

U.S. TERM LIMITS, INC. V. THORNTON AND UNITED STATES V. LOPEZ: THE SUPREME COURT RESUSCITATES THE TENTH AMENDMENT

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I. INTRODUCTION

Federalism has died a slow death in American jurisprudence. It died officially in 1985 when the Supreme Court decided *Garcia v. San Antonio Metropolitan Transit Authority*,¹ removing one of the last court-imposed limitations on federal regulation.² In his dissenting opinion in *Garcia*, Justice Powell wrote federalism's obituary: The Supreme Court, "reject[ing] almost 200 years of the understanding of the constitutional status of federalism,"³ "has effectively reduce[d] the Tenth Amendment to meaningless rhetoric"⁴

In the 1994-95 Term, however, the U.S. Supreme Court resuscitated the long dormant Tenth Amendment,⁵ invoking the very principles that formed the basis of American government more than 200 years ago. In *U.S. Term Limits v. Thornton*,⁶ a four-Justice dissent expressed the need for a limited federal government, and in *United States v. Lopez*,⁷ the Court applied the Tenth Amendment in an effort to protect state sovereignty and limit the power of the federal government. In doing so, the Supreme Court rattled the legal community, eliciting loud, critical, and often personal responses.⁸

1. 469 U.S. 528 (1985).

2. See *id.* (holding that it was impossible to distinguish between traditional government functions and those that were not traditional), *rev'g* National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that the federal government could not regulate traditional government functions of the state governments).

3. *Garcia*, 469 U.S. at 560 (Powell, J., dissenting).

4. *Id.* (Powell, J., dissenting).

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

6. 115 S. Ct. 1842 (1995).

7. 115 S. Ct. 1624 (1995).

8. See, e.g., Bennett L. Gershman, *Judicial Conservatism*, N.Y. L.J., June 21, 1995, at 2; Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995,

To fully understand the responses to *U.S. Term Limits* and *Lopez*, it is necessary to understand the role federalism has played in American jurisprudence since the enactment of the Constitution. Part II of this comment will examine the roots of federalism, tracing the application of the Tenth Amendment since the time of its original inception in 1789. Part III will explore the Supreme Court's application of the Tenth Amendment in both *Lopez* and *U.S. Term Limits*, and Part IV will discuss the reactions these decisions elicited from both the legal and academic communities. Part V of the comment will examine the principle of federalism and application of the Tenth Amendment in the legal and political context of 1995. Part VI will examine the potential ramifications of these decisions. Finally, Part VII will conclude that the recent decisions by the Court, while constituting a slight rebalancing of federal and state power, will ultimately have little effect on the current regulatory state.

II. ROOTS OF FEDERALISM

The Articles of Confederation, enacted in 1781, explicitly affirmed that "each state retains its sovereignty, freedom, and independence."⁹ The Articles, however, proved too weak to sustain the union of the individual states, and when the Founders met in Philadelphia in 1787, their primary goal was to strengthen federal power.¹⁰ The Founders satisfied their desire for more central authority while protecting the independence of the states by creating a system of dual sovereignty, with some powers delegated to the federal government and all others reserved by

at A1; Timothy M. Phelps, *One Vote Away from Radical Change*, CINCINNATI ENQUIRER, July 2, 1995, at E4.

9. ARTICLES OF CONFEDERATION art. II (U.S. 1781).

10. See ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 137 (Frederic A. Ogg ed., 1935).

The problem was to find a method, if union was to subsist at all, for overcoming the difficulty, to find therefore some arrangement, some scheme or plan of organization wherein there would be reasonable assurance that the states would fulfill their obligations and play their part under established articles of union and not make mockery of union by willful disregard or negligent delay. That was the *chief problem* of the day.

Id. at 146.

the states.¹¹ The intentions of the Framers were stated by James Madison during the debate over ratification of the Constitution:

The powers delegated . . . to the federal government are few and defined. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.¹²

As a result of the ratification debates, and as an appeasement to the anti-federalists,¹³ the Tenth Amendment was inserted in the Bill of Rights and explicitly states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁴

For over a century following the ratification of the Constitution, the federal government rarely tested the limits of its constitutional powers. During this time, the Supreme Court, speaking through Chief Justice Marshall in *Marbury v. Madison*,¹⁵ held that the purpose of the Constitution is to define and limit the power delegated to the federal government.¹⁶ Congress legislated only sporadically on state matters, avoiding the intense debate that surrounded the adoption of the Constitution. The landmark case of the era, which aroused the suspicions of anti-federalists and increased the strength of the federal

11. See U.S. CONST. amend. X.

12. THE FEDERALIST NO. 45, at 290 (James Madison) (Henry Cabot Lodge ed., 1923). The Federalist Papers, written by James Madison, Alexander Hamilton, and John Jay, were written to encourage public support for the Constitution, and are often consulted as a means of understanding the theory underlying the Constitution and the "intentions" of its drafters. See DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 118 (Melvin I. Urofsky ed., 1989) ("Aside from the Constitution itself, no other source is considered as authoritative as the Federalist in determining the intent of the Framers.").

13. "Anti-federalist" was a title given to those who opposed Madison and believed "that the Constitution would destroy the states and create one large, consolidated republic that would deteriorate into monarchy or despotism." FEDERALISTS AND ANTI-FEDERALISTS, THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 3 (John P. Kaminski & Richard Leffler eds., 1989).

14. U.S. CONST. amend. X.

15. 5 U.S. (1 Cranch) 137 (1803).

16. See *id.* at 176.

government, was *McCullough v. Maryland*.¹⁷ In *McCullough*, the Supreme Court decided whether Congress had the power to constitutionally charter a bank,¹⁸ and the case hinged upon whether powers of the federal government could exceed those enumerated in Articles I, II, and III of the Constitution.¹⁹ Despite arguments that the establishment of the bank exceeded the exclusive powers of Congress, Chief Justice Marshall held that additional powers were implied by the language and meaning of the Constitution.²⁰ By interpreting the Constitution to create implied powers, Chief Justice Marshall greatly expanded the powers of Congress and thereby limited the scope of the Tenth Amendment.

The first test for the new federalism created under the Constitution came with the Civil War, where the idea of a strong federal union prevailed over the cries for state sovereignty.²¹ Momentum for a strong federal government continued with the adoption of the Fourteenth Amendment in 1868,²² guaranteeing all citizens equal protection under the laws of the United States.²³ The theory of a strong centralized government grew with the Progressive movement, when society became "supremely confident of the ability of university-trained social-scientific experts to discern the public interest."²⁴ Following World War I, Progressive

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

18. *See id.* at 401.

19. *See id.* at 406 ("[T]here is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.").

20. *See id.* at 421 ("[W]e think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.").

21. After the war, President Lincoln's primary goal was strengthening the Union. *See* Speech by Abraham Lincoln (April 11, 1865), in *GREAT ISSUES IN AMERICAN HISTORY 12* (Richard Hofstadter & Beatrice Hofstadter eds., rev. ed., 1982) ("We all agree that the seceded States, so called, are out of their practical relation with the Union, and that the sole object of the Government, civil and military, in regard to those States is to again get them into that proper practical relation. . . . Let us all join in doing the acts necessary to restoring the proper practical relations between these States and the Union . . .").

22. U.S. CONST. amend. XIV.

23. *See id.*

24. Wilfred McClay, *A More Perfect Union? Toward a New Federalism*, 100 COMMENTARY 28 (1995).

reformers preached the virtues of a "powerfully activist national government" that could "preserve the essential thrust of the Constitution precisely by being free from its particulars."²⁵ The Progressive notion of government was based on the assumption that restrictions on power would only hamper the government's ability to do what was best for the country.²⁶

The Progressive theory peaked in the 1930s under the New Deal policies of President Franklin D. Roosevelt, who declared in his inaugural address: "It is hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure."²⁷

Bolstered by the support of the U.S. Supreme Court, Congress found a powerful tool for state regulation in the Commerce Clause,²⁸ the true nemesis of the Tenth Amendment. Prior to 1937, Congress had confined its use of the Commerce Clause primarily to the regulation of national commercial activity. For example, Congress enacted such laws as the Sherman Antitrust Act of 1890²⁹ to prevent monopolistic behavior, and the Interstate Commerce Act of 1887³⁰ to regulate railroads. The few incursions into local activity were generally rationalized as anti-corruption measures.³¹

In 1937, however, the Supreme Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,³² which

25. *Id.*

26. *See id.*

27. Speech by Franklin Roosevelt (March 4, 1933), in GREAT ISSUES IN AMERICAN HISTORY 351, 356 (Richard Hofstadter ed., 1969).

28. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

29. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

30. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 501 to 507, 522, 523, 525, 526, 3101 to 3104, 10101 to 11916 (1994)).

31. *See, e.g.*, *Hoke v. United States*, 227 U.S. 308 (1913) (prohibiting the interstate transportation of women for immoral purposes); *Champion v. Ames*, 188 U.S. 321 (1903) (prohibiting interstate transportation of lottery tickets).

32. 301 U.S. 1 (1937) (finding that the National Labor Relations Act can be applied within a state if the employer's labor practices affect interstate commerce).

held that Congress could regulate activities within states, as long as Congress could show that the activity had some effect, whether direct or indirect, on interstate commerce.³³ It quickly became apparent that every economic activity, no matter how small, could be found to have some effect on interstate commerce.³⁴

Between 1937 and 1941, President Roosevelt appointed eight Justices to the U.S. Supreme Court, ensuring the expanse of federal power and support for his legislative agenda.³⁵ "After 1937, as the historian William Leuchtenberg has observed, the Supreme Court 'upheld every New Deal Statute that came before it,' and by so doing, 'legitimated the arrival of the Leviathan State.'"³⁶ In the post-New Deal era, the national government regulated freely, and the states were left to fend for themselves.³⁷

In 1985, in the crowning blow to states' rights, the Court decided *Garcia*,³⁸ upholding the Fair Labor Standards Act.³⁹ The Court held that because the Constitution granted the states a role in the selection of the executive and legislative branches of government, there was no need to fashion any discrete limitations on the objects of federal authority.⁴⁰ By allowing Congress to usurp what was once considered a "traditional state government function," the Court removed the last restraint on federal power and elicited Justice Powell's obituary to federalism.⁴¹

33. See *id.* at 36.

34. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that a restaurant that purchased meat that had been moved in interstate commerce fell under Congress's power under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that wheat grown for personal use affects interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (holding that Congress may regulate all economic activities that affect interstate commerce, including wages and hours of intrastate employees), *rev'g* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that intrastate wage and hour regulation was a state, rather than a federal, function).

35. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW LXXXI* (1991) (listing the appointed Justices as: Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Harlan F. Stone, James F. Byrnes, and Robert H. Jackson).

36. McClay, *supra* note 24, at 31.

37. See Pete du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137, 140 (1995). "[T]he Court disavowed any judicial role in protecting the states from federal intrusion, leaving the states to fend for themselves and the national bull free to rampage through state china shops." *Id.*

38. 469 U.S. 528 (1985).

39. 29 U.S.C. § 201 (1938) (applying federal minimum wage laws to local government employees).

40. See *Garcia*, 469 U.S. at 552.

41. See *id.* at 569 (Powell, J., dissenting); see also *supra* Part I.

In recent years, the national government has continued to regulate the local arena through various means. In the early 1980s the federal government usurped powers explicitly granted to the states under the Twenty-First Amendment⁴² by forcing the states to raise their drinking age or face the denial of federal highway funds.⁴³ In other examples of judicial dominance, federal courts have decided cases forcing states to accept garbage⁴⁴ and even radioactive waste⁴⁵ from neighboring states. Federal courts have assumed the power to decide the location of government housing,⁴⁶ and have even gone as far as realigning local school districts, requiring the school districts to raise local taxes to pay for the expenses caused by the courts' decrees.⁴⁷

What has emerged in the last sixty years is a balance of power far different from that envisioned by the Founders.⁴⁸ By allowing federal regulation to go substantially unchecked, the Supreme Court has rendered the Tenth Amendment virtually meaningless.⁴⁹ Nevertheless, this system of federal dominance has become the norm in American jurisprudence. It has been court-tested and citizen-approved. By 1995, this gradual build-up of centralized power had been normalized, and it set the stage for *United States v. Lopez*⁵⁰ and *U.S. Term Limits v. Thornton*.⁵¹

42. U.S. CONST. amend. XXI (repealing Prohibition under the Eighteenth Amendment and granting states the right to determine legal drinking age).

43. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

44. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

45. See *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Idaho v. United States Dep't of Energy*, 945 F.2d 295 (9th Cir. 1991).

46. See *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

47. See *Missouri v. Jenkins*, 495 U.S. 33 (1990).

48. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987). "[W]hat the people ratified is something quite different from what they ultimately got." *Id.* at 1485. "Whatever the founders' intentions, the rules they wrote are skewed in favor of national power." *Id.* at 1488.

49. *But see New York v. United States*, 505 U.S. 144 (1992) (holding that the Congress could not commandeer the legal process of the States by directly compelling them to "enact and enforce" a federal regulatory program under the Tenth Amendment).

50. 115 S. Ct. 1624 (1995).

51. 115 S. Ct. 1842 (1995).

III. RECENT APPLICATION OF THE TENTH AMENDMENT

A. *United States v. Lopez*

The issue in *United States v. Lopez* was the constitutionality of the federal Gun-Free School Zones Act of 1990,⁵² which prohibited the possession of guns within 1000 feet of a school.⁵³ In 1992, Alfonso Lopez violated the Act by bringing a handgun to his San Antonio, Texas, high school. As a result, Lopez was facing a federally imposed six-month prison sentence.⁵⁴ Lopez's court-appointed attorney, Jack Carter, in a strategy that *Time* magazine called, "the closest an attorney ever gets to throwing a Hail Mary pass in the final two seconds of the Super Bowl,"⁵⁵ argued that although Lopez was guilty, the Gun-Free School Zones Act was unconstitutional.⁵⁶

In the majority opinion, written by Chief Justice Rehnquist, the Supreme Court agreed with Carter.⁵⁷ The opinion was driven by the long-lost conviction that the Constitution's enumeration of powers to the federal government must mean there are private activities that the states, but not Congress, can regulate.⁵⁸

Although Congress had held hearings on school violence, neither the hearings nor the statute itself directly addressed the effect of this violence on interstate commerce, nor did the statute require proof that the firearm had been in interstate commerce.⁵⁹ Despite this, the government argued that violence in and around the nation's schools had a substantial effect on the interstate economy.⁶⁰ Moreover, the government argued, the presence of guns in or near schools threatens education, which in turn results in a less productive citizenry.⁶¹

The Court rejected these arguments, indicating that the absence of a limit on federal power was not acceptable.⁶² Other-

52. 18 U.S.C. § 922 (1994).

53. See 115 S. Ct. at 1626 & n.1.

54. See *id.* at 1626.

55. Kevin Fedarko, *A Gun Ban Is Shot Down*, TIME, May 8, 1995, at 85.

56. See *Lopez*, 115 S. Ct. at 1626.

57. See *id.*

58. See *id.* at 1633.

59. See *id.* at 1631-32.

60. See *id.* at 1632.

61. See *id.*

62. See *id.*

wise, the “distinction between what is truly national and what is truly local” would be obliterated.⁶³ According to the Court, if the activity being regulated will substantially affect interstate commerce, Congress is permitted to act.⁶⁴ However, the Court concluded that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”⁶⁵ The Court went on to say that “if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly.”⁶⁶

The reasoning applied by the majority in *Lopez* reflects the original meaning of the Tenth Amendment and the intentions of the Founders to create a dual sovereignty based on the specific enumerated powers of the Constitution.⁶⁷ The concurring opinion in *Lopez*, written by Justice Kennedy and joined by Justice O'Connor, reflects the potential magnitude of the Court's decision. Justice Kennedy stated:

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision⁶⁸

Although opinions differ on the eventual ramifications of this decision,⁶⁹ the Court's willingness to recognize a limit on federal power represents a significant departure from the rubber-stamp approval process apparent since the post-New Deal era.⁷⁰ If nothing else, the opinion in *Lopez* signals recognition of the Tenth Amendment, and the ability of the federal government to overstep the constitutionally imposed boundaries of power, wherever they may lie.

63. *Id.* at 1634.

64. *See id.* at 1634.

65. *Id.*

66. *Id.* at 1633.

67. *See supra* text accompanying notes 11-14.

68. *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring).

69. *See infra* Part IV.

70. *See supra* note 34.

B. U.S. Term Limits, Inc. v. Thornton

In *U.S. Term Limits v. Thornton*,⁷¹ the issue before the Court was a state's ability to enforce a term limit initiative, which limited the tenure of the state's congressional representatives.⁷² By 1995, twenty-two states had passed term limit measures through citizen initiatives, following the lead of Colorado, which passed the first term limit measure in 1991.⁷³ Since 1991, the measures have passed with an average of sixty-six percent of the vote, gaining over twenty-two million votes in twenty-three states.⁷⁴ The initiative before the Court in *U.S. Term Limits* was one passed in Arkansas in 1992⁷⁵ with sixty percent of the vote.⁷⁶ The measure allowed candidates for the U.S. House of Representatives to appear on the ballot in only three consecutive elections, while limiting candidates for U.S. Senate to two consecutive appearances.⁷⁷

In an opinion by Justice Stevens, the Court affirmed the decision of the Arkansas Supreme Court and held the citizen initiative to be unconstitutional.⁷⁸ The Court found that such restrictions violated the Qualifications Clauses of the U.S. Constitution, which set the exclusive criteria—age, citizenship, and residency—for members of Congress.⁷⁹ Justice Stevens' opinion relied heavily on *Powell v. McCormack*,⁸⁰ in which the Court held that members of Congress could only be dismissed if they failed to meet "the qualifications expressly set forth in the Constitution."⁸¹ Justice Stevens interpreted *Powell* to stand for the proposition that "the Framers affirmatively intended the qualifications set forth in the text of the Constitution to be exclusive."⁸² Justice Stevens also relied heavily on a historic

71. 115 S. Ct. 1842 (1995).

72. See *id.* at 1842.

73. See Paul Jacob, *From the Voters with Care, in THE POLITICS AND LAW OF TERM LIMITS* 28 (Edward H. Crane & Roger Pilon eds., 1994).

74. See *id.*

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

76. See Jacob, *supra* note 73, at 28.

77. See ARK. CONST. amend. 73.

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

79. See U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3.

80. 395 U.S. 486 (1969).

81. *Id.* at 548.

82. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1852 n.12.

interpretation of the Founders' debates⁸³ and concluded that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand."⁸⁴

In *U.S. Term Limits*, however, it was the dissent, not the majority, that stirred the legal community.⁸⁵ In a lengthy and scholarly dissent, joined by Justice Scalia, Justice O'Connor and Chief Justice Rehnquist, Justice Thomas invoked the language of the Founders in rebuking the majority opinion.⁸⁶ The dissent emphasized the separateness of the states from each other in the formation of both the nation and the ongoing national government.⁸⁷

"Because the majority fundamentally misunderstands the notion of 'reserved' powers, I start with some first principles. . . . The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."⁸⁸ Justice Thomas relied on the explicit language of the Tenth Amendment, stating that "the States can exercise all powers that the Constitution does not withhold from them."⁸⁹ Because the Constitution made no reference to the creation of qualifications, Justice Thomas viewed the Clauses not as exclusive but "merely straightforward recitations of the minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet."⁹⁰

In his defense of the Tenth Amendment, Justice Thomas reached back 200 years, quoting many of the Founders. He cited James Madison, who said the authority of the Constitution was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."⁹¹ Justice Thomas then reminded

83. *See id.* at 1869.

84. *Id.* at 1868.

85. *See* sources cited *supra* note 8 and accompanying text.

86. *See* 115 S. Ct. at 1875 (Thomas, J., dissenting).

87. *See id.* at 1876 (Thomas, J., dissenting) ("Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers: the Federal Government's powers are limited and enumerated.")

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

89. *Id.* at 1876 (Thomas, J., dissenting).

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

91. *Id.* at 1875-76 (Thomas, J., dissenting) (quoting THE FEDERALIST No. 39, at

the majority of a statement by Thomas Jefferson regarding the Qualifications Clauses:

[The Constitution] has exercised the power [to prescribe qualifications and disqualifications] in part, by declaring some disqualifications But it does not . . . prohibit to the State the power of declaring . . . disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.⁹²

Therefore, based on both a literal interpretation of the Tenth Amendment, and the reasoning of the Founders, Justice Thomas concluded that the qualifications were not exclusive.⁹³

The debate surrounding *U.S. Term Limits* is intensified because Justice Thomas was joined by three Justices in his dissent, bringing the Court one vote shy of a fundamental shift in constitutional interpretation of federalism. The Justices forming the majority in *Lopez* lost the vote of Justice Kennedy, who drew a bright line on the issue of term limits.⁹⁴ In his concurring opinion, Justice Kennedy said the dissent "might be construed to disparage the republican character of the National Government. . . ."⁹⁵ He emphasized that the principle of dual sovereignty was not a one-way street: "That the states may not invade the sphere of Federal sovereignty is as incontestable, 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."⁹⁶ Justice Kennedy's concurrence suggests that while he supports limitations on federal power, he will not subscribe to the literal interpretation

243 (James Madison) (Clinton Rossiter ed., 1961)).

92. *Id.* at 1888-89 (Thomas, J., dissenting) (quoting letter from Thomas Jefferson to Joseph C. Cabell (Jan. 31, 1814), in 14 WRITINGS OF THOMAS JEFFERSON 82, 83 (A. Lipscomb ed., 1904)).

93. *See id.* at 1886 (Thomas, J., dissenting) ("At most, the specification of certain nationwide disqualifications in the Constitution implies the negation of other nationwide disqualifications; it does not imply that individual States or their people are barred from adopting their own disqualifications on a state by state basis.").

94. *See id.* at 1872, 1874 (Kennedy, J., concurring). Although supportive of a dual sovereignty, as displayed in *Lopez*, Justice Kennedy believes that issues regarding the qualifications of the national government are strictly federal and therefore "immune from state abridgement." *Id.* (Kennedy, J., concurring).

95. *Id.* at 1872 (Kennedy, J., concurring).

96. *Id.* at 1873 (Kennedy, J., concurring).

espoused by the dissent. Although he clearly rejects state-imposed term limits, he gives little indication of exactly where he will draw the line between enumerated and reserved powers.

In *U.S. Term Limits*, the arguments formulated in the Thomas dissent echo those of the *Lopez* majority. Both opinions are based on the principle of reserved powers, and both express the need to limit federal intrusion and restore some semblance of state independence as guaranteed under the Tenth Amendment.

IV. PUBLIC REACTION

The public reaction to the majority opinion in *Lopez* and to the dissent in *U.S. Term Limits* was passionate from both sides of the federalism debate.⁹⁷ Those who felt that Congress and the Court had been overstepping the boundaries of federal power for decades welcomed the opinions as much-needed rediscoveries of state sovereignty.⁹⁸ Many, however, saw the opinions as posing a serious threat to well-established principles of law that—whether intended by the Founders or not—have guided American jurisprudence for sixty years.⁹⁹

The decision in *Lopez* did not, by itself, shock the legal community. The language of the decision was somewhat conciliatory,¹⁰⁰ leaving room to distinguish *Lopez* from other Commerce Clause cases. Together with the dissent in *U.S. Term Limits*, however, there was an undeniable trend towards capping federal power and breaking down the regulatory state. Jeffrey Rosen, of *The New Republic*, summed up the magnitude of these implications when he wrote, “Having rejected the constitutional legacy of the New Deal in the *Lopez* decision a few weeks ago, Thomas

97. See, e.g., Gershman, *supra* note 8, at 2; W. John Moore, *Pleading the 10th*, NAT'L J., July 29, 1995, at 1940; Phelps, *supra* note 8, at E4.

98. See, e.g., William Murchison, *The Court Puts Federalism in Focus*, TEX. LAW., June 5, 1995, at 22.

99. See, e.g., Linda Greenhouse, *supra* note 8, at A1; Phelps, *supra* note 8, at E4.

100. See 115 S. Ct. at 1634.

Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that . . . there will never be a distinction between what is truly national and what is truly local.

Id. (citations omitted):

now seems inclined to question the legacy of Reconstruction as well."¹⁰¹

Lopez also drew a reaction from those within the federal government, where there was an attempt to distinguish the holding from existing Commerce Clause precedent and downplay any real significance. President Clinton, a former professor of constitutional law, said he was "gravely disappointed" by the decision.¹⁰² He showed his disapproval by immediately instructing the Attorney General to "find a way to 'get around' the constitutional prohibition."¹⁰³

Following *U.S. Term Limits*, however, much of the legal community lashed out at Justice Thomas and the other dissenting Justices. The reasoning and language used by Justice Thomas was described as extravagant and astonishing.¹⁰⁴ Many felt that the dissenting Justices had betrayed their conservative principles and ignored well-established and accepted precedents.¹⁰⁵ As Professor Bennett Gershman of Pace Law School wrote:

A conservative respects *stare decisis*. In both cases these Justices ignored substantial precedents that would have comfortably applied. A conservative defers to the rational decisions of popularly elected representatives. These Justices paid no such deference. A conservative interprets the Constitution based on neutral principles. These Justices interposed their own novel subjective notions of constitutional language . . . as well as their own subjective interpretation of the political process as it relates to incumbency A conservative exercises restraint in judicial review, and does not reach out to strike down laws or to radically reinvent constitutional rules. . . . In *Term Limits*, the view of our constitutional history espoused by the conservatives—that the ultimate source of Constitutional power comes from the individual states rather than the whole people of the United States—was so radical that it seemed downright revolutionary. . . . At least [House Speaker] Newt Gingrich has the virtue of honesty when he admits that he is a revolutionary.¹⁰⁶

101. Jeffrey Rosen, *Terminated*, THE NEW REPUBLIC, June 12, 1995, at 12.

102. Chi Chi Sileo, *Courting Change; Thomas Leads Charge on Race, Federalism*, WASH. TIMES, Sept. 4, 1995, at 8.

103. *Id.*

104. See Gershman, *supra* note 8, at 2.

105. See, e.g., Gershman, *supra* note 8, at 2; Rosen, *supra* note 101, at 13.

106. Gershman, *supra* note 8, at 2.

Other commentators have questioned the dissent's agenda and its desire to return to a stronger system of federalism and state independence. A reporter for the *New York Times* wrote that "it is only a slight exaggeration to say that the dissent brought the Court a single vote shy of reinstalling the Articles of Confederation, the affiliation of sovereign states that the Constitution replaced with the Federal system in 1789."¹⁰⁷ Laurence Tribe echoed those sentiments when he said of the dissent: "It's kind of sobering how close the Court came to accepting [the views of Clarence Thomas]."¹⁰⁸ Tribe also described the decision as a "threat to national cohesion," stating that if similar "measures . . . will be upheld by the Supreme Court regardless of how much they may undermine the integrity of the union, then the ability of the country to hold together in difficult times may be seriously endangered."¹⁰⁹ Harry Scheiber, a law professor at the University of California at Berkeley, went as far as to label the *U.S. Term Limits* dissent "'irresponsible' and said its historical analysis was 'weird and almost incoherent.'"¹¹⁰ Scheiber said the dissent was actually a "very radical agenda under the guise of conservatism."¹¹¹

The criticism demonstrates how conditioned the legal society has become to the dominant regulatory state. Decades of unhampered federal intrusion have made returning to the Founders' vision of a dual sovereignty a revolutionary concept. Conservatives who espouse a return to such principles are labeled radicals, when, in fact, it was these very "radical" principles that served as the basis for the Constitution a mere 200 years ago.

While a shift to state power would result in significant change, to surmise a threat to national unity implies a return to the weak confederation of states that existed prior to the Civil War. Such a return seems unlikely in the modern era, where technology and communication have shrunk the country and weakened the concept of state identity. It is unlikely that allowing states to administer federal funds or act free of federal regulation will result in cries for independence or secession. In

107. Greenhouse, *supra* note 8, at A1.

108. Julie Cohen, *10th Amendment's Hired Gun; NRA Advocate Litigates Against Federal Power*, LEGAL TIMES, June 19, 1995, at 1.

109. Moore, *supra* note 97, at 1941-42.

110. Phelps, *supra* note 8, at E4.

111. *Id.*

fact, most modern cries for secession, such as the Sagebrush Rebellion of the 1970s or the County Supremacy Movement of the 1990s, are a direct result of what some citizens view as excessive federal intrusion.¹¹²

Conversely, those who call themselves civil libertarians, and who have been attempting to roll back federal regulation for years, rejoiced at the Thomas dissent. The American Civil Liberties Union welcomed what they called "a radical constitutional vision in which the power of the federal government is derived from, and ultimately subservient to, the power of the states."¹¹³ A libertarian scholar said the dissent indicates America is "coming out of the era of laws for technicians and into the era of law in all its majesty."¹¹⁴ Supporters of states' rights expressed confidence that the Thomas dissent "will stand in history as the most important document to come out of that ruling."¹¹⁵ William Murchison, a columnist for the *Dallas Morning News*, believes the Thomas dissent could mark a fundamental change in the direction of the Supreme Court.¹¹⁶ Murchison recently wrote:

Thomas' eloquent opinions in fact establish the 10th Amendment's intimate connection with freedom: the states as barriers to federal busybodiness and outright oppression. . . . His words ring out in the intellectual stillness to which habit and example have accustomed us when the question is federalism. The stillness shudders and cracks. Soon it may perish altogether in the hum of voices asking those overdue questions: What kind of nation are we at last? Where does power come from?¹¹⁷

112. See, e.g., William F. Rawson, *Legislators Make War on Washington, Uprising Recalls Sagebrush Rebellion*, THE ASSOCIATED PRESS, Mar. 8, 1995, available in 1995 WL 4358125.

113. Sileo, *supra* note 102, at 8 (quoting Steven Shapiro, legal director of the ACLU).

114. Phelps, *supra* note 8, at E4 (quoting Roger Pilon of the Cato Institute, a libertarian think-tank).

115. Sileo, *supra* note 102, at 8 (quoting Roger Pilon of the Cato Institute).

116. See Murchison, *supra* note 98, at 22.

117. *Id.*

V. CLIMATE FOR CHANGE

It is difficult to analyze the decisions in *Lopez* and *U.S. Term Limits* without examining the social and political context within which they were made. Although the Supreme Court remains the most isolated branch in the federal government, no decisions are made in a vacuum, and no decision-makers are free from public pressure or opinion.¹¹⁸ The latest trend toward a limitation of federal power is no exception.

The last few years have seen a marked increase in political discontent among the American people, and a desire to change business-as-usual in the nation's capital.¹¹⁹ Since 1991, term limit initiatives, anti-tax measures, and third-party candidates have littered ballots nationwide.¹²⁰ In 1994, Republicans, preaching less government, gained nine seats in the United States Senate and over fifty seats in the United States House of Representatives.¹²¹ The 1994 elections were seen by many as a grass-roots revolt against Washington, D.C., led by voters "who felt the federal government [had] become overly centralized, overly burdensome, too big and out of the reach of the [American] people."¹²²

Since taking control of Congress, the Republicans have delivered on their promises to cut federal regulation.¹²³ In the first months of the new Congress, legislation was passed ending the use of unfunded federal mandates.¹²⁴ Under the Republican legislative agenda, states would receive block grants to spend on everything from welfare to the management of health care.¹²⁵

118. See Marcia Coyle, *Washington Gets Amendment Fever*, NAT'L L.J., June 5, 1995, at A21 (quoting R. B. Bernstein of the New York Law School as saying, "If people think of the federal government as the enemy and that becomes the consensus, that consensus has the power to reshape the workings of the constitutional system.").

119. See, e.g., Karen Foerstel, *Term Limits Dominate Long List of Initiatives*, ROCKY MTN. NEWS, Nov. 9, 1996, at 46A.

120. See *id.*

121. See, e.g., Janelle Carter, *Republicans Hope to Hold Voter Support*, ASSOCIATED PRESS POL. SERVICE, Jan. 11, 1995, available in 1995 WL 6706295.

122. Moore, *supra* note 97, at 1940 (quoting Governor George Allen (R-Va.)).

123. See, e.g., Sam Walker, *200 Day Drive by GOP Slices Federal Programs*, CHRISTIAN SCI. MONITOR, Aug. 7, 1995, at 1.

124. See *Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

125. See Patrice Hill, *Senate Passes GOP Budget Bill, 52-47; Democrats Force Record 39 Roll-Call Votes*, WASH. TIMES, Oct. 28, 1995, at A1.

Freshmen Republican lawmakers have organized a Constitutional Caucus that already boasts 100 members, and bills have been introduced in the House and Senate that would require all legislation to contain a statement justifying its constitutional authority.¹²⁶ In his first speech as the Republican Majority Leader, former Senator Bob Dole said: "If I have one goal for the 104th Congress, it is this: That we will dust off the 10th amendment and restore it to its rightful place in the Constitution. . . . [W]e are going to continue our drive to return power to our States and our people. . . ."¹²⁷

The states, however, are taking matters into their own hands. Last year, California sued the federal government in an effort to recover \$800 million that it had spent on the health care and incarceration of illegal immigrants.¹²⁸ Arizona, Florida, New Jersey, and Texas quickly filed suits of their own.¹²⁹ California, Illinois, Michigan, and South Carolina have also filed suits that challenge the constitutionality of the National Voter Registration Act,¹³⁰ which requires state motor vehicle departments to provide voter registration services.¹³¹ Arizona has established a Constitutional Defense Council to "challenge the federal government's regulatory authority,"¹³² and eight states have already passed resolutions with the sole purpose of affirming the validity of the Tenth Amendment.¹³³

The courts have had their say in the new rise of federalism as well. The Brady Bill,¹³⁴ requiring background checks on prospec-

126. See H.R. Res. 106, 104th Cong. (1995); S. 1039, 104th Cong. (1995).

127. 141 CONG. REC. S12 (daily ed. Jan. 4, 1995) (statement of former Sen. Dole).

128. See *California v. United States*, 104 F.3d 1086 (9th Cir. 1997).

129. See *Arizona v. United States*, No. 94-0866 (D. Ariz. 1995), *aff'd*, 104 F.3d 1095 (9th Cir. 1997); *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994); *New Jersey v. United States*, 91 F.3d 463 (1996); *Texas v. United States* B-94-228 (S.D. Tex. 1995), *appeal pending*, No. 95-40721 (5th Cir.).

130. 42 U.S.C. § 1973gg (1996).

131. See *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995); *Association of Community Org. for Reform Now v. Miller*, 912 F. Supp. 989 (W.D. Mich. 1996); *Association of Community Org. for Reform Now v. Edgar*, 880 F. Supp. 1215 (N.D. Ill. 1995); *Association of Community Org. for Reform Now v. Ridge*, 1995 U.S. Dist. LEXIS 3933 (E.D. Pa. Mar. 30, 1995).

132. See Moore, *supra* note 97, at 1941.

133. See ARIZ. REV. STAT. ANN. § 41-1293 (West 1995); COLO. REV. STAT. § 24-78-102 (1994); LA. REV. STAT. ANN. § 49:21 (West 1995); MISS. CODE ANN. § 5-3-79 (1995); MO. REV. STAT. § 226.501 (1990); MONT. CODE ANN. § 2-1-402 (1995); NEV. REV. STAT. § 321.596 (1995); W. VA. CODE § 11-26-1 (1991).

134. 18 U.S.C. § 922 (1995).

tive handgun buyers, has become a target of gun rights advocates.¹³⁵ So far, three out of four federal district courts, citing the Tenth Amendment, have ruled the law unconstitutional.¹³⁶ The 1994 Freedom of Access to Clinic Entrances Act¹³⁷ has also been attacked as an excessive application of federal power.¹³⁸ A federal district court in Wisconsin recently applied an analysis similar to that used in *Lopez* to find that the Act violated the Commerce Clause.¹³⁹ It is clear that anti-abortion activists have found a new legal weapon in the Tenth Amendment.

Both of these issues will most likely be decided by the U.S. Supreme Court, which has shown no desire to shy away from the federalism debate. A quick look at the Court's current caseload shows a desire to review the balance between federal and state power.¹⁴⁰ Already in the 1996-97 Term, the Court struck down Colorado's Amendment 2,¹⁴¹ which barred state and local governments from enacting laws to protect homosexuals.¹⁴² The Court also examined a challenge to the Indian Gaming Regulatory Act,¹⁴³ determining that Congress lacked authority under the Act to nullify a state's Eleventh Amendment immunity.¹⁴⁴ In a case involving the power of Rhode Island to ban the advertising of liquor prices, the Court held that a state's power to regulate liquor under the Twenty-First Amendment does not invoke the constitutional protection of the First Amendment.¹⁴⁵

The Supreme Court came down on the side of states' rights when it recently held that a federal district court had gone too far in attempting to micromanage a state institution by mandating

135. See, e.g., Moore, *supra* note 97, at 1943.

136. See *McGee v. United States*, 863 F. Supp. 321, 328 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994); *Printz v. United States*, 854 F. Supp. 1503, 1519-20 (D. Mont. 1994), *aff'd in part, rev'd in part, dismissed in part sub nom. Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub nom. Printz v. United States*, 116 S. Ct. 2521 (1996). *But see Roy v. Kentucky State Police*, 881 F. Supp. 290, 294 (W.D. Ky. 1995).

137. 18 U.S.C. § 248 (1995).

138. See, e.g., Moore, *supra* note 97, at 1943.

139. See *United States v. Wilson*, No. 94-CR-140, 1994 WL 777319, at *4-5 (E.D. Wis. Nov. 30, 1994).

140. See *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, 64 U.S.L.W. 2225, 2253-56 (Oct. 24, 1995).

141. COLO. CONST. art. II, § 30(b).

142. See *Romer v. Evans*, 116 S. Ct. 1620 (1996).

143. 25 U.S.C. § 2710 (1988).

144. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1122 (1996).

145. See *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (1996).

improvements in state prison libraries.¹⁴⁶ Finally, the Court is scheduled to determine the fate of the Brady Bill,¹⁴⁷ and whether the federal government has the power to utilize state governments in carrying out federal programs.¹⁴⁸ Regardless of the outcomes, it is apparent that the Supreme Court is ready to reexamine some fundamental issues of federal and state rights.

All of this activity regarding issues of federalism shows a popular and widespread political groundswell for a reduction in federal regulation. The voters have elected politicians who will take this message to Washington, D.C., and citizens are arguing their cases before judges nationwide. As the Supreme Court addresses the fundamental issues of federalism before it, the extent to which the Court will be swayed by the recent political momentum remains to be seen.

VI. FALLOUT

Following *U.S. Term Limits* and *Lopez*, the question is whether these holdings will mark a significant turn in judicial interpretation of federalism, or whether they are readily distinguishable and unique to their immediate circumstances. As the legal community waits for the next piece of the puzzle, three distinct fields of thought have emerged.¹⁴⁹

One group of scholars and commentators believes that these decisions will have an immediate impact, resulting in sweeping

146. See *Lewis v. Casey*, 116 S. Ct. 2174, 2185 (1996).

147. 18 U.S.C. § 922 (1995) (requiring background checks for those purchasing handguns).

148. See *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), cert. granted sub nom. *Printz v. United States*, 116 S. Ct. 2521 (1996).

149. For a discussion of the first field of thought, see *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, supra note 140, at 2253-56 (quoting Kathleen Sullivan); Marcia Coyle, *Washington Gets Amendment Fever*, NAT'L L.J., June 5, 1995, at A1; Moore, supra note 97, at 1941. For a discussion of the second field of thought, see Joseph Calve, *What Does Lopez Mean?*, CONN. L. TRIB., Aug. 14, 1995, at 1; *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, supra note 140, at 2242, 2253-56 (quoting Jesse Choper and Frank Easterbrook). For a discussion of the third field of thought, see Marcia Coyle, *An Emboldened Majority Breaks Ground*, NAT'L L.J., July 31, 1995, at C2 (quoting A.E. Dick Howard of the University of Virginia); Vicki C. Jackson, *Cautioning Congress to Pull Back*, N.J. L.J., Aug. 28, 1995, at 14; *State Sovereignty and the Role of Federal Government: Hearings Before the Senate Judiciary Committee*, 104th Cong., 1st Sess. (1995) [hereinafter *Hearings*] (statement of John Kester, attorney at Williams & Connolly).

and fundamental change.¹⁵⁰ A second believes that these decisions are nothing more than a bump in the road on the way to increased federal regulation.¹⁵¹ A third group believes that the Court has finally chosen to establish broad outer perimeters to federal authority, which have existed informally for decades.¹⁵²

A. *Immediate Impact*

“[T]he beginning of the recrudescence of the original constitutional design”¹⁵³ is how Roger Pilon of the Cato Institute describes the two recent decisions. While many do not share his enthusiasm for the shift, those within the first group of scholars do agree that the 1994-95 Term marked a significant transition in the history of federalism. “We’re seeing the most remarkable shift in public thinking about government and where governmental responsibilities should be placed since FDR,” said Professor Bernstein of New York Law School.¹⁵⁴ Proponents of this theory base their case on two factors: history and the current make-up of the Court.¹⁵⁵

Viewing the role of the federal government since the 1930s, this group of scholars argues that the three “engines of national power” have always created a justification and at least a perceived need for a strong federal government.¹⁵⁶ During the Depression, a strong federal government was necessary to enact the New Deal policies of President Roosevelt and to save the country from its financial woes.¹⁵⁷ Following the Depression, it was the Second World War that required centralized leadership

150. See, e.g., *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, *supra* note 140, at 2242, 2253-56; Coyle, *Washington Gets Amendment Fever*, *supra* note 149, at A1; Moore, *supra* note 97, at 1941.

151. See, e.g., Calve, *supra* note 149, at 1; *Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term*, *supra* note 140, at 2242, 2253-56.

152. See, e.g., Coyle, *An Emboldened Majority Breaks Ground*, *supra* note 149, at C2; *Hearings*, *supra* note 149; Jackson, *supra* note 149, at 14.

153. Moore, *supra* note 97, at 1941.

154. Coyle, *Washington Gets Amendment Fever*, *supra* note 149, at A21.

155. See *id.*

156. *The Charlie Rose Show*, (WNET Educational Broadcasting Company, May 23, 1995) available in 1995 WL 6126172, at *15 (quoting Professor Burt Neuborne, New York University School of Law).

157. See *id.*

and control,¹⁵⁸ and into the last decade, it has been the Cold War that has necessitated strong federal leadership.¹⁵⁹

Since the 1930s, the need for centralized control has caused power to flow from the states to Washington, D.C.¹⁶⁰ With the disappearance of these three engines of national power, however, the need for a centralized government is significantly reduced.¹⁶¹ Therefore, the Court's recent decisions are the first step toward a lasting decentralization of power.¹⁶² It is the historical transition, says Burt Neuborne of New York University, that has allowed people to ask: "Do we need a huge federal government, or is it possible to get . . . back to a vision of having the states take more responsibility?"¹⁶³

This group of scholars, who believes that these decisions mark a significant turning point, finds support for its theory in the current make-up of the Supreme Court.¹⁶⁴ According to Kathleen Sullivan of Stanford Law School, two groups of Justices hold "opposite one-way ratchets" on issues of federalism.¹⁶⁵ Sullivan believes that Chief Justice Rehnquist, along with Justices O'Connor, Scalia, and Thomas, will always strike down federal encroachments upon the states.¹⁶⁶ With the help of Justice Kennedy, who is the only Justice to hold a "two-way ratchet" on issues of federalism, Sullivan contends that the Court will be able to gain "strong anti-federalist momentum."¹⁶⁷

To emphasize the importance of these decisions on federalism, scholars like Sullivan point to the language of the Justice Thomas dissent in *U.S. Term Limits*.¹⁶⁸ Rather than make a functional argument in support of state-imposed congressional

158. *See id.*

159. *See id.*

160. *See id.*; du Pont, *supra* note 37, at 140 ("In the turmoil of the New Deal, however, the Supreme Court began to allow Congress to regulate activities within states . . .").

161. *See The Charlie Rose Show, supra* note 156, at *15 (comments of Professor Burt Neuborne, New York University School of Law).

162. *See McClay, supra* note 24, at 29 ("An intellectual shift is taking shape, one whose momentum has been gradually building for several decades, and whose eventual effects . . . are likely to be deep and enduring.")

163. *The Charlie Rose Show, supra* note 156, at *15.

164. *See Constitutional Law Conference Probes Impact of Supreme Court's 1994-95 Term, supra* note 140, at 2253.

165. *Id.*

166. *See id.*

167. *Id.*

168. *See id.*

term limits, Justice Thomas chose to match Justice Stevens' historical interpretation.¹⁶⁹ The reason, according to Sullivan, is that the dissent wanted to effect future decisions of the Court by addressing the issue of state sovereignty.¹⁷⁰

The analysis of these scholars contains both strengths and weaknesses. In terms of the historical arguments, it does appear that the need for a strong federal government has been reduced. Many of the most pressing problems currently facing the United States are domestic problems such as crime, welfare, and drugs. Arguably, such issues are better tackled at the state level than through federal intervention.¹⁷¹

Yet, Americans will continue to look to Washington, D.C., for solutions for a number of reasons. First, the end of the Cold War has left several regions of the world politically unstable. Recent American troop deployments to Somalia, Haiti, Bosnia, and Iraq show the need for American leadership abroad. Domestically, the federal government continues to control the country's purse strings, and the large majority of plans enacted on the state level will continue to require federal funding.

Another weakness can be found in the argument made by Kathleen Sullivan regarding the language of the Thomas dissent in *U.S. Term Limits*. While Sullivan points to the severity of the language as evidence the dissent was making a point for future debates, it could be interpreted differently. In fact, it may be that Justice Thomas chose this particular case to take such a strong stand on federalism because of the issue involved. It is almost certain that the Court will not decide another case interpreting the Qualifications Clauses or ballot restrictions. Therefore, Justice Thomas could take a stand, outlining his vision of states' rights, without impacting future decisions.¹⁷²

In addition, aside from the growth of the regulatory state, there have been fundamental changes in American government that would tend to prevent a return to a true dual sovereignty.

169. *See id.*

170. *See id.* Reportedly, Sullivan believes the dissent "really wanted to say some things about state sovereignty that may have implications for future debates." *Id.*

171. In fact, the welfare reform legislation recently passed by the Republican Congress and signed by President Clinton relies on block grants to the states to be administered at their discretion. *See* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 100 Stat. 2105 (1996).

172. For a discussion of this argument, *see supra* Part III.B.

One such change was the enactment of the Seventeenth Amendment in 1913.¹⁷³ This amendment to the U.S. Constitution allowed for the popular election of U.S. Senators, previously appointed by the state legislatures.¹⁷⁴ Because the United States Congress was no longer directly accountable to the several state legislatures, the effect of this change was to perpetuate the centralization of power. Such changes have added to the weakening of states' rights and will be unaffected by judicial decisions regarding issues of federalism.

B. Bump in the Road

Probably the largest faction of Court-watchers falls into the second field of thought and believes that the recent holding in *Lopez* and dissent in *U.S. Term Limits* will have little to no effect on the future interpretation of federalism.¹⁷⁵ The strongest support for this theory comes from the extremely limited nature of the issues involved in each case.¹⁷⁶ In *U.S. Term Limits*, the debate centered around grandiose principles of federalism, yet the issue of voter-imposed congressional term limits was very specific.¹⁷⁷ It is hard, argue these scholars, to imagine another case that would present similar issues of state power to the Court.¹⁷⁸ Among these scholars is Jesse Choper, who calls *U.S. Term Limits* a case of "great political moment." Nevertheless, Choper reportedly believes that "the ruling is of no great doctrinal or practical significance beyond the particular issue presented, and doesn't portend great changes in other areas."¹⁷⁹

The argument is more easily made in regard to *Lopez*, where a number of scholars believe Congress simply got lazy.¹⁸⁰ The

173. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .").

174. *See id.*

175. *See Calve, supra* note 149, at 1; *Constitutional Law Conference Probes Impact of Supreme Court's 1994-1995 Term, supra* note 140, at 2242.

176. *See Constitutional Law Conference Probes Impact of Supreme Court's 1994-1995 Term, supra* note 140, at 2242, 2253 (Professor Choper reportedly views the cases as "narrow decisions involving rare phenomenon.")

177. *See id.* at 2253.

178. *See id.* at 2242, 2253.

179. *Id.* at 2242.

180. *See id.* at 2254 ("Congress might easily patch-up the statute . . .") (summarizing statements of Judge Frank Easterbrook).

sloppy wording of the statute combined with language of the majority opinion supports the statement of Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit who has called the case "a dud."¹⁸¹

Although Commerce Clause jurisdictional justification has been regarded as somewhat of a formality in the last sixty years, the Court has always required some rationalization, no matter how trivial, as to how the subject matter being regulated affects interstate commerce.¹⁸² In the case of *Lopez*, neither the Gun Free School Zone Act, nor its legislative history, made any attempt to demonstrate an effect on interstate commerce.¹⁸³ Justice Thomas noted in his concurring opinion to *Lopez* that "[w]hen asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words."¹⁸⁴ The circuit court stated that the law was written so broadly that it could apply to carrying an unloaded shotgun "in an unlocked pickup truck gun rack, while driving on a country road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of the river, even during the summer when the kindergarten is not in session."¹⁸⁵

In his majority opinion, Chief Justice Rehnquist only went as far as to say that schools are presumptively local and that the statute does not put in a commerce hook.¹⁸⁶ This led Judge Easterbrook to believe that Congress could have easily remedied the statute by adding a hook such as: "You can't have within 1,000 yards of a school any gun that has ever moved in interstate commerce;" or "you can't have a gun within 1,000 yards of a school, any part of which was built with building materials from out of state."¹⁸⁷ Therefore, according to Easterbrook, the point "turns out to be wholly formal."¹⁸⁸

181. *Id.* at 2253.

182. *See supra* note 34.

183. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (quoting Brief for the United States) ("The Government concedes that '[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'").

184. *Id.* at 1649 (Thomas, J., concurring).

185. *United States v. Lopez*, 2 F.2d 1342, 1366 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

186. *See Lopez*, 115 S. Ct. at 1632.

187. *See id.*

188. *See id.*

This line of argument suggests that the Court took a stand in *Lopez* to preserve the integrity of its prior holdings, but has no intention of revising its stand on federal power under the Commerce Clause. Those who participated in the case seem to agree. Assistant United States Attorney Richard L. Durbin Jr., who argued the Fifth Circuit appeal, said, "I like to think that this is a case where the courts said, 'We have to draw the line.'"¹⁸⁹ Even Jack Carter, the Public Defender who handled the case, concedes, "It's not going to affect economic regulation one whit."¹⁹⁰

Although persuasive, these arguments view both *Lopez* and *U.S. Term Limits* in too much of a vacuum. It is apparent, as these scholars point out, that the Court has left room to distinguish these opinions and continue a pattern of federal growth.¹⁹¹ Yet, it is undeniably significant that the Court in *Lopez* chose to draw a line, the first in fifty years. In addition, the fact that four Justices gave their support to the Thomas dissent in *U.S. Term Limits*, an opinion that outlined a strict dual sovereignty based on the Founders' intent, demonstrates a strong dislike for the current regulatory state. Whether this dislike will translate to significant change is unclear. With numerous issues of federalism on the horizon, however, this view is certain to have a marked effect on the debate.

C. Fine-Tuning

The third group of scholars believes that these recent decisions suggest only a slight adjustment in the Court's vision of states' rights.¹⁹² The scholars who share this view believe that federalism is an ongoing process of balancing, one that is constantly being fine-tuned by the Supreme Court.¹⁹³ To make this point, some focus on the Court's entire body of work and its attitude toward federal power.¹⁹⁴ Others call attention to the fact that the Tenth Amendment, although much maligned, has never been discarded in American jurisprudence.¹⁹⁵ Regardless of what

189. Calve, *supra* note 149, at 1.

190. *Id.*

191. See *supra* text accompanying note 100.

192. See, e.g., Coyle, *An Emboldened Majority Breaks Ground*, *supra* note 149, at C2; *Hearings*, *supra* note 149; Jackson, *supra* note 149, at 14.

193. See sources cited *supra* note 192.

194. See Coyle, *An Emboldened Majority Breaks Ground*, *supra* note 149, at C3.

195. See *Hearings*, *supra* note 149.

path these scholars take, the result is the same: a Supreme Court that patrols the border between state and federal authority, adjusting the balance to meet modern requirements.¹⁹⁶

Although the Court is clearly divided on the issue of federalism, proponents of this theory expect no drastic alteration in the permissible exercise of federal power.¹⁹⁷ These scholars share the view that the dissent in *U.S. Term Limits* took a stand only because the case presented a narrow issue and, therefore, a good opportunity to send a message.¹⁹⁸ The message is not that there ought to be a complete return to a state dominated government, but rather that there is a need to recognize the importance of federalism and the power of the Tenth Amendment.¹⁹⁹

The message was driven home in *Lopez*, where the majority found the statute to be an unconstitutional extension of federal power.²⁰⁰ Even in *Lopez*, however, two of the majority Justices went out of their way to express caution regarding their holding.²⁰¹ John Kester, who argued on behalf of *U.S. Term Limits*, recently said:

Probably even after *Lopez* the Supreme Court will leave Congress a wide range in which to legislate under the commerce power. . . . The Tenth Amendment is likely to be enforced as a limitation in its own right on federal regulation only if Congress tries to commandeer state governments against their will to perform Congress' bidding, or interferes with the functioning of state governments themselves.²⁰²

A.E. Dick Howard, of the University of Virginia, echoes these sentiments when he says of *Lopez*, "I'm very cautious there will

196. See *id.*

197. See sources cited *supra* note 192.

198. See sources cited *supra* note 192.

199. See sources cited *supra* note 192.

200. See *United States v. Lopez*, 115 S. Ct. 1624 (1995).

201. See *id.* at 1634 (Kennedy, J., concurring, joined by O'Connor, J.).

The history [of Commerce Clause jurisprudence] . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Id.

202. See *Hearings*, *supra* note 149.

be a *Lopez* sequel, but the point has been made the Court cares about the limits of federal power."²⁰³

Despite the recent attempts by Congress to curb federal power, and the decisions of the Court in *Lopez* and *U.S. Term Limits*, the federalism debate remains riddled with inconsistencies. Congress, which is attempting to reduce federal responsibilities for welfare, the environment and other areas, is simultaneously attempting to federalize tort law as well as several crimes.²⁰⁴ This may be a result of public pressure. In fact, many of the same citizens who elected a Republican Congress to limit federal regulation welcome the protection of a powerful central government.²⁰⁵ Vicki C. Jackson, a professor at Georgetown University, summed up the tensions when she wrote:

Given the size of the federal government relative to those of the states, as well as the continued perception of elected officials of both parties that the public wants federal action on such arguably noncommercial matters as crime, domestic abuse, and terrorism, it seems unlikely that the clock will be epochally turned back.²⁰⁶

The Supreme Court has also contributed to the inconsistencies of the debate. Even setting aside the contradictory outcomes in *Lopez* and *U.S. Term Limits*, the Court has failed to show a consistent trend. In fact, a week after the Court decided *Lopez*, it unanimously held that a gold mine, where workers, money, and goods had all crossed state lines, was linked to interstate commerce and therefore subject to federal police power.²⁰⁷

Those who believe that *Lopez* and *U.S. Term Limits* merely represent a rebalancing of state and federal power also point to the many tools Congress can use to regulate state activities without violating the Tenth Amendment or the Commerce Clause.²⁰⁸ One such tool is the use of financial incentives for states to enact laws or participate in certain programs.²⁰⁹ Another tool, as discussed previously, is the ability to draft

203. Coyle, *An Emboldened Majority Breaks Ground*, *supra* note 149, at C4.

204. *See* Walker, *supra* note 123, at 15.

205. *See id.*

206. Jackson, *supra* note 149, at 14.

207. *See* *United States v. Robertson*, 115 S. Ct. 1732 (1995).

208. *See* *Hearings*, *supra* note 149.

209. *See* Jackson, *supra* note 149, at 14.

legislation that more accurately reflects an activity's nexus to interstate commerce.²¹⁰ Therefore, these scholars recognize that Congress will always have a hand in local regulation, and these decisions serve more as a warning from the Court. Carter G. Phillips, who worked on both the *U.S. Term Limits* and *Lopez* cases, characterized the decisions as a "rebalancing" necessitated by the fact that federal lawmakers have slipped into some bad habits.²¹¹ He called it "a wakeup call for Congress to take a long, hard look before it starts to regulate . . . [i]t will spawn litigation, but it's more of a political than a legal message."²¹²

This interpretation of the *Lopez* holding and the *U.S. Term Limits* dissent appears to be supported by the most evidence. The Court's inconsistencies indicate that it is not ready to prohibit the use of the Commerce Clause as a tool of federal regulation. Moreover, at least four Justices believe that a recognition of states' rights is essential to retain the meaning of the Tenth Amendment. Therefore, these two cases, both examples of an excessive use of federal power, enabled the Court to begin to draw a boundary, without disrupting the balance of power between the states and the federal government.

VII. CONCLUSION

Exactly where the new boundary between state and federal power will come to rest is still unclear. In cases where the federal government depends on the Commerce Clause to justify state regulation, it appears that the Court will continue to apply a very liberal definition of what "affects" interstate commerce. Because the Court shows no sign of overruling previous Commerce Clause cases, careful drafting will continue to allow Congress almost unlimited access to state activity. Legislation, provided it contains a tie to interstate commerce, will most likely survive Court scrutiny. The Court will, however, entertain arguments under the *Lopez* precedent, striking down legislation completely unrelated to interstate commerce.

Implicit in *Lopez*, however, seems to be what is informally referred to in the legal profession as a "straight-face test." By refusing to uphold all legislation, the Court seems to be saying

210. *See id.*

211. *See supra* Calve, *supra* note 149, at 1.

212. Calve, *supra* note 149, at 1.

that it will no longer tolerate wholly tenuous or far-fetched arguments connecting legislation to interstate commerce. In other words, the Court will only entertain arguments that could be made with a straight face. Without overruling precedent, the Court seems to have adopted a test that would arguably provide a different conclusion in extreme cases such as *Wickard v. Filburn*,²¹³ where the Court found that wheat grown for personal consumption affected interstate commerce by lowering demand.²¹⁴ Outside of these cases, little change should be expected in judicial interpretation of the Commerce Clause.

More significant and immediate change will most likely be seen in cases falling outside the Commerce Clause. The Court may find ways, through a resuscitated Tenth Amendment, to empower states on such issues as immigration or affirmative action, much the way Congress already has through legislation ending unfunded federal mandates and reforming welfare. In addition, rulings on issues such as to what extent it is permissible for federal courts to micromanage state institutions, may continue the trend towards an increased emphasis on state rights and a limitation on federal regulation. Probably the most pivotal case, however, will be that involving the Brady Bill, which will define how much direct control the federal government can exert over state governments before it crosses the evolving boundary of the Tenth Amendment.²¹⁵

History has shown that political change occurs sporadically and is often cyclical in nature. Conversely, judicial policy evolves far more gradually. While *Lopez* and *U.S. Term Limits* mark an end to a sixty-year judicial trend, the Court continues to operate within the containment of strict judicial precedent and is limited by those cases that reach the docket. What is clear is that both cases represent the beginning of a new path for federalism in American jurisprudence. Since *McCullough v. Maryland*,²¹⁶ the Tenth Amendment, through judicial interpretation, has strayed from its literal meaning. Now, with *Lopez* and the dissent in *U.S.*

213. 317 U.S. 111 (1942).

214. *See id.*

215. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that the Congress could not commandeer the legislative process of the States by directly compelling them to "enact and enforce" a federal regulatory program.

216. 17 U.S. (4 Wheat.) 316 (1819).

Term Limits, the Court has begun to redefine exactly where the line should be drawn between state and federal power.

