *Id.*

[126] 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935, which subjected the bituminous coal mining industry to pervasive federal regulation, including labor legislation). Professor Currie notes that the government resorted to the ingenious argument that the enumerated powers should be construed in light of the so-called Virginia Plan presented by Randolph to the Constitutional Convention, which would have authorized Congress to legislate "'in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation'"—an argument which, as Currie correctly points out, was not easy to reconcile with the Convention's rejection of that proposal in favor of an enumeration of powers.

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distinction turned "not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."[127] Labor legislation—which deals with such matters as "[t]he employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things," whether separately or collectively—"is purely local in character." It concerns "intercourse for the purpose of production, not of trade," explained Sutherland, thus reviving the *E.C. Knight* distinction between manufacturing and commerce.[128] The federal regulatory power "ceases when interstate commercial intercourse ends," as the Court held in *Schechter*; "correlatively, the power does not attach until interstate commercial intercourse begins."[129] Thus, except for businesses directly involved in interstate commerce (such as the railroad industry), Congress has no power under the Commerce Clause to regulate labor: "[T]he want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."[130]

With regard to the Article I, § 8, power to tax and spend, the Court reaffirmed that these powers were not unlimited. In his opinion for the Court in *United States v. Butler*,[131] Justice Roberts began by observing that "[t]he view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted."[132] Discussing the early American constitutional debate between the Jeffersonian Republicans and the Federalists over the limits of the power, Roberts adopted the Federalist, or "Hamiltonian," position—as

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CURRIE, *supra* note 121, at 223 n.94 (quoting *Carter*, 298 U.S. at 207-08 (oral argument of Mr. Dickinson)).

[127] *Carter*, 298 U.S. at 308.

[128] *Id.* at 303. Mining, like manufacturing, thus was outside the sphere of commerce, according to Sutherland's analysis.

> Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

Id. at 303-04.

[129] *Id.* at 309.

[130] *Id.* at 310.

[131] 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act, which authorized the Secretary of Agriculture to subsidize farmers who agreed to limit their production).

[132] *Id.* at 64.

articulated by Justice Story in his *Commentaries*—that the first clause of Article I, § 8, confers "a power separate and distinct from those later enumerated."[133] Thus, Roberts rejected the narrower view, advanced by Jefferson and Madison, that the taxing and spending powers were limited to the objects enumerated in the rest of Article I, § 8. Notwithstanding his adoption, on behalf of the Court, of the broader, Hamiltonian view, Roberts nevertheless emphasized that the power to tax was not unlimited, for "its confines are set in the clause which confers it"[134]—namely, that it must be exercised "'to pay the Debts and provide for the common Defence and general Welfare of the United States,'" as the Constitution stipulates.[135] Implying that the statute involved here concerned matters of local, not national, welfare,[136] Roberts nevertheless abstained from ascertaining the scope of "general welfare of the United States" because, he noted, "[w]holly apart from that question," the statute constituted an unconstitutional use of the taxing power to invade the police power of the states in contravention of the Tenth Amendment.[137] Here Roberts invoked the well-established principle prohibiting use of the taxing power as a pretext for general police power regulations. To use the taxing power as Congress sought to use it in the Agricultural Adjustment Act—to enforce a national scheme for controlling farm production—would exceed the limits of Article I, § 8; the Act was "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."[138]

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[133] *Id.* at 65.

[134] *Id.* at 66.

[135] *Id.* at 64 (quoting U.S. CONST. art. I, § 8). Quoting Story, Roberts noted that "'[t]he Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers.'" The power to tax "'for the common defence and general welfare'" was, as Story had said, "'not in common sense a general power, [but] . . . limited to those objects.'" *Id.* at 66 (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 909, 922, 902 (William S. Hein & Co., 5th ed. 1994)).

[136] Roberts added, "It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states." *Id.* at 74-75. Thus, the Court in *Butler* rejected the so-called "aggregation principle" that the Court applied to the Commerce Clause in *Wickard v. Filburn*, discussed in Part II.B. *infra*, and which Justice Thomas accused the majority of retaining in *Lopez*, as noted in Part III.A. *infra*.

[137] *Id.* at 68.

[138] *Id.* at 68-69. In two other decisions from the years 1935 and 1936, the Court followed its decision in the *Child Labor Tax Case* of 1922 and invalidated federal taxes that

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B. *The "New Deal Revolution": The Supreme Court Eviscerates the Tenth Amendment*

Against this background of the Supreme Court's efforts over a century and a half to enforce the Tenth Amendment by providing meaningful constitutional limitations on federal legislative powers—particularly Congress' powers under the Article I Commerce Clause—one can appreciate the significance of the so-called "New Deal revolution" of 1937.[139] The shift that occurred so suddenly and dramatically in the spring of 1937, with a series of five to four decisions (in which both Hughes and Roberts joined the majority) upholding New Deal legislation,[140] was

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were pretexts for regulating a subject Congress could not regulate directly. *Carter*, 298 U.S. at 280-81 (invalidating a tax provision in the Bituminous Coal Conservation Act that imposed a 15 percent gross receipts tax but exempted producers who adhered to the wage and price standards); United States v. Constantine, 296 U.S. 287 (1935) (invalidating a federal excise tax on persons selling liquor in violation of state law).

[139] It is commonplace for historians and constitutional scholars to describe 1937 as a constitutional "revolution" and to associate the Supreme Court's apparently sudden reversal that year as a reaction to President Roosevelt's infamous plan to "pack" the Court—the famous "switch in time that saved nine." *See* MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 295-96 (1996); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 281-82 (1989). Bruce A. Ackerman has described the New Deal Revolution as one of the "three great turning points of constitutional history." Like the other two turning points he identifies—the Founding and Reconstruction—it involved "a total repudiation of the preexisting constitutional tradition and its replacement . . . with a new comprehensive synthesis." BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 58, 114 (1991). Professor Ackerman nevertheless notes that the new synthesis merely began in 1937, and he emphasizes the Court's famous footnote in its *Carolene Products* opinion the following year as the critical watershed, thus suggesting that the real "revolution" occurred the year after 1937. *Id.* at 119. Other scholars, in dispelling the "switch in time that saved nine" myth, have emphasized that the critical shift in the views of the swing voters, Justice Roberts and Chief Justice Hughes, really occurred prior to 1937, well before President Roosevelt had announced his court packing plan. *See* 2 KELLY ET AL., *supra* note 72, at 488; CURRIE, *supra* note 121, at 236. It should be noted that Justice Roberts was the author of the majority opinion in the 1934 decision of *Nebbia v. New York*, 291 U.S. 502 (1934), discussed *supra* note 120; Chief Justice Hughes was the author of the majority opinions in *Home Building & Loan v. Blaisdell*, 290 U.S. 398 (1934), discussed *supra* note 120, and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330 (1936) (upholding the constitutionality of the TVA as an exercise of Congress' power, under Article IV, § 3, "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

[140] Helvering v. Davis, 301 U.S. 619 (1937) (upholding the Social Security Act's old-age tax and benefit provisions); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (upholding the Social Security Act's unemployment excise tax upon employers); Associated Press v. NLRB, 301 U.S. 103 (1937) (upholding the NLRA as applied to the labor relations

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twofold. First, with regard to limitations on both state and federal legislative powers through substantive use of the due process clause—what many scholars describe as "laissez-faire constitutionalism"[141]—the Court, in *West Coast Hotel v. Parrish*, abandoned its protection of liberty of contract as a fundamental right.[142] A year later, in *United States v. Carolene Products*,[143] it adopted the minimal "rational basis" test for economic legislation,[144] a test that in the eyes of many commentators established a "double standard" in modern constitutional law, affording less protection for property rights and economic liberty than for other, non-economic

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of newspapers and press associations); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (upholding the NLRA as applied to a small manufacturer with only a negligible effect upon interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act (NLRA)); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding a Washington state minimum wage law).

[141] *See* BENEDICT, *supra* note 139, at 238-40; JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 87-91 (1992).

[142] *See West Coast Hotel*, 300 U.S. at 397 (overruling *Adkins v. Children's Hospital* and upholding legislation setting minimum wages and/or maximum hours as reasonable exercises of the police power, not violating the Due Process Clauses of the Fifth and Fourteenth Amendments). As legal historian James Ely notes, the decision in *West Coast Hotel* "effectively repudiated the liberty of contract doctrine" as well as "marked the virtual end of economic due process as a constitutional norm." ELY, *supra* note 141, at 127.

[143] 304 U.S. 144 (1938) (rejecting a due process challenge to a federal law prohibiting interstate shipment of "filled" milk). The most famous part of Justice Stone's opinion for the majority of the Court in *Carolene Products* is his Footnote 4—called by Professor Ackerman "the most famous [footnote] in Supreme Court history," ACKERMAN, *supra* note 139, at 119—which suggested a "more exacting judicial scrutiny" for legislation falling "within a specific prohibition of the Constitution, such as those of the first ten amendments," or for legislation disadvantaging "discrete and insular minorities," or obstructing "political processes which can ordinarily be expected to bring about repeal of undesirable legislation." 304 U.S. at 152-53 n.4. As Professor Currie notes, Justice Stone's footnote "established the Court's agenda for the next fifty years." CURRIE, *supra* note 121, at 244. Note that Justice Stone's reference to "a specific prohibition of the Constitution" included the Tenth Amendment, as well as the Ninth Amendment, and that it did not exclude provisions of the Bill of Rights that protected property rights and economic liberty, such as the Fifth Amendment Takings and Due Process Clauses.

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> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Carolene Products, 304 U.S. at 152.

rights.[145] Second, with regard to the scope of federal power, the Court abandoned its previous holdings limiting Congress' powers, in effect eviscerating the Tenth Amendment as a fundamental rule of interpretation.

Although it is only the second aspect of the New Deal revolution that is directly relevant here, both aspects are interrelated and illustrate the fundamental nature of the Court's shift: under the guise of judicial restraint, the majority of the Justices on the Court—reflecting their own policy preferences in favor of the New Deal—discarded long-established constitutional precedents in order to uphold the validity of the modern regulatory and welfare state.[146] The fragile five-to-four majorities of 1937 became more sizable majorities as the "Four Horsemen" one by one left the Court and were replaced by pro-New Deal Roosevelt appointees.[147] By the end of World War II, the Justices on the "Roosevelt Court" would come to ignore the clear language of certain clauses of the Constitution—

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[145] On the constitutional double standard, see ELY, *supra* note 141, at 133; BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 41-42 (1987).

[146] For example, Chief Justice Hughes' opinion for the Court in *West Coast Hotel* is replete with assumptions about the "evils of the 'sweating system'" and policy arguments in favor of minimum wage laws. In his dissenting opinion in the case, Justice Sutherland argued that the meaning of the Constitution "does not change with the ebb and flow of economic events" and criticized the majority for amending the Constitution "under the guise of interpretation." *West Coast Hotel*, 300 U.S. at 402-04 (Sutherland, J., dissenting). Sutherland's stance was reminiscent of Justice Story's admonition "not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous." *See* text accompanying notes 67-68.

[147] In 1937, Justice Van Devanter retired and was replaced by former Senator Hugo Black, the "ultra-radical of the Senate" and a strident populist; the following year, Justice Sutherland retired and was replaced by Stanley Reed, former Solicitor General of Kentucky and an advocate of the modern regulatory state. Justice Cardozo also died in 1938; Roosevelt replaced him with Felix Frankfurter, a Harvard Law School professor who was a protégé of, and political collaborator with, Justice Brandeis in reform causes. In 1939 Justice Butler died; he was replaced the following year by former Attorney General and Michigan governor Frank Murphy, a friend of organized labor. Also in 1939, Justice Brandeis retired, replaced by William O. Douglas, chairman of the Securities Exchange Commission and former professor. In 1941, Justice McReynolds retired and was replaced by Robert H. Jackson, another Attorney General. The same year, Charles Evans Hughes stepped down as Chief Justice, succeeded by Associate Justice Harlan F. Stone; the vacancy created by Stone's elevation to Chief Justice was filled, first by South Carolina Senator James F. Byrnes and later by former professor and circuit judge Wiley Rutledge. Thus, by World War II, all but one of the Justices on the Court were Roosevelt appointees; by the time of Justice Stone's death in 1946, President Truman appointed Ohio Senator Harold H. Burton to replace Justice Roberts, the last holdover from the mid-1930s. CURRIE, *supra* note 121, at 277-79; 2 KELLY ET AL., *supra* note 72, at 489.

among them, the Tenth Amendment—and, in effect, read them out of the document.[148]

With regard to the Court's interpretation of the Commerce Clause, the fateful day was April 12, 1937, when in three companion cases the Court by the same five-to-four vote that had decided *West Coast Hotel* upheld the National Labor Relations Act provision protecting the right of employees not engaged in interstate or foreign commerce to organize for purposes of collective bargaining. In the most famous of the three decisions, *NLRB v. Jones & Laughlin Steel Corp.*, the majority discarded the careful distinctions used by the Court in *Schechter* and *Carter Coal* to delineate the scope of interstate commerce.[149] Chief Justice Hughes' opinion for the Court adopted a broad definition of commerce, stressing not "commerce among the states" or "intercourse" across state lines, nor even the "flow," or "stream of commerce," but rather the interconnected nature of the national economy:

> The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to

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[148] Perhaps the most glaring example of the Court ignoring the text of the Constitution and its own prior decisions in order to reach a result favorable to the Roosevelt administration is the infamous decision in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the executive order that authorized the relocation of Japanese Americans to concentration camps. In his opinion for the majority, Justice Black conceded that under the *Carolene Products* analysis, the racial classification was "immediately suspect" and therefore must be subjected to "the most rigid scrutiny"; nevertheless, he was loath to second-guess the Roosevelt administration's decision during wartime. *Id.* at 216. In the words of dissenting Justice Murphy, the majority permitted the government "to infer that examples of individual loyalty prove group disloyalty," a fundamental denial of due process. *Id.* at 240 (Murphy, J., dissenting). For other examples of "victims of the judicial New Deal," see CURRIE, *supra* note 121, at 239-44.

[149] *See* NLRB v. Jones & Laughlin, 301 U.S. 1, 30-33 (1937). Not only did Justice Roberts and Chief Justice Hughes seem to change their minds, but so had Justices Brandeis, Stone, and Cardozo, all of whom had concurred in *Schechter*. Professor Currie noted that the *Jones & Laughlin* dissenters "had been deftly hoisted by their own petard" because it was Justice Sutherland in the *Carter* case who "had so fatefully insisted that the magnitude of the effect on commerce was immaterial." CURRIE, *supra* note 121, at 237-38.

> foster, protect, control, and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[150]

Jones & Laughlin was an easy case; it involved a giant steelmaker that obtained its ores from other states and shipped 75 percent of its products in interstate commerce. As Chief Justice Hughes pointed out, an organizing strike at Jones & Laughlin could have had a "catastrophic" impact on interstate commerce.[151] In one of the companion cases, however, the majority, citing *Jones & Laughlin* without discussion, sustained application of federal labor law to a small clothing manufacturer with a minuscule share of the interstate market. Justice McReynolds objected, in dissent, that "[a]lmost anything—marriage, birth, death—may in some fashion affect commerce" under the majority's test.[152]

In May 1937, in two landmark opinions validating the Social Security Act, the Court further undermined precedents delineating the scope of federal power, this time with respect to Congress' taxing and spending powers. In his opinions for the majority in both cases, Justice Cardozo repudiated the entire theory of dual federalism, which had reached its apogee only a year before in the *Butler* case. In *Helvering v. Davis* he upheld the statute's old-age tax and benefit provisions, observing merely that "Congress may spend money in aid of the 'general welfare'"[153]—and

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[150] *Jones & Laughlin*, 301 U.S. at 36-37 (citations omitted).

[151] *Id.* at 41.

[152] NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 99 (1937) (McReynolds, J., dissenting). Justice McReynolds noted that "[t]he business of the Company is so small that to close its factory would have no direct or material effect upon the volume of interstate commerce in clothing." *Id.* at 94. The Court eventually confirmed that the magnitude of the effect on interstate commerce was indeed immaterial. NLRB v. Fainblatt, 306 U.S. 601, 606 (1939) (in which Justice Stone, in a case involving another small manufacturer, stated that "[t]he power of Congress to regulate interstate commerce . . . extends to all such commerce be it great or small."). By that time, with Justices Van Devanter and Sutherland gone, only Justices McReynolds and Butler remained to protest that the majority's construction of the commerce power "brings within the ambit of federal control most if not all activities of the Nation." *Id.* at 610.

[153] 301 U.S. 619, 640 (1937).

thus realized Jefferson's fear that the general welfare phrase of the first clause of Article I, § 8, would be construed as a separate grant of power rendering nugatory the enumeration of powers in the rest of § 8. In *Steward Machine Co. v. Davis*, sustaining a federal tax plainly designed to induce the states to provide unemployment insurance, Justice Cardozo defended in exceedingly nationalistic terms the federal taxing power, which he held to be "as comprehensive" as that of the states.[154]

It was in Justice Cardozo's opinion in *Steward Machine* that a critical transformation of the Court's interpretation of the Tenth Amendment took place, paving the way for Justice Stone's later characterization of it as merely a "truism." With regard to the Tenth Amendment criticism of the Social Security Act, Justice Cardozo held that "[t]here must be a showing . . . that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states."[155] Because the states were not "coerced" through operation of the statute, Cardozo concluded, the statute was not void as inconsistent with the Tenth Amendment or "restrictions implicit in our federal form of government."[156] No longer was the Tenth Amendment viewed as a fundamental rule of interpretation, limiting federal powers to the Article I enumeration; rather, it became merely a defense of the states. Moreover, the Tenth Amendment was seen as defending the states not against the exercise of any federal power that encroached on their reserved powers, but against only the exercise of powers that "coerced" them in a way that impaired their "autonomy." The Court had completely forgotten that the original purpose of the Amendment was to affirm the enumerated powers scheme of the Constitution. Furthermore, the Court ignored the text of the Amendment itself, whose last four words—*or to the people*—made clear that it was about something more than just "states' rights."

When in *United States v. Darby*[157] Justice Stone maintained that the Tenth Amendment "states but a truism that all is retained which has not been surrendered,"[158] he was technically correct.[159] However, by

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[154] 301 U.S. 548, 581 (1937).

[155] *Id.* at 586.

[156] *Id.* at 585.

[157] 312 U.S. 100 (1941) (overturning the *Hammer v. Dagenhart* limit on the commerce power and upholding the federal Fair Labor Standards Act, which, *inter alia*, banned from interstate commerce the shipment of goods that had been produced in plants violating maximum hours, minimum wage, and child labor standards).

[158] *Id.* at 124. Explaining the "truism" stated in the Tenth Amendment, Stone wrote: "There is nothing in the history of its adoption to suggest that it was more than declaratory of

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characterizing the Amendment as a mere truism affirming reserved state powers, he eviscerated it of virtually all meaning. Justice Stone's explanation, which perpetuated the mischaracterization of the Tenth Amendment as exclusively concerned with federalism, begged the critical questions: "retained"—by whom? "surrendered"—how? Ultimately, it was the right of the American people not to be subjected to illegitimate exercises of federal power—their right to "retain" all their natural liberty not "surrendered" to the federal government through the enumeration of its powers in the Constitution—that the Tenth Amendment was designed to protect. That protection would become worthless if, through its broad interpretation of the commerce power, the Supreme Court transformed the nature of the federal government from one of enumerated powers to a government with plenary police powers.

Shortly after Hughes retired, to be succeeded by Stone as chief justice, the Court further broadened the commerce power in *Wickard v. Filburn*,[160] aptly described by one legal scholar as "a case that still, over 50 years later, elicits surprise, puzzlement, and occasionally outrage from first-year law students."[161] In permitting Congress to limit the wheat a farmer grew

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the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *Id.* at 124. As Professor Currie notes, "[t]he decision was unanimous, having been rendered two days after the retirement of Justice McReynolds, the last of the old guard." CURRIE, *supra* note 121, at 238 n.177.

[159] As Justice O'Connor observed in her opinion for the Court in *New York v. United States*, 505 U.S. 144 (1992), discussed *infra* Part II.C., the Tenth Amendment "is essentially a tautology" that confirms the enumerated powers scheme of the Constitution: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* at 156-57. As noted *supra* Part I, however, the historical justification for the addition of the Tenth Amendment to the Constitution was based on the fears that the enumerated powers scheme was imperfect and that without a rule of strict construction such as the Tenth Amendment provided, additional powers might accrue to the federal government over time. As the New Deal revolution so dramatically illustrates, that is precisely what happened.

[160] 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938, which gave the Secretary of Agriculture authority to set annual grain quotas and to penalize farmers who exceeded their assignments, even if the food had been grown for use on their own farms).

[161] Glenn Harlan Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* POLICY ANALYSIS (Cato Institute, Washington, D.C.),

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for his own consumption on the ground that what he could not grow he might buy from another state, the Court adopted the so-called "aggregation" test, including in the scope of the commerce power activities that, by themselves, had negligible impact on interstate commerce but substantial impact in the aggregate.[162] With no one left to dissent, the "Roosevelt Court" left as its legacy a federal commerce power with no constitutional limitations. In the words of one commentator, "Congress could reach just about any commercial subject it might want to reach and could do to that subject just about anything it was likely to want to do."[163] The New Deal revolution was complete.

In subsequent decades the Supreme Court further expanded the commerce power to embrace non-commercial activities as well. When the Court upheld the Civil Rights Act of 1964 under the Commerce Clause, it held that the power of Congress could reach even local activities not regarded as commerce but which had a substantial effect on interstate commerce, such as racial discrimination in local restaurants.[164] And in *Perez v. United States*, the Court found that federal legislation outlawing "loan sharking" was within the commerce power, by combining the "affecting commerce" and "aggregation" tests.[165] It was this expansion of the *Wickard* rationale to empower Congress to define and punish local

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Oct. 10, 1994, at 12. Professor Reynolds notes the *Wickard* rationale could permit regulation of "virtually any activity, down to the wearing of hats":

> A requirement to wear hats could be justified by arguing that it would boost hat sales and help prop up the flagging American hat industry, and (if hat wearing can plausibly be asserted to prevent colds) that it might even help control skyrocketing health care costs and reduce worker absenteeism—all effects with implications for the national economy and hence, in the *Wickard* sense, for "commerce."

Id. at 14. Reynolds' hypothetical example is not as far-fetched as it may seem, as the Court's later Commerce Clause decisions suggest; indeed, the rationale is similar to that advanced by the government and the dissenting justices in *Lopez*, as discussed *infra* Part III.

[162] In his opinion for the Court, Justice Jackson rejected the distinction between direct and indirect effects, holding it irrelevant that "appellee's own . . . demand for wheat may be trivial by itself . . . where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28.

[163] CURRIE, *supra* note 121, at 238-39 n.178. It is worth emphasizing, as Professor Currie notes, that "[w]hen subsidies for the same purpose were struck down in *Butler*, no one had even argued that Congress could directly impose production quotas under the commerce power." *Id.*

[164] Katzenbach v. McClung, 379 U.S. 294 (1964).

[165] 402 U.S. 146, 150 (1971).

intrastate crime that prompted Justice Potter Stewart to write a vigorous dissent protesting against the federalization of criminal law:

> [I]t is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.[166]

Noting that "the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws," Justice Stewart concluded that "[t]he definition and prosecution of local, intrastate crime" were reserved to the states under the Ninth and Tenth Amendments.[167] It is telling that Justice Stewart was the lone dissenter in *Perez*. The first two of President Nixon's "conservative" appointees to the Court, Chief Justice Burger and Justice Blackmun, joined in Justice Douglas' majority opinion holding that Congress' findings that loan sharking activities had a substantially adverse effect on interstate commerce were sufficient to sustain the constitutionality of the statute.

By the time of the Burger Court, the Tenth Amendment had become so eviscerated that, even under its post-1937 transformation as a "truism" affirming federalism, the Amendment seemed to have lost its relevance altogether. Indeed, some commentators have taken the incredible view that judicial review of federalism issues cannot be justified. The only check on Congress' power, they argue, is the national political process.[168]

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[166] *Id.* at 157-58 (Stewart, J., dissenting).

[167] *Id.* at 157-58.

[168] *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176 (1980) (arguing that "a primary justification for the Supreme Court's exercise of the power of judicial review in respect to claimed infringements of individual liberty is . . . that these constitutionally secured interests are unlikely to receive sympathetic consideration in the political process" but that "[j]udicial review of federalism issues cannot be similarly justified."). Professor Choper identifies several aspects of the national political system which serve "to assure that states' rights will not be trampled," among them the equal representation of states in the Senate, bloc voting in the House of Representatives, the President's role in lawmaking, and the "intergovernmental lobby." *Id.* at 176-81. It is sad

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C. *Forgotten, but Not Quite Dead: The Tenth Amendment in Recent Decades*

Some decisions of the Supreme Court under Chief Justices Warren Burger and William Rehnquist suggest that the Tenth Amendment is not entirely dead. Although the Court did not return to the pre-1937 jurisprudence limiting the scope of federal powers generally, it did breathe some new life into the Tenth Amendment as a limit on federal powers in one respect: Congress may not turn the states into instrumentalities of the national government. Put another way, the form in which the Tenth Amendment has survived is as a constitutional protection of the autonomy of state governments in certain limited respects.

In *National League of Cities v. Usery*,[169] the Burger Court by a five-to-four margin held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which applied federal minimum-wage and maximum-hours requirements to virtually all employees of state governments. Notwithstanding an earlier decision by the Warren Court upholding the extension of federal wage and hour laws to employees in state schools and hospitals,[170] the majority, in an opinion by Justice Rehnquist, stressed federalism—or more precisely, the principle of intergovernmental immunity—as a grounds for limiting federal commerce power. "'Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system,'" wrote Rehnquist.[171] If Congress could withdraw from the states the authority to set their own employment policy, "we think there would be little left of the States' 'separate and independent existence.'"[172] Justice Brennan, in a scathing dissent, accused the majority of returning to that "line of opinions dealing with the Commerce Clause and the Tenth Amendment that ultimately provoked a constitutional crisis for the Court in the 1930's." Under the modern reinterpretation, he maintained, the Tenth Amendment imposed no "affirmative limitation" on powers granted Congress but

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commentary on the Tenth Amendment today that the states have been reduced to the status of special interest groups who must lobby Congress for protection against federal legislation.

[169] 426 U.S. 833 (1976).

[170] Maryland v. Wirtz, 392 U.S. 183 (1968). Despite its holding in this case, the Court also reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. *Id.* at 196.

[171] *National League of Cities*, 426 U.S. at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

[172] *Id.* at 851 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)).

merely declared the federal government one of delegated powers[173]—the "truism" Justice Stone had identified in *Darby*.

The fragile majority in favor of a partial restoration of the Tenth Amendment was short-lived. In less than a decade, by another five-to-four vote (with Justice Blackmun changing sides) in *Garcia v. San Antonio Metropolitan Transit Authority*,[174] the Court overruled its decision in *National League of Cities* and affirmed *Darby* as the "proper understanding of congressional power under the Commerce Clause."[175] In effect, the Court held that the reach of the federal commerce power embraced even those state employees engaged in "traditional government functions" whom the Court had exempted from federal labor law in *National League of Cities*. Despite his reference to *Darby*, Justice Blackmun in his opinion for the majority did not completely reject the Tenth Amendment as a theoretical limitation on federal power. "Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position," Blackmun conceded.[176] Nevertheless, he added that in practice, "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[177] By thus relying on the national "political process" to guard against laws that "unduly burden" the states, Blackmun in effect abdicated Supreme Court review of a fundamental constitutional principle, the division of powers between the states and federal government.[178] The Tenth Amendment, as an effective constitutional rule, again appeared dead.

Justice Powell, in a dissenting opinion joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor, noted that the majority's abdication of judicial review of federal legislation under the Commerce Clause—which in effect left Congress free to judge the extent of its own powers—was inconsistent with "the fundamental principles of our

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173 *Id.* at 861-63, 868 (Brennan, J., dissenting).

174 469 U.S. 528 (1985) (holding that a public mass-transit authority is not immune from the wage and hour requirements of the Fair Labor Standards Act). Justice Blackmun had concurred in *National League of Cities*, finding its result "necessarily correct" although he noted that he was "not untroubled by certain possible implications of the Court's opinion." *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

175 *Garcia*, 469 U.S. at 557.

176 *Id.* at 556.

177 *Id.*

178 *Id.*

constitutional system" and with "the teaching of the most famous case in our history," *Marbury v. Madison*.[179] The "fundamental character of the Court's error" in *Garcia*, according to Powell, was that it ignored the significance of the Tenth Amendment as "essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."[180] Justice Powell recognized that the purpose of the Amendment was to protect not just the autonomy of state governments, but also the rights of individuals, against the exercise of unconstitutional federal powers. "The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government," he observed.[181] "[B]y usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties."[182] Justice Powell, in effect, was urging a return to the pre-1937 view of the Tenth Amendment as a basic limitation on federal powers.

In her separate *Garcia* dissent, Justice O'Connor agreed with Justice Powell as to the need for judicial review. "If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."[183] Moreover, she noted that, in exercising its commerce power, Congress must choose means that did not contravene "the *spirit*" as well as the letter of the Constitution, and that the spirit of the Tenth Amendment requires that the states "retain their

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[179] *Id.* at 567 (Powell, J., dissenting) (citing the defense of judicial review in THE FEDERALIST No. 78 (Alexander Hamilton) and Chief Justice Marshall's affirmation in *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1803), that it was "emphatically the province and duty" of the judiciary "'to say what the law is' with respect to the constitutionality of Acts of Congress").

[180] *Id.* at 570. Powell, remarkably, invoked the original meaning of the Tenth Amendment as illustrated by its historical foundations. "As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated" on the understanding that "[i]n our federal system, the States have a major role that cannot be pre-empted by the National Government," he noted. *Id.* at 568. "Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized." *Id.*

[181] *Id.* at 571.

[182] *Id.* at 572.

[183] *Id.* at 581 (O'Connor, J., dissenting).

integrity."[184] By focusing on state autonomy, however, O'Connor did not go quite as far as Powell in applying the Tenth Amendment. She urged only a return to the *National League of Cities* attempt "to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power." She suggested this be done by "weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States."[185]

Justice O'Connor's position ultimately prevailed with a majority of the Rehnquist Court in *New York v. United States*,[186] in which the Court struck down a provision of a federal environmental law, the Low-Level Radioactive Waste Policy Act, that required states either to regulate the low-level radioactive waste generated within their borders or to "take title" to the waste and assume all legal liability for it.[187] "Some truths are so basic that, like the air around us, they are easily overlooked," Justice O'Connor noted in her opinion for the Court.[188] "States are not mere

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[184] *Id.* at 585 (quoting Marshall's famous language in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional.'").

[185] *Id.* at 587-88. Justice O'Connor explicitly rejected the majority's approach, which treated the states, when functioning as employers, on par with private employers. Rather, by urging that the threat to state autonomy be weighed as "a factor," O'Connor suggested that Congress must, to some extent, discriminate between public and private employers when regulating labor under the commerce power. *Id.* at 588.

[186] 505 U.S. 144 (1992). By the time the Court decided the *New York* case, two of the five justices in the *Garcia* majority had left the Court: Justice Brennan retired and was replaced by Justice Souter in 1990; Justice Marshall retired and was replaced by Justice Thomas in 1991. Both Souter and Thomas joined in Justice O'Connor's opinion for the Court; the other three justices from the *Garcia* majority—Blackmun, White, and Stevens—dissented from the part of Justice O'Connor's opinion discussed here.

[187] 42 U.S.C. § 2021(b) (1994).

[188] *New York*, 505 U.S. at 187. Among the "truths" confirmed by the Tenth Amendment is that the Constitution "divides authority between the federal and state governments for the protection of individuals," O'Connor notes. *Id.* at 181. "'Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.'" *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that the federal Age Discrimination in Employment Act did not apply to a state's mandatory retirement provisions affecting appointed state judges)). Like Justice Powell in his *Garcia* dissent, Justice O'Connor, in this part of her opinion for the Court, thus recognized that the Tenth Amendment does not simply concern "states' rights." Nevertheless, in other parts of

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political subdivisions of the United States;" rather, they retain "a residuary and inviolable sovereignty . . . reserved explicitly to the States by the Tenth Amendment."[189] Justice O'Connor concluded that "[w]hatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[190]

Because *New York* did not involve the application of generally applicable commercial regulations to state and local governments, the Court did not address the question whether *Garcia* should be overruled. The Court therefore left intact Justice Blackmun's renunciation in *Garcia* of substantive constitutional limits on the federal commerce power in most cases; *New York* carved a relatively narrow exception striking down federal laws that coerced the states in certain ways. Beyond that exception, Justice O'Connor's opinion left open the determination of the "outer limits" of powers reserved to the states by the Tenth Amendment and, presumably, denied to Congress, even under its exercise of the commerce power. This was the uncertain status of the Tenth Amendment in the Supreme Court prior to the 1994 Term.

III. THE TENTH AMENDMENT IN THE COURT'S 1994-95 TERM

In his two Tenth Amendment opinions from the 1994-95 term, his concurrence in *Lopez* and his dissent in *Term Limits,* Justice Thomas breaks from the Court's 60-year, post-1937 tradition and returns to the pre-1937 jurisprudence that took seriously the Tenth Amendment as something more than a "truism." To Justice Thomas, the Tenth Amendment does not merely state the tautology that all that is not delegated to the federal government is reserved to the states. Rather, Justice Thomas sees the Amendment as a basic rule of interpretation requiring the Court to construe strictly each of the powers enumerated in particular clauses of Article I, § 8, to give meaning to the other clauses of Article I, § 8, and to the Constitution as a whole. Moreover, he recognizes that the Amendment protects not only state governments but the *people* of the states as well.

To fully understand the significance of Justice Thomas' break with the Court's recent past and his return to the older Tenth Amendment

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her opinion, she viewed the Amendment as "essentially a tautology" affirming federalism—following Justice Stone's famous characterization of it in *Darby*—and in applying the Amendment to the statute involved in this case, she emphasized its impairment of state sovereignty. *See id.* at 156-57, 188.

[189] *Id.* at 188.

[190] *Id.*

jurisprudential tradition, one must examine closely both the *Lopez* and *Term Limits* opinions. Justice Thomas' disagreement with his colleagues on the Court today who comprised the majorities in both cases is, in many ways, as interesting as his break from the "New Deal revolution" that apparently still holds sway over his colleagues' view of the Tenth Amendment.

A. United States v. Lopez: *Refusing to Give Congress a "Blank Check"*

In *Lopez*, the Court struck down as unconstitutional the federal Gun-Free School Zones Act of 1990 [hereinafter GFSZA] because the Act exceeded Congress' authority under the Commerce Clause.[191] An editorial in the *Wall Street Journal* aptly described the significance of the *Lopez* decision: "After 60 years of being asleep at the constitutional switch, the Supreme Court decided that our Founders did indeed create a government of limited powers."[192] Many commentators characterized the decision as the "first" since the New Deal to limit Congress' powers under the Commerce Clause;[193] and although it is still too soon to tell how far the

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[191] 115 S. Ct. 1624 (1995). The GFSZA provides, "[i]t shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. v), *quoted in Lopez*, 115 S. Ct. at 1626. It defines *school zone* as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1000 feet from the grounds of a public, parochial or private school"; and it defines *school* as "a school which provides elementary or secondary education, as determined under state law." 18 U.S.C. § 921(a)(25), *quoted in Lopez*, 115 S. Ct. at 1626 n.1. Nowhere does the statute require that the possession of the gun affect interstate commerce or that the gun have moved in interstate commerce.

[192] Editorial, *Expansion Checked*, WALL ST. J., Apr. 27, 1995, at A14. Jeremy Rabkin, a professor of government at Cornell University, writing in the *American Spectator*, illustrated the significance of *Lopez* this way:

> A 1993 op-ed in the *Wall Street Journal* argued that President Clinton's health-care plan, which required even new-born babies to be enrolled in federally regulated health alliances, went beyond the reach of congressional power to regulate commerce among the states. At the time, the argument seemed amusing but wildly anachronistic. Now it is suddenly quite relevant.

Jeremy Rabkin, *State Your Business*, THE AMERICAN SPECTATOR, July 1995, at 55, 56.

[193] *See* David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of* Lopez, A.B.A. J., July 1995, at 46 ("the first time in almost 60 years that the Court invalidated on commerce clause grounds federal legislation regulating private parties"); *see also* Rosen, *supra* note 1, at 19 (describing the significance of the case somewhat too broadly: that the Court held, "for the first time since the New

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Court itself or lower federal courts may go in following *Lopez*,[194] virtually all commentators, of various political stripes, whether conservative, liberal,

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Deal, that Congress lacked the power to enact a law"; that of course is not quite true, for, as noted in Part II.C. *supra*, in *New York v. United States*, the Court did strike down as unconstitutional part of the federal Low-Level Radioactive Waste Policy Act).

[194] As of September 1, 1996, neither the Supreme Court nor any federal court of appeals has followed *Lopez* in declaring any federal law unconstitutional. Some courts of appeals have followed *Lopez* in reversing criminal convictions in individual cases. *See* United States v. Denalli, 73 F.3d 328 (11th Cir. 1996); United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995); United States v. Walker, 59 F.3d 1196 (11th Cir. 1995) (reversing convictions under federal arson statute). Most criminal appellate opinions citing *Lopez*, however, have distinguished it and have affirmed convictions under a variety of federal statutes. *See* United States v. Rambo, 74 F.3d 948 (9th Cir. 1996) (affirming conviction for possession of a machine gun); United States v. Brown, 72 F.3d 96 (8th Cir. 1995) (affirming conviction for use of firearm during drug-trafficking offense); United States v. Diaz-Martinez, 71 F.3d 946 (1st Cir. 1995) (affirming conviction for violation of statute prohibiting possession of firearms with obliterated serial numbers "shipped or transported in interstate or foreign commerce"); United States v. Kirk, 70 F.3d 791 (5th Cir. 1995) (affirming conviction for unlawful possession of a machine gun); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995) (affirming conviction under federal anti-carjacking statute).

Several of the foregoing court of appeals decisions distinguishing *Lopez* have been over the strenuous objections of dissenting judges. *See Kirk*, 70 F.3d at 798 (Judge Jones, dissenting, argued that insofar as the statute criminalizes mere private possession of a machine gun, it lacks the requisite nexus to interstate commerce); *Bishop*, 66 F.3d at 591 (Judge Becker, dissenting, argued that "in the wake of *Lopez* . . . a criminal statute . . . which does not involve a commercial transaction, cannot be upheld as the majority tries to do, by piling inference upon inference to construct from anecdotal data an argument that carjacking is an essential part of the operation of car-theft rings"); *see also* United States v. Wilson, 73 F.3d 675, 689 (7th Cir. 1995) (Judge Coffey, dissenting from the court's decision upholding the Freedom of Access to Clinic Entrances Act), discussed more fully *infra* note 201.

A number of district court decisions, however, have followed *Lopez* in holding unconstitutional certain federal statutes on the ground that they involve regulation of activities that do not affect, or affect only insubstantially, interstate commerce. *See* Brzonkala v. Virginia Polytechnic & State Univ., No. CIV.A.95-1358-R, 1996 WL 431097 (W.D. Va. July 26, 1996) (dismissing claims under Violence Against Women Act); Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996) (holding unconstitutional the Freedom of Access to Clinic Entrances Act); United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995) (holding unconstitutional the Child Support Recovery Act (CSRA)); United States v. Schroeder, 894 F. Supp. 360, and United States v. Mussari, 894 F. Supp. 1360 (D. Ariz. 1995) (holding CSRA unconstitutional).

Meanwhile, Congress continues to pass, and President Clinton to sign into law, bills that seem inconsistent with *Lopez*. One example is the federal version of New Jersey's "Megan's Law," Pub. L. No. 104-145, 110 Stat. 1345 (to be codified at 42 U.S.C. §§ 13701, 14071 (1996), which requires state and local law enforcement agencies to "release relevant information that is necessary to protect the public" from persons convicted of certain sex offenses. Under *Lopez*, the statute is not constitutional as a legitimate exercise of the

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or libertarian, agree that the decision marks an important shift in Supreme Court history.[195] Federal constitutional law, in recent decades, has focused almost exclusively on questions of rights. With its decision in *Lopez*, however, the Court again has placed on center stage questions about power: where power resides in the federal system and how the Constitution's grant of powers to the national government is to be interpreted.

In his opinion for the majority, Chief Justice Rehnquist started "with first principles:" Madison's affirmation, from *Federalist No. 45*, that the Constitution created a federal government of "few and defined" powers and that this basic division of powers between the federal government and the states was adopted to "reduce the risk of tyranny and abuse from either front."[196] After a short history of the Court's interpretation of the Commerce Clause through the New Deal cases, Rehnquist noted that "even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[197]

Chief Justice Rehnquist identified those limits both negatively and positively: under the guise of the commerce power, Congress cannot regulate activity that has only "remote," insubstantial, or "trivial" impact on interstate commerce. Put another way, Congress under its commerce power can regulate three broad categories of activity: first, "the use of the

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commerce power; moreover, it seems inconsistent with *New York* in that it compels state and local government to administer a federal policy. Another example of recently-enacted legislation is the much-publicized "Church Arson Prevention Act"—passed unanimously in both the House and Senate in June 1996—which amended current law to make it a federal crime to damage religious property "because of the race, color, or ethnic characteristics of any individual associated with that religious property." Pub. L. No. 104-155 (1996). The congressional findings that the incidence of arson of places of religious worship "poses a serious national problem" which Congress "has authority, pursuant to the Commerce Clause of the Constitution," to make a violation of federal law are blatantly incompatible with the Court's decision in *Lopez*.

[195] For example, the *New York Times* Supreme Court reporter described *Lopez* as a "reincarnation of the Constitution that was," a repudiation of the New Deal revolution. Linda Greenhouse, *Blowing the Dust Off the Constitution That Was*, N.Y. TIMES, May 28, 1995 § 4, at 1. Roger Pilon, director of the Center for Constitutional Studies at the Cato Institute, described the decision as one that "questioned the very foundations of the post-New Deal world." Roger Pilon, *It's Not About Guns: The Court's Lopez Decision Is Really About Limits on Government*, WASHINGTON POST, May 21, 1995, at C5.

[196] *Lopez*, 115 S. Ct. at 1626.

[197] Id. at 1627-28 (discussing particularly *Jones & Laughlin Steel*, *Darby*, and *Wickard*).

channels of interstate commerce;" second, "the instrumentalities of" or "persons and things in" interstate commerce; and third, the category at issue in *Lopez*, "activities having a substantial relation to" or which "substantially affect" interstate commerce.[198] Having an effect is not enough; the effect must be "substantial."[199] Moreover (Rehnquist implied, without directly saying), the activity must itself be commercial, or "economic." Comparing the present case with *Wickard*, which he characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," Rehnquist found that it "involved economic activity in a way that the possession of a gun in a school zone does not."[200] The GFSZA is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[201]

Finally, Chief Justice Rehnquist rejected the Government's strained "House That Jack Built" argument[202] that possession of firearms in school

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[198] *Id.* at 1629-30.

[199] *Id.* at 1630.

[200] *Id.*

[201] *Id.* at 1630-31. Following Rehnquist's analysis, at least one federal appellate judge, in dissent, has found unconstitutional the federal statute regulating protests outside abortion clinics. United States v. Wilson, 73 F.3d 675, 689 (7th Cir. 1995) (Coffey, J., dissenting) (majority's decision upholding the Freedom of Access to Clinic Entrances Act). As Judge Coffey understood Rehnquist's test, only two types of statutes fall within the "substantial effects" category: first, federal criminal statutes that include a jurisdictional element ensuring, through case-by-case inquiry, that the prohibited conduct substantially affects interstate commerce; and second, *economic* activity that substantially affects interstate commerce. Disputing the majority's characterization of the law as a valid example of the second class of statutes—because, the majority held, the provision of reproductive health services is a "commercial activity"—Judge Coffey noted that the Act does not regulate the business or commercial practices of abortion clinics but rather criminalizes the purely non-economic activities of anti-abortion protesters and that, therefore, the Act should be unconstitutional under *Lopez*. *Id.*

[202] Although Rehnquist did not use this term, coined by Thomas Jefferson in this context, it aptly applies. Shortly before his presidency, Jefferson criticized a House bill incorporating a company for the Roosevelt copper mines in New Jersey by observing that it was

> under the *sweeping clause* of the Constitution, and supported by the following pedigree of necessities. Congress are authorized to defend the country: ships are necessary for that defence: copper is necessary for ships: mines are necessary to produce copper: companies are necessary to work mines: and "this is the house that Jack built."

MAYER, *supra* note 33, at 214 (quoting letter from Thomas Jefferson to Robert R. Livingston (Apr. 30, 1800)). This was the same sort of reasoning with respect to the

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Kennedy's opinion is key: "Were the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[209] Drawing upon the example of the Court's dormant Commerce Clause jurisprudence—from time to time the Court must make "delicate judgments," said Kennedy—he concluded that "[t]he statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required."[210] Given that education is a "traditional concern of the States," Kennedy emphasized that the Court has "a particular duty to insure that the federal-state balance is not destroyed."[211] Noting that over 40 states already had criminal laws substantially the same as the federal law, Kennedy added that the federal law also "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."[212]

Justice Thomas, writing separately "to observe that our case law has drifted far from the original understanding of the Commerce Clause," called into question the majority's "substantial effects" test as too vague, insofar as it enabled the dissent to argue that Congress can regulate gun possession.[213] Noting that the original meaning of *commerce* pertained to the sale and/or transport of goods rather than to business generally,[214] Justice Thomas then, remarkably, interpreted the Constitution in true Jeffersonian fashion, taking seriously its text.[215] If Congress may regulate all matters that substantially affect commerce, he argued, "there is no need for the Constitution to specify" the powers enumerated in Article I, § 8. "An interpretation of cl. 3 that makes the rest of § 8 superfluous simply

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[209] *Id.* at 1638.

[210] *Id.* at 1640.

[211] *Id.*

[212] *Id.* at 1641.

[213] *Id.* at 1642 (Thomas, J., concurring); *cf. id.* at 1651 (Stevens, J., dissenting). As Roger Pilon has argued, Justice Thomas, alone among the Justices, plainly saw that Chief Justice Rehnquist's opinion for the *Lopez* majority left intact the post-New Deal rule—"whereby Congress has power to regulate anything that 'substantially affects' interstate commerce"—a rule that is "not only inconsistent with the terms and purpose of the commerce clause but effectively guts the doctrine of enumerated powers, the very premise of the Constitution." Pilon, *supra* note 195.

[214] *Lopez*, 115 S. Ct. at 1643-44.

[215] *Id.*; *cf.* Jefferson, Opinion on the Bank Bill, *supra* note 44 and text accompanying notes 44-52.

cannot be correct."[216] Moreover, Thomas seemed also to echo Jefferson's view that the Tenth Amendment is the fundamental principle of the Constitution,[217] arguing that the Framers intended that "most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government."[218] To the extent that the Court has departed from that principle in its Commerce Clause jurisprudence since 1937, the Court has "com[e] close to turning the Tenth Amendment on its head."[219]

Following another historical discussion—showing that the "substantial effects" test truly is of "recent vintage," flowing from the "wrong turn" taken by the Court in the 1930s,[220] a turn away from its 150-year effort to draw meaningful limits on congressional powers under the Commerce Clause—Justice Thomas then argued that a "further flaw" with the test articulated by the majority was that it failed to do what Rehnquist maintained it must do.[221] The majority's test "appears to grant Congress a police power over the Nation," Thomas revealed: through the "aggregation principle," even the "substantial effects" test is susceptible to a "House That Jack Built" rationalization.[222] Without suggesting where the line should be drawn—other than along the original meaning of *commerce*, perhaps?—Thomas concluded that "at an appropriate juncture" the Court must modify its Commerce Clause jurisprudence.[223] Nothing less than the Constitution itself is at stake, Thomas added:

> If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce

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[216] *Lopez*, 115 S. Ct. at 1644.

[217] Although Thomas cited Hamilton, in *Federalist No. 17*, he went on to give the Jeffersonian-Madisonian argument that the Tenth Amendment merely confirmed the explicit language at the beginning of Article I, assigning Congress only those powers "herein granted" by the rest of the Constitution. *Id.* at 1645-46.

[218] *Id.* at 1645.

[219] *Id.*

[220] *Id.* at 1648-49.

[221] *Id.* at 1649.

[222] *Id.* at 1649-50. The "aggregation principle," of course, was used by Justice Jackson in his notorious opinion for the majority in *Wickard v. Filburn*, 317 U.S. 111 (1942), discussed *supra* Part II.B.

[223] *Lopez*, 115 S. Ct. at 1651 (Thomas, J., concurring). By criticizing the "substantial effects" standard, Thomas seemed to be calling for a return to a pre-*Wickard* analysis. Perhaps tenable is the line drawn by the Court in *Schechter Poultry Corp v. United States*, 295 U.S. 495, 545 (1935), discussed *supra* Part II.B.: Congress may regulate only those transactions that *directly* affect interstate commerce.

zones posed "substantial" harms to interstate commerce through "costs of crime" or dampening of "national productivity."[203] Under the Government's theory, he observed, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[204] Indeed, he added, "if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate . . . even in areas such as criminal law enforcement or education where States historically have been sovereign."[205] He similarly dismissed Justice Breyer's rationale, that "Congress . . . could rationally conclude that schools fall on the commercial side of the line," as lacking "any real limits because, depending on the level of generality, any activity can be looked upon as commercial."[206] "To uphold the Government's contentions here," he concluded, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[207]

Justice Kennedy's concurrence gave an alternate interpretation of the history of the Court's Commerce Clause jurisprudence, emphasizing that after the New Deal revolution the Court abandoned content-based boundaries between federal and state authority over commerce and yet did not totally abandon federalism.[208] Buried in the midst of a murky discussion of federalism and judicial restraint, one sentence from

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Necessary and Proper Clause that Jefferson had condemned in his opinion on the bank bill. *See supra* Part I text accompanying notes 50-52.

[203] *Lopez*, 115 S. Ct. at 1632.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 1633.

[207] *Id.* at 1634. As discussed *supra* note 194, other federal judges have followed Rehnquist's analysis in questioning the constitutionality of certain federal firearm laws and the federal anti-carjacking statute. Similarly, one might question the constitutionality of federal drug possession laws: If Congress lacks the power to make it a crime to possess a gun near a school, how can it prohibit the possession of marijuana or crack cocaine in private homes? Another federal law that seems questionable after *Lopez* is the provision in the Brady Handgun Violence Prevention Act that requires local law enforcement officials to conduct background checks. 18 U.S.C. § 922(s)(9)(t) (1994). Although one court of appeals has upheld the Brady Act, Mack v. United States, 66 F.3d 1025, 1028-29 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 2521 (1996), another court has held that it violates the Tenth Amendment, under the rationale of *New York v. United States*. Koog v. United States, 79 F.3d 452, 457-58 (5th Cir. 1996).

[208] *Lopez*, 115 S. Ct. at 1636-37 (Kennedy, J., concurring).

> 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.'" Such a formulation of federal power is no test at all: it is a blank check.[224]

Of the three dissents in *Lopez*,[225] Justice Souter's was the most interesting—and disappointing. Souter began by begging the question, noting that the Court should respect "the institutional competence of the Congress on a subject expressly assigned to it by the Constitution."[226] Proclaiming that the Court must show deference to legislative policy judgments, Souter argued that the commercial/noncommercial distinction drawn by the majority "looks much like the old distinction between what directly affects commerce and what touches it only indirectly," and thus constituted "a backward glance" to *Lochner*-era jurisprudence.[227] Souter thus likened formalistic Commerce Clause review to substantive due process protection of liberty of contract. Under his view, any attempt on the part of the Court to limit Congress' power under the Commerce Clause involved "judicial policy judgments."[228] The inevitable result of Souter's

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[224] *Lopez*, 115 S. Ct. at 1650-51 (quoting *id.* at 1662-63 (Breyer, J., dissenting) (quoting North American Co. v. SEC, 327 U.S. 686, 705 (1946))).

[225] Justice Stevens' dissent rationalized Congress' power to prohibit possession of guns in a way that truly would grant Congress a national police power. He also incorporated by reference Justice Souter's "exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process," cross-referencing Stevens' equally shrill dissent in *Dolan v. Tigard*, 114 S. Ct. 2309 (1994), the case in which a majority of the Court gave new life to the Takings Clause of the Fifth Amendment. *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting). Justice Breyer's dissent in *Lopez* was a classic Brandeis brief, citing in an appendix page after page of "studies" that purport to show the rationality of Congress' supposed finding that the possession of guns near schools has a detrimental impact on the nation's economy. *Id.* at 1665-71 (Breyer, J., dissenting). The titles of the articles listed in Breyer's appendix show that many, if not most of them, have at best marginal relevance to the proposition he asserted.

[226] *Id.* at 1651 (Souter, J., dissenting).

[227] *Id.* at 1653-54.

[228] *Id.* at 1653. Discussing Justice Souter's reference to the "untenable jurisprudence" of the Court prior to 1937, Raoul Berger has aptly observed, "That is strange advocacy for a court that discarded settled cases in droves. Why are the decisions of the last 60 years more sacrosanct than those of the prior 140?" Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 713-14 (1996) (footnote omitted).

analysis, it seems, is that Congress' power under the Commerce Clause is unlimited.

Justice Thomas responded to Justice Souter's analysis by observing that "'commercial' character is not only a natural but an inevitable 'ground of *Commerce* Clause distinction,'"[229] and he concluded that the Court's invalidation of the GFSZA "therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself."[230] In further support of Thomas' position, one might add that the Court no more makes "judicial policy judgments" when it defines *commerce* than it does when it defines *speech* in First Amendment cases. Indeed, as argued *infra* Part IV, under at least one form of originalism—the form that Jefferson espoused—judges ought to define power-granting clauses of the Constitution more strictly than they do power-limiting or rights-guaranteeing clauses.

Justice Thomas' opinion in *Lopez* perhaps can be faulted for not going far enough in returning to the original meaning of the Commerce Clause. As one scholar has observed, *commerce* is not the only term critical to the clause, as originally intended. Equally important is the term *regulate*, which in the eighteenth century meant "to make regular," not "to control," an even more important definitional limitation on Congress' power under the Commerce Clause.[231] The commerce power in early American constitutional thought was understood essentially as the power to prescribe uniform rules that would preempt inconsistent state laws that burdened or obstructed the free flow of goods across state lines—what in modern constitutional law is understood as the "dormant" Commerce Clause.[232] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story defined the power *to regulate commerce* as the power "to prescribe the rule, by which commerce is to be governed." Also, he explained that the commerce power was intended to remedy "a leading defect" in the Articles of Confederation, "the want of some uniform system to regulate"

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[229] *Lopez*, 115 S. Ct. at 1650 n.9 (Thomas, J., concurring) (quoting *id.* at 1654 (Souter, J., dissenting)).

[230] *Id.*

[231] Reynolds, *supra* note 161, at 6.

[232] The Marshall Court's decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), for example, might be considered illustrative of what the framers of the Constitution intended the Commerce Clause to accomplish: Gibbons, the holder of a federal coasting license, had a federal constitutional right—by virtue of operation of the Article VI Supremacy Clause—to operate steam vessels on interstate waterways notwithstanding the State of New York's grant of a monopoly to his competitor, Ogden; the state-granted monopoly falls as a state law inconsistent with the federal "regulation." *Id.* at 2, 10, 210.

foreign and interstate commerce, given the inconsistencies of state laws.[233] Indeed, Madison himself observed in 1829 that the federal commerce power "grew out of the abuse" of state taxing powers, "and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government."[234] If Madison's explanation is true—and how can one invoking the framers' original intent seriously ignore Madison?—the Supreme Court departed from "the original understanding of the Commerce Clause" long before the New Deal revolution, when during the so-called "Progressive era" in the early twentieth century it began upholding federal police powers.

B. U.S. Term Limits v. Thornton: *Unconstitutional Amendment or Reserved Power?*

In *Term Limits*, by a five-to-four decision (this time, with Justice Kennedy concurring with the majority and with Justice Thomas authoring the dissenters' opinion), the Court struck down state-imposed term limits on members of Congress.[235] Given the closeness of the vote and the nature of the question, some commentators have associated the decision together with *Lopez*, as signals of a potential shift in the Supreme Court giving new vigor to issues of federalism.[236] Commentators also have seen one of the

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[233] STORY, *supra* note 67, at 99, 359-60. He further defined *commerce* as not only "traffic" but "intercourse"—"the commercial intercourse between nations, and parts of nations, in all its branches"—and noted that commerce "is regulated by prescribing rules for carrying on that intercourse." *Id.* at 361.

[234] Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 50, at 521.

[235] 115 S. Ct. 1842 (1995). Specifically at issue was an amendment to the Arkansas Constitution, approved by voters in the November 1992 general election, which prohibited the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the United States House of Representatives or two terms in the United States Senate. *Id.* at 1843. The amendment also directly limited the terms of Arkansas state government officials: It provided that no elected official in the executive branch may serve more than two four-year terms, that no member of the Arkansas House of Representatives may serve more than three two-year terms, and that no member of the Arkansas Senate may serve more than two four-year terms. *Id.* at 1845-46. Not at issue in the case was the constitutionality of term limits for state government officials; in 1992, the Court had let stand a state supreme court ruling that such limits did not violate the constitutional rights of citizens, either as voters or candidates. Legislature v. Eu, 816 P.2d 1309, 1324-25 (Cal. 1991), *cert. denied*, Californians for Citizen Government v. Legislature, 503 U.S. 919 (1992).

[236] In many cases, commentators have described this apparent trend with considerable hyperbole. *See* Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at

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Court's decisions from the 1995-1996 term, *Seminole Tribe v. Florida*,[237] as further evidence of this trend.[238] *Term Limits*, however, was less about federalism, in the strict sense—that is, the division of powers between the national government and the state—than it was about the nature of the federal union itself. Specifically at issue in the case was the extent of the political power of the American people, in their capacity as citizens of the several states. The significance of Thomas's dissent was that it saw the Tenth Amendment as equally relevant to this issue as it was in *Lopez* to federalism per se.

Writing the opinion for the majority—whom I shall label the "nationalists" on the Court—Justice Stevens found dispositive the language of Article I, § 2, Clause 2, and § 3, Clause 3 (the Qualifications Clauses),[239] demonstrating the framers' intent that the qualifications for members of Congress "be fixed and exclusive."[240] Following the Court's decision in

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A1 ("[I]t is only a slight exaggeration to say that the dissent brought the Court a single vote shy of reinstalling the Articles of Confederation."). Because Justice Thomas' dissent was well-grounded in the text of the Constitution, as noted below, the exaggeration is really more than "slight."

[237] 116 S. Ct. 1114 (1996) (holding unconstitutional, as inconsistent with the Eleventh Amendment, a provision in the Indian Gaming Regulatory Act that permits a tribe to sue a state in federal court).

[238] *See* David G. Savage, *States on a Winning Streak*, A.B.A. J., June 1996, at 46-47 (noting that *Seminole Tribe* shared with *Lopez* the same majority: Chief Justice Rehnquist wrote both opinions, in which he was joined by Justices Thomas, O'Connor, Scalia, and Kennedy).

[239] "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

[240] *Term Limits*, 115 S. Ct. at 1849. Despite his characterization of these two provisions as "exclusive," Justice Stevens acknowledged that several other provisions of the Constitution imposed additional qualifications on members of Congress: for example, that they not hold any other federal office (Art. I, § 6, cl. 2), that they take an oath to support the Constitution (Art. VI, cl. 3), and that they have not been convicted in an impeachment proceeding (Art I, § 3, cl. 7). *Id.* at 1847 n.2. "Because [these] additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution," Stevens maintained. *Id.* Yet another provision in the Constitution, not mentioned by Stevens, is the clause stating that "no religious Test shall ever be required as a Qualification" for federal office (Art. VI, cl. 3). As one commentator has argued, this provision shows that the framers contemplated the possibility of still other qualifications or disqualifications. John G. Kester, *State Term*

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1969 in the Adam Clayton Powell case (which held that *Congress* could not alter qualifications), but applying its reasoning to the *people of the several states* as well,[241] Stevens supported this conclusion not only with historical evidence[242] but also with "the basic principles of our democratic system."[243] With regard to both, Stevens' opinion assumed that Congress

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Limits Laws and the Constitution, *in* THE POLITICS AND LAW OF TERM LIMITS 109, 113 (Edward H. Crane & Roger Pilon eds., 1994).

[241] Powell v. McCormack, 395 U.S. 486 (1969) (holding that the refusal of the House of Representatives to seat Adam Clayton Powell, an outspoken black representative from Harlem who had been accused of various acts of wrongdoing, exceeded the authority of the House under Art. I, § 5, cl. 1 to "judge" the "qualifications" of its members). As commentators have noted, reliance on this decision is misplaced. *Powell* dealt only with the power of one chamber of Congress to discipline one of its members; it did not concern term limits at all: the Court said nothing about either the power of *states* to enact term limits—indeed, the Court specifically stated that it was not considering that question, *id.* at 543—or the power of *both* houses of Congress to enact a statute that imposed term limits. Kester, *supra* note 240, at 120; Ronald D. Rotunda, *A Commentary on Constitutionality*, *in* THE POLITICS AND LAW OF TERM LIMITS, *supra* note 240, at 141, 151-52.

[242] *Term Limits*, 115 S. Ct. at 1848-50 (history cited in *Powell*); *id.* at 1856-62 (additional historical evidence). Contrary to Justice Stevens' assertions, none of the historical evidence he cited clearly shows the framers' intent to deny the states the power to impose additional qualifications on members of Congress. Evidence from the ratification debates—which included statements by both Madison and Hamilton describing congressional qualifications as "fixed"—dealt with the inability of *Congress*, not the states, to add qualifications. *Id.* at 1848-49. The only "compelling" evidence dealing with the states' power that Stevens could cite from the ratification debates was the *absence* of the assertion that the states could require rotation for the representatives of their own citizens. *Id.* at 1859-60. With regard to evidence from the period following ratification, Stevens relied almost entirely upon two sources: Story's *Commentaries on the Constitution* and the debate in Congress in 1807 over the qualifications of William McCreery, a Representative from Maryland who did not satisfy the residency requirement imposed by that state. *Id.* at 1854-62. Neither of these sources is as persuasive as Stevens' opinion implied. Story was an ardent nationalist whose objection to state qualification laws was based on "fair reasoning" because he thought such state power dangerous; but even Story may have had doubts about his view—which he admitted was not shared by his contemporaries—for he omitted the argument from the one-volume abridgment of his treatise. Kester, *supra* note 240, at 114; Rotunda, *supra* note 241, at 146, 146 n.17. Although the 1807 congressional debate was resolved in McCreery's favor, Stevens conceded that it was "inconclusive" because the whole House did not vote on the constitutional question but merely voted to seat McCreery. *Term Limits*, 115 S. Ct. at 1861. As Stevens observed, Thomas Jefferson cited the House' decision in a 1814 letter in which he questioned the constitutionality of state-imposed alterations in the qualifications of members of Congress. *Id.* at 1861-62. As noted in the discussion of Justice Thomas' dissent, however, Jefferson later changed his mind, expressing uncertainty about the question. *See* discussion *infra* notes 252-261 and accompanying text..

[243] *Term Limits*, 115 S. Ct. at 1856. The main "democratic principle" identified by Stevens was the right of the people to "choose whom they please to govern them." *Id.* at

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represented the people of the United States as one nation, not a confederation of sovereign states—reading back to the time of the framers the consensus that did not emerge until after the Civil War, which was fought in part to resolve this basic ambiguity at the heart of the Constitution.[244] Permitting individual states to impose additional

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1862. One might ask, under democratic theory, why that right is more fundamental than the right of the people to determine the qualifications of their elected government officials. As one commentator has noted, voter initiatives—like the ones used to enact term limits—are acts of "the People," who are empowered by Article I and the Seventeenth Amendment to choose members of Congress; and as the California Supreme Court observed in its decision upholding term limits for state officials, "'It would be anomalous to hold that a statewide initiative measure . . . is invalid as an unwarranted infringement of the rights to vote and seek public office.'" Kester, *supra* note 240, at 117 (omission in original) (quoting Legislature v. Eu, 816 P.2d 1309, 1329 (1991)). Professor Rotunda further has observed that the United States Supreme Court, in its decision upholding a state constitutional provision requiring state judges to retire at age 70, has held that the people's right to determine the qualifications of their "most important government officials" is "an authority that lies at 'the heart of representative government'" as well as a power reserved to them under the Tenth Amendment as well as the Guarantee Clause of Article IV, § 4. Rotunda, *supra* note 241, at 147 (quoting Gregory v. Ashcroft, 501 U.S. 452, 463 (1991)). As Justice Thomas' dissent further shows, the argument for democracy, or republicanism, cuts both ways. *See* discussion *infra* notes 252-261 and accompanying text..

[244] Are the people of the United States united with respect to their relationship to the national government, or do they exist in a political capacity only as members of their respective states? That fundamental question was at the heart of the constitutional crisis that caused the Civil War. The southern states that seceded from the Union in 1860-61 did so on the basis of their beliefs that the Union consisted of a compact among sovereign states and that any state may dissolve its union with other states simply by repealing its ratification of the Constitution. *See* South Carolina Ordinance of Secession (Dec. 20, 1860), *in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, *supra* note 82, at 446. Abraham Lincoln, in response, regarded secession as an unlawful act because he understood the Union to be older than the Constitution and "perpetual." *See* Lincoln's First Inaugural Address (Mar. 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY, *supra* note 57, at 385. The Union victory in the Civil War may be regarded as settling—in the negative, of course—the constitutional question of the right of secession; after the war, the Supreme Court validated Lincoln's conception of "an indestructible Union, composed of indestructible States." Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). Even after the Civil War, however, Americans both in the North and South still valued loyalty to their states as highly as loyalty to the United States, as the state monuments to fallen Union dead at Civil War battlefields such as Gettysburg so dramatically attest. Reconstruction of the Union, too, was effected on a state-by-state basis. Indeed, the Fourteenth Amendment itself provides that "[r]epresentatives shall be apportioned *among the several States* according to their respective numbers" and further provides a mechanism for reducing the representation of any state that denies the right to vote in national elections in certain ways. U.S. CONST. amend. XIV, § 2 (emphasis added). These provisions suggest that even in the House of Representatives, the

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qualifications for their representatives would "undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure," Stevens concluded,[245]—assuming, of course, that the framers did envision such national "uniformity."

Stevens blithely dismissed states' rights concerns. Responding to the petitioners' Tenth Amendment argument, Stevens maintained that it "misconceives the nature of the right at issue because that Amendment could only 'reserve' that which existed before."[246] Stevens also rejected the petitioners' argument that state-imposed term limits should be viewed as permissible exercises of the states' power under Article I, § 4, to regulate the "Times, Places, and Manner of Holding Elections." In an intriguing passage of his opinion, Stevens maintained that the framers intended the Elections Clause to permit states "procedural regulations" only, "not to provide States with license to exclude classes of candidates from federal office."[247]

Interestingly, Stevens' opinion concluded by noting the political nature of the issue. "The merits of term limits, or 'rotation,' have been the subject of debate since the formation of our Constitution," and remain hotly

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people of the United States are represented not as individual citizens of the United States but as citizens of the several states.

[245] *Term Limits*, 115 S. Ct. at 1864. Justice Kennedy's concurring opinion was even more stridently nationalistic, concluding that "there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 1875.

[246] *Term Limits*, 115 S. Ct. at 1854. Here, Stevens echoed John Marshall's reasoning in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), rejecting the argument that "the Constitution's silence" on the power of states "to tax corporations chartered by Congress implies that the states have [the] 'reserved' power" to do so. *Id.*

[247] *Term Limits*, 115 S. Ct. at 1867-71 (questioning of the constitutionality of state regulations that have "the likely effect of handicapping a class of candidates" and thus create additional qualifications indirectly). Professor Rotunda has observed that "[o]ver the years, states have enacted a host of restrictions that govern and place qualifications on persons running for Congress"; among them, requirements that candidates resign from certain other offices before running for Congress, requirements that candidates not be listed on the ballot unless they meet demonstrated-support or party-affiliation requirements, prohibitions on write-in votes, and requirements that candidates win primaries. "The Court has upheld such requirements if they are, in general, reasonable." Rotunda, *supra* note 241, at 152. One may wonder about the full implications, for these and other "ballot access" regulations that the Court has upheld in the past, of Justice Stevens' test. *Term Limits*, 115 S. Ct. at 1870. Under his reasoning, should the Court strike down as unconstitutional state prohibitions on write-in candidates, as well as onerous ballot-access requirements that effectively exclude Libertarians and other third-party candidates?

contested today.[248] While conceding that "[i]t is not our province to resolve this longstanding debate"—an observation that might justify the Court's abstention under the political question doctrine—Stevens nevertheless held that "allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework."[249] The conclusion that the change would be "fundamental," of course, rested upon Justice Stevens' rather unpersuasive use of historical evidence and his appeal to nebulous "principles of our democratic system."[250] Perhaps, then, the majority position was characterized not only by its nationalism but also its apparent elitism. Rather than permitting the people to decide on the wisdom of congressional term limits on a state-by-state basis, the majority decided to resolve the debate on constitutional grounds, thereby effectively killing the congressional term limits movement.[251]

Justice Thomas began his opinion for the dissenters—whom I shall label the "populists" on the Court—by observing the irony in the majority's claim to base its decision on the right of "the people" to choose whom they

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[248] *Term Limits*, 115 S. Ct. at 1871. The term-limits movement, a broad-based grassroots assault on the political establishment, was tremendously successful with voters in the early 1990s. By 1995, voters in twenty-one states (plus Utah and New Hampshire, by legislative action) had approved term limits for their members of Congress; twenty states have term limits on their state legislatures, and forty states on their governors. Grover G. Norquist, *A Limited Future*, AMERICAN SPECTATOR, Aug. 1995, at 58-59 (citing data from U.S. Term Limits). Although the term-limits movement is a recent political phenomenon, the idea of term limits—called "rotation in office" by the founders' generation—is not new; it is deeply rooted in the radical Whig tradition that shaped early American political thought. *See* Mark P. Petracca, *Rotation in Office: The History of an Idea*, *in* LIMITING LEGISLATIVE TERMS 19-43 (Gerald Benjamin & Michael J. Malbin eds., 1992); David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131, 208 n.314 (1992).

[249] *Term Limits*, 115 S. Ct. at 1871.

[250] *Id.* at 1856, 1862.

[251] As observed *supra* note 248, by 1995 over twenty states had passed laws or voter initiatives limiting the terms of members of Congress. The effect of the Court's decision was to nullify those efforts, depriving the people of the only recourse they had directly to impose term limits; the movement has been forced either to lobby Congress itself to propose a constitutional amendment or to lobby the state legislatures to call for a convention to propose an amendment. Although term-limit supporters have expressed confidence in their ability ultimately to succeed—*see* Norquist, *supra* note 248, at 58—the prospects for a constitutional amendment remain doubtful. As one commentator wrote shortly before the *Term Limits* decision, "[n]o part of the Republican Contract with America has generated more opposition within the GOP than term limits," and this waning support poses a serious obstacle to passage. Doug Bandow, *Real Term Limits: Now More than Ever*, POLICY ANALYSIS (Cato Institute, Washington, D.C.), Mar. 28, 1995, at 1-2.

please, noting that the immediate effect of the Court's decision was to invalidate an Arkansas provision that won 60% of the votes cast in a general election and carried every congressional district in the state.[252] Following up on his opinion in *Lopez*, Thomas again emphasized the Tenth Amendment: since the Constitution is silent on the question of additional qualifications for members of Congress, the power to impose them is "reserved" by the Tenth Amendment to the states or to the people.[253]

Justice Thomas' opinion demonstrated a far greater sensitivity to the text of the Constitution and to history than did Stevens'.[254] As Thomas correctly noted

> [a]lthough the United States obviously is a Nation, and although it obviously has citizens, the Constitution does not call for Members of Congress to be elected by the undifferentiated national citizenry; indeed, it does not recognize any mechanism at all (such as a national

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[252] *Term* Limits, 115 S. Ct. at 1875 (Thomas, J., dissenting).

[253] *Id.* at 1875-77.

[254] For example, in discussing the McCreery episode, Justice Thomas gave a far more complete account of the history of the debate in Congress, noting that it was resolved on the factual question of Mr. McCreery's residency, leaving unresolved the constitutional issue, and showing that the House in 1807 was "deeply divided" on the question. *Id.* at 1888. Justice Thomas also cited the same Jefferson document cited by Justice Stevens—a letter to Joseph Cabell written in 1814—and, although both Justices Stevens and Thomas quoted Jefferson out of context, Justice Thomas did so less egregiously. *Id.* at 1888-89. The full text of the letter shows that, after his retirement from the presidency, Jefferson did an about-face on this issue. His earlier view—an "off-hand opinion" contemporaneous with the debate in Congress over the McCreery case—was essentially in agreement with Justice Stevens' view: that the states could not add any qualifications to those which the Constitution has prescribed. (Significantly, Jefferson referred to members of Congress as "their"—i.e., the states'—members.) However, upon further reflection, in 1814, Jefferson doubted the correctness of his earlier opinion and essentially agreed with the position taken by Justice Thomas in this case: that the Constitution imposes *some* qualifications but leaves others to the discretion of the states, pursuant to the general reservation of powers under the Tenth Amendment. Jefferson added, however, that he was not "too confident" of this opinion, viewing it as "one of the doubtful questions on which honest men may differ." He went on to caution Joseph Cabell against a proposal (apparently then being considered in the Virginia legislature) to require that Virginia's members of Congress reside in the district for which they were elected. Unless such a residency requirement were of "urgent" necessity, Jefferson felt that it would be best to "let it lie undisturbed." He viewed it as another instance of his general rule of thumb, that "where the line of demarcation between the powers of the General and the State governments was doubtfully or indistinctly drawn, it would be prudent and praiseworthy in both parties, never to approach it but under the most urgent necessity." Letter of Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), *in* 9 THE WRITINGS OF THOMAS JEFFERSON 451-52 (Paul L. Ford ed., 1898).

> referendum) for action by the undifferentiated people of the Nation as a whole.[255]

Both the text of the Constitution and the intent of the framers amply demonstrate to Thomas that it is the people of the *several* states who are represented in Congress, not the people of the *United* States, as the nationalists in the majority assume.[256] Therefore, to Thomas, the issue is: May the people of the states exercise a reserved power to set eligibility requirements for *their own representatives*?

Perhaps the most important aspect of Justice Thomas' Tenth Amendment analysis in the *Term Limits* case is his response to Justice Stevens' argument in the majority opinion that the Amendment "could only 'reserve' that which existed before."[257] As Justice Thomas aptly observed, Stevens' argument placed "an enormous and untenable limitation on the principle expressed by the Tenth Amendment."[258] As he explained it,

> [t]he majority's essential logic is that the state governments could not "reserve" any powers that they did not control at the time the Constitution was drafted. But it was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of *the people* of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.[259]

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[255] *Term Limits*, 115 S. Ct. at 1882 (Thomas, J., dissenting). Among the features of the Constitution that support Thomas' analysis are ratification by the people in the several states, the equal representation of the states in the Senate, and voting by states in the Electoral College.

[256] Conceding that the strongest support for the majority's view came from Story's *Commentaries*, Thomas dismissed Story as an authority on originalist grounds: As Story was "not a member of the Founding generation," his views "[r]ather than representing the original understanding of the Constitution . . . represent only his own understanding" at the time he wrote his treatise, "a half century after the framing." More importantly, Thomas also noted that Story had a strong nationalist bias. *Id.* at 1880.

[257] *Id.* at 1854.

[258] *Id.* at 1877. It is also an argument that backfires on the majority—for, as Thomas noted, during the Articles of Confederation period the states "unquestionably" had enjoyed the power to establish qualifications for their delegates to Congress, above and beyond the qualifications created by the Articles themselves. *Id.* at 1878 n.3.

[259] *Id.* at 1878.

Thus Justice Thomas showed his appreciation of the fundamental fact that the Tenth Amendment was not about "states' rights." Rather it was designed to protect not only the powers of state governments but also the powers of the people themselves.

Arguably, the weakness of Thomas' opinion was that it assumed that the imposition of additional qualifications is a "power," like other powers of government, when it rather might be more appropriately seen as a constitutional limitation.[260] Surely the Tenth Amendment was not intended to permit amendment of the Constitution; that would run afoul of the basic principle Thomas recognized in his *Lopez* opinion, that every provision in the Constitution should be given full effect. What, then, of Article V, which specifies the procedure for amending the Constitution? Had Justice Stevens' opinion for the majority focused more on this textualist argument, rather than expounding on more dubious propositions, Thomas might have been less confident in dissent.[261] Nevertheless, if the Tenth Amendment was a red herring in this case, it was raised by the majority, and in so doing, the majority gave Thomas an opportunity to further emphasize the significance of the Amendment.

IV. ORIGINALISM AS "PRINCIPLED JUDICIAL ACTIVISM": THE UNFULFILLED PROMISE OF JUSTICE THOMAS' JURISPRUDENCE

Justice Thomas' opinions in *Lopez* and *Term Limits* confirm that he seeks to follow an originalist theory of constitutional interpretation,[262] but what kind of originalist is he? There are at least two schools of "original

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[260] As previously observed, *supra* note 254, Jefferson's 1814 letter was ambivalent. Jefferson seemed to agree with Thomas' view that it is the people of the several states who were represented in Congress (after all, in his Kentucky Resolutions, Jefferson viewed the Constitution basically as a compact among the states); and, in the passage quoted by Thomas, he did assume that the imposition of additional qualifications was a "power" reserved to the states. But are term limits the same as the type of disqualifications Jefferson cited in the 1814 letter (lunacy, conviction of a serious crime, or non-residency)? Or, rather, are they more in the nature of the basic structural characteristics for composition of each house of Congress specified in Article I of the Constitution?

[261] At the very end of his majority opinion, Justice Stevens raised the Article V argument—almost as an afterthought—noting that "allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework," and thus would by-pass the amendment procedures set forth in Article V. *Id.* at 1871.

[262] One constitutional scholar has called Thomas' opinions in *Lopez* and *U.S. Term Limits* "the most uncompromising originalist opinions in decades." Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 501 (1996).

intent" jurisprudence:[263] the more famous theory of interpretation advanced by judicial restraint conservatives such as former Attorney General Edwin Meese and former Judge Robert Bork;[264] and the lesser-known theory of "principled judicial activism" advanced by Randy Barnett and other libertarian scholars.[265]

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[263] For scholarship representative of both of these schools, see generally Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y 237 (1996). It is appropriate that this symposium was published in the *Harvard Journal of Law & Public Policy*, the journal of the Federalist Society for Law and Public Policy Studies, for the Federalist Society—as an association of conservatives and libertarians—comprises members of both schools. A possible third school of originalism is the so-called "new natural law" movement. *See* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (1994); HADLEY ARKES, BEYOND THE CONSTITUTION (1990). Scholars in this movement have criticized the leading proponents of conservative originalism, such as Robert Bork, as legal positivists who repudiate the very existence of natural law and therefore exclude from constitutional interpretation "higher law" principles like those of the Declaration of Independence. *See* JAFFA, *supra*, at 22-23 (arguing, following Jefferson and Madison, that the Declaration of Independence was the best guide to the genuine principles of the Constitution); ARKES, *supra*, at 17 (arguing that the framers justified the Constitution "by an appeal to those standards of natural right that existed *antecedent* to the Constitution" and that therefore "the Constitution produced by the Founders cannot be understood or defended if it is detached from those moral premises"). It should be noted further that some libertarian scholars have argued that natural rights—as distinct from natural law—ought to inform constitutional interpretation. *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 107-108 (1995) (distinguishing natural rights from natural law). Justice Thomas' pre-confirmation writings—in particular, his essay in *Howard Law Journal* cited *supra* note 8—suggest his adherence to either the natural law or the natural rights school, at least insofar as he accepted the general notion that the principles of the Declaration of Independence ought to guide constitutional interpretation. Thomas, however, has yet to demonstrate application of this notion in his Supreme Court opinions; therefore, the discussion in this part of the article focuses on the basic tension between the conservative and libertarian schools without further exploring the tension between natural law and natural rights.

[264] *See* Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22 (1985); BORK, *supra* note 36, at 5-9.

[265] *See generally* James A. Dorn & Henry G. Manne, *Editors' Preface* to ECONOMIC LIBERTIES AND THE JUDICIARY xix-xx (James A. Dorn & Henry G. Manne eds., 1987) (describing principled judicial activism as an approach to constitutional interpretation that provides an alternative to both liberal judicial activism and conservative judicial restraint: "Principled judicial activism places individual rights and limited government at the forefront of the constitutional debate and seeks to restore property rights to the central position they held in the Founders' Constitution. Under this approach to constitutional interpretation emphasis is placed on the text and structure of the Constitution—viewed within a natural rights framework—rather than on the preferences of judges or the power of majorities."). For examples of this libertarian scholarship, see Randy E. Barnett, *Judicial Conservativism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987); STEPHEN

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The conservative jurisprudence of "original intent" claims to be more objective in its theory of constitutional interpretation because it focuses on the text of the Constitution "as understood at the enactment."[266] As critics of conservative originalism have pointed out, however, the conservatives' claim is flawed because conservatives generally have ignored natural rights theory and its pervasiveness among Americans of the founders' generation. In particular, critics argue, conservative originalists have failed to give meaning to the Ninth Amendment, the provision in the Constitution that gives explicit textual recognition to unenumerated natural rights.[267] Robert Bork's famous characterization of the Ninth Amendment as an "inkblot"—an offhand metaphor he gave at his Senate confirmation hearings[268] and

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MACEDO, THE NEW RIGHT V. THE CONSTITUTION (rev. ed. 1987); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

[266] BORK, *supra* note 36, at 5, 143-44; *see also* Meese, *supra* note 264, at 26 (describing the "jurisprudence of original intention" as adhering to three basic rules of interpretation):

> Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

[267] *See* Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 969 (1992). The most thoughtful, or sophisticated, of the conservative originalists has challenged this "natural rights" reading of the Ninth Amendment, arguing instead that the Amendment was originally intended only to affirm the general reservation of rights embodied in the enumerated powers scheme of the Constitution. Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). For responses to Professor McAffee's interpretation, see generally 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 18, at 29-44, 367-90 (essays of Randy E. Barnett, David N. Mayer, and Steven J. Heyman). The basic flaw in Professor McAffee's approach, in my view, is that it fails to fully account for the relationship of the Ninth and Tenth Amendments: as noted *supra* text accompanying notes 35-38, Madison intended the two amendments to complement each other, as solutions to the two "dangers" that Federalists argued would ensue from the addition of a bill of rights to the Constitution. The Ninth Amendment was intended to guard against the loss of rights; the Tenth Amendment, to safeguard the enumerated powers scheme—the purpose that McAffee mistakenly attributes to the Ninth.

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> I do not think that you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says, "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot.

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explained more fully in his book[269]—is quite revealing. It shows, for a constitutional scholar who claims to be guided by the "original intention" of the framers, an appalling ignorance of one of the most important arguments raised in the ratification debates, the Federalists' argument that it would be "dangerous" to add a bill of rights to the Constitution.

Conservative originalists' lack of understanding about the history of the Bill of Rights, which largely explains their disparagement of the Ninth Amendment, also explains their reduction of the Tenth Amendment to simply a guarantee of federalism. As noted above in Part I, the Federalists identified two dangers that would flow from the addition of a bill of rights: first, that it would result in the loss of rights not enumerated; and second, that it would undermine the enumerated powers scheme. The Ninth and Tenth Amendments were intended by Madison to solve these problems by providing rules of interpretation to safeguard, respectively, both unenumerated rights and enumerated powers. In light of this basic purpose of the two amendments, one might argue that they are key not only to the Bill of Rights but to the Constitution as a whole—its "foundation," as Jefferson considered the Tenth Amendment. Not surprisingly, however, conservative originalists have seemed as oblivious to the original meaning

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Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong. 249 (1987) (testimony of Robert Bork).

[269] BORK, *supra* note 36, at 183-85 (arguing that although "[t]here is almost no history that would indicate what the ninth amendment was intended to accomplish," its possible purpose was the protection of rights guaranteed by the various state constitutions). In the book, Bork also applied the ink blot metaphor to the Fourteenth Amendment privileges and immunities clause. *Id.* at 166. Contrary to Bork's assertion, however, the legislative history of the Fourteenth Amendment is replete with proponents' explanation of the meaning of "privileges and immunities." *See, e.g.*, THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 98, at 219 (in the debate in the Senate on May 23, 1866, Sen. Howard identifying "the privileges and immunities" of citizens of the United States, which included the rights guaranteed by the first eight amendments to the Constitution). Thus, Bork's assertion that "[t]hat clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter," is blatantly wrong. Bork, *supra* note 36, at 166. The Fourteenth Amendment privileges and immunities clause became a dead letter only after Justice Miller, in his opinion for the majority of the Court in the *Slaughter-House Cases*, interpreted the clause so narrowly as to make it virtually meaningless—what Justice Field in his dissent correctly criticized as reducing the Fourteenth Amendment to "a vain and idle enactment." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96. Tellingly, Bork praised the *Slaughter-House Cases* as "a narrow victory for judicial moderation" and chastised the dissenters for being "radical." BORK, *supra* note 36, at 38-39. For a devastating critique of Bork's book—detailing the many manifestations of his "failure as an historian"—see Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1425 (1990).

of the Tenth Amendment as they have the Ninth. Edwin Meese, for all his criticisms of rights-oriented judicial activism,[270] has not complained as vociferously about the activism of the justices of the "Roosevelt" Court who, as argued above in Part II, essentially read the Tenth Amendment out of the Constitution. Robert Bork, while criticizing the New Deal Court for its abdication of federalism, nevertheless has concentrated his criticism on that Court for its keeping alive substantive due process.[271]

Because of its emphasis on judicial restraint, conservative originalism has justly been criticized as a jurisprudence that results in

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[270] Decrying the tendency of activist justices on the Court "to view the Constitution—more accurately, part of the Constitution, provisions of the Bill of Rights and the fourteenth amendment—as a charter for judicial activism on behalf of various constituencies," the former Attorney General has cited as examples rulings that appeal "to social theories, to moral philosophies or personal notions of human dignity, or to 'penumbras,' somehow emanating ghostlike from various provisions . . . in the Bill of Rights"—apparent references, respectively, to Chief Justice Warren's opinion for the Court in *Brown*, to Justice Brennan's opinions in the death penalty cases, and to Justice Douglas' opinion for the majority of the Court in *Griswold v. Connecticut*. Meese, *supra* note 264, at 27.

[271] BORK, *supra* note 36, at 56-57. Bork understands the Tenth Amendment as a provision guaranteeing federalism, which he defines as "[l]eaving the states as the sole regulators of areas left beyond federal power"; he further argues that federalism thus defined is "the only constitutional protection of liberty that is neutral." *Id.* at 52-53. Thus, in praising the Supreme Court's 1935 *Schechter* decision, he concludes, "[t]here is much to be said . . . for a Court that attempted to preserve federalism, which is a real constitutional principle, by setting limits to national powers." *Id.* at 53. Bork's characterization of federalism as a "neutral"—i.e., "real"—constitutional principle is particularly telling. His explanation is so astonishing it deserves to be quoted in full:

> The various amendments to the Constitution specify what freedom is protected—freedom of speech, press, religion, freedom from unreasonable searches, and so on. If a liberty you cherish does not fall within one of the specified categories (or does not appeal to judges who are making up new constitutional rights), you will receive no protection from the courts. *But if another state allows the liberty you value, you can move there, and the choice of what freedom you value is yours alone, not dependent on those who made the Constitution.* In this sense, federalism is the constitutional guarantee most protective of the individual's freedom to make his own choices.

Id. (emphasis added). Apparently, to Bork, liberty is a simply a matter of personal taste, as subjective as one's taste in music or art. It is true that federalism by its very nature is an effective device for limiting government and thus preserving liberty. *See generally* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 184 (1960). Federalism, however, is no panacea, for state and local governments—all the way down to the local zoning board—can be as destructive of liberty and property rights as can the federal government. *See* CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM (1993).

majoritarianism.[272] In its extreme manifestation, conservative originalism reduces judicial review to an enforcement of only those provisions of the Constitution explicitly limiting federal powers.[273] Ironically, many conservative originalists do so in the name of upholding a "right" found nowhere in the Constitution—the "right of self-government"[274] or the right of the majority to use legislation to force their policy choices on everyone else[275]—which under libertarian theory is not a right, properly speaking, at all.[276] Judicial restraint conservatives may be called Hamiltonian in the sense that their reading of the Constitution, like Hamilton's in his 1791 opinion on the bank bill, assumes that the essential purpose of the document is to empower government.[277]

As libertarian critics of conservative originalism have noted, however, the Constitution in many of its provisions is anti-majoritarian.[278] From a

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[272] Stephen Macedo has argued that "the conservative invocation of Original Intent has less to do with reverence for the ideas of the Founders than with a political preference for majoritarian power over individual rights and liberty." MACEDO, *supra* note 265, at 23. He adds that "[t]his preference . . . controls the conservatives' use of the idea of Original Intent and thereby forms the real basis of their theory of the Constitution." *Id.* at 25; *see also* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1370 (1990) (referring to Robert Bork's "democracy-mongering").

[273] *See* Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 633 (1993) (arguing that "if the [Supreme] Court cannot say that a [legislative] policy choice is [explicitly] prohibited by the Constitution, it can have no basis for declaring it unconstitutional").

[274] BORK, *supra* note 36, at 353. As Bork uses the term, it refers to the "right" of political majorities to govern through legislation—not the right of individuals to govern themselves.

[275] *See* Graglia, *supra* note 273, at 633; *see also* Frank H. Easterbrook, *Alternatives to Originalism?* 19 HARV. J.L. & PUB. POL'Y 479, 484 (1996) (arguing that "the principal function of the Constitution is to enable majorities to legislate").

[276] *See* Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1188 (1979) (describing the right to noninterference as "the most basic general right we have" and all other general rights as "simply more specially described exemplifications of this right"); *see also* AYN RAND, *Man's Rights, in* THE VIRTUE OF SELFISHNESS 108-17 (1964).

[277] As observed *supra* note 53, Hamilton's opinion began by stating his cardinal principle that "every power vested in a government is in its nature *sovereign*" and concluded that Congress was empowered by the Constitution to exercise all powers "not precluded by restrictions & exceptions specified in the constitution." It is interesting to note that Hamilton did not go as far as have some modern conservatives in empowering government, for Hamilton also added the restriction that the means chosen by government must be "not immoral" and "not contrary to the essential ends of political society." Thus even Hamilton accepted unwritten "higher law" principles as limitations on government.

[278] Citing such provisions as the Electoral College, staggered elections, long terms for senators and the President, separation of powers, and the scope of the judicial power,

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Jeffersonian perspective, the essential purpose of the Constitution is not to empower government but to restrain it; that, after all, is the reason for having a written constitution and the devices found within it—the enumeration of powers, the division of powers between the federal government and the states, the separation of powers among the three branches of government, and the declaration of rights—which Jefferson called the "chains of the Constitution" which "bind down those whom we are obliged to trust with power."[279] To the libertarian proponents of "principled judicial activism," the conservative originalists' emphasis on judicial restraint is misplaced; judges ought to be "activist" in enforcing the libertarian guarantees of the Constitution.[280]

To fully give meaning to the founders' principles—the "spirit" as well as text of the Constitution[281]—originalist jurisprudence ought to draw a

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Stephen Macedo has argued, "[d]irect democracy and majoritarianism were decisively rejected by the Framers, and the system of government established by the Constitution embodies this rejection." MACEDO, *supra* note 265, at 28. Noting also the many provisions in the Constitution that explicitly protect individual liberties—including property rights and economic freedom as well as other, non-economic liberties—Macedo concluded that the Constitution "is basically concerned not simply with empowering the people's representatives to govern, but with checking and limiting the powers of legislative majorities in a host of important ways, both procedurally and substantively." *Id.* at 36.

[279] Thomas Jefferson, "Fair Copy" of the Kentucky Resolutions (Nov. 1798), *in* 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 254, at 304-305. Jefferson's description of the "chains of the Constitution" succinctly summarizes his constitutionalism. *See* MAYER, *supra* note 33, at 321.

[280] *See* MACEDO, *supra* note 265, at 60 (calling for closer judicial scrutiny of all government restrictions on liberty: "[P]rincipled activism would require, at the very least, that governments provide 'real and substantial' justification for restrictions on the full array of liberties protected by the Constitution's scheme of values."); Barnett, *supra* note 18, at 10-12 (arguing that the Ninth Amendment should be implemented by judges through application of a presumption in favor of liberty).

[281] As Randy Barnett has argued, the framers should be viewed as "designers" or architects of the "machine" we call the Constitution:

> We consult them when we want to know how the machine is supposed to work, not because they are a surrogate for the majority of the people who lived two-hundred years ago, but because they might have special insight into the machine they designed—especially its internal quality-control procedures. They gave its purpose and design much thought—perhaps more thought than we have—and we benefit from their learning in interpreting their design.

Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 408 (1996). Thus, Barnett concludes, "We are 'bound' to adhere to their principles because

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basic distinction between the power-granting clauses of the Constitution and its power-limiting, or rights-guaranteeing, provisions. The same theory of textual interpretation ought not apply to both because the framers' overall intent in writing the Constitution was to limit the powers of government.[282] As Stephen Macedo has aptly described it, the vision of the founders was one "wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights."[283] In light of this fundamental intention of the framers, originalist jurisprudence ought to emphasize one of the cardinal rules of interpretation: to interpret each provision of the Constitution in light of its place within the document as a whole. Such a "contextual" theory of interpretation[284] would require judges to interpret power-granting clauses of the Constitution quite strictly, according to the original intent of the framers, but to interpret power-limiting, or rights-guaranteeing, provisions quite broadly—beyond what the framers may have specifically intended—in order to effectuate the framers' fundamental intent of limiting governmental power and thereby safeguarding individual rights.

As I have argued in my book on Thomas Jefferson's constitutional thought, Jefferson did exactly that: he adhered to a "contextual" theory of constitutional interpretation, the context being his understanding of the Constitution as a compact among the states to form a national government for specified purposes. In interpreting the provisions of the Constitution that granted power to the federal government, Jefferson adhered to a

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they are as vital to protecting liberty as the principles by which one designs a bridge are to preventing its collapse. We ignore them at our peril." *Id.* at 410.

[282] The original Federal Constitution, of course, limited primarily the powers of the federal government, with only a few limitations (such as those found in Article I, § 10) placed on the states. Subsequent amendments to the Constitution, particularly the Fourteenth Amendment, significantly limited the powers of state governments as well.

[283] MACEDO, *supra* note 265, at 32; *see also* Ackerman, *supra* note 269, at 1438 (chastising Robert Bork for "his grim determination to cut up our constitutional text into such small pieces that the Framers' larger commitment to individual liberty is rendered invisible").

[284] By "contextual," in this sense, I do not mean a results-oriented jurisprudence, but rather a jurisprudence that views the Constitution holistically. Judges who fail to interpret particular provisions of the Constitution in light of their relation to the overall purpose of the document—to limit the powers of government and to safeguard individual rights—are guilty of what Ayn Rand called the fallacy of "context-dropping." *See* AYN RAND, *Censorship: Local and Express, in* PHILOSOPHY: WHO NEEDS IT 210, 226 (1982) (criticizing Chief Justice Burger's reaffirmation, in one of the Burger Court's "obscenity" decisions, of the Court's reluctance to question Congress' commerce power). I am grateful to Tom Johnston for reminding me of Rand's concept and its relevance to constitutional interpretation.

"canon" that called for the provision to be construed in accordance with the "'probable [meaning] in which it was passed.'"[285] For evidence of the framers' intent, he frequently cited the *Federalist Papers* as an authoritative guide; and as his opinion on the bank bill shows, he also relied on Madison's notes of debates in the Constitutional Convention.[286] When he interpreted power-limiting, or rights-guaranteeing, provisions of the Constitution, however, Jefferson ignored original intention and construed the text quite broadly.[287] Thus, Jefferson's reputation as a "strict constructionist" of the Constitution is undeserved; he construed strictly—under a strict intentionalism form of originalism—only those provisions that granted powers to the federal government.[288] With regard to other provisions of the Constitution, he followed a more moderate form of originalism or dispensed with an originalist interpretation altogether, following instead "'the plain and ordinary meaning'" of the language without regard to the specific intent of the framers.[289] Jefferson's apparent

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[285] MAYER, *supra* note 33, at 285-86 (alteration in original) (quoting Jefferson to Justice William Johnson (June 12, 1823)).

[286] As discussed *supra* note 50, Jefferson cited the Convention's rejection of a proposal to empower Congress to charter corporations as evidence of the framers' intent not to give Congress the power to incorporate a bank.

[287] For example, in the fifth of his Kentucky Resolutions, Jefferson resorted to an ingenious constitutional argument that involved a literal, but certainly nonoriginalist, interpretation of one of the limits on Congress' powers: he maintained that the Alien Act was void because it violated the clause in Article I, § 9 that prohibited Congress prior to 1808 from banning "the Migration or Importation of Such Persons as any of the States now existing shall think proper to admit." U.S. CONST., art. I, § 9, cl. 1. Surely Jefferson knew the framers' intent was to protect the foreign slave trade; however, he applied the language literally to prevent Congress from restricting the entry into America of "alien friends"—in this case, French nationals. MAYER, *supra* note 33, at 203. Similarly, Jefferson interpreted the First Amendment religion clause quite broadly, considering its prohibition on any law "respecting an establishment of religion" as erecting, in his famous phrase, "a wall of separation between Church and State." As president, he followed this broad interpretation of the First Amendment in justifying his refusal to issue proclamations for national days of prayer or thanksgiving. *Id.* at 163-65.

[288] In addition, Jefferson adhered to a fairly strict theory of separation of powers which, among other things, constrained his actions as president in those areas he regarded as the prerogatives of Congress. *See id.* at 235-44.

[289] *Id.* at 370 n.70 (quoting Jefferson to James Madison (Dec. 24, 1825)). For a critical discussion of various forms of originalism, ranging from "strict textualism" to "moderate originalism," see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980). Brest's classifications do not include the contextualist, or holistic, approach taken by Jefferson and suggested by modern proponents of "principled judicial activism."

inconsistency can be explained as a consistent adherence to a contextualist, or holistic, theory of constitutional interpretation.

As noted above in Part III, in the discussion of his concurring opinion in *Lopez*, Justice Thomas has appeared quite Jeffersonian in his understanding of the Tenth Amendment in two respects. First, like Jefferson, he saw the Amendment as the fundamental principle of the Constitution, one designed to ensure that "most areas of life . . . would remain outside the reach of the Federal Government." Second, he also followed Jefferson in interpreting the Commerce Clause fairly strictly, understanding that to do otherwise would jeopardize the entire enumerated powers scheme of the Constitution—for, as he explained it, a broad interpretation of the commerce power would make the rest of Article I, § 8, "superfluous."[290] Justice Thomas thus gave real effect to the Tenth Amendment as a fundamental rule of interpretation of federal powers. Similarly, in his dissent in *Term Limits*, he gave effect to the Tenth Amendment by including among the "reserved powers" of the states—or, more precisely in this case, of the people—the "power" to impose term limits on members of Congress.[291] In both cases Justice Thomas seemed quite Jeffersonian in his narrow interpretation of federal powers and correlatively broad interpretation of reserved rights.

What then about Justice Thomas' interpretation of other provisions in the Constitution? If Thomas were to follow a Jeffersonian, or holistic, theory of constitutional interpretation fully, the strict view that he takes of the power-granting provisions of the Constitution ought to be complemented by a broader view of the provisions that limit governmental powers or guarantee rights. These include not only the first eight amendments to the Constitution and their application to the states through the Fourteenth Amendment but also the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment, read as a substantive limitation on the states to protect life, liberty, and property. How libertarian is Justice Thomas?

During the public debate over Clarence Thomas' nomination to the Supreme Court in mid-July 1991, several commentators observed that Thomas was "no Robert Bork," arguing that his jurisprudence—as revealed in several published writings written near the close of his tenure as chairman of the U.S. Equal Employment Opportunity Commission—

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290 United States v. Lopez, 115 S. Ct. 1624, 1644-45 (1995).

291 U.S. Term Limits v. Thornton, 115 S. Ct. 1842 (1995).

differed significantly from that of judicial restraint conservatives.[292] While some liberal commentators raised fears that Thomas' philosophy of higher law—coupled, perhaps, with his Catholicism—might jeopardize constitutional protection of abortion rights,[293] libertarian commentators confidently predicted that Thomas would be the first principled judicial activist to serve on the Court since the departure of the "Four Horsemen."[294]

It remains to be seen whether Justice Thomas will fulfill these predictions and adopt a Jeffersonian, or libertarian, version of originalism. Justice Thomas did not invoke natural rights in any opinion during his fifteen months on the federal appeals court in Washington, and he has not done so thus far on the Supreme Court. In many of his earliest opinions on the Court, Justice Thomas instead tended to follow Justice Scalia in taking

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[292] *See* Ruth Marcus, *A Conservative, But He's No Robert Bork*, WASH. POST NAT'L ED., July 15-21, 1991; Stephen Macedo, *Hurrah for Judge Thomas's Conservative Activism*, WALL ST. J., July 11, 1991, at A1. Thomas' writings cited in these articles included his 1987 *Howard Law Journal* article, cited *supra* note 8, as well as *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989). In the latter article, Thomas had written that "the higher law political philosophy of the Founding Fathers"—including both "natural rights and higher law arguments"—was "the best defense of liberty and of limited government." He added, "[c]ontrary to the worst fears of my conservative allies," higher law principles do not provide "a license for unlimited government and a roving judiciary"; rather, "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." *Id.* at 63-64.

[293] *See* Marcus, *supra* note 292 (citing concern expressed by a Roman Catholic abortion rights group, Catholics for a Free Choice, over Thomas' invocation of natural law because of its implications for abortion rights); *see also* Lawrence H. Tribe, *"Natural Law" and the Nominee*, N.Y. TIMES, July 15, 1991, at A23 (warning that natural law "has most often been cited to justify moralistic intrusions on personal choice"); Patricia Ireland, *Clarence Thomas Is a Threat to American Democracy and the Bill of Rights*, NAT'L L.J., July 29, 1991, at 17 (describing as "alarming" Thomas' support for the doctrine of natural law). *But see* Michael W. McConnell, *Trashing Natural Law*, N.Y. TIMES, Aug. 16, 1991, at A1 (arguing that Thomas' liberal detractors have mischaracterized the "venerable concept" of natural law and that Thomas' discussions of natural law, far from being "'weird' or dangerous," are consistent with "the best and most widely accepted way to understand the Constitution").

[294] *See* Macedo, *supra* note 292 (arguing that "[t]he promise of Clarence Thomas is that of a principled judicial activism that honors the whole range of constitutional values," including economic liberties); James Taggart, *Judge Thomas versus the Constitutional "Mainstream,"* LIBERTY, Sept. 1991, at 20-21 (arguing that despite Thomas' earlier criticisms of the Ninth Amendment as a "blank check" for unprincipled judicial activism, Thomas will protect natural rights by using the Ninth Amendment as general presumption in favor of liberty).

an extremely narrow view of the rights-guaranteeing, or power-limiting, provisions of the Constitution. In perhaps the most politically explosive case decided by the Court in Justice Thomas' first year, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[295] he was among the dissenters who maintained that *Roe v. Wade* had been wrongly decided and should be overruled. Justice Thomas joined, too, in Justice Scalia's separate dissent, which called into question substantive due process protection of any unspecified liberty interest.[296] Moreover, in one of his first important dissenting opinions on the Court, Thomas—joined by Scalia—took a narrow view of the Eighth Amendment,[297] prompting some commentators to call him the Court's "youngest, cruelest Justice."[298]

In his opinions from the 1994-1995 term, however, Thomas at last seemed to be moving away from Scalia—as their disagreement in the

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[295] 505 U.S. 833 (1992) (reaffirming *Roe v. Wade* in reviewing various provisions of the Pennsylvania Abortion Control Act).

[296] *Id.* at 979-80 (Scalia, J., dissenting).

[297] Hudson v. McMillian, 503 U.S. 1 (1992) (holding that use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the prisoner did not suffer serious injury). The petitioner, a Louisiana prison inmate, was beaten by prison guards and suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate—injuries characterized by the court of appeals as "minor" and, therefore, not violative of the Eighth Amendment, under prior holdings of the Court. Criticizing the majority of the Court for its broadening the scope of the Eighth Amendment to such injuries, Justice Thomas began by describing the original meaning of the Amendment and noted that "[u]ntil recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime." *Id.* at 18 (Thomas, J., concurring). He further observed that after 1976, when the Court "cut the Eighth Amendment loose from its historical moorings and applied it to a broad range of prison deprivations," it nevertheless required "serious" injury inflicted by prison officials acting with a culpable state of mind—prerequisites discarded by the majority by its decision in this case. *Id.* at 20-21. "Today's expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society," Thomas concluded. *Id.* at 28. "In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution" or under state law, "but it is not cruel and unusual punishment." *Id.* at 18. I thank David Bernstein for calling to my attention the significance of Justice Thomas' opinion in this case.

[298] Randall L. Kennedy, *Justice Thomas's First Year*, EMERGE, Oct. 1992, at 35-36 (quoting a *New York Times* editorial). *But see* James Taggart, *Clarence Thomas: Cruel and Unusual Justice?* LIBERTY, May 1992, at 25-26 (while acknowledging that Thomas' position seemed "detached, overly technical, and even callous," arguing that Thomas was drawing a justifiable distinction between constitutional and common law protections of individual rights).

McIntyre case suggests[299]—and has begun to apply a more libertarian originalist jurisprudence. A hopeful sign of Justice Thomas' willingness to use originalism to protect civil liberties is his opinion for a unanimous Court in *Wilson v. Arkansas* that, except in extraordinary circumstances, unannounced searches violated the Fourth Amendment.[300] Thus Thomas' remarkable opinions in *Lopez* and *Term Limits*—which take a broad view of the Tenth Amendment, both as a limitation on federal power and a guarantee of the reserved rights of the states and the American people—were supplemented by other opinions in which, applying originalist principles, he took similarly broad views of specific rights guarantees found in the Constitution.

CONCLUSION

The significance of Justice Thomas' analysis in *Lopez* and *Term Limits* is the key that it provides the rest of the Justices for the Supreme Court's rediscovery of the original meaning of the Tenth Amendment. In both cases, Thomas challenged the post-1937 evisceration of the Amendment which had reduced it to a mere "truism" or, at most, a rule protecting the autonomy of state governments in the narrow sense recognized by the Court in *New York*. Justice Thomas recognizes the Tenth Amendment instead as a fundamental rule of construction limiting the federal government generally to a fairly strict reading of its powers enumerated in the Constitution. He also recognizes that by so limiting federal powers, the Amendment protects not only the rights of the *states*, under a federal system of government, but also the rights of the *people* of the United States, under a constitutional scheme of limited government. By thus understanding the Tenth Amendment as the essential principle—indeed, the "foundation," as Jefferson called it—of the Constitution, Thomas in effect is calling for a reversal of the "New Deal revolution" and a return to the prior, 150-year-old tradition of the Supreme Court in which it took the Amendment seriously.

Whether Justice Thomas will be equally Jeffersonian in his understanding of other power-limiting, or rights-guaranteeing, provisions of the Constitution—particularly as those provisions might be applied as well to the states under the Fourteenth Amendment Due Process Clause—remains to be seen. Only recently has Thomas started to move in the more

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[299] See discussion *supra* note 10.

[300] Wilson v. Arkansas, 115 S. Ct. 1914 (1995). Thomas' historical analysis concluded that the Fourth Amendment reflected the "knock-and-announce principle" of the common law at the time of its framing. *Id.* at 1916-17.

libertarian direction predicted by some commentators at the time of his confirmation hearings. But Justice Thomas' opinions from the 1994-1995 Term give libertarians some reason to be cautiously optimistic and to continue to hope that Thomas truly will be faithful to the framers' Constitution, in all its aspects.