Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers

Vince Lee Farhat

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol29/iss3/14
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THE POPULAR SOVEREIGNTY MODEL OF RESERVED POWERS

I. INTRODUCTION

Nothing in the Constitution deprives the people of each State of the power to prescribe the eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.1

In the last two elections, 24,513,439 Americans voted to limit the terms of their congressional representatives.2 But on May 22, 1995, term limits came up one vote short. In a 5-4 decision, the United States Supreme Court struck down an Arkansas term limit statute, holding that states cannot supplement the qualifications of their congressional representatives beyond those specifically enumerated in the Constitution.3 The Court’s decision effectively invalidated term limit laws passed in twenty-three states.4

_U.S. Term Limits, Inc. v. Thornton_5 “elicited a confrontation among the Justices over the basic structural principles of the federal union.”6 “[A]re we,” as Professor Sullivan writes, “one people insofar as we constitute the federal government . . . or rather, as the dissent would have it, [are we] irreducibly the peoples of the several states?”7 While the _Thornton_ majority held that the states have “no powers respecting the federal government unless the Constitution

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3. Thornton, 115 S. Ct. at 1845.
7. Id.
expressly delegates them," the dissenters vigorously argued that "the states may exercise all powers, even with respect to the federal government, that the Constitution does not . . . withhold."9

In his dissent, Justice Thomas proposed a model of "reserved" powers under the Tenth Amendment that would give the states much greater latitude to act absent specific constitutional preemption.10 Characterizing the states' reserved powers as a function of "popular sovereignty" rather than of "original powers," Thomas lays the foundation for a new and expansive approach to Tenth Amendment jurisprudence.11 While the majority approaches the Qualifications Clause2 from a point of view of expressio unius est exclusio alterius,13 Thomas frames the issue as whether the states have power to act where the Constitution does not specifically preclude action. His affirmative answer carries revolutionary implications for those who advocate a return to constitutional federalism.14

8. Id. (citing Thornton, 115 S. Ct. at 1854).
9. Id. (citing Thornton, 115 S. Ct. at 1876 (Thomas, J., dissenting)).
10. Thomas argues that "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." Thornton, 115 S. Ct. at 1876 (Thomas, J., dissenting). Of course, Thomas's reference to federal powers by "necessary implication" raises the problem that has plagued Tenth Amendment enthusiasts: What to do about the expansive power of Congress under both the Commerce Clause and the Spending Clause? Long viewed as independent grants of federal power, these two provisions in the Constitution have been construed so broadly as to eclipse the Tenth Amendment. See generally Anthony B. Ching, Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Tenth Amendment, 29 LOY. L.A. L. REV. 99 (1995) (discussing the evolution of Tenth Amendment jurisprudence under the Commerce Clause and the Spending Clause). However, the Court's stunning decision in United States v. Lopez, 115 S. Ct. 1624 (1995), may have cleared the way for a narrower reading of the Commerce Clause. Part IV.D of this Note addresses the relationship between Lopez and Thomas's model of reserved powers.
11. Thomas's approach is new because it involves a unique question in modern Tenth Amendment jurisprudence. Although recent cases have addressed the Tenth Amendment barring congressional action that Article I of the Constitution appears to authorize, Thornton raises the question of whether Article I precludes state action that it does not appear to forbid. See infra part IV.B.
12. U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").
13. BLACK'S LAW DICTIONARY 581 (6th ed. 1990) (defining the Latin maxim of statutory construction as "the expression of one thing is the exclusion of another").
14. See H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993) (arguing that the United States has had no constitutional law of
This Note contends that Justice Thomas’s popular sovereignty model of reserved powers, if adopted by a future majority, could return significant portions of federal power to the states. Given the close division of the Court, whoever wins the White House this November may decide whether the dissenter has the opportunity to form a new majority committed to federalism. Part II touches on the definitional problems associated with any discussion of federalism and provides a brief overview of Tenth Amendment jurisprudence. Part III reviews the relevant facts and issues presented in Thornton and describes the reasoning of both the majority and the dissent. Part IV explains why Thornton involves a question of first impression in modern federalism jurisprudence and analyzes Thornton in the context of the Court’s landmark decision in United States v. Lopez. Finally, Part V applies Thomas’s Tenth Amendment model of federalism for most of the last half-century). For purposes of this Note, “constitutional federalism” is defined as the political agenda of states’ rights, justified from the Tenth Amendment perspective. President Reagan best described this political vision in his first Inaugural Address:

“It is my intention ... to demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people. All of us need to be reminded that the federal government did not create the states. The States created the federal government.”

Ronald W. Reagan, Inaugural Address (Jan. 20, 1981), quoted in RONALD REAGAN: THE GREAT COMMUNICATOR 51 (Frederick J. Ryan, Jr. ed., 1995). Constitutional federalism can also be expressed as “antifederalism” as defined in its original sense, connoting resistance to centralization of power in the federal government and a preference for leaving substantial governmental authority with the states. Sullivan, supra note 6, at 80 n.18.

15. Indeed, Thomas’s opinions in the 1994 Term of the Supreme Court were “redolent of first principles and revolutionary gesture.” Charles Fried, Foreword: Revolutions?, 109 HARV. L. REV. 13, 13 (1995). As Charles Fried, Associate Justice of the Massachusetts Supreme Judicial Court, writes:

Twice Justice Thomas, reaching back to the original vision of the Constitution’s Framers, asserted claims about the nature of our federalism that stand in stark contrast to the conception, grown familiar in the last three generations, of the national regime as capable of virtually all power that the Constitution leaves to government.

Id. (citing U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. at 1877-80 (Thomas, J., dissenting); United States v. Lopez, 115 S. Ct. 1624, 1643-46 (1995) (Thomas, J., concurring) (arguing for a return to the original understanding of the Commerce Clause)).

16. Justice Stevens wrote for the five-member majority, which included Justices Kennedy, Souter, Ginsburg, and Breyer. Thornton, 115 S. Ct. at 1845-71. Justice Kennedy filed a separate concurring opinion. Id. at 1872-75. Justice Thomas wrote for the four-member dissent. Id. at 1875-94 (Thomas, J., dissenting). He was joined by Chief Justice Rehnquist, and Justices O’Connor and Scalia. Id.

17. See infra part IV.C.

reserved powers to test the constitutionality of the Brady Handgun Control Act.¹⁹

II. FEDERALISM AND THE TENTH AMENDMENT

A. The Oldest Question in Constitutional Law²⁰

Justice Sandra Day O'Connor has described the question of "the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law."²¹ Unfortunately, "[t]alking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant. It's such a big topic, one can't possibly hope to grasp more than a small part of the beast."²² The threshold problem in surveying this vast field is definitional—what federalism "is" and what it "means" looks different depending on the area examined and the question asked.²³ To make matters worse, since the New Deal era, the Supreme Court has failed to adopt a sustainable and coherent legal basis for federalism:

In a polity called the United States of America, one might assume, there could be no question about the legal character of federalism. The very name suggests the federal character of what many Americans still refer to as "the Union."... It is, therefore, notable that for most of the last half-century, the United States has had no constitutional law of federalism.²⁴

Federalism proponents fall into three principal categories: (1) Tenth Amendment federalists, (2) Guarantee Clause federalists, and

¹⁹. 18 U.S.C. § 922(s) (1994). The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun and subjects purchasers to a background check during that period. The background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. 18 U.S.C. § 922(s)(2) (1994).

²⁰. For a brief and informative historical review of federalism, see Powell, supra note 14.


²³. Id. at 1486.

²⁴. Powell, supra note 14, at 633. Professor Charles L. Black has written that "[t]he issue... is not whether our federal system... has any basis. It has a basis in the political structure of the national government... The issue, rather, is whether the federal system has any legal substance, any core of constitutional right that courts will enforce." Id. (quoting CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 29 (rev. ed. 1970)).
(3) political process federalists. As discussed in detail in the following section, the Supreme Court has used the Tenth Amendment on two occasions in recent years to invalidate congressional laws on federalism grounds. The Court's 1992 decision in New York v. United States reenergized Tenth Amendment federalists and made "federalism claims a growth industry for future litigation." Tenth Amendment federalists contend that otherwise valid congressional acts are always subject to scrutiny under the Tenth Amendment and that federal laws that "coerce" states to pass state legislation to implement federal policy violate state sovereignty under the Tenth Amendment.

Guarantee Clause federalists argue that "the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government," which "implies a modest restraint on federal power to interfere with state autonomy." This school of thought maintains that the Guarantee Clause is the textual embodiment of structural concerns of the Constitution which clearly contemplates a federal system. Guarantee Clause federalists encourage courts evaluating federal intrusions into state autonomy to begin their analysis with the Guarantee Clause, not the Tenth Amendment.

27. Erwin Chemerinsky, Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term, 26 CREIGHTON L. REV. 987, 990 (1993) ("The Court's failure to adopt a clear standard [in New York v. United States] to guide courts applying the Tenth Amendment will lead to numerous challenges to federal laws . . . "). Professor Chemerinsky's prediction has come true. See, e.g., Mack v. United States, 66 F.3d 1025 (9th Cir. 1995) (sheriffs unsuccessfully challenge the Brady Handgun Control Act on Tenth Amendment grounds).
28. New York, 505 U.S. at 166. New York will be discussed in greater detail in the following section of this Note. See infra part II.B.4.
29. U.S. CONST. art. IV, § 4 ("The United States shall . . . guarantee to every State in this Union a Republican Form of Government.").
31. Id.
32. Id. at 1-2.
Finally, process federalists leave the question of the proper division of authority between the Federal Government and the states to the political process itself, choosing to remove the courts from the fray altogether. This approach holds that courts should not invalidate federal statutes for intruding on "traditional functions" of state government because "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."

B. Tenth Amendment Jurisprudence

The Supreme Court has struggled for two hundred years to "reconcile the conflicting demands of state autonomy and national supremacy." The Tenth Amendment has been at the heart of this struggle, and Tenth Amendment jurisprudence evolved as the Supreme Court's vision of the proper role of the federal government changed. Since many of the early cases involving the expansion of federal power dealt with the Commerce Clause, the evolution of Tenth Amendment jurisprudence is intertwined with the evolution of the Commerce Clause. The historical development of the Tenth

33. The Supreme Court briefly embraced this approach in Garcia. However, the Court reasserted its authority to invalidate federal laws based on the Tenth Amendment seven years later in New York.

34. Garcia, 469 U.S. at 550. However, Garcia's rationale that the structure of federal politics protects the autonomy of the states "is simply wishful thinking." Merritt, supra note 25, at 15. In fact, this theory is "so implausible ... as virtually to compel one's skepticism that those who assert [it] can possibly believe it .... [I]t is difficult to take the political science portion of the whole 'safeguards' argument as other than a good-hearted joke." William W. Van Alstyne, The Second Death of Federalism, 83 MICH. L. REV. 1709, 1724 n.64 (1985).

35. For an excellent summary of Tenth Amendment jurisprudence from the Marshall Court to the present, see Ching, supra note 10.


37. Ching, supra note 10, at 103.

38. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . "). Beginning in 1937, the Supreme Court adopted a lenient "rational basis test" in Commerce Clause cases, upholding an exercise of commerce authority so long as Congress could have reasonably concluded that the statute would accomplish the aim of regulating interstate commerce. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). However, after more than 60 years on the sidelines, the Supreme Court has returned to the business of drawing boundaries between federal and state authority on Commerce Clause grounds. See United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (overturning a federal law forbidding firearms within 1,000 feet of a school as beyond Congress's power to regulate interstate commerce).

Amendment breaks down into four principal stages: the Marshall Court (1819-1888), the “Dual Federalism” era (1888-1937), the New Deal (1937-1976), and the Modern Revival (1976-present).

1. The Marshall Court

Two landmark cases marked the expansion of federal power during the tenure of Chief Justice John Marshall—*McCulloch v. Maryland*\(^{41}\) and *Gibbons v. Ogden*.\(^{42}\) The question presented in *McCulloch* was whether the State of Maryland had the power to tax a bank chartered by Congress.\(^{43}\) Marshall wrote that an “original right to tax” such federal entities “never existed, and the question whether it has been surrendered, cannot arise.”\(^{44}\) Marshall rejected Maryland’s argument that the Constitution’s silence on the subject of state power to tax corporations chartered by Congress implies that the states have reserved power to tax federal instrumentalities.\(^{45}\) He construed federal power broadly, declaring that “all means which are appropriate, which are plainly adapted to that [legitimate] end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”\(^{46}\) In this pro-government Federalist victory, Marshall appears to have rejected the Tenth Amendment as an active limitation on federal power.

*Gibbons* addressed whether the State of New York could grant licenses for ships to operate between New York and New Jersey despite a federal law licensing ships to engage in coastal trade.\(^{47}\) The Marshall Court held that states may regulate intrastate commerce, but when these state laws conflict with federal laws enacted pursuant to the Commerce Clause, federal law preempts.\(^{48}\) Marshall’s interpretation of the Commerce Clause in *Gibbons* was broad in two respects. First, he defined “commerce” broadly as including the right to

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40. A thorough review of the history of the Tenth Amendment is far beyond the scope of this Note. The following text aims to place the Tenth Amendment in proper historical context and describe the various cases which are important to understanding the Supreme Court’s discussion in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).
41. 17 U.S. (4 Wheat.) 316 (1819).
42. 22 U.S. (9 Wheat.) 1 (1824).
44. *Id.* at 430.
45. *Id.* at 432-33.
46. *Id.* at 421 (footnote omitted).
48. *Id.* at 210.
seafaring navigation, not just "commodities." According to Marshall, commerce "among the states" involved more than merely transactions between states; it also includes anything that affects other states, even if the activity is strictly intrastate. Second, Marshall reasoned that congressional power to regulate commerce is unlimited so long as Congress can point to an enumerated end. Thus, so long as Congress's purpose is somehow linked to an enumerated power, the Commerce Clause effectively negates the Tenth Amendment as a limitation on federal power.

2. The "dual federalism" era

The "Civil War and its aftermath inaugurated an era in which Congress began to act more vigorously" in regulating interstate commerce. Congress's regulatory efforts generated fierce opposition from interest groups newly burdened by federal limitations on interstate commerce. These groups challenged many of the new federal laws, contending that only the states could regulate their activities. In response, the Supreme Court began to limit the federal government's power by defining commerce more narrowly. Seventy-four years after Gibbons, the Supreme Court retreated from Marshall's vision of a strong federal government in United States v. E.C. Knight Co. The issue in E.C. Knight concerned whether the federal government could invoke the Sherman Antitrust Act to break up a sugar refining monopoly. The Supreme Court held that the Sherman Act did not affect the monopoly because the Commerce Clause proscribed Congress from regulating intrastate manufacturing. The Court argued that manufacturing was a "local" step in the chain of production and not "commerce" subject to federal control. By drawing distinctions among the different steps in the chain of

49. Id. at 189-90.
50. Id. at 194.
51. Id. at 196.
53. Id.
54. Id.
55. See id. at 168.
56. 156 U.S. 1 (1895).
57. Id. at 11.
58. Id. at 17.
59. Id. at 12-15.
production, the Court used the Tenth Amendment to reserve the
regulation of some economic activities to the states. This approach
came to be known as “dual federalism.”

In 1918 the Supreme Court in *Hammer v. Dagenhart* struck
down a federal law prohibiting the interstate transportation of goods
manufactured by child labor. *Hammer* “put the brake on the
expansion of Congress’s Commerce Clause power” and “stood as the
zenith of states’ rights and, correspondingly, private property rights to
be free from government regulation.” The Supreme Court articulated
another approach to limiting federal power under the Commerce
Clause in *Carter v. Carter Coal Co.* *Carter* addressed the constitutionality of the New Deal-era Bituminous Coal Conservation Act as
an exercise of congressional power. The Court found that coal
manufacturing was a local activity and that local manufacturing had
only an “indirect” effect on interstate commerce. The Court
distinguished among activities which directly or indirectly affected
interstate commerce and held that the federal government could only
regulate activities that directly affected interstate commerce.

3. The New Deal

After the election of Franklin Roosevelt to the presidency in
1932, Congress enacted a series of statutes designed to remedy the
economic and social ills associated with the Great Depression. Many business interests opposed much of the New Deal legislation
contending that it interfered with private property rights and
encroached upon the proper domain of the states. Beginning in
1934, the Supreme Court struck down much of this New Deal
legislation on both Due Process and Tenth Amendment grounds.

60. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4
(1950).
61. 247 U.S. 251 (1918).
62. *Id.* at 276-77.
64. 298 U.S. 238 (1936).
65. *Id.* at 278.
66. *Id.* at 304-05.
67. *Id.* at 305.
68. STONE ET AL., *supra* note 52, at 167-68.
69. *Id.* at 168.
70. The three major cases decided on Tenth Amendment grounds were Carter v.
Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation
Act of 1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down
These decisions outraged New Deal supporters. Following his massive victory in the 1936 election, President Roosevelt set out to remake the Supreme Court by proposing his infamous "court packing" scheme.\textsuperscript{71} Although FDR's plan encountered substantial opposition, by the summer of 1937 the Senate was prepared to adopt a modified version of the court-packing plan.\textsuperscript{72} However, before the Senate Judiciary Committee could vote on the matter, the Supreme Court did an about-face in \textit{West Coast Hotel Co. v. Parrish}.\textsuperscript{73} In what became known as "the switch in time that saved Nine," Justice Roberts, who had previously voted to invalidate New Deal legislation, joined the majority in upholding a state minimum wage statute.\textsuperscript{74} The Court's reversal, coupled with the death of Senate Majority Leader Joseph Robinson weeks before the Senate vote, led to the defeat of FDR's court-packing scheme in July 1937.\textsuperscript{75}

The Supreme Court decided cases over the next several years that vastly increased Congress's Commerce Clause power and gutted the Tenth Amendment of any real meaning.\textsuperscript{76} In \textit{NLRB v. Jones & Laughlin Steel Corp.},\textsuperscript{77} the Court upheld the National Labor Relations Act, regulating unfair labor practices, broadly construing congressional power over conduct affecting commerce.\textsuperscript{78} In \textit{Wickard v. Filburn},\textsuperscript{79} the Court upheld the Agricultural Adjustment Act of 1938 establishing wheat production quotas for individual farmers.\textsuperscript{80} Beginning with these two cases, the Court adopted a lenient rational basis test in Commerce Clause cases, validating an exercise of commerce authority provided Congress could have concluded rationally that the statute would accomplish the aim of regulating interstate commerce.\textsuperscript{81}


\textsuperscript{71} See STONE ET AL., \textit{supra} note 52, at 180 ("Seizing on the fact that six justices were over seventy years old in 1937, Roosevelt proposed that one additional justice, up to a total of fifteen, be appointed for each justice over seventy who did not resign or retire.").

\textsuperscript{72} See \textit{id.} at 180-81.

\textsuperscript{73} 300 U.S. 379 (1937).

\textsuperscript{74} STONE ET AL., \textit{supra} note 52, at 181.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} See Ching, \textit{supra} note 10, at 107-10.

\textsuperscript{77} 301 U.S. 1 (1937).

\textsuperscript{78} \textit{Id.} at 49.

\textsuperscript{79} 317 U.S. 111 (1942).

\textsuperscript{80} \textit{Id.} at 129.

\textsuperscript{81} See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277
In *United States v. Darby*, the Supreme Court "relegated the Tenth Amendment to the status of mere window dressing," effectively reading it out of the Constitution for the next thirty-five years. *Darby* involved a criminal violation of the minimum wage provision of the Fair Labor Standards Act of 1938. In its discussion of the Tenth Amendment, the Court declared:

> The amendment states *but a truism* that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment.

In holding that the Tenth Amendment states "but a truism," the Court eliminated the Tenth Amendment as a basis for declaring federal laws unconstitutional. The New Deal Court believed that the Tenth Amendment no longer reserved a "zone of activities for exclusive state regulation and control" and deferred the question of states’ rights to the political process.

4. Modern revival

From the "New Deal until the mid-1970s, the political branches of the federal government acted on the assumption, invariably confirmed by the Supreme Court, that there is no 'legal substance, [no] core of constitutional right' limiting national power in the interests of federalism." In 1976, however, the Supreme Court revived the Tenth Amendment in *National League of Cities v. Usery*. In a 5-4 decision, the Court held that the Fair Labor Standards Act’s wage and overtime provisions, as applied to state and

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(1981). NLRB established what has come to be known as the "affection doctrine": If the activity subject to regulation affects interstate commerce in any way, the regulation is constitutional. In *Wickard*, the Court employed the concept of "aggregation" by looking at the cumulative economic effect of personal wheat consumption on interstate commerce. *Wickard*, 317 U.S. at 127-28.

82. 312 U.S. 100 (1941).
85. *Id.* at 124 (emphasis added).
86. Chemerinsky, *supra* note 27, at 988.
87. *Id.*
local government employees, violated the Tenth Amendment. The Court declared that the Tenth Amendment provided an affirmative check on congressional power: "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress lacks an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."91

_National League of Cities_ sparked a "roar of criticism from the academy"92 because the Court failed to articulate a clear standard "for when federal laws impermissibly usurped state functions."93 The legitimacy of _National League of Cities_ was eroded over the next nine years as the Court struggled to apply the case to other state challenges of federal laws.94 Indeed, the Court found it so difficult to invoke the Tenth Amendment against federal laws that it was never able to actually use _National League of Cities_ to invalidate a federal law.95

The Court finally abandoned its efforts to define an administrable Tenth Amendment standard in _Garcia v. San Antonio Metropolitan Transit Authority_.96 _Garcia_ overruled _National League of Cities_ by permitting the application of the Fair Labor Standards Act to state and local government employees.97 Frustrated with the difficult task of "drawing a line between what is properly the national power and what is properly the states' power,"98 the _Garcia_ Court concluded that the national political process afforded the best protection for states' interests.99 The Court reasoned that "since Congress is composed of elected representatives from the States, States' interests were

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90. Ching, _supra_ note 10, at 111.
91. _National League of Cities_, 426 U.S. at 845.
92. Powell, _supra_ note 14, at 634.
95. See Chemerinsky, _supra_ note 27, at 989.
97. _Id._ at 552-54.
99. _Garcia_, 469 U.S. at 552.
protected by their elected representatives." Garcia appeared to once again remove the federal judiciary from the role of interpreting and enforcing the Tenth Amendment.

Seven years later, however, in New York v. United States the Court "resurrected the Tenth Amendment and returned it to the jurisdiction of the judicial branch." The State of New York challenged the federal Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act provided for penalties against states that did not enter into regional agreements for the disposal of radioactive waste. Instead of creating a federal program to dispose of such waste under its Commerce Clause powers, Congress passed the Act to force the states to take action in developing adequate disposal sites either in-state or by regional agreements. States failing to comply with the act would be forced to take title to all the waste and become liable as the owner of the waste.

The Supreme Court held that the "take title" provision violated the Tenth Amendment. The Court reasoned that federal laws that "coerce" states to pass state legislation to implement federal policies violate state sovereignty under the Tenth Amendment:

[T]he second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

100. Ching, supra note 10, at 114. Ching points out that "Garcia, like Darby before it, expressed the philosophy that the Tenth Amendment was nothing more than a statement of political policy without the force of affirmative prohibition on Congressional action." Id.

101. In his brief dissent, Justice Rehnquist predicted that "in time again [judicial enforcement of the Tenth Amendment will] command the support of a majority of this Court." Garcia, 469 U.S. at 580 (Rehnquist, J., dissenting).

103. Ching, supra note 10, at 118.
104. New York, 505 U.S. at 149.
105. Id. at 152-54.
106. Id. at 150-51.
107. Id.
108. New York, 505 U.S. at 166 (The Constitution "confers upon Congress the power to regulate individuals, not States . . . . [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").
109. Id. at 175-76.
The Tenth Amendment makes it clear that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”¹¹⁰ Despite its brief retreat in Garcia, the Supreme Court has once again asserted its authority to interpret and enforce the Tenth Amendment as an active limit on federal power. The Tenth Amendment is no longer a mere “truism,” but a powerful tool in the legal battle to revive federalism.

C. The Values of Federalism¹¹¹

Professor Kramer writes that federalism is a theory of institutions:

A federal system is one in which political power is divided between central and subordinate authorities . . . [and] the subordinate units possess enclaves of jurisdiction that cannot be invaded by the central government. . . . [T]he critical feature of a federal system is that officials of the subordinate units are not appointed, and cannot be fired, by officials of the central government.¹¹²

But why is a federal system preferable to, say, a unitary system where the federal government exercises complete control over state agencies? What is so inherently valuable about federalism that inspired the Framers to draft a Constitution designed to produce vertical separation of powers?¹¹³ While many argue that states have outlived their usefulness as the American economy and culture have become truly national,¹¹⁴ the American federal system is far from an

¹¹⁰ Id. at 188.
¹¹¹ For an excellent overview of the positive features of federalism, see Merritt, supra note 25. The author has drawn heavily from the sources noted in Professor Merritt's article.
¹¹² Kramer, supra note 22, at 1488 n.5.
¹¹³ Actually, the Framers were probably just being pragmatic; American federalism is more a product of political compromise than political theory. Merritt, supra note 25, at 3. Indeed, “[f]ederalism was the means and price of the formation of the Union.” Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 543 (1954).
¹¹⁴ "Opponents of state sovereignty view the federal system as an outdated relic of the colonial period.” Merritt, supra note 25, at 2. Some critics also contend that federalism hampers the resolution of serious national problems and perpetuates racism and other malignant political agendas. See, e.g., Jesse Choper, The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review, 86 YALE L.J. 1552, 1618-19 (1977); Alpheus Thomas Mason, Judicial Activism: Old and New, 55 VA. L. REV. 385, 391 (1969) (judicial doctrine of dual federalism was a “lethal weapon . . . stalling government
anachronism. Federalism protects the American people from excessive government power, encourages grassroots political participation, promotes ethnic, gender, and political diversity, and paves the way for innovative leadership in public policy.\textsuperscript{115} The following four values of federalism are timeless, bridging the vast expanse of time from the Framing to the twenty-first century.

1. States protect liberty

Federalism guards against the concentration of power in the federal government through a "vertical" separation of powers. James Madison argued that the division of powers between national and state governments would check abuses of government power:

\begin{quote}
In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [federal and state], and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.\textsuperscript{116}
\end{quote}

Alexander Hamilton agreed, writing in Federalist No. 28 that "[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the State governments, and [state governments] will have the same disposition towards the general government."\textsuperscript{117}

State governments obviously cannot check national power like the President checks the Congress through the veto, and state governments must "yield gracefully" when the "federal government chooses to preempt a field within its delegated powers."\textsuperscript{118} However, state governments can restrain national power by opposing federal policies in the courts\textsuperscript{119} and in Congress,\textsuperscript{120} by regulating areas that

\begin{footnotes}
\footnote{115. See infra parts II.C.1-4.}
\footnote{116. The Federalist No. 51, at 349 (James Madison) (C. Van Doren ed., 1973).}
\footnote{117. The Federalist No. 28, at 178 (Alexander Hamilton) (C. Van Doren ed., 1973).}
\footnote{118. Merritt, supra note 25, at 5.}
\footnote{119. "When the Reagan administration attacked quotas and other types of affirmative action for minorities, several states and cities defended those practices in complex lawsuits." Id.; see, e.g., Johnson v. Transportation Agency, 480 U.S. 616 (1987) (county agency defended affirmative action plan in suit that lasted six years and reached the Supreme Court); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478}
\end{footnotes}
the Congress ignores,\textsuperscript{121} and by providing political parties that lack national power with a grassroots power base.\textsuperscript{122} By virtue of the very structure of American politics, states possess significant means by which to restrain the exercise of national power, guarding against the excessive concentration of federal power.

2. States are closer to the people

State and local governments are more accessible to the people, encouraging greater citizen participation in civic affairs. "It is at the local level—the government 'closest to the people'—that citizen participation is most prevalent and significant."\textsuperscript{123} Thomas Jefferson believed that public participation in government enhanced citizen confidence in the democratic process:

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; ... he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.\textsuperscript{124}

\textsuperscript{120} U.S. 501 (1986) (city defended affirmative action plan adopted in consent decree while United States attacked the plan).

\textsuperscript{121} See, e.g., Jonathan Peterson, Governors' Budget Plan Asks Wider Role on Medicaid, L.A. TIMES, Feb. 7, 1996, at A1 (seeking to break the stalemate over the federal budget, the nation's governors proposed a bipartisan plan that included Medicaid and welfare reform).

\textsuperscript{122} For example, although the Reagan Administration rejected the idea of comparable worth for women, at least five states adopted comparable worth legislation in the 1980s. Merritt, supra note 25, at 6.

\textsuperscript{123} The Republican takeover of Congress in the 1994 general elections is one example of how the states can provide a power base for a party's return to national prominence. See NATIONAL REPUBLICAN CONGRESSIONAL COMM., PROJECT '94: CREATIVE CONCEPTS FOR REPUBLICAN CONGRESSIONAL CAMPAIGNS (1994). The National Republican Congressional Committee (NRCC) and House Speaker Newt Gingrich's political organization "GOPAC" conducted candidate recruitment and training programs in conjunction with state and local GOP organizations after President Bush was defeated for re-election in 1992. Id. GOPAC and the NRCC provided local GOP organizations and candidates with polling data, media consulting and weekly "talking points" in their successful effort to coordinate a unified national campaign theme. Id. GOPAC and the NRCC relied on state and local organizations to implement and direct the "Contract with America" campaign plan. Id.

Citizen participation in state and local government also trains people in the techniques of democracy and fosters accountability among elected officials.\textsuperscript{125}

3. States promote diversity

Because state and local governments are more effective at drawing people into the political process, a relatively high proportion of women and minorities hold positions in local government as compared with the national government. For example, in 1985, women held 14.4\% of the seats in state legislatures, three times the proportion of seats they held in Congress.\textsuperscript{126} African-Americans held five percent of the state legislative seats compared with only three percent in Congress, and another 2,685 African-Americans served as mayors or members of city governing boards.\textsuperscript{127} In short, federalism promotes gender and ethnic diversity in American politics.

Federalism also promotes political diversity as “citizens in each state create the type of social and political climate they prefer.”\textsuperscript{128} While Alaska chooses to spend $8,627 per pupil for elementary and secondary education, Utah chooses to spend only $2,053.\textsuperscript{129} Similarly, while Wisconsin has chosen to implement a school choice program allowing parents to send their children to private schools, California has expressly rejected the “voucher” approach to education reform.\textsuperscript{130} Federalism empowers people to express their different social and cultural values through the state legislative process.


\textsuperscript{126} Merritt, supra note 25, at 8 (citing \textit{States Are Found More Responsive on Social Issues}, N.Y. Times, May 19, 1985, at 1, 32).

\textsuperscript{127} Merritt, supra note 25, at 8.

\textsuperscript{128} Id.

\textsuperscript{129} Id. at 8-9.

\textsuperscript{130} Compare Wis. Stat. § 119.23 (1990) (providing every child from a low-income family with a voucher payment to be used to cover the child’s full tuition at any qualifying private school) \textit{with} Proposition 174, California Ballot Pamphlet, Nov. 2, 1993, at 32 (proposing to provide every parent, regardless of income, with a school voucher worth approximately 50\% of the prior year cost-per-student tuition cost). While the State of Wisconsin enacted its voucher program through legislative means, California voucher proponents attempted to pass its program by initiative. However, California voters overwhelmingly rejected Proposition 174 in a 1993 special election. \textit{Election ’93}, CAL. J. WKLY., Sept. 27, 1993, at 2.
4. States encourage innovation

As Justice Brandeis observed, the "[s]tate[s] ... serve as a laboratory" to "try novel social and economic experiments without risk to the rest of the country."\textsuperscript{131} Strong state governments represent a principal source of governmental innovation.\textsuperscript{132} Indeed, "[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment all originated in state legislatures."\textsuperscript{133} After proving their worth at the state level, many of these ideas developed into federal programs.\textsuperscript{134} State governments are closer to the people and thus more responsive to their demands for reform; consequently, the states are able to create new and innovative programs.

III. STATEMENT OF THE CASE

A. Background: The Term Limits Movement

Popular frustration with exceedingly high reelection rates among incumbent members of Congress sparked the national term limits movement.\textsuperscript{135} Turnover in the House of Representatives during the 1980s was almost identical to that of Great Britain's House of Lords, who are appointed for life!\textsuperscript{136} Lee Iacocca aptly observed that "[s]itting Congressmen are almost as likely to be sentenced to jail as they are to be sent home by the voters. Since 1988, six Congressmen went home and five were sentenced to the slammer."\textsuperscript{137} Ninety

\textsuperscript{131} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
\textsuperscript{133} Merritt, supra note 25, at 9.
\textsuperscript{134} In fact, the Constitution itself was drawn from the provisions of several state constitutions. \textit{Id.} at 9 n.46 (citing reprints of Virginia and Massachusetts constitutions in \textit{2 THE FOUNDERS’ CONSTITUTION} 142, at 7-9, 11-23 (P. Kurland & R. Lerner eds., 1987)).
\textsuperscript{136} See 137 CONG. REC. S6273 (daily ed. May 22, 1991) (statement of Sen. Hank Brown); \textit{see also} Gorsuch & Guzman, supra note 135, at 341 (noting that only one incumbent Senator was defeated in the 1990 election and that the overall reelection rate was 96%).
\textsuperscript{137} Gorsuch & Guzman, supra note 135, at 341 (quoting Lee Iacocca, \textit{We Can’t Even...}
percent of all congressional incumbents over the past thirty years who
have run for reelection have been reelected.\textsuperscript{138} Justice Thomas notes
that "[e]ven in the November 1994 elections, which are widely
considered to have effected the most sweeping change in Congress in
recent memory, 90 percent of the incumbents who sought reelection
to the House were successful, and nearly half of the losers were
completing only their first terms."\textsuperscript{139}

Realizing that high reelection rates are due in large measure to
the many advantages of incumbency,\textsuperscript{140} political reformers in both
parties launched a grassroots movement to limit the tenure of elected
state and federal officials.\textsuperscript{141} On November 6, 1990, Colorado
became the first state to limit the terms of its representatives in
Congress.\textsuperscript{142} By an almost three-to-one majority, the people of
Colorado voted to prohibit their federal representatives from serving
more than twelve consecutive years in the same office.\textsuperscript{143} The idea
cought on—in the 1992 election, voters in fourteen states approved
state initiatives to limit the terms of their federal representatives.\textsuperscript{144}
The margins of victory for these initiatives were high: Sixty-three
percent of California voters approved an initiative limiting House
members to three terms and Senators to two terms.\textsuperscript{145} Capitalizing
on growing anti-incumbent sentiment in the country, House Republic-
icans made term limits one of the prominent planks in their "Contract

\textsuperscript{138} Lloyd N. Cutler, \textit{Now is the Time for All Good Men . . .}, 30 WM. & MARY L. REV.
\textsuperscript{139} U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1912 (Thomas, J., dissenting)
(citation omitted).
\textsuperscript{140} Current federal laws confer many advantages on incumbents. For example, federal
law permits members of Congress to send "franked" mail and newsletters to constituents
at taxpayer expense, thus building name recognition among likely voters. 39 U.S.C.A.
§ 3210 (West Supp. 1995). Other provisions permit Members to hire taxpayer-funded
staffs, many of whom are really just campaign operatives. 2 U.S.C. §§ 61-1 (1994).
Campaign finance laws also give incumbents a built-in advantage because political action
committees will seldom contribute to challengers.
\textsuperscript{141} Term limits have gained the support of an unlikely bipartisan coalition, including
consumer activist Ralph Nader, presidential candidate Jerry Brown, conservative columnist
George Will, and Republican Senator Hank Brown. Gorsuch & Guzman, \textit{supra} note 135,
at 342-43.
\textsuperscript{142} Roderick M. Hills, Jr., \textit{A Defense of State Constitutional Limits on Federal
\textsuperscript{143} Id.
\textsuperscript{144} Robert Reinhold, \textit{The 1992 Elections: The States—The Ballot Issues; Move to
\textsuperscript{145} Id.
with America." Strong GOP support for term limits played a key role in the Republicans gaining control of Congress in the 1994 elections.\textsuperscript{147}

On November 3, 1992, Arkansas voters adopted Amendment 73 to their state constitution.\textsuperscript{148} Amendment 73 limits the terms of both Arkansas state and federal elected officials.\textsuperscript{149} Section 3 provides that:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.\textsuperscript{150}

Bobbie Hill, on behalf of herself, "similarly situated" Arkansas citizens, and the League of Women Voters of Arkansas, filed a complaint on November 13, 1992, seeking to invalidate Section 3 of Amendment 73 as "unconstitutional and void."\textsuperscript{151} Hill filed her complaint in the circuit court for Pulaski County, Arkansas and "named as defendants then-Governor Clinton, other state officers, the

\begin{itemize}
    \item \textsuperscript{146} Supreme Court Strikes Down, supra note 4, at 371.
    \item \textsuperscript{147} House Republicans' support for term limits, however, cooled considerably after they gained control of Congress. Term limits fell 63 votes short when the issue finally came up for a House vote in June 1995. See Rep. Bill McCollum, After Supreme Court Decision, a Retooled Term-Limits Strategy, ROLL CALL, June 12, 1995, at 3.
    \item \textsuperscript{148} Thornton, 115 S. Ct. at 1845.
    \item \textsuperscript{149} Id. at 1846. Section 1 applies to state elected officials in the executive branch, and section 2 applies to the state legislative branch. Id. These provisions were not at issue in the case.
    \item \textsuperscript{150} Id.
    \item \textsuperscript{151} Id. The Supreme Court decided this action, Winston Bryant, Attorney General of Arkansas v. Bobbie E. Hill, together with U.S. Term Limits, Inc. v. Thornton on May 22, 1995. United States Representative Ray Thornton is a member of the Arkansas congressional delegation who also brought suit for declaratory relief. The Court refers to these consolidated actions simply as U.S. Term Limits, Inc. v. Thornton. Ironically, just hours after the Court ruled that Section 3 was unconstitutional, Thornton announced that he would not seek a fourth term from Arkansas' Second Congressional District. Rex Nelson, Will Thornton Swap House Shoes for Chief's Robes?, ARK. DEMOCRAT-GAZETTE, May 30, 1995, at 1A.
\end{itemize}
Republican Party of Arkansas, and the Democratic Party of Arkansas. The Arkansas State Attorney General intervened on behalf of the State of Arkansas as a party defendant in support of Amendment 73. U.S. Term Limits, Inc., a proponent of the amendment, also intervened as a party defendant. The circuit court held that Section 3 violated Article I of the United States Constitution.

The Arkansas Supreme Court affirmed the trial court's decision. Justice Robert L. Brown, writing for a plurality of three justices, concluded that "the congressional restrictions in Amendment 73 are unconstitutional because the States have no authority 'to change, add to, or diminish' the requirements for congressional service enumerated in the Qualifications Clauses." Justice Brown argued that "[i]f there is one watchword for representation of the various states in Congress, it is uniformity .... The uniformity in qualifications mandated in Article I provides the tenor and the fabric for representation in Congress. Piecemeal restrictions by State[s] would fly in the face of that order." Brown also rejected the contention that the amendment is a mere "ballot access" restriction rather than an outright disqualification from running for office.

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152. Thornton, 115 S. Ct. at 1846.
153. Id.
154. Id.
155. Id.
157. The Arkansas Supreme Court upheld the trial court in a 5-2 decision. Id. The majority, however, was unable to join in a single opinion. In separate opinions, Justice Dudley and Justice Gerald P. Brown concluded that Amendment 73 violates the U.S. Constitution. Justice Robert L. Brown's opinion therefore only reflected the views of three out of seven justices. Id.
158. Thornton, 115 S. Ct. at 1846 (quoting Hill, 872 S.W.2d at 356).
159. Hill, 872 S.W.2d at 356.
160. Thornton, 115 S. Ct. at 1846. Justice Brown concluded that "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." Id. He also rejected the argument that disqualified incumbents could run again as write-in candidates because they would have virtually no chance of winning. Id. Petitioners in Thornton also raised this argument. They asserted that even if the states may not add qualifications, the amendment is constitutional as a permissible exercise of state power to regulate the "Times, Places and Manner of Holding Elections." Id. at 1866-67. Some term limits proponents have also advanced this argument. See Gorsuch & Guzman, supra note 135, at 345. Justice Thomas's model of reserved powers under the Tenth Amendment, however, arises from the question of whether the State of Arkansas can supplement the qualifications of their congressional representatives beyond those qualifications specifically enumerated in the Constitution. This Note focuses on whether Amendment 73 violates the Qualifications Clauses, not whether it is a ballot access restriction.
Justice Hay and Special Chief Justice Cracraft dissented.\(^{161}\) Justice Hay concluded that Amendment 73 is constitutional “[b]ecause his examination of the text and history of the Qualifications Clauses convinced him that the Constitution contains no express or implicit restriction on the States’ ability to impose additional qualifications on candidates for Congress.”\(^{162}\) Hay’s approach resembles that of Justice Thomas, starting from “the premise that all political authority resides in the people, limited only by those provisions of the federal or state constitutions specifically to the contrary.”\(^{163}\) Special Chief Justice Cracraft reasoned that the amendment does not implicate the Qualifications Clauses because it is a permissible ballot access restriction.\(^{164}\)

The Arkansas Attorney General and the intervenors petitioned for writs of certiorari.\(^{165}\) The Supreme Court granted both petitions and consolidated the cases for argument.\(^{166}\) The Court heard oral arguments on November 29, 1994, and affirmed the Arkansas Supreme Court’s ruling in a 5-4 decision announced on May 22, 1995.\(^{167}\)

B. Issues Presented

The Thornton majority frames the two issues presented as (1) whether the Constitution forbids states from adding or altering the qualifications specifically enumerated in the Constitution, and (2) if the Constitution does so forbid, whether the Arkansas law is formulated as a ballot access restriction rather than an outright disqualification.\(^{168}\) The first question turns on how one construes the Qualifications Clauses and whether the power to add qualifications is part of the states’ “reserved” powers under the Tenth Amendment.\(^{169}\)

\(^{161}\) Thornton, 115 S. Ct. at 1847.
\(^{162}\) Id.
\(^{163}\) Id. (quoting Hill, 872 S.W.2d at 367); cf. id. at 1876 (Thomas, J., dissenting) (“In each State, the remainder of the people's powers—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,' Amdt. 10—are either delegated to the state government or retained by the people.”).
\(^{164}\) Thornton, 115 S. Ct. at 1847.
\(^{165}\) Id.
\(^{167}\) Thornton, 115 S. Ct. at 1847.
\(^{168}\) Id.
\(^{169}\) The majority concludes that the Qualifications Clauses represent an exclusive enumeration of the qualifications of federal legislators and that the framers thereby
Article I, Section 2, Clause 2 of the United States Constitution, which applies to the House of Representatives, provides:

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.¹⁷⁰

Similarly, the Constitution provides the following for the Senate:

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 in which he shall be chosen.¹⁷¹

According to the Tenth Amendment, “[t]he 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.”¹⁷²

C. Holding and Reasoning of the Majority

The State of Arkansas argued that the Constitution does not expressly prohibit state-added qualifications and “that Amendment 73 is therefore an appropriate exercise of a State’s reserved power to place additional restrictions on the choices that its own voters may make.”¹⁷³ The Court rejected this argument on two grounds. First, the Tenth Amendment does not “reserve” the power to add qualifications to the states. Second, even if the states possess some original powers in this area, the Framers intended the Constitution to “divest” the states of power to add qualifications.¹⁷⁴

¹⁷⁰ U.S. Const. art. I, § 2, cl. 2.
¹⁷¹ Id. art. I, § 3, cl. 3.
¹⁷² Id. amend. X.
¹⁷³ Thornton, 115 S. Ct. at 1853.
¹⁷⁴ Id. at 1854.
The majority holds that the power to add qualifications for congressional representatives is not within the "original powers" of state sovereignty and thus is not "reserved" to the states by the Tenth Amendment.\textsuperscript{175} Justice Stevens argues that the Tenth Amendment can only "reserve" to the states powers that existed prior to the ratification of the Constitution.\textsuperscript{176} The majority quotes Justice Joseph Story in support of its view of reserved powers: "[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.... No state can say, that it has reserved, what it never possessed."\textsuperscript{177} According to this "original powers" view, the only powers reserved to the states are those that the states enjoyed prior to the framing of the Constitution.\textsuperscript{178}

Because the qualifications for congressional service are a creature of the Constitution, the "right" to set qualifications did not exist.

\textsuperscript{175} Id. The majority also rejects the argument that Amendment 73 is a permissible exercise of state power to regulate the "Times, Places and Manner of Holding Elections." \textit{Id.} at 1866-67. For the reasons stated in note 196 infra, however, this Note does not focus on this aspect of the case.

Assuming, arguendo, that Amendment 73 is a permissible ballot access measure, can the Arkansas legislature delegate this power to the people of Arkansas directly? In the absence of the Tenth Amendment, the Arkansas legislature might not be able to delegate to the people the concurrent authority to create ballot restrictions. However, the presence of the Tenth Amendment means that unless the Constitution specifically prohibits such delegation, the states and the people of the states have reserved that option. Specifically, the Tenth Amendment reserves the option for the people to propose legislation directly through initiatives. It would be incongruous for the Tenth Amendment to protect the initiative process in all areas except where the people of the states wish to pass ballot access measures.

The Ninth Amendment further bolsters this contention that the state legislature can delegate the authority to create ballot restrictions, stating that "[t]he 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. That the Times, Places and Manner Clause reserves the power to govern the manner of elections in state legislatures does not suggest that a state's initiative process cannot reach ballot-access measures.

\textsuperscript{176} Thornton, 115 S. Ct. at 1854.

\textsuperscript{177} Id. Justice Thomas notes, however, that the Court has deemed positions taken by Justice Story's commentaries to be more nationalist than the Constitution warrants. \textit{See} 1 \textsc{Life and Letters of Joseph Story} 296 (William W. Story ed., 1851) ("I hold it to be a maxim... that the Government of the United States is intrinsically too weak, and the powers of the State Governments too strong"). \textit{Compare} 2 \textsc{Joseph Story, Commentaries on the Constitution of the United States} § 1067 (1891) (arguing that the Commerce Clause deprives the states of the power to regulate any commerce within Congress' reach) \textit{with} Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851) (holding that Congress's Commerce Clause powers are not exclusive).

\textsuperscript{178} Thornton, 115 S. Ct. at 1878 (Thomas, J., dissenting).
before the Constitution was ratified.\textsuperscript{179} Electing representatives to Congress is a right arising from the Constitution itself; the Tenth Amendment cannot provide any basis for the proposition that states possess reserved power to add qualifications to those enumerated in the Qualifications Clauses.\textsuperscript{180} Justice Stevens relies on the maxim \textit{expressio unius exclusio alterius},\textsuperscript{181} concluding that "in the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a [reserved] power does not exist."\textsuperscript{182}

The majority finds support for its "original powers" view of reserved powers in \textit{McCulloch v. Maryland}\textsuperscript{183} and \textit{Powell v. McCormack}.\textsuperscript{184} \textit{McCulloch} questioned whether the State of Maryland could tax a bank chartered by Congress.\textsuperscript{185} Chief Justice Marshall presaged Justice Story's argument: "[A]n 'original right to tax' such federal entities 'never existed, and the question whether it has been surrendered, cannot arise.'"\textsuperscript{186} The Marshall Court rejected Maryland's argument that constitutional silence regarding state power to tax corporations chartered by Congress implies a reserved power for states to tax federal instrumentalities.\textsuperscript{187}

Justice Stevens also cites \textit{Powell v. McCormack} to support the majority's interpretation of the Qualifications Clauses.\textsuperscript{188} In November 1966, Adam Clayton Powell, Jr. was elected to the United

\begin{itemize}
\item \textsuperscript{179} \textit{Id.} at 1855.
\item \textsuperscript{180} \textit{Id.} at 1856.
\item \textsuperscript{181} \textit{Id.} at 1850 n.9 ("[T]he Framers' were well aware of the \textit{expressio unius} argument that would result from their wording of the Qualifications Clauses; they adopted that wording nonetheless.").
\item \textsuperscript{182} \textit{Id.} at 1856.
\item \textsuperscript{183} 17 U.S. (4 Wheat) 316 (1819).
\item \textsuperscript{184} 395 U.S. 486 (1969). The majority also cites to the "impressive and uniform body of judicial decisions and learned commentary" that supports its view that states lack the power to add qualifications. \textit{Thornton}, 115 S. Ct. at 1853.
\item \textsuperscript{185} \textit{McCulloch}, 17 U.S. (4 Wheat) at 326.
\item \textsuperscript{186} \textit{Thornton}, 115 S. Ct. at 1854 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat) at 430).
\item \textsuperscript{187} \textit{Id.} Justice Thomas, however, argues that the majority's characterization of the holding in \textit{McCulloch} is inaccurate. According to Thomas, the issue in \textit{McCulloch} did not turn on whether Maryland enjoyed the power to tax the bank before the framing; rather, the majority's view of the holding in \textit{McCulloch} renders "most of Chief Justice Marshall's opinion irrelevant." \textit{Id.} at 1880 (Thomas, J., dissenting). Marshall actually seemed to assume the opposite—that the people "conferred on the general government the power contained in the constitution, and on the States the whole residuum of power." \textit{Id.} at 1879 (Thomas, J., dissenting) (quoting Marshall, C.J., \textit{McCulloch}, 17 U.S. (4 Wheat) at 410).
\item \textsuperscript{188} \textit{Id.} at 1847.
\end{itemize}
States House of Representatives from the State of New York. Powell faced accusations of serious misconduct, and a Select Committee found that he had wrongfully diverted House funds and falsely reported foreign currency expenditures. The House of Representatives voted to exclude Powell from membership in Congress and declared his seat vacant. The Court found Powell’s expulsion unconstitutional because Article I, Section 2, Clause 2, sets forth the exclusive qualifications for House membership.

Justice Stevens only relies on Powell for its detailed and thorough review of the history and meaning of the Qualifications Clauses. Stevens admits that Powell does not control: “Our reaffirmation of Powell, does not necessarily resolve the specific questions presented in these cases.” While Powell held that Congress may not impose additional qualifications on its members, “the historical and textual materials discussed in Powell do not support the conclusion that the Constitution prohibits ‘additional qualifications imposed by States.’

The majority advances a second, independent argument against Amendment 73: Even if the states possess some original power in this area, the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress, thereby “divesting” the states of any power to add qualifications. According to the majority’s interpretation of the Constitutional Convention and ratification debates, “the Framers envisioned a uniform national system... creating a direct link between the National Government

189. Powell, 395 U.S. at 489.
190. Id. at 490.
191. Id. at 492-93.
192. Id. at 522 (holding that the House of Representatives has no “authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution”).
193. Thornton, 115 S. Ct. at 1847-54.
194. Id. at 1852.
195. Id.
196. Id. at 1856. Justices Stevens and Thomas engage in intellectual hand-to-hand combat over the issue of the Framers’ intent. While both make well-reasoned arguments, the historical record they are debating is too inconclusive to be dispositive. Professor Sullivan writes that “the relevant text and history [of the Constitution] alone did not clearly determine whether states may impose term limits. The majority and dissent battled fiercely over text and history, but to a draw.” Sullivan, supra note 6, at 80. Accordingly, this Note will not review in detail either side’s view of what the Framers actually thought about state-imposed term limits.
and the people of the United States.” Justice Stevens argues that the complete absence in the ratification debates of any assertion that states have the power to add qualifications is proof that the Framers intended to exclude action by the states in this area. Stevens supports this conclusion by citing Garcia for the proposition that, while the states retain a significant measure of sovereign authority, they do so “only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”

D. Reasoning of the Dissent

Justice Thomas begins his dissent by noting the irony that “[t]he majority... defends the right of the people of Arkansas to ‘choose whom they please to govern them’ by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.” In a populist defense of states’ rights, Thomas argues that the people of the states need not point to any affirmative constitutional grant of power to add

197. Thornton, 115 S. Ct. at 1855.
198. Id. at 1859. Not surprisingly, Justice Thomas construes this silence differently: “To the extent that the records from the Philadelphia Convention itself shed light on this case, they tend to hurt the majority’s case.” Id. at 1895 (Thomas, J., dissenting).
199. Id. at 1854 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985)). Justice Thomas argues, however, that Garcia does not control because “[t]he question raised by the present case... is not [as in Garcia] whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid.” Id. at 1879 (Thomas, J., dissenting).
200. Id. at 1875 (Thomas, J., dissenting) (quoting Justice Stevens: “We noted [in Powell] that allowing Congress to impose additional qualifications would violate that ‘fundamental principle of our representative democracy... that the people should choose whom they please to govern them.’ ”).
201. Professor John McGinnis notes that Justice Thomas’s opinions are informed and guided by an “originalist” approach to constitutional interpretation: Justice Thomas emerged as the boldest member of the Court in half a century— a jurist committed to seeking the original meaning of the Constitution in lengthy and learned opinions that survey the vast scope of American constitutional history.

In case after case where the original meaning of the Constitution was put in issue... Thomas wrote magisterial opinions that investigated the original understanding of the Constitution in detail.

qualifications for representatives in Congress. On the contrary, 
"[t]he Constitution is simply silent on this question. And where the 
Constitution is silent, it raises no bar to action by the States or the 
people." 

Justice Thomas rejects the majority's "original powers" view and 
embraces a "popular sovereignty" approach to Tenth Amendment 
reserved powers. While he never actually coins this phrase to 
describe this perspective, it is an appropriate label given his view that 
"[t]he ultimate source of the Constitution's authority is the consent of 
the people of each individual State" and that "[b]ecause the 
people of the several States are the only true source of power . . . the 
Federal Government enjoys no authority beyond what the Constitution 
confers." The majority does not reject the premise that the 
Constitution derives its authority from the people. Indeed, the 
majority notes that in Powell the Court "recognized the critical 
postulate that sovereignty is vested in the people," Differences 
arise over conflicting interpretations of the Tenth Amendment's use 
of the phrase "the people." Construing "the people" to mean "people 
of the States"—as Justice Thomas does—the Tenth Amendment 
reserves all nonenumerated power to the states. If "the people" are 
"the undifferentiated people of the nation"—regardless of state 
boundaries—the Tenth Amendment provides less support for 
proponents of states' rights.

Rather than asking whether the power in question existed before 
the ratification of the Constitution, Thomas contends that all power 
steps from the people of the states and that "reserved" powers 
therefore include all those not specifically granted to the federal 
government in the Constitution. Accordingly, Thomas concludes 
that the people of Arkansas enjoy reserved powers to limit the terms 
of their representatives in Congress because the Qualification Clauses 
merely recite minimum eligibility requirements.

203. Id. (Thomas, J., dissenting).
204. Id. (Thomas, J., dissenting).
205. Id. at 1876 (Thomas, J., dissenting).
206. Id. at 1851.
207. Id. at 1876 (Thomas, J., dissenting).
208. Id. at 1885-87 (Thomas, J., dissenting). Justice Thomas therefore rejects the 
majority's expressio unius formulation of the Qualifications Clauses.
Justice Thomas reasons that the ultimate source of the Constitution’s authority is the consent of the people of each individual state.\footnote{Id. at 1876 (Thomas, J., dissenting).} Further, “[b]ecause the people of the several States are the only true source of power . . . the Federal Government enjoys no authority beyond what the Constitution confers: the Federal Government’s powers are limited and enumerated.”\footnote{Id. (Thomas, J., dissenting).} The remainder of the people’s powers not specifically granted to the federal government through the Constitution is therefore either delegated to state governments or retained by the people.\footnote{Id. (Thomas, J., dissenting).} Constitutional silence concerning a particular power means that the federal government lacks that power and the states enjoy it.\footnote{Id. (Thomas, J., dissenting).} Thomas argues that “[t]hese basic principles are enshrined in the Tenth Amendment” and that all “powers reside at the state level except where the Constitution removes them from that level.”\footnote{Id. (Thomas, J., dissenting).}

While the Tenth Amendment does not specify whether “the people” means the people of each state or the people of the nation as a whole, Justice Thomas argues that the latter interpretation would render the Amendment pointless.\footnote{Id. (Thomas, J., dissenting).} “[I]t would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it.”\footnote{Id. (Thomas, J., dissenting).} Every mechanism for action provided by the Constitution tracks state boundaries. For example, amendments are ratified by conventions of the people in each state, not by a national convention,\footnote{U.S. CONST. art. V.} members

\begin{itemize}
  \item \textbf{209.} \textit{Id.} at 1876 (Thomas, J., dissenting).
  \item \textbf{210.} \textit{Id.} (Thomas, J., dissenting). Justice Thomas quotes the late Justice Black as saying that “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source.” \textit{Id.} (Thomas, J., dissenting) (quoting Reid v. Covert, 354 U.S. 1, 5-6 (1957)).
  \item \textbf{211.} \textit{Id.} (Thomas, J., dissenting). Which reserved powers are delegated to state governments and which reserved powers are retained by the people directly? The Constitution does not deal with this issue—Thomas notes that “it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government.” \textit{Id.} (Thomas, J., dissenting). The Tenth Amendment artfully avoids taking a position on the “division of power” among the people and their various state governments. Powers “are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The people thus decide which reserved powers to delegate to their state governments.
  \item \textbf{212.} \textit{Thornton,} 115 S. Ct. at 1876 (Thomas, J., dissenting).
  \item \textbf{213.} \textit{Id.} (Thomas, J., dissenting).
  \item \textbf{214.} \textit{Id.} at 1876-77 (Thomas, J., dissenting).
  \item \textbf{215.} \textit{Id.} (Thomas, J., dissenting).
  \item \textbf{216.} U.S. CONST. art. V.
\end{itemize}
of Congress are chosen state by state, not by nationwide elections; the President is selected by an electoral college comprised of delegates chosen by the states, not by nationwide election. Furthermore, the structure of the Constitution itself supports the interpretation that the Tenth Amendment's use of the phrase "the people" actually refers to "the people of the States." The Constitution provides that the United States Congress shall enjoy "[a]ll legislative Powers herein granted." The Constitution specifically enumerates the powers of Congress and prevents the states from exercising certain powers. Thus, "[t]he import of this structure is the same as the import of the Tenth Amendment." Powers not specifically granted to the federal government or prohibited to the states are reserved to the people of the states. "In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them."

Justice Thomas attacks the majority's "original powers" model of reserved powers as untenable and incoherent. According to the majority, since the Tenth Amendment can only "reserve" to the states powers that existed before the Constitution, the people of Arkansas cannot exercise any power over the terms of their representatives in Congress because the states did not enjoy any powers over the selection of Congress prior to the ratification of the Constitution. Again, the majority holds that the States cannot "reserve" powers that they did not control at the time of the Framing. Justice Thomas disagrees:

217. Id. art. I, § 2, cl. 1 (stating that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States"); id. art. I, § 3, cl. 1 (stating that "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof").

218. Id. art. I, § 1 (emphasis added).

219. Id. art. I, § 8.

220. Id. art. I, § 10.

221. Thornton, 115 S. Ct. at 1877 (Thomas, J., dissenting).

222. Id. (Thomas, J., dissenting). Justice Thomas's position that the Constitution derives its authority from the people of each state is consistent with Madison's views as expressed in The Federalist: The Constitution was "founded on the assent and ratification of the people of America ... not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." THE FEDERALIST No. 39, at 254 (James Madison) (Carl Van Doren ed., 1973).

223. Thornton, 115 S. Ct. at 1877-78 (Thomas, J., dissenting).

224. Id. at 1878 (Thomas, J., dissenting).

225. Id. (Thomas, J., dissenting).
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 [this] fundamental principle ... it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled. 226

The use of the word "reserved" in the Tenth Amendment also does not support the majority's interpretation:

If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. 227

Justice Thomas concludes that the majority errs in finding that the people of the states cannot authorize their state governments to exercise any powers that were unknown to the states at the time of the Framing. 228

Justice Thomas also takes issue with the majority's view that Amendment 73 conflicts with "national sovereignty." 229 The majority cites Justice Story in support of its view that it would be incongruous for the states or the people of the states to have any reserved powers over the selection of members of Congress. 230

Justice Stevens contends that since Congress is a national institution and its members "owe primary allegiance not to the people of a State, but to the people of the Nation," 231 allowing individual states to

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226. Id. (Thomas, J., dissenting).
227. Id. (Thomas, J., dissenting).
228. Id. (Thomas, J., dissenting). Indeed, the majority's view of reserved powers frustrates the purpose of the Tenth Amendment's final phrase, "to the people." Thomas argues that the Tenth Amendment does not preempt any limitations on state power found in the state constitutions. Id. (Thomas, J., dissenting). Had the Tenth Amendment been written to exclude this final phrase—the powers not delegated to the federal government are simply reserved to the states—it could have been construed as eliminating the power of the people to amend their state constitutions to remove limitations that were in effect when the Constitution and Bill of Rights were ratified. Id. (Thomas, J., dissenting).
229. Id. at 1881 (Thomas, J., dissenting).
230. Id. at 1853.
231. Id. at 1855.
limit the terms of their representatives in Congress is inconsistent with
the Framers' vision of a national government. Justice Thomas
argues, however, that "the selection of representatives in Congress is
indisputably an act of the people of each State, not some abstract
people of the Nation as a whole." The Constitution does not
create any means at all, such as a national initiative, for action by the
people of the nation as a whole. Since the Constitution has left
the election of Members of Congress entirely to the people of the
states or their state legislatures, the people of each State have
retained their "independent political identity" when it comes to
choosing their federal representatives. "As a result, there is
absolutely nothing strange about the notion that the people of the
States or their state legislatures possess 'reserved' powers in this
area."

232. *Id.* The majority also cites the provision of the Constitution setting compensation
for members of Congress in support of its idea that federal officials owe their allegiance
to the people and not to states. *Id.* Article I, Section 6, Clause 1, of the Constitution
provides that federal legislators "shall receive a Compensation for their Services, to be
ascertained by Law, and paid out of the Treasury of the United States." The majority
reasons that since the federal government pays their salaries, Members of Congress owe
their primary loyalty to the federal government. *Id.* at 1882 (Thomas, J., dissenting).

Justice Thomas disagrees: "The fact that Members of Congress draw a federal
salary once they have assembled hardly means that the people of the States lack reserved
powers over the selection of their representatives." *Id.* (Thomas, J., dissenting). Indeed,
Thomas points out that historical evidence regarding the compensation provision suggests
that the reserved powers of the states extend beyond the mere selection stage. *Id.*
(Thomas, J., dissenting). James Madison "specifically indicated that even with the
compensation provision in place, the individual States still enjoyed the reserved power to
supplement the federal salary." *Id.* (Thomas, J., dissenting) (citation omitted) (citing
Madison's remarks at the Virginia ratifying convention).

233. *Id.* at 1881 (Thomas, J., dissenting) ("When the people of Georgia pick their
representatives in Congress, they are acting as the people of Georgia, not as the corporate
agents for the undifferentiated people of the Nation as a whole.").

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

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

236. *Id.* (Thomas, J., dissenting). The majority also argues that the people of Arkansas
do not enjoy reserved powers over the selection of their members of Congress because the
Constitution expressly delegates power to the states concerning federal elections. *Id.* at
1855 ("The provisions governing elections reveal the Framers' understanding that powers
over the election of federal officers had to be delegated to, rather than reserved by, the
States."). Justice Thomas, however, contends that the "Times, Places and Manner" clause
does not delegate any authority to the states and simply imposes a duty upon them to
guarantee the continued existence of Congress. *Id.* at 1883 (Thomas, J., dissenting). This
duty to preserve the Union by continuing to elect federal representatives is consistent with
the notion of reserved powers. *Id.* (Thomas, J., dissenting).
Justice Thomas also disagrees with the majority's characterization of *McCulloch v. Maryland.* Justice Thomas admits that *McCulloch* specifies that "a power need not be 'expressly' delegated to the United States or prohibited to the States in order to fall outside the Tenth Amendment's reservation; delegations and prohibitions can also arise by necessary implication." However, *McCulloch* is true to the text of the Tenth Amendment; it holds that all powers to which the Constitution does not speak are reserved to the state level.

Justice Thomas also notes that *McCulloch* does not qualify its holding on whether the states had enjoyed the power to tax federal instrumentalities before the framing. On the contrary, *McCulloch* assumes that the people of the states "conferred on the general government the power contained in the [C]onstitution, and on the States the whole residuum of power." Thomas chides the majority for misreading the holding of *McCulloch.* "For the majority . . . *McCulloch* apparently turned on the fact that before the Constitution was adopted, the States had possessed no power to tax . . . institutions that the Constitution created." The majority's view of the holding in *McCulloch* is untenable because it renders the balance of Chief Justice Marshall's opinion irrelevant.

The majority also relies on the Court's analysis in *Powell v. McCormick* to support its interpretation of the Qualifications Clauses. Although *Powell* did not address the specific questions presented in *Thornton,* the Court in *Powell* concluded that

237. Id. at 1879 (Thomas, J., dissenting).
238. Id. (Thomas, J., dissenting). Thomas fails to define the circumstances which would justify a finding of federal power based on "necessary implication." This ambiguity in his model of reserved powers poses a serious problem. If congressional authority can be "necessarily implied" from an Article I power, such as the Commerce Clause or the Spending Clause, then the Tenth Amendment becomes meaningless and Thomas's model an exercise in circular reasoning. Absent a clear definition of "necessary implication," Thomas's model fails to resolve the biggest challenge facing Tenth Amendment proponents: how to evade the Commerce Clause's broad, independent grant of power to Congress. Part IV of this Note addresses this issue in more detail. See infra part IV.D.
240. Id. (Thomas, J., dissenting) (quoting *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 410 (1819)).
241. Id. at 1880 (Thomas, J., dissenting).
242. Id. (Thomas, J., dissenting) ("[A]ccording to the majority, there was no need to inquire into whether federal law deprived Maryland of the power in question, because the power could not fall into the category of 'reserved' powers anyway.").
244. *See supra* note 193 and accompanying text.
**Congress** has no power to prescribe qualifications for its own members. Justice Thomas agrees with the holding in *Powell*, but contends that the majority is wrong in concluding that *Powell* somehow stands for the proposition that "the Qualifications Clauses contain a hidden exclusivity provision."  

Justice Thomas reasons that Congress cannot add qualifications because nothing in the Constitution grants Congress this power. *Powell* addressed the issue of whether the power granted to each House of Congress in Article I, Section 5 of the Constitution includes the power to add extra qualifications beyond those that are set forth in the Qualifications Clauses. Contrary to the majority's characterization, "the critical question in *Powell* was whether [Section 5] conferred a qualification-setting power—not whether the Qualifications Clauses took it away." Thus, Justice Thomas concludes that the "fact that the Framers did not grant a qualification-setting power to Congress does not imply that they wanted to bar its exercise at the state level."  

Justice Thomas also distinguishes the majority's use of *Garcia v. San Antonio Metropolitan Transit Authority*. According to the majority, the complete absence of any assertion that states have the power to add qualifications in the ratification debates proves the Framers' intent to exclude state action in this area. Citing *Garcia*, the majority argues that although the states retain a significant measure of sovereign authority, they do so only to the extent that the Constitution has not divested them of their original powers and

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248. *Id.* (Thomas, J., dissenting).
251. *Id.* (Thomas, J., dissenting) ("[D]eciding whether the Constitution denies the qualification-setting power to the States and the people of the States requires a fundamentally different legal analysis" rather than whether Article I, Section 5, grants a qualification-setting power to Congress.).
252. *Id.* at 1890 (Thomas, J., dissenting). Thomas points out that the Framers decided not to let Congress prescribe the qualifications of its own members because "members of Congress would have an obvious conflict of interest if they could determine who may run against them." *Id.* (Thomas, J., dissenting). However, neither the state legislatures nor the people of the states "would labor under the same conflict of interest when prescribing qualifications" for their representatives in Congress. *Id.* (Thomas, J., dissenting).
transferred those powers to the federal government. However, Thomas contends that *Garcia* does not control. "The question raised by the present case... is not [as in *Garcia*] whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid."  

Justice Thomas also notes that the Court's decision may have some unintended consequences. "Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent... who are currently in prison... or who have past vote fraud convictions." Whereas states require that all candidates be qualified to vote, the Court's decision leaves open the possibility that the people of each state may trust someone with "their vote in Congress even though they do not trust him with a vote in the election for Congress."

**IV. THOMAS'S POPULAR SOVEREIGNTY MODEL OF RESERVED POWERS**

Justice Thomas contends, as a matter of first principle, that the people of each state, not the people of the nation as a whole, adopted the Constitution. The people of the states are thus prohibited from acting "only if they impose such a prohibition on themselves in the Constitution or cede[sic] such power exclusively to the federal government." Accordingly, "[o]nce it is established that the federal government is a government of enumerated powers while the state governments are governments of residual powers, the term-limits case is easily decided."

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255. *Id.* at 1854.
256. *Id.* at 1879 (Thomas, J., dissenting).
257. *Id.* at 1909 (Thomas, J., dissenting) (citations omitted).
258. See, e.g., R.I. GEN. LAWS § 17-14-1.2 (1988) (restricting candidacy to people "qualified to vote").
260. *Id.* at 1875 (Thomas, J., dissenting).
261. *Id.* (Thomas, J., dissenting).
262. *Id.* (Thomas, J., dissenting).
A. Thomas's Cornerstone: The Doctrine of Enumerated Powers

The Tenth Amendment fails to identify among powers delegated to the federal government, prohibited to the states, or reserved to the states or to the people. Thomas’s popular sovereignty model of reserved powers must therefore necessarily be read in light of the doctrine of enumerated powers.

The doctrine of enumerated powers is explicit in the very first sentence of Article I of the Constitution: “All legislative Powers herein granted shall be vested in a Congress of the United States.” This sentence assumes the obvious: If the Constitution does not grant Congress a power, Congress simply does not possess that power. As Roger Pilon of the Cato Institute has written:

Plainly, power resides in the first instance in the people, who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally—through the Constitution. The importance of that starting point cannot be overstated, for it is the foundation of whatever legitimacy our system of government can claim.

Put in this context, the Tenth Amendment represents a broad expression of the Framers’ intent to limit the federal government to specific, enumerated powers:

As the final member of the Bill of Rights, and the culmination of the founding period, the Tenth Amendment recapitulates the philosophy of government first set forth in the Declaration of Independence, that governments are instituted to secure our rights, that they derive their just powers from the consent of the governed.

The doctrine of enumerated powers “gives content to the Tenth Amendment” and serves as the cornerstone of Thomas’s popular powers doctrine.

263. For an excellent analysis of the relationship between the Tenth Amendment and the enumerated powers doctrine, see CATO INST., THE CATO HANDBOOK FOR CONGRESS 17-34 (1995).
264. See supra note 228.
267. Id. (emphasis omitted).
268. Id.
sovereignty model of reserved powers. Because the scope of federal power is limited to those powers enumerated in the Constitution, "where the Constitution is silent, it raises no bar to action by the States or the people." The doctrine of enumerated powers informs and guides Thomas's approach to reserved powers under the Tenth Amendment:

[I]f a power has not been delegated to the federal government, that government simply does not have it. In that case, as Justice Thomas correctly said in his trenchant dissent in [Thornton], it becomes a question of state law whether the power is held by a state or, failing that, by the people, having never been granted to either government.

B. Thornton: A Case of First Impression

Thornton is also the first modern Tenth Amendment case that does not directly implicate the Commerce Clause or some other Article I power of Congress. While National League of Cities, Garcia, and New York v. United States addressed whether the Tenth Amendment bars congressional action the Constitution appears to authorize, the issue in Thornton concerns the Constitution barring state action that it does not appear to forbid.

Each of the previous three cases involved challenges to otherwise constitutional federal laws and each used the Tenth Amendment as a "sword" to curtail the scope of federal power. In National League of Cities the Court held that the wage and overtime provisions of the Fair Labor Standards Act as applied to state and local government employees violated the Tenth Amendment. The Court never questioned, however, whether Congress had the power under the Commerce Clause to enact the legislation in the first place. The Tenth Amendment simply provided an affirmative check on an otherwise valid exercise of congressional power. "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but

270. Pilon, supra note 266, at 10.
271. See supra part IV.B.
272. See supra notes 88-110 and accompanying text.
because the Constitution prohibits it from exercising the authority in that manner.\textsuperscript{274}

Like \textit{National League of Cities}, Garcia involved "the extent to which principles of state sovereignty implicit in our federal system curtail Congress's authority to exercise its enumerated powers."\textsuperscript{275} Although the Garcia Court overruled \textit{National League of Cities}, the issue of applying the Fair Labor Standards Act to state and local government employees was the same.\textsuperscript{276} Similarly, \textit{New York v. United States} addressed whether the federal government could compel the states to enact or administer an otherwise constitutional federal regulatory program,\textsuperscript{277} not whether Congress had the power to enact a regulatory program to dispose of radioactive waste.

\textit{Thornton}, however, does not involve the extent to which principles of state sovereignty limit Congress's authority to exercise its enumerated powers. The reserved powers of the State of Arkansas, not the enumerated powers of Congress, are at issue in \textit{Thornton}. The Arkansas term limit law raises the question of "whether [the Constitution] bars state action that it does not appear to forbid."\textsuperscript{278} According to Justice Thomas, the answer appears in the Tenth Amendment: "[U]nless the Federal Constitution affirmatively prohibits an action by the States or the people, it raises no bar to such action."\textsuperscript{279}

\textit{Thornton} appears to be a case of first impression in modern Tenth Amendment jurisprudence. Justice Thomas's model of reserved powers could have broad implications for federalism if adopted by a future majority. Under the Thomas approach, whenever a state enacts legislation in an area of constitutional silence, the Constitution will not proscribe the state's action.\textsuperscript{280} Justice Thomas's model, if applied in conjunction with decisions like \textit{New York}, could conceivably create a very large zone of reserved activity for the states. For example, the Constitution is silent on the issue of doctor-

\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1878 (1995) (Thomas, J., dissenting).}
\textsuperscript{276} \textit{See supra} notes 96-101.
\textsuperscript{277} \textit{See New York v. United States, 505 U.S. 144, 154 (1992).}
\textsuperscript{278} \textit{Thornton, 115 S. Ct. at 1879 (Thomas, J., dissenting).}
\textsuperscript{279} \textit{Id. (Thomas, J., dissenting).}
\textsuperscript{280} \textit{See id. at 1875-84 (Thomas, J., dissenting). The states, of course, must yield to federal law where the Congress preempts the field pursuant to a valid exercise of its enumerated powers.}
assisted suicide. There is no enumerated grant of power to Congress in this area. Because the Constitution is silent, the states and the people of the states are free to exercise their reserved powers in this area.

C. The "Federalism Coalition"

Thornton can be "read as a preview of the Court's response to other coming controversies over the relative reach of state and federal power." The formalist approaches adopted by both the majority and the dissent appear to be aimed at "locking in default rules to govern future federalism disputes." The Supreme Court split in Thornton into two, four-Justice camps, with Justice Kennedy occupying the middle ground.

As discussed in Part II, for sixty years the Supreme Court refused to check Congress's exercise of its commerce power and refused to acknowledge that the Tenth Amendment provided any affirmative check on federal power. New York and Lopez may have signaled a change in course, however. The Court now appears willing to limit the reach of federal power in certain circumstances. The dissent in Thornton is therefore best understood in the context of New York and Lopez as part of an overall effort by the Court's "federalism coalition" to limit federal power.

A review of the voting patterns in Garcia, New York, Lopez, and Thornton reveals the existence of a distinct four-Justice "federalism coalition." Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas have consistently voted to limit federal power through a more expansive reading of the Tenth Amendment and a narrower

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281. One could argue that Congress has the power to act in this area under an extremely attenuated reading of the Commerce Clause. Doctor-assisted suicides may "affect" interstate commerce by impacting federal Medicare reimbursements to hospitals that allow their facilities to be used in this manner.

282. Sullivan, supra note 6, at 81.

283. Id.

284. Id. at 97.

285. See supra part I.B.3-4.

286. Id.

287. For purposes of this Note, the dissenting opinions in Thornton and Garcia, and the majority opinions in New York and Lopez, are representative of a pro-federalism philosophy.
reading of the Commerce Clause.\textsuperscript{288} Each of these Justices has a 100\% "federalism rating."\textsuperscript{289}

Three Justices have a zero percent federalism rating: Justices Stevens, Breyer, and Ginsburg.\textsuperscript{290} These three appear to form a recognizable pro-federal bloc. Whenever a case presents an opportunity to limit federal power, this group has consistently voted to uphold federal power. Justice Kennedy, with a 66\% rating,\textsuperscript{291} and Justice Souter, with a 33\% rating,\textsuperscript{292} have provided the "swing votes" in federalism cases. Recently, however, Justice Souter appears to have cast his lot with the federal camp—he dissented in \textit{Lopez} and joined the majority in \textit{Thornton}.\textsuperscript{293} Thus, any continuing trend by the Court to limit federal power hinges on the federalism coalition's ability to persuade Justice Kennedy to vote with them.

Proponents of Tenth Amendment federalism have reason to be optimistic that Justice Kennedy may return to the fold in future cases. Although the federalism coalition was unsuccessful in winning Kennedy's vote in \textit{Thornton}, they assembled a five-vote majority with Kennedy's help in both \textit{Lopez} and \textit{New York}. In his concurring opinion in \textit{Thornton}, Justice Kennedy actually embraces the principles of federalism embodied in the Tenth Amendment:

\begin{itemize}
\item \textsuperscript{288} Chief Justice Rehnquist and Justice O'Connor dissented in \textit{Garcia} and \textit{Thornton} and voted with the majority in \textit{New York} and \textit{Lopez}. Justices Scalia and Thomas also dissented in \textit{Thornton} and voted with the majority in \textit{New York} and \textit{Lopez}. See supra notes 89-110 and accompanying text.
\item \textsuperscript{289} Assuming that these four cases represent benchmark cases in modern federalism jurisprudence, a Justice's "federalism rating" is a function of how often a particular Justice voted to limit federal power. For example, Chief Justice Rehnquist has voted consistently in all four cases to limit federal power. The Chief Justice's four-for-four record yields a 100\% rating.
\item \textsuperscript{290} Justice Stevens dissented in \textit{Lopez} and \textit{New York}, and voted with the majority in \textit{Garcia} and \textit{Thornton}. Justices Breyer and Ginsburg dissented in \textit{Lopez} and voted with the majority in \textit{Thornton}.
\item \textsuperscript{291} Justice Kennedy voted with the federalism coalition in \textit{New York} and \textit{Lopez} but defected to the other side in \textit{Thornton}.
\item \textsuperscript{292} Justice Souter only voted with the federalism coalition on one occasion, in \textit{New York}.
\item \textsuperscript{293} The two camps are best discerned by juxtaposing \textit{Thornton} with \textit{Lopez}. The four Justices who joined the majority in \textit{Thornton} but dissented in \textit{Lopez} appeared "willing to strike down a state encroachment upon the federal government, but not a federal encroachment upon the states." Sullivan, supra note 6, at 103. The four Justices who dissented in \textit{Thornton} but joined the majority in \textit{Lopez}—the federalism coalition—"favored the opposite one-way ratchet, invalidating a federal encroachment upon the states but not a state encroachment upon the federal government." \textit{Id.}
\end{itemize}
Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.294

Indeed, Justice Kennedy argues that his vote to invalidate the Arkansas term limit statute is actually consistent with his previous support of the federalism coalition in New York and Lopez: "That the States may not invade the sphere of federal sovereignty is as uncontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States."295

Unfortunately for the federalism coalition, Kennedy adopts the view that qualifications for members of Congress fall within the "sphere of federal sovereignty."296 However, given Justice Kennedy's apparent predisposition toward limiting federal power,297 it appears that the federalism coalition has a reasonable chance of building future five-vote majorities in support of its pro-states agenda.

**D. The Problem with the Commerce Clause: Does Lopez Clear the Way?**

Justice Thomas writes that "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."298 Justice Thomas's ambiguous reference to federal powers "by necessary implication" poses a serious problem. If congressional authority can be "necessarily implied" from an Article I power such as the Commerce Clause, then the Tenth Amendment becomes

295. Id. at 1873 (Kennedy J., concurring). Justice Kennedy cites Lopez in support of this proposition.
296. Id. (Kennedy, J., concurring).
297. See supra notes 291-95 and accompanying text.
298. Thornton, 115 S. Ct. at 1876 (Thomas, J., dissenting) (emphasis added).
meaningless and Justice Thomas's model an exercise in circular reasoning. Absent a clear definition of what "by necessary implication" means, Thomas's approach fails to resolve the biggest challenge facing Tenth Amendment proponents—how to get around the Commerce Clause's broad, independent grant of power to Congress.299

The Supreme Court's stunning decision in *Lopez* appears to have cleared the way for a narrower reading of the Commerce Clause, creating an opening for the jurisprudential revival of the Tenth Amendment through Justice Thomas's model of reserved powers. Until *Lopez*, the modern Court never declared a single federal law unconstitutional as exceeding the scope of congressional power under the Commerce Clause, choosing instead to adopt a very deferential "rational basis" test in regard to federal commerce power.300 For almost sixty years, Congress had broad authority to legislate pursuant to the Commerce Clause. "So long as Congress [did] not violate another constitutional provision . . . legislation adopted under the commerce clause would be upheld because almost any activity has some reasonable relationship to interstate commerce."301

In a 5-4 decision, the Court struck down the Gun-Free School Zones Act of 1990302 which made it a federal crime to possess a firearm within 1,000 feet of a school.303 Writing for the majority, Chief Justice Rehnquist identified three types of activities that Congress can regulate under its commerce power: channels of interstate commerce,304 instrumentalities of interstate commerce,305 and activities that substantially affect interstate commerce.306 The Court held that "the proper test requires an analysis of whether the

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304. *Id.* at 1629. Rehnquist cites to Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), which upheld the federal law prohibiting discrimination by hotels and restaurants as an example of protecting interstate commerce channels. *Lopez*, 115 S. Ct. at 1629.
305. *Lopez*, 115 S. Ct. at 1629. The Chief Justice cites to several cases upholding Congress's power to regulate the railroads as examples of regulating the instrumentalities of interstate commerce. *See Shreveport Rate Cases*, 234 U.S. 342 (1914).
regulated activity 'substantially affects' interstate commerce." The Court concluded that the presence of a gun near a school did not substantially affect interstate commerce and that its relationship to interstate commerce was too attenuated and tangential to uphold the law as a valid exercise of congressional commerce power.

The impact of Lopez and the extent to which it will curtail federal power remains to be seen. The majority opinion in Lopez presents Tenth Amendment advocates with a rather unsatisfying resolution to the commerce power problem. The majority "did little to explain what the 'substantial affects' interstate commerce test means" and failed to articulate criteria to be used by lower courts or the Supreme Court in the future. Lopez runs the risk of becoming another National League of Cities, generating sufficient confusion and uncertainty to drive Justice "swing vote" Kennedy out of the federalism coalition.

The majority's rationale for striking down the statute was at most a minor departure from existing precedent. While the majority created an exception to Congress's commerce power for intrastate activity that is not of a commercial nature, the Court ignored the "rational basis test" without discarding it explicitly. In dicta, the Court reaffirmed the traditional test, inquiring whether Congress has a rational basis for concluding that the activity, in the aggregate, has a substantial effect on interstate commerce. Although the Court

307. Id.
308. Id.
309. See supra part IV.D.
311. See supra notes 89-101 and accompanying text. It was Justice Blackmun—the shaky "swing vote" in National League of Cities—who eventually switched sides nine years later and wrote the new majority opinion in Garcia expressly overruling National League of Cities.
313. Lopez, 115 S. Ct. at 1630. Acknowledging the Court's past lenient review under the rational basis test, the Chief Justice nevertheless points out that the previous cases all involved statutes that regulated "economic activity." Id. The Chief Justice does not take issue with the "great deference" the Court has shown to Congress in previous cases involving commercial activities. Gauch, supra note 312, at 10 (quoting Lopez, 115 S. Ct. at 1634).
314. Lopez, 115 S. Ct. at 1630.
315. Gauch, supra note 312, at 9 ("Only Justice Thomas, in a lone concurrence, questioned the substantial effects test or rational basis scrutiny.").
"took a step toward restoring limits to Congress's commerce powers, it was a small and hesitant step."

Footnote four of the majority's opinion does not appear to preclude the possibility that in the future the Court could uphold a new version of the statute if supported by congressional findings documenting the interstate commerce nexus. The majority implicitly reserves whether congressional findings could have saved the Gun-Free School Zones Act. Given that the majority has reiterated the need for appropriate deference to Congress, consider the dilemma that the Court would face if Congress reenacts the statute with the types of findings referenced in footnote four. To be consistent, the Court would have to strike down the statute regardless of the findings because the connection between possession of guns near schools and interstate commerce is too tangential and uncertain under the "substantial affects" test. However, by deferring to the findings and upholding the new statute, as it certainly could under footnote four, the Court looks as though it were making Congress "jump through the hoops" of providing specific findings to support its exercise of commerce power. Neither approach seems particularly deferential to Congress, and both approaches support the charge that the Court would be engaged in judicial policymaking.

While proponents of Justice Thomas's Tenth Amendment model of reserved powers can take heart in the Court's retreat from its expansive reading of the Commerce Clause, it remains to be seen whether Lopez marks the beginning of a long-term trend toward restoring limits to Congress's commerce powers. "Depending on how aggressively the Supreme Court applies its holding in Lopez, literally hundreds of federal laws might be constitutionally vulnerable." If, however, the substantial affects standard in Lopez proves to be too difficult to administer or creates too much confusion in the lower

316. Id. at 10.
317. See Lopez, 115 S. Ct. at 1632 n.4.
319. Lopez, 115 S. Ct. at 1634.
320. Yin, supra note 318, at 23.
321. A Major New Limit, supra note 301, at 1. For an example of how Lopez is already having an impact on federal criminal law, see United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) (where proof that a private residence received natural gas from out-of-state sources was not enough to demonstrate a "substantial effect" on interstate commerce required by the jurisdictional element of the federal arson statute, 18 U.S.C. § 844(i) (1994)).
courts, *Lopez* may well turn out to be another *National League of Cities*—a trailblazing opinion rendered meaningless by its own internal contradictions and ambiguities. This result would be most unfortunate because future acceptance of Justice Thomas's popular sovereignty model of reserved powers depends on a narrower reading of the Commerce Clause.

V. **THE BRADY HANDGUN CONTROL ACT: APPLYING THE POPULAR SOVEREIGNTY MODEL**

Justice Thomas's popular sovereignty model of Tenth Amendment reserved powers would give the states much greater latitude to act absent specific constitutional preemption. This new and expansive approach to Tenth Amendment jurisprudence, if adopted by a future majority, would call into question many federal laws, potentially returning significant portions of federal power to the states.

An example of one such law is the Brady Handgun Control Act. While the Brady Act has been the subject of repeated challenges since its passage in 1993, the Ninth Circuit has upheld the Act on the grounds that it does not violate the Tenth Amendment as interpreted by *United States v. New York*. The following discussion reviews these *New York*-based Tenth Amendment challenges to the Act and then shows how the application of Justice Thomas's popular sovereignty model would result in the Act being found unconstitutional.

A. **History and Provisions of the Brady Act**

In March 1981, John Hinckley, Jr. attempted to kill President Ronald Reagan in a deluded effort to impress actress Jodie Fos-

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322. *See supra* part IV.
323. 18 U.S.C. § 922(s) (1994). State and local officials in Illinois and California also have challenged the National Voter Registration Act, 42 U.S.C. § 1973gg (Supp. V 1993), popularly known as the “motor-voter” law, claiming that the law requires the states to enforce federal programs in violation of structural principles of state autonomy. Two federal courts have rejected their Tenth Amendment state autonomy claim, upholding the motor-voter law as constitutional. *See* Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir.), cert. denied, ___ S. Ct. ___, 64 USLW 3498 (1995); Association of Community Orgs. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995).
324. *See infra* notes 342-43 and accompanying text.
325. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).
ter. While President Reagan fully recovered from the attack, his press secretary, James Brady, was not so lucky. During the assassination attempt, the first of six bullets fired from Hinckley's gun entered Brady's skull. Although Brady beat ten-to-one odds by surviving surgery, the bullet left Brady partially paralyzed. Many were outraged when it became known that, despite a history of mental instability, Hinckley had easily purchased a .22-caliber handgun for only $29.00 from a Texas pawnshop.

As a result of the assassination attempt, James Brady's wife, Sarah, became "a visible leader in the effort to strengthen America's gun control laws and prevent criminals and mentally unstable people from obtaining handguns." In 1984, Sarah Brady joined Handgun Control, Inc., becoming its national chairperson in 1990. Brady and other gun control proponents aggressively lobbied Congress to pass federal legislation requiring all handgun purchasers to submit to background checks and a mandatory waiting period. Although the so-called "Brady Bill" was first introduced in Congress in 1987, its passage was blocked for seven years due to intense resistance from gun owner organizations like the National Rifle Association. However, with the election of a Democratic President in 1992, gun control proponents finally gained the upper hand. On November 30, 1993, President Bill Clinton signed the Brady Handgun Violence Protection Act into law.

328. *Id.*
329. David Behrens, *Ten Years of Survival*, NEWSDAY, Mar. 5, 1991, at 48. Indeed, at the time of the shooting, Hinckley was under psychiatric care and was taking Valium. Finguerra, *supra* note 326, at 637 n.4.
331. *Id.* at 639 n.7.
332. *Id.* at 639.
Passed as an amendment to the Gun Control Act of 1968, the Brady Act imposes a waiting period of up to five days for the purchase of a handgun and subjects purchasers to a background check during that period. The background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser’s place of residence. The Act requires CLEOs to “make a reasonable effort to ascertain ... whether receipt or possession [of a handgun] would be in violation of the law.” If the CLEO approves the transfer, he or she must destroy the buyer’s sworn statement within twenty days after the statement was made. If the CLEO disapproves of the transfer, the CLEO must provide the reasons for the disapproval within twenty business days if so requested by the disappointed buyer. The Act does not require Congress to appropriate funds to the states to administer this program.

B. Tenth Amendment Challenges to the Brady Act

A series of Tenth Amendment challenges to the Brady Act have experienced some success in federal court. Five of six district court cases have held all or part of the Act unconstitutional. Gun owner groups suffered a defeat, however, when a three-judge panel on the United States Court of Appeals for the Ninth Circuit concluded that the Act was constitutional. Despite this setback, Mack v.

335. The original Gun Control Act only required a purchaser to swear on a federal form that he or she was mentally stable and not a fugitive.
337. Id. Within five years from the effective date of the Act, such checks are to be performed instantaneously through a national criminal background check system maintained by the Department of Justice. Id. § 922(i) (1994).
338. Id. § 922(s)(2) (1994).
340. Id. § 922(s)(6)(C) (1994).
341. See id. § 922(s) (1994).
343. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).
"United States" offers an excellent illustration of how the Tenth Amendment, as interpreted by the Supreme Court in New York v. United States, has been used to challenge the validity of the Brady Act.

Richard Mack and Jay Printz, as sheriffs and CLEOs in their respective jurisdictions, filed suit in their local federal district courts challenging the constitutionality of the Brady Act. Mack and Printz contended that the Act's provisions imposing duties upon them violated the Tenth and Fifth Amendments. Both district courts held that the Act, by imposing the duty to conduct background checks, violated the Tenth Amendment as interpreted in New York v. United States. Both courts also held that the invalid portions of the Brady Act were severable, refusing to hold the entire Act unconstitutional.

The sheriffs argued on appeal that Congress has no power to impose duties on CLEOS and that the unconstitutional provisions were not severable from the remainder of the Act. Mack and Printz contended that "[b]ecause [the Brady Act] issues commands to CLEOs who are created by State law, [it] is beyond the powers delegated to Congress in Article I, §8 of the Constitution, and violates the Tenth Amendment." Arguing that the Congress cannot issue commands to state officials, they asserted that the three duties imposed on CLEOs by the Act were invalid under New York v. United States:

State governments are neither regional offices nor administrative agencies of the federal government. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.

344. Id.
345. 505 U.S. 144 (1992); see supra notes 102-10 and accompanying text.
346. Mack, 66 F.3d at 1028.
347. Id.
349. Id. On appeal, the sheriffs primarily disputed the holdings of severability, while the government argued that the entire Act was constitutional.
350. Brief of Appellant Jay Printz, Mack v. United States, 66 F.3d 1025 (9th Cir. 1995) (Nos. 94-36193, 95-35037) [hereinafter Appellant Printz's Opening Brief].
351. Id. at 14.
Whatever 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.\textsuperscript{352}

Using this language from New York, the sheriffs argued that the Brady Act represented an unconstitutional “command” by the federal government to the states to administer a federal regulatory program.\textsuperscript{353} If Congress was so concerned about handgun controls, it should have attempted to regulate the field directly: “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”\textsuperscript{354}

In upholding the Act, however, the Ninth Circuit panel rejected the sheriffs’ expansive reading of New York: “Although we concede that there is language in New York that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered.”\textsuperscript{355} The Court instead adopted a narrower view of New York. “New York, then, is best read as a case that... holds the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government.”\textsuperscript{356}

According to the Court, the Brady Act does not represent a mandate to the “states” in the sovereign sense discussed in New York.\textsuperscript{357} Rather, the Act “is a regulatory program aimed at individuals and not the states.”\textsuperscript{358} The Act does not regulate states as sovereign units. “CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which

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\textsuperscript{352} Id. at 15-16 (quoting New York v. United States, 505 U.S at 178 (citations omitted)).
\textsuperscript{353} Id. at 16-22.
\textsuperscript{354} Id. at 19 (quoting New York, 505 U.S. at 178). If the Congress chose instead to impose the duty of background checks on federal officials (e.g., agents of the Federal Bureau of Alcohol, Tobacco and Firearms), it would have to enact this legislation pursuant to an enumerated Article I power. Assuming that the Congress passed this legislation under its commerce power, would it survive a constitutional challenge under United States v. Lopez? See supra part IV.D.
\textsuperscript{355} Mack, 66 F.3d at 1030.
\textsuperscript{356} Id. (emphasis added).
\textsuperscript{357} Id.
\textsuperscript{358} Id. at 1031 (emphasis added).
the state must bear political accountability.” 359 The Court distinguished the Brady Act from the “take title” provision in New York 360 on the basis that the Act commands individual state officers, not states as sovereign units. 361

C. Application of Thomas’s Model to the Brady Act

The court’s decision in Mack v. United States represents the first skirmish in a battle that may ultimately be fought before the Supreme Court. The sheriffs in Mack have requested an en banc hearing before the entire Ninth Circuit. Moreover, a similar case is now pending before the Fifth Circuit. 362 Should one of the circuits find the Brady Act unconstitutional, the Supreme Court may very well grant certiorari in 1996 to resolve the circuit split.

Whatever one thinks of the holding in Mack, the Court’s reasoning illustrates the weaknesses and limits of New York-based Tenth Amendment challenges to federal laws. To avoid the holding of New York, courts need only argue that the case at bar involves a statute that regulates individuals rather than states as sovereign units. 363 With this distinction, courts can narrow the holding of New York to include only the most extreme and coercive federal legislation. Justice Thomas’s popular sovereignty model of reserved powers, however, is much broader than the New York-based approach. Under Thomas’s model, the Brady Act would most likely be found unconstitutional.

359. Id.
360. See supra notes 107-08 and accompanying text.
361. Circuit Judge Fernandez disagreed with this distinction, arguing that the Brady Act does in fact “command” states directly in their sovereign capacity: “[The Act] is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees.” Mack, 66 F.3d at 1035 (Fernandez, J., dissenting). Fernandez argued that the Act, by regulating individuals in their capacities as state officers, was precisely the kind of legislation that New York held unconstitutional: “[S]tate officials are conscripted by the federal government to fulfill its purposes and they can do nothing about that. . . . I assume that the Supreme Court meant what it said when it said: ‘The Federal Government may not compel the States to enact or administer a federal regulatory program.’” Id. (quoting New York v. United States, 505 U.S. 144, 188 (1992)).
363. See supra notes 109-10 and accompanying text.
Justice Thomas contends that all power stems from the people of the states and that those powers “reserved” under the Tenth Amendment include all powers not specifically granted to the federal government by the Constitution. The remainder of the people’s powers not specifically granted to the federal government through the Constitution are either delegated to state governments or retained by the people. When the Constitution is silent about the exercise of a particular power, the federal government lacks that power and the states enjoy it.

Justice Thomas might approach the Brady Act as follows. The Constitution is silent on the issue of handgun controls, and the duties imposed by the Act on state officials are not authorized by any enumerated power. The power to impose background checks and waiting periods is thus “reserved” to the people of the states, and the Brady Act is therefore unconstitutional as violative of the Tenth Amendment.

1. The duties imposed on the states by the Brady Act do not fall within the commerce power of Congress

Prior to the Supreme Court’s decision in *Lopez*, the Brady Act would undoubtedly have been found constitutional as a valid exercise of Congress’s commerce power. However, *Lopez* appears to have created a broad exception to the Court’s otherwise lenient review under the rational basis test. Where the regulated activity is not of a commercial nature, it must have a “substantial effect” on interstate commerce in order to be within the reach of the commerce power of Congress. Under *Lopez*, only “channels” and “instrumentalities” of interstate commerce are subject to the rational basis test.

Handguns are not “channels” of interstate commerce within the meaning of *Lopez*. The *Lopez* majority cites to *Heart of Atlanta Motel, Inc. v. United States* which upheld the federal law prohibiting discrimination by hotels and restaurants, as an example of protecting interstate commerce channels. Unlike public accom-
modations that regularly advertise for out-of-state customers and whose regular clientele are mainly from out-of-state,\footnote{Heart of Atlanta, 379 U.S. at 258-59.} handguns do not serve as a regular channel through which interstate commerce flows. Similarly, handguns are not mere "instrumentalities" of interstate commerce within the meaning of \textit{Lopez}. The \textit{Lopez} majority cites to several cases upholding Congress's power to regulate the railroads as examples of regulating the instrumentalities of interstate commerce.\footnote{Lopez, 115 S. Ct. at 1629.} Unlike railroads that exist for the purpose of transporting goods across state lines, handguns do not serve as a means or instrumentality of interstate commerce.

The regulation of handguns thus falls squarely within \textit{Lopez}'s "not of a commercial nature" exception. Under \textit{Lopez}, the Brady Act is therefore not subject to review under the deferential rational basis test. Rather, the sale of handguns must have a "substantial effect" on interstate commerce in order to be within the reach of the commerce power of Congress. Armed with the "substantial effects" test, a future majority might well argue that the relationship between handgun sales and interstate commerce is too attenuated and tangential to uphold the Brady Act as a valid exercise of congressional commerce power.\footnote{Of course, as noted above, this line of reasoning would face some serious obstacles. What exactly constitutes a "substantial effect?" How much deference should the Court give to congressional findings of an interstate commerce "nexus?" See supra notes 317-20 and accompanying text; see also Mack v. United States, 66 F.3d 1025, 1028 n.5 (9th Cir. 1995) ("The legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings.").}

2. The duties imposed on the states by the Brady Act are not authorized by any other enumerated power.

The Constitution is silent on the issue of handgun controls.\footnote{The Constitution's only direct reference to firearms, the Second Amendment, does not appear to support congressional preemption of gun control: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Indeed, insofar as it applies, the Second Amendment supports the inference that the power to impose waiting periods and background checks is reserved to the people of the States under the Tenth Amendment.} Moreover, nothing in the Brady Act suggests any enumerated power in the Constitution which justifies the imposition of duties on state officials.\footnote{Appellant Printz's Opening Brief, supra note 350, at 22.} "The Constitution delegates the enforcement of federal
law to the President, and is explicit concerning limited duties of the States vis-a-vis federal law enforcement.376 Three provisions of the Constitution involve federal-state law enforcement relations.377 None of these provisions empower Congress to “commandeer” state governments into the service of federal regulatory purposes.378

The Constitution empowers Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”379 It also allows Congress to organize, arm, and discipline the militia, presumably in time of war.380 However, while the Constitution allows Congress to “call forth” state national guards and militias to aid in the national defense, it does not empower Congress to command local sheriffs to enforce federal gun control regulations.381

The Constitution also addresses law enforcement. “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”382 The federal government can only protect a state “against domestic violence” when the state so applies.383 Even if a state were to apply for such protection, nowhere does the Constitution grant the federal government the power to conscript state officials, except for militia officers, for this effort.384

Finally, the Constitution empowers the federal courts to compel a state governor to extradite a fugitive to the state having jurisdiction over the crime.385 While “[t]he commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum State,”386 this provision of the Constitution has

376. Id.
377. Id. at 23.
380. Id. art. I, § 8, cl. 16.
381. Appellant Printz’s Opening Brief, supra note 350, at 23.
384. Id.
385. U.S. CONST. art. IV, § 2, cl. 2.
no obvious application to the issue of congressional commands to state law enforcement officials to enforce federal gun control laws.\(^\text{387}\)

3. The power to impose background checks and waiting periods is thus “reserved” to the people of the states.

The duties the Brady Act imposes on state officials are not authorized by any enumerated power in the Constitution. The Act is not a valid exercise of Congress’s commerce power under \textit{Lopez}. The Constitution is simply silent on this issue. Accordingly, under Justice Thomas’s popular sovereignty model, the power to impose background checks and waiting periods is “reserved” to the people of the states, and the Brady Act is therefore unconstitutional as violative of the Tenth Amendment.

VI. CONCLUSION

Justice Thomas’s dissent in \textit{Thornton} proposes a model of reserved powers under the Tenth Amendment that would give the states much greater latitude to act absent specific constitutional preemption. By characterizing the states’ reserved powers as a function of “popular sovereignty” rather than “original powers,” Thomas lays the foundation for a new and expansive approach to Tenth Amendment jurisprudence. As the discussion of the Brady Act shows, the popular sovereignty model would call into question many federal laws, potentially returning significant portions of federal power to the states. Depending on whether the Supreme Court’s “federalism coalition” is able to build a five-vote majority in the future, the Tenth Amendment could become the basis for the judicial restoration of limited, decentralized government.

Former Delaware Governor Pete du Pont has written that “[o]f the ten amendments constituting the Bill of Rights, none has been so humbled as the Tenth.”\(^\text{388}\) However, federalism advocates like du Pont believe that their moment has finally arrived: “[T]he Tenth Amendment clearly fits the temper of our times. The conservative revolution that is in progress around the globe is devolving power—from governments to people, from groups to individuals, and from central governments to local ones.”\(^\text{389}\) Many proponents of the

387. Id. at 24-25.
389. Id. at 51. Governor du Pont argues that the Supreme Court “rationalized [the Tenth Amendment] out of existence” because “the Tenth Amendment goes against the
Tenth Amendment contend that technological and economic trends associated with the information age will advance the cause of federalism. Syndicated columnist George F. Will writes that:

[T]he revival of the constitutional theory of decentralization was fostered by a scientific event in 1971—the Intel Corporation’s introduction of the first microprocessor. A decade later there were millions of such slivers of silicon in personal computers and millions more in fax machines, cellphones, voice-mail systems and other devices. . . . Today the Framers’ constitutional vision of decentralized governance, until quite recently regarded as a quaint antique, is being rejuvenated by modernity.390

It remains to be seen whether constitutional federalism is truly on the verge of being “rejuvenated by modernity.” Without a doubt, Justice Thomas has left a lasting mark and has done much to restore the Framers’ vision through his popular sovereignty model of reserved powers.

Vince Lee Farhat*

grain of conventional liberalism.” Id. at 50. He contends that the Tenth Amendment “is the antithesis of the liberal belief that society’s elite groups—academics, the judiciary, civil servants, bureaucrats—know better than we do what is good for us.” Id.


* My sincere thanks to the members of the Loyola of Los Angeles Law Review for their assistance in publishing this Note. I also wish to thank Professor Karl M. Manheim and Tung Yin, Law Clerk to the Hon. Edward Rafeedie, for their invaluable insight. This Note is dedicated to Betsy Scott, to whom I owe special thanks for her extraordinary love, support, and patience.