RECENT DEVELOPMENTS

THE REEMERGENCE OF THE COMMERCE CLAUSE AS A LIMIT ON FEDERAL POWER: *United States v. Lopez*, 115 S. Ct. 1624 (1995).

Since the Supreme Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*,[1] the Commerce Clause[2] has been understood to permit congressional regulation of intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[3] Although the Court has been extremely deferential in its review of congressional enactments subject to challenge under the Commerce Clause,[4] it has never articulated a clear standard isolating those intrastate activities that are valid subjects of congressional control.[5] Last Term, in *United States v. Lopez*,[6] the Court addressed this issue, holding that a purely intrastate activity is subject to congressional regulation under the Commerce Clause only if it "substantially affects" interstate commerce.[7]

Although the Court's decision in *Lopez* brought new life to the Framers' vision of a government of enumerated powers, the ruling by no means assures the future vitality of the federal system. Because the line between "affecting" and "substantially affecting" interstate commerce is unclear, Congress easily can manipulate its findings concerning the magnitude of an activity's effect on interstate commerce. Because the Court deems itself ill-equipped to review substantively congressional findings in this area,[8] the

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1. 301 U.S. 1 (1937).

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

3. *Jones & Laughlin*, 301 U.S. at 37.

4. The Court has employed a "rational basis test" in deciding Commerce Clause challenges, sustaining the regulation of an intrastate activity so long as Congress has made a "rational" finding that the activity "affects interstate commerce." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981). No act of Congress reviewed under this standard has heretofore been struck down. *See* Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1020 (1988).

5. *Compare Hodel*, 452 U.S. at 277 ("[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational") *with* Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) ("Congress may [not] use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities").

6. 115 S. Ct. 1624 (1995).

7. *Id.* at 1630.

8. The Court engages in substantive review of congressional findings when it reviews the evidence underpinning a determination that an activity affects interstate commerce in

Court must establish a categorical limit on Congress's exercise of the commerce power if it hopes to preserve the constitutional role for the States envisioned by the Framers. The Commerce Clause is most accurately read to authorize Congress to regulate only those intrastate activities that are themselves commercial. In all other cases, the text and structure of the Constitution evince the Framers' judgment that the benefits of state-by-state regulation, measured in terms of both freedom and efficiency, outweigh the gains of uniform national regulation.

In 1990, Congress passed the Gun-Free School Zones Act,[9] which made it a federal offense "for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone."[10] Subsequent to the law's passage, Alfonso Lopez, a twelfth grade student at a Texas high school, was arrested by state authorities for carrying a concealed .38 caliber handgun on campus.[11] Lopez was charged with violating a Texas law prohibiting firearm possession on school premises,[12] but the state charges were dismissed after federal agents charged Lopez with violating the Gun-Free School Zones Act.[13]

Following his indictment by a federal grand jury, Lopez petitioned for dismissal of the charges, arguing that the Gun-Free School Zones Act exceeded "the power of Congress to legislate control over our public schools."[14] The district court denied this motion and convicted Lopez after a bench trial.[15] Lopez appealed his conviction, reasserting his claim that the Gun-Free School Zones Act exceeded Congress's authority to legislate

deciding whether the evidence adequately supports that determination. As with the lowest level of equal protection review, the Court has eschewed such an inquiry in the Commerce Clause context. *Compare* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators") *with Hodel*, 452 U.S. at 276 ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding").

9. Pub. L. No. 101-647, 104 Stat. 4844 (1990) (codified at 18 U.S.C. §§ 921(a)(25)-(27), 922(q)(2)-(4), 924(a)(4) (1994)).

10. 18 U.S.C. § 922(q)(2)(A) (1994). The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25) (1994).

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

12. *See* TEX. PENAL CODE ANN. § 46.03(a)(1) (West Supp. 1994).

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

14. *Id.*

15. *See id.*

under the Commerce Clause.[16] Relying on the absence of congressional findings identifying a nexus between gun possession in schools and interstate commerce, the Court of Appeals for the Fifth Circuit reversed Lopez's conviction, holding the Act "invalid as beyond the power of Congress under the Commerce Clause."[17]

In a five-to-four decision, the Supreme Court affirmed. Writing for the majority, Chief Justice Rehnquist began his opinion with a discussion of constitutional "first principles."[18] Observing that the Constitution chartered a government of enumerated powers, the Chief Justice reiterated the Framers' view that "[t]he powers [of] the federal government are few and defined," and "those which are to remain in the State governments are numerous and indefinite."[19] Following a detailed discussion of the Court's past Commerce Clause cases, Chief Justice Rehnquist identified three types of activities the Constitution authorizes Congress to regulate under the commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.[20]

Despite the fact that the Court's past cases had not consistently defined whether an activity regulated under this third category must "affect" or "substantially affect" interstate commerce, the Chief Justice concluded that the Constitution requires the use of the more restrictive "substantial effects" test.[21]

Because the Gun-Free School Zones Act relied for its justification on this third category, Chief Justice Rehnquist next sought to determine whether the Act indeed regulated an activity that substantially affects interstate commerce. The Chief Justice identified three significant defects in the Act that undermined the government's contention that Congress could validly regulate

16. *See id.*
17. United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993).
18. *Lopez*, 115 S. Ct. at 1626.
19. *Id.*
20. *Id.* at 1629-30 (citations omitted).
21. *Id.* at 1630.

gun possession in schools. First, the behavior Congress sought to regulate was purely criminal in nature and not tied to commerce or economic enterprise of any sort. Thus, Chief Justice Rehnquist concluded that the Act's validity could not be premised on the line of cases beginning with *Wickard v. Filburn*,[22] which upheld congressional regulation "of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[23]

Second, Chief Justice Rehnquist noted that the Gun-Free School Zones Act did not contain a jurisdictional element to guarantee that the firearm carried in each individual case actually "affect[ed] interstate commerce."[24] Finally, neither the statute as originally enacted nor its legislative history contained congressional findings delineating the effects of gun possession in schools on interstate commerce. Although the Chief Justice conceded that Congress generally is not required to make such findings, their absence in this case undermined the government's defense of the statute because the connection between the regulated activity and interstate commerce was so obscure.[25]

Chief Justice Rehnquist ultimately turned to the government's formulation of the connection between firearm possession in local school zones and interstate commerce. The government attempted to establish this connection by arguing that gun possession in and around schools tends to increase violent crime.[26] The direct costs of this violence are spread across state lines through the operation of insurance markets. The government also contended that increased gun violence would reduce the willingness of individuals to travel to dangerous parts of the country and undermine the quality of education by creating an unstable learning environment.[27] This handicapped educational process would spawn a less productive citizenry, with consequent economic losses spread throughout the nation.[28]

22. 317 U.S. 111 (1942) (upholding the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat).

23. *Lopez*, 115 S. Ct. at 1631.

24. *Id.* One possible jurisdictional element in this context would require the charged individual's gun to have passed in interstate commerce. *See* United States v. Bass, 404 U.S. 336, 350 (1971).

25. *See Lopez*, 115 S. Ct. at 1631-32.

26. *See id.* at 1632.

27. *See id.*

28. *See id.*

Chief Justice Rehnquist rejected the government's use of this elaborate causal chain to link gun possession in schools with interstate commerce because, if accepted, it would have brought every aspect of human activity under federal control. Taken to its logical extreme, the Chief Justice concluded, the government's "cost of crime" rationale would permit federal regulation not only of all criminal activity, but of any activity which might potentially cause crime.[29] The Chief Justice rejected the government's "economic productivity" rationale as being even broader in implication, because nearly all activities influence productivity or work habits to some extent.[30]

The Chief Justice found this proposed extension of federal power particularly troublesome because it would have given Congress a free hand to regulate activities that have traditionally been within the ambit of state control, including basic enforcement of the criminal law, definition of familial obligations and relationships, school management, and the development of school curricula.[31] Ultimately, Chief Justice Rehnquist rejected the government's broad reading of the commerce power because such a reading would have converted Congress's authority under the Clause into "a general police power of the sort retained by the States."[32]

Justice Kennedy authored a concurring opinion, joined by Justice O'Connor, in which he expressed reservations about creating uncertainty in this well-settled area of law. Justice Kennedy stated that content-based restrictions on Congress's exercise of the commerce power traditionally have proven difficult for the Court to enforce,[33] and cautioned against a return to an activist role when reviewing matters of "political judgment."[34] Justice Kennedy thus called for strong adherence to the doctrine of stare decisis in deciding future Commerce Clause cases, concluding that Congress is free to "regulate in the commercial sphere

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29. *Id.*

30. *Lopez*, 115 S. Ct. at 1632.

31. *See id.* at 1632-33.

32. *Id.* at 1634.

33. *See id.* at 1637 (Kennedy, J., concurring); *see also* Wickard v. Filburn, 317 U.S. 111, 122 (1942) (rejecting the Court's prior content-based restrictions on Congress's Commerce Clause authority).

34. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring) ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes").

on the assumption that we have a single national market and a unified purpose to build a stable national economy."[35] However, because the regulated activity in this case was not of a commercial character, and the Gun-Free School Zones Act interfered with matters of traditional state concern, Justice Kennedy was willing to join the Court's narrowly drawn opinion.[36]

Contrary to Justice Kennedy's conservative approach, Justice Thomas's concurring opinion called for the Court's return to an interpretation of the Commerce Clause more closely reflecting that of the Framers. After a detailed discussion of the Clause's original meaning, Justice Thomas concluded that the commerce power was not intended to authorize congressional regulation of activities that only affect (substantially or otherwise) interstate commerce.[37] Thomas urged the Court to correct this misstep in future cases by enforcing a coherent categorical limit on Congress's power "that does not tend to obliterate the distinction between what is national and what is local."[38]

Chief Justice Rehnquist's opinion focused on constitutional "first principles;"[39] the primary dissent, authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, focused on "the scope of the commerce power as th[e] Court has understood [it] over the last half-century."[40] Justice Breyer criticized the majority's failure to defer to Congress's "empirical judgment" linking gun possession in schools and interstate commerce.[41] After surveying the available data, Justice Breyer concluded that ample evidence supported Congress' determination that gun possession in schools undermined the quality of education, and thereby exerted a substantial negative impact on interstate commerce.[42]

Justice Breyer also was critical of the majority's conclusion that the Gun-Free School Zones Act regulated a "noncommercial" activity.[43] Justice Breyer argued that because education serves both "social and commercial purposes," and because gun possession adversely affects education, Congress could have rationally con-

35. *Id.* at 1637.
36. *See id.* at 1640.
37. *See id.* at 1646 (Thomas, J., concurring).
38. *Id.* at 1643 (internal quotations omitted).
39. *Lopez*, 115 S. Ct. at 1626.
40. *Id.* at 1657 (Breyer, J., dissenting).
41. *Id.* at 1658, 1662-63.
42. *See id.* at 1659-62.
43. *See id.* at 1664.

cluded that gun possession in school zones fell "on the commercial side of the line."[44] Despite the indirectness of this connection to interstate commerce, Justice Breyer denied the majority's contention that his reading of the Commerce Clause would afford Congress unlimited police power. Only in "the rare case," Justice Breyer argued, would a "statute strike[ ] at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce."[45]

Dissenting separately, Justice Souter criticized the majority for manipulating the degree of deference shown to Congress depending on "the commercial or noncommercial nature" of the regulated activity."[46] Like Justice Breyer, Justice Souter criticized the distinction's "porosity" and unworkable nature given "America's highly connected economy."[47] Justice Souter also rejected the notion that Congress is entitled to less deference when the Court reviews statutes regulating subjects of traditional state concern, or that do not contain explicit factual findings establishing a connection between the regulated activity and interstate commerce.[48] Deference is due to Congress even in such cases, Justice Souter concluded, because political accountability offers an adequate check against abuse of power.[49]

Justice Stevens also authored a separate dissent, which argued that "[g]uns are both articles of commerce and articles that can be used to restrain commerce."[50] As such, Justice Stevens concluded that Congress should be free to regulate gun traffic, even to the extent of prohibiting the possession of guns by certain classes of consumers or in particular locales.[51]

The Court's decision in *Lopez* marked a small first step in the revitalization of constitutional protection for federalism. Given the narrowness of Chief Justice Rehnquist's and Justice Kennedy's opinions, it is not apparent, however, whether the case ultimately will be judged an aberration or a watershed. Perhaps the clearest principle to emerge from the case is Congress's near-

44. *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting).
45. *Id.* at 1662.
46. *Id.* at 1653 (Souter, J., dissenting).
47. *Id.* at 1654.
48. *See id.*
49. *See Lopez*, 115 S. Ct. at 1656 (Souter, J., dissenting).
50. *Id.* at 1651 (Stevens, J., dissenting).
51. *See id.*

complete freedom to regulate in the commercial sphere.[52] Thus, the ultimate question posed by *Lopez* is the extent of the Court's willingness to limit congressional regulation of intrastate noncommercial activities. If the decision is to have any lasting impact, the Court must unequivocally state in a future case that Congress is constitutionally prohibited from regulating such activities.

The Commerce Clause authorizes Congress "[t]o regulate Commerce . . . among the several States."[53] As a matter of textual interpretation, it is difficult to construe this grant of power to confer congressional jurisdiction over noncommercial activities.[54] Despite the text's clarity on this point, the *Lopez* dissenters argued that the language of the Clause is broad enough to permit growth in the commerce power "commensurate with national needs."[55] This observation has historical support, given the expansion of the commerce power since the inception of the New Deal. However, the words of the Clause are not so elastic as to be without meaning, and interpreting the Clause to permit regulation of noncommercial activities breaks a constitutional limit on congressional power that was, at most, intended to bend.

At a minimum, a valid interpretation of the Commerce Clause must not conflict with any other explicit constitutional provision or be inconsistent with the overall structure of the document. An interpretation of the commerce power that permits regulation of noncommercial activities fails on both counts because it, in ef-

52. In his opinion for the Court, Chief Justice Rehnquist stated unequivocally, "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 115 S. Ct. at 1630. Similarly, in his concurring opinion, Justice Kennedy stated that the doctrine of stare decisis "mandates against [a] return[ ] to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system." *Id.* at 1637 (Kennedy, J., concurring). Only Justice Thomas indicated a willingness to enforce limits on congressional regulation of intrastate commercial activities. *See id.* at 1642 (Thomas, J., concurring). For a discussion of the merits of enforcing such limits on the commerce power, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994).

53. U.S. CONST. art. I, § 8, cl. 3.

54. *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Textual Analysis: The Role of Judicial Review*, 62 N.Y.U. L. REV. 1, 8 (1987) (explaining that a regulated activity must be "rationally definable as commerce" before it can be an appropriate subject of federal regulation and that a contrary interpretation violates "the objective, reasonable" meaning of the Clause).

55. *Lopez*, 115 S. Ct. at 1662 (Breyer, J., dissenting); *see also* New York v. United States, 112 S. Ct. 2408, 2418 (1992) ("[T]he powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role").

fect, extends a plenary police power to Congress.[56] The Tenth Amendment expressly contradicts this broad reading of the Commerce Clause by demonstrating the Framers' intention that the States maintain exclusive jurisdiction over some activities.[57] Its validity is also contradicted by the overall structure of Article I, Section 8, which, by enumerating an exhaustive list of Congress's powers, negates the view that the Framers intended federal power to be limitless.[58]

Although the *Lopez* Court reiterated its longstanding distaste for substantive review of congressional findings linking a regulated intrastate activity with interstate commerce,[59] the majority indicated a willingness to enforce a categorical bar against regulation of intrastate noncommercial activities. Chief Justice Rehnquist's opinion recast the Court's prior "substantial affects" cases, narrowly reading them to justify congressional regulation of only those intrastate activities that are economic in nature.[60] Justice Kennedy ratified this interpretation of the Court's past cases, stating that "unlike the earlier cases to come before the Court, here neither the actors nor their conduct have a commercial character."[61]

Additionally, both Justices were influenced by the fact that the Gun-Free School Zones Act regulated a matter of traditional state concern.[62] Because many matters of traditional state concern are noncommercial in nature,[63] this suggests that the Court may be

56. *See Lopez*, 115 S. Ct. at 1632-34; *id.* at 1650-51 (Thomas, J., concurring).

57. *See* 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").

58. *See* U.S. CONST. art. I, § 8; *see also* Epstein, *supra* note 52, at 1395 (stating that the scope of Article I, Section 8 suggests that "some matters are wholly beyond the power of Congress"); Redish & Drizin, *supra* note 54, at 41-42 (arguing that the Constitution's structure unambiguously indicates that the powers of the federal government are limited).

59. *See Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring).

60. *Lopez*, 115 S. Ct. at 1630-31. Justice Breyer accurately characterized Chief Justice Rehnquist's treatment of the Court's prior Commerce Clause cases as revisionist. *See id.* at 1662 (Breyer, J., dissenting). In the past, the Court often upheld congressional regulation of noncommercial intrastate activities. *See* United States v. Bass, 404 U.S. 336, 350 (1971) (explaining that Congress may constitutionally prosecute an individual for possessing a handgun so long as at one time the gun passed in interstate commerce); Wickard v. Filburn, 317 U.S. 111, 125 (1942) (upholding regulation of home wheat production even "though it may not be regarded as commerce"). Chief Justice Rehnquist's use of these narrow readings to delegitimize the Gun-Free School Zones Act strongly suggests that they will have controlling force in the future.

61. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

62. *See Lopez*, 115 S. Ct. at 1632-33; *id.* at 1640-41 (Kennedy, J., concurring).

63. *Lopez*, 115 S. Ct. at 1640-41 (Kennedy, J., concurring).

willing to police the line between commercial and noncommercial activities to protect indirectly the state's ability to control such matters.[64]

The *Lopez* dissenters levied two objections against a categorical prohibition on congressional regulation of intrastate noncommercial activities. First, Justice Souter characterized it as an unwarranted "gloss[ ] on rationality review."[65] Justice Souter thus concluded, "As for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have observed, is plenary."[66]

Justice Souter's understanding of rational basis review is flawed, however, because it delegates to Congress the ability to define its own constitutional jurisdiction. The Court's power "to say what the law is" includes the responsibility to define the types of activities that are outside of Congress's regulatory jurisdiction.[67] Once that set of activities is defined, the rational basis test does require the Court to defer to a congressional determination that a particular activity falls within the set.[68] However, if the

64. The Court could protect the state's ability to control matters of traditional concern either directly or indirectly. Direct protection would take the form of heightened scrutiny (that is, something stronger than rational basis scrutiny) when congressional regulation undermined the state's ability to control such activities. This approach was endorsed in National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court held that congressional regulation of traditional state governmental functions was subject to heightened scrutiny. This higher level of scrutiny applied, despite the fact that Congress would have been within its power to regulate the activities if engaged in by private actors. *See* Garcia v. Metropolitan Transit Auth., 469 U.S. 528, 537 (1985). Thus, the sole basis for the application of heightened scrutiny was the conflict between federal regulation and state control over traditional state governmental activities. *See id.* Ultimately, the Court repudiated this direct approach. *See id.* at 546-47.

Contrary to this direct method, the categorical approach to the commerce power proposed here provides indirect protection to the state's ability to control matters of traditional concern. Many matters of traditional state concern, including education, prosecution of local crimes, and family law, are noncommercial in nature. Thus, if the Court were to bar congressional regulation of all noncommercial intrastate activities, such matters would form a subset (though not the full set) of all federally unregulable activities.

65. *Lopez*, 115 S. Ct. at 1654-55 (Souter, J., dissenting).

66. *Id.*

67. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

68. The Court uses the rational basis test to judge the sufficiency of congressional findings linking an activity with interstate commerce "because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy." *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting). This rationale applies to the Court's review of substantive factual findings, but not to its efforts to draw jurisdictional lines limiting Congress's exercise of the commerce power. That exercise is strictly a matter of constitutional interpretation and as such is clearly within the province of the Court. *See Marbury*, 5 U.S. at 177.

Court were to adopt Justice Souter's approach and permit congressional regulation of any noncommercial activity based on a "rational" factual finding that the activity affects commerce, the scope of the commerce power would be limited only by legislative will.[69] Such a scheme would completely undermine the Constitution's structure of enumerated powers, and thereby destroy a critical check against the tyrannical exercise of federal authority.[70]

The second objection levied by the dissenters against the categorical standard proposed here is that the line between commercial and noncommercial activities is "almost impossible to draw."[71] However, this line readily can be drawn if the Court adopts a "transactional" approach to defining commerce. The nation's "commerce" consists of individual commercial transactions involving the sale of goods or services, and the production or preparation of goods for trade.[72] This definition clearly distinguishes "commerce" from education, family life, or possession of an item for personal use. Though all of these activities may affect commercial activities indirectly, they are not themselves commercial transactions.[73]

69. This result mirrors the "political process" model adopted by the Court to govern congressional regulation of the state's performance of traditional governmental functions. In *Garcia*, the Court held that it no longer would enforce "judicially created limitations" against such regulations, but instead would leave to the "federal political process" the role of protecting "state sovereign interests." Garcia v. Metropolitan Transit Auth., 469 U.S. 528, 552 (1985); *see also* Redish & Drizin, *supra* note 54, at 41 (arguing that the logic of *Garcia*'s political process model applies with equal force to congressional regulation of private activities under the Commerce Clause).

70. *See Garcia*, 469 U.S. at 572 (Powell, J., dissenting) ("By usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties"); Greenspan, *supra* note 4, at 1043-44 (discussing deficiencies in the political process theory).

71. *Lopez*, 115 S. Ct. at 1664 (Breyer, J., dissenting).

72. *See* 15 C.J.S. *Commerce* § 1 (1967) ("The functions of commerce consist in the purchasing, selling and exchanging of commodities and the transportation incidental thereto"). Through historical development, the term as used in the constitutional context has come to include "manufacturing" as well. *See* United States v. Darby, 312 U.S. 100, 118 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-38 (1937).

73. It should be noted that this approach is inconsistent with *Bass*, in which the Court approved a federal statute criminalizing handgun possession by a felon, so long as at one time the gun passed in interstate commerce. *See* United States v. Bass, 404 U.S. 336, 350 (1971). However, the fact that an item at one time passed in interstate commerce does not make its use or possession a commercial activity. If the Court permits congressional regulation of an activity simply because it involves an item that once passed in interstate commerce, the Commerce Clause will be without limit again. For example, acceptance of this jurisdictional predicate would permit Congress to enact a statute mandating a national education curriculum, based on the fact that school building materials, desks, books, and chalk all once passed in interstate commerce. Thus, the Court must distin-

In practice, the Court has proven itself capable of distinguishing between commercial and noncommercial activities in a number of contexts. For example, the Court applies different standards to judge the constitutionality of regulations restricting commercial and political speech.[74] Similarly, in the Dormant Commerce Clause context, the Court is required to identify state regulations that impose an undue burden on interstate commerce.[75] Presumably, the Court must have an understanding of what "interstate commerce" is before it can determine whether a regulation burdens it. Ultimately, even if the commercial-noncommercial line proves difficult for the Court to draw in the most extreme cases, "any possible benefit from eliminating this legal uncertainty would be at the expense of the Constitution's system of enumerated powers."[76]

The benefits of preserving this system are well documented. State and local regulation is more likely to reflect the values and attitudes of local residents.[77] The state's ability to cope with national diversity is particularly valuable when regulating matters of traditional concern. Educational curricula vary widely from community to community, and these divergences are largely attributable to differences in the values of local residents.[78] Similarly, law enforcement priorities differ from State to State,[79] as do the

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guish or overrule *Bass* if it hopes to enforce the categorical limit on the commerce power proposed here.

74. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc., 425 U.S. 748, 771-72 (1976).

75. *Cf.* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669-71 (1981) (declaring unconstitutional state regulations that unduly burden interstate commerce).

76. *Lopez*, 115 S. Ct. at 1633.

77. This is true both because States are smaller, more homogenous communities of interest, and because voters at the state level are better able to monitor their representatives and influence the outcome of elections. *See* Greenspan, *supra* note 4, at 1039-43; LeBoeuf, *supra* note 52, at 558-59, 564-65; John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power*, 45 RUTGERS L. REV. 417, 459-461 (1993).

78. This point is dramatically illustrated by the current debate over sex education and condom distribution in schools. Resolutions of this controversy differ greatly between local school districts. *See* Frank J. Murray, *Georgia Parents Go to Court Over Birth-Control Law*, WASH. TIMES, Aug. 7, 1995, at A6; Tom Teepen, *Sad State of Moderation In Politics*, ATLANTA CONST., August 13, 1995, at 7C.

79. Levels of gun violence in schools differ from State to State, and as a result each State can be expected to enforce laws against gun possession in schools with a different degree of vigor. If federal prosecutors evaluate the seriousness of the problem on a national scale and enforce the federal law to an extent commensurate with that view, defendants residing in States in which the problem's severity is below the national average will be overprosecuted or oversentenced. *See* Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 470 (1994) (explaining that "state and local prosecutors and judges are more closely attuned to local standards of fairness than are their federal counterparts"). The *Lopez* case perfectly illustrates this

scope of procedural protections afforded to criminal defendants.[80] If these differences are paved over by uniform national regulation, both parents and criminal defendants will lose vital guarantees of personal freedom.

Preservation of state control over education and criminal law enforcement also prevents the unfair and inefficient subsidization of States with a below-average quality of life by more prosperous States. Both levels of crime and educational quality are readily affected by strong community involvement and resource investment.[81] Federal regulation of these activities, which is financed by taxes levied evenly across the country, disproportionately benefits communities that have made below-average investments in reducing crime and improving education. In addition to being unfair to those communities forced to pay twice, this type of cross-subsidization is inefficient because it dulls state incentives to allocate resources to education and law enforcement.[82] It also undermines competition among States for residents by reducing the differences in quality of life from State to State.[83] In the absence of such competition, and its consequent incentives for innovation, total national prosperity is likely to decline.[84]

Federalism operates as the critical constitutional bulwark against the tyranny and inefficiency of centralized government.

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point. Although Lopez likely would not have received a jail sentence under the Texas law prohibiting gun possession in schools, federal officials decided to "make[ ] an example out of" him. Lopez ultimately was sentenced to a six-month prison term. Joseph Calve, *Anatomy of a Landmark Ruling*, LEGAL TIMES, Aug. 14, 1995, at 9, 10.

80. Although the federal Constitution mandates minimum procedural protections for criminal defendants, many state constitutions provide greater protections for individual rights. *See* James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 FORDHAM L. REV. 1795, 1797 n.17 (1994).

81. *See* ANGELA L. CARRASQUILLO & CLEMENT B. G. LONDON, PARENTS AND SCHOOLS 141-42, 159 (1993) (stressing the importance of parental and community involvement in improving education); Randolph M. Grinc, *Angels in Marble: Problems in Stimulating Community Involvement in Community Policing*, 40 CRIME & DELINQ. 437, 464-65 (1994) (arguing that community participation is critical to the success of local crime reduction efforts).

82. This situation creates a classic "free rider" problem, because it gives States an incentive to spend less on crime and education secure in the notion that programs will be funded by federal tax dollars disproportionately drawn from citizens of other States. *See* Chippendale, *supra* note 79, at 469 (arguing that an increased federal role in law enforcement encourages state and local governments to rely on federal prosecution and shift resources to other budgetary priorities).

83. *See* LeBoeuf, *supra* note 52, at 559-61; Schmidt, *supra* note 77, at 458; William Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 776-78.

84. *See* Greenspan, *supra* note 4, at 1043; LeBoeuf, *supra* note 52, at 561-53.

The Court's modern interpretation of the Commerce Clause has extended to the federal government plenary power over almost every meaningful aspect of human existence, despite the absence of a textual or functional justification supporting this grant of authority. Although the *Lopez* decision marked a necessary first step in the revitalization of federalism, the Court should further protect the values guaranteed by this division of political authority and establish a categorical bar against congressional regulation of noncommercial intrastate activities.

John P. Frantz

FEDERAL PRECLUSION OF STATE-IMPOSED CONGRESSIONAL TERM LIMITS: *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995).

When the Supreme Court struck down Arkansas's congressional term limits amendment in *U.S. Term Limits, Inc. v. Thornton*,[1] the Court struck a stronger blow against federalism than it did against term limits themselves. State-imposed term limits were an imperfect, and probably temporary, effort to reform a Congress whose members have become almost permanently ensconced on Capitol Hill.[2] A federal constitutional amendment likely would have been needed to limit most congressional terms regardless of how the Court decided *U.S. Term Limits*.[3] The Court's holding merits scrutiny, however, because it shows how easily the Court can trump the Constitution's federalist structure. The willingness of the *U.S. Term Limits* Court to permit ill-defined "democratic principles" and theoretical threats to national sovereignty override a popularly-ratified state constitutional amendment underscores the precarious position in which federalism finds itself today.

1. 115 S. Ct. 1842 (1995).

2. *See, e.g.*, Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 385 (1991) (charting the sharp decline in turnover rates in the House of Representatives). Even in the supposedly watershed 1994 congressional elections, 90 percent of House incumbents seeking reelection were victorious. *See U.S. Term Limits*, 115 S. Ct. at 1912 (Thomas, J., dissenting).

3. That States would impose term limits on their representatives is almost inexplicable to those trained in economics and game theory. Those disciplines predict that no State would give up its senior members of Congress and the associated pork barrel perquisites without commitments from other States to do likewise. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). It is doubtful, however, whether even States that enacted term limits would have maintained the limits after seeing States that did not enact limits "free-ride" by letting their representatives gain unlimited seniority in Congress.

In the 1992 general election, Arkansas voters amended the state constitution to forbid any individual who had served three or more terms in the U.S. House of Representatives, or two or more terms in the U.S. Senate, from getting his name on the ballot for reelection.[4] The Arkansas amendment thus was not a "pure" term limits provision banning all long-term incumbents from being reelected; it merely limited incumbents' access to the ballot and preserved the possibility of successful write-in candidacies.[5] An Arkansas circuit court held that this term limits provision violated Article I of the United States Constitution, and the Arkansas Supreme Court affirmed that ruling.[6]

Prior to *U.S. Term Limits*, the U.S. Supreme Court had most thoroughly discussed the so-called Qualification Clauses[7] of the U.S. Constitution in *Powell v. McCormack*.[8] In *Powell*, the House of Representatives had tried to prevent Adam Clayton Powell from taking his seat based on prior charges of misappropriation of public funds. The Court held, however, that because Powell had been duly elected and met all three qualifications listed in the House Qualifications Clause, Congress could not exclude him. Although Article 1, section 5, permits each House to "be the Judge of the . . . Qualifications of its own Members,"[9] the Court held that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution."[10]

Powell's holding, however, prevents only Congress from going beyond the qualifications listed in the Constitution; that decision

4. ARK. CONST. amend. 73, § 3. Section 1 and Section 2 of Amendment 73 enacted term limits for state government officials and thus were not at issue in *U.S. Term Limits*. *See* Moore v. McCartney, 425 U.S. 946 (1976) (dismissing a Fourteenth Amendment challenge to term limits on state officials "for want of substantial federal question").

5. After the 1994 general election, twenty-two States had enacted either pure term limits or ballot access measures, and twenty-one of those States had used direct votes by the people to enact these provisions. *See U.S. Term Limits*, 115 S. Ct. at 1909 n.39 (Thomas, J., dissenting).

6. *See* U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 351 (Ark. 1994).

7. Although neither clause contains the word "qualifications," Article I, § 2, cl. 2, and Article I, § 3, cl. 3, are often referred to as the Qualifications Clauses. The House Qualifications Clause reads: "No Person shall be Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The Senate Qualifications Clause reads: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

8. 395 U.S. 486 (1969).

9. U.S. CONST. art I, § 5, cl. 1.

10. *Id.* at 550.

does not stop the States from adding further qualifications such as term limit provisions. The Court in *U.S. Term Limits* thus had to decide whether the qualifications listed in the Constitution are the exclusive qualifications or, alternatively, just the minimum qualifications with respect to state power over congressional representation.

In a five-to-four decision, the Supreme Court affirmed the Arkansas Supreme Court's decision, holding that States may not add to the qualifications listed in the Constitution.[11] Writing for the majority,[12] Justice Stevens explained that state-imposed qualifications are contrary to the fundamental constitutional principle that "the people should choose whom they please to govern them."[13] Moreover, "[a]llowing individual States to adopt their own qualifications for congressional service," Justice Stevens reasoned, "would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[14]

More specifically, the Court held that States may not impose additional qualifications because: (1) that power was not one of the "original powers" reserved to the States by the Tenth Amendment;[15] and (2) even if adding qualifications was an original power of the States, the Framers intended to "divest" the States of that authority.[16] The majority reasoned that the States never could have reserved this qualifications power under the Tenth Amendment because the States never possessed that power in the first place. Rather, "electing representatives was a new right, arising from the Constitution itself," and any state power over that right would therefore have to come from an express delegation to the States in the Constitution.[17] The Constitution, of course, makes no such delegation. The Court thus concluded that States have no power over congressional qualifications.

Justice Stevens argued further, however, that even if the States originally possessed some power over their representatives' quali-

11. Justice Kennedy filed a concurring opinion, and Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justices O'Connor and Scalia joined.

12. Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.

13. *U.S. Term Limits*, 115 S. Ct. at 1845 (quoting *Powell*, 395 U.S. at 547).

14. *Id.*

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

16. *See U.S. Term Limits*, 115 S. Ct. at 1854.

17. *See id.* at 1856.

fications, the Qualifications Clauses were "intended to preclude the States from exercising any such power."[18] He relied first on Madison's statement in *The Federalist* that, except for the qualifications listed in the Constitution, "the door [of the House] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."[19] Furthermore, Justice Stevens explained, the Framers feared the States might undermine the National Legislature by not sending any representatives. If the States could set additional qualifications, Justice Stevens continued, they possibly could establish impossible qualifications and thus decline to send any representatives to Congress. Given this possibility, the Framers "could not have intended States to have the power to set qualifications."[20]

In the Court's eyes, however, the "most important[ ]" reason behind its holding was that to do otherwise would violate three "basic principles of our democratic system."[21] First, by limiting who can enter government, state-imposed qualifications threaten the "egalitarian ideal" on which the Constitution was based.[22] Second, such qualifications thwart the right of the people "to vote for whom they wish."[23] And finally, state power over congressional qualifications imperils the principle that the people at large and not the States are represented in Congress. "Permitting individual States to formulate diverse qualifications for their representatives," wrote the Court, "would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure."[24]

The Court also rejected the argument that the Arkansas amendment was constitutional because it limited only access to the ballot and was therefore defensible as an exercise of state authority (pursuant to the Elections Clause) to regulate the

18. *Id.*

19. *Id.* at 1857 (quoting THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961)). Elsewhere in *The Federalist*, Madison similarly wrote:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

20. *U.S. Term Limits*, 115 S. Ct. at 1858.

21. *Id.* at 1856.

22. *Id.* at 1862.

23. *Id.* at 1863.

24. *Id.* at 1864.

"Manner" of elections.[25] The Court saw itself as bound to accept the Arkansas Supreme Court's factual assessment that the "sole purpose" of the amendment was to add an additional qualification. The Court therefore held more generally that "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."[26]

Although joining the Court's opinion, Justice Kennedy wrote a separate concurrence to emphasize his view that state-imposed qualifications impermissibly interfere with the "relationship between the people of the Nation and their National Government."[27] While acknowledging the "intricacy" of the question before the Court,[28] Justice Kennedy felt that allowing States to add congressional qualifications would "invade the sphere of federal sovereignty"[29] and "burden the exercise" of federal voting rights.[30]

In an exhaustive dissent, Justice Thomas challenged virtually every assertion made by the majority. Justice Thomas first attacked the Court's foundational notions of sovereignty and federalism. Although agreeing with the Court that the people are sovereign, Justice Thomas argued that the Constitution derives its ultimate authority from the people *of each individual State,* not from "the undifferentiated people of the Nation as a whole."[31] The people of each individual State, Justice Thomas admitted, surrendered some of their sovereignty to the national government when they joined the Union.[32] Nonetheless, Justice Thomas maintained, the Tenth Amendment mandates that all other political authority stayed with either the respective state governments or the people of each individual State.[33]

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

26. *U.S. Term Limits,* 115 S. Ct. at 1871.

27. *Id.* at 1875 (Kennedy, J., concurring).

28. *See id.* at 1872.

29. *Id.* at 1873.

30. *Id.* at 1874.

31. *U.S. Term Limits,* 115 S. Ct. at 1875 (Thomas, J., dissenting).

32. *See id.* Justice Thomas stated, for example, that under Article V each State joining the Union agreed to be bound by even those constitutional amendments that it did not ratify. *See id.* at 1877.

33. *See id.* The Tenth Amendment, according to the dissent, leaves to the people of each State the decision about how much of their reserved authority to delegate subsequently to their state governments. *See id.*

The burden was thus not on the States to show that adding qualifications was one of their "original powers," Justice Thomas argued, but rather on term limits opponents to show that the Constitution divested the States of their residual power over congressional representatives. For even if state governments prior to the Constitution enjoyed no qualifications power to reserve, the people of the States reserved through the Tenth Amendment all governmental powers not expressly surrendered to the National Government.[34]

According to Justice Thomas, the Qualifications Clauses were intended only to guarantee to the people of each State that "the legislators elected by the people of the other States will meet

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The dissent's reading of the Tenth Amendment as reserving power to the people of each individual State is not immediately obvious from the text, which says only that powers are reserved "to the people." *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1456 (1987) ("[T]he juxtaposition of the Amendment's plural reference to 'the states, respectively' and its singular reference to 'the People' . . . underscores the unity of the American people . . . .").

Justice Thomas argued, however, that reading the Amendment as reserving powers to the people of the Nation as a whole would give the Amendment no meaning. According to Justice Thomas, if the Amendment is supposed to define what authority remains at the state level, the Amendment becomes a meaningless tautology when read to say that powers are either delegated to the States or they are not. *See U.S. Term Limits*, 115 S. Ct. at 1876 (Thomas, J., dissenting). The Amendment, however, may serve only to emphasize that the federal government's powers are limited to those enumerated, and it may thus leave to the States and the people of the Nation as a whole the job of distributing the remaining power.

Justice Thomas's next point, however, removes that possibility: "[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 recognize any mechanism for action by the undifferentiated people of the Nation." *Id.* at 1877.

34. *See U.S. Term Limits*, 115 S. Ct. at 1878 (Thomas, J., dissenting). Justice Story took a contrary view in his 1833 treatise on constitutional law. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858) (arguing that the 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"). Justice Thomas asserted, however, that Story was not a member of the Founding generation and that Story's view "conflicts with both the plain language of the Tenth Amendment and the underlying theory of the Constitution." *U.S. Term Limits*, 115 S. Ct. at 1880 (Thomas, J., dissenting).

The dissent's use of Justice Story and Thomas Jefferson to support its argument contrasts ironically with Chief Justice Rehnquist's use of those same authorities in Establishment Clause jurisprudence. The dissent in *U.S. Term Limits*, for example, cites Jefferson's view that States may impose additional qualifications, *see id.* at 1888-89, and dismisses Justice Story's contrary opinion because Justice Story was not a member of the Founding generation. In the Establishment Clause arena, by contrast, Chief Justice Rehnquist has cited Justice Story's view that the government may encourage religion, and dismissed Jefferson's "wall of separation between church and State" language because Jefferson was not one of the Founders at the Convention in Philadelphia. *See* Wallace v. Jaffree, 472 U.S. 38, 91-92, 104 (1985) (Rehnquist, J., dissenting). This apparent inconsistency may be illusory, however, because although the views of both Justice Story and Jefferson deserve consideration, neither is an infallible constitutional authority.

minimum standards of competence."[35] Justice Thomas also disputed the Court's interpretation of Madison's egalitarian language in *The Federalist.* Madison, Justice Thomas claimed, merely was addressing the charge that the Constitution "was undemocratic and would lead to aristocracies in office."[36] In Justice Thomas's view, the fact that the Constitution itself leaves the door of government open "to merit of every description" did not imply that the people of each State were prohibited from closing that door slightly by adding eligibility requirements for their own Representatives.[37] Justice Thomas further explained that there was no danger that the States would close the door entirely by setting impossible qualifications, because the Constitution expressly requires the States to send representatives to both the House and the Senate.[38]

Justice Thomas also challenged the majority's use of "democratic principles" to strike down state-imposed term limits. Whereas the Court could see no distinction between qualifications set by Congress and those set by the people of each State, Justice Thomas argued that "[t]here is a world of difference between a self-imposed constraint and a constraint imposed from above."[39] Moreover, Justice Thomas accused the Court of elevating Madison's "merit of every description" language into "a personal right to be a candidate for Congress."[40]

Justice Thomas went on to observe that five States imposed extra qualifications during the period immediately following the Constitution's ratification.[41] Virginia, for example, enacted a requirement that all members of its delegation to the House of Representatives be property owners.[42] Although the dissent did not mention this fact, Madison himself went to the House under

35. *U.S. Term Limits,* 115 S. Ct. at 1886 (Thomas, J., dissenting). Justice Thomas wrote, for example, that although the "people of the other States could legitimately complain if the people of Arkansas decide . . . to send a 6-year old to Congress," the Constitution gives them "no basis to complain if the people of Arkansas elect a freshman representative in preference to a long-term incumbent." *Id.* at 1887.

36. *Id.*

37. *See id.* at 1891.

38. *See id.* at 1899. The dissent traced this duty of the States to Article I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . .") and Article I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

39. *U.S. Term Limits,* 115 S. Ct. at 1890 (Thomas, J., dissenting).

40. *Id.* at 1891.

41. *See id.* at 1907.

42. *See* 1788 Va. Acts, ch. 2, § 2.

this property requirement in Virginia's first congressional delegation.[43]

Finally, Justice Thomas disagreed with the majority's contention that the Arkansas amendment had to be considered a qualification just because its intent supposedly was to add a qualification. Justice Thomas argued that the Arkansas Supreme Court had not made a definitive ruling regarding the amendment's intent[44] and that even if it had, the "intent behind a law" should not affect analysis under the Qualifications Clauses.[45] The amendment, for instance, might have been intended simply to "level the playing field" for challengers who have to compete against incumbents' obvious institutional advantages.[46]

The Court's decision in *U.S. Term Limits* to forbid state-imposed qualifications was a disappointing display of judicial decisionmaking. Although the Court believed it was following the intent of the Founders regarding the Qualifications Clauses, the Court achieved its result largely by relying on vague and indeterminate "democratic principles." The Court's willingness to set aside state sovereignty in the face of a nonexistent threat to national unity suggests that federalism is neither well-received nor well-protected as a principle enshrined in our constitutional framework.

Justice Thomas's scholarly and thorough dissent was fundamentally correct. His view that the Constitution derives its authority from the people of each State, for example, is faithful to Madison's views in *The Federalist.* Madison too thought the Constitution was "founded on the assent and ratification of the people of America . . . not as individuals composing one entire nation,

43. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, S. DOC. No. 34, 100th Cong., 2d Sess. 1410 (1989).

44. A plurality of three Justices on the Arkansas Supreme Court had ruled that the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." *U.S. Term Limits,* 872 S.W.2d at 357 (R. Brown, J., plurality opinion). A concurring Justice wrote that the amendment was "[a] practical limit on the terms of the members of the Congress." *Id.* at 364 (Dudley, J., concurring in part and dissenting in part). The Court in *U.S. Term Limits* stated that combining these two opinions created a binding ruling that the intent of the amendment was to add an additional qualification. *See U.S. Term Limits,* 115 S. Ct. at 1867. Justice Thomas wrote that the concurring opinion's language created no such majority ruling. *See id.* at 1911 (Thomas, J., dissenting).

45. *U.S. Term Limits,* 115 S. Ct. at 1911 (Thomas, J., dissenting). Justice Thomas wrote, "inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters." *Id.*

46. *Id.* Nor did Justice Thomas think that limiting ballot access had the *effect* of a qualification because, of the two incumbent Congressmen who have attempted write-in candidacies in modern times, one was elected in a landslide and the other received 27% of the vote even after losing his party's primary. *See id.* at 1910.

but as composing distinct and independent States to which they respectively belong."[47] Madison further asserted that the national government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over *all other objects*."[48]

Such discussions about sovereignty were, of course, at the heart of antebellum debates regarding states' rights, nullification, and secession.[49] Proponents of states' rights argued that the people of each State retained full sovereignty and that a State could thus nullify an act of Congress or secede from the Union. The argument failed, however, both in the courtroom and on the battlefield. As Professor Amar explains, the structure and intent of the Constitution both demonstrate that the peoples of the States lost their full sovereignty when they ratified the Constitution. Article V, for example, makes constitutional amendments binding on even nonratifying States.[50] Or, as Hamilton argued in *The Federalist*, if a constitution is not supreme over the entities that formed it, the compact would "be a mere treaty, dependent on the good faith of the parties, and not a government."[51]

All would therefore agree with Justice Thomas that the people of each State gave up some of their sovereignty when they ratified the Constitution. The dissent's view, however, that the Constitution did not unite the peoples of the several States into one people is more controversial, and it conflicts with Professor Amar's conclusion that by the Constitution's ratification "previously separate state Peoples agreed to 'consolidate' themselves into a single continental People."[52] Importantly, however, even Professor Amar's position does not imply that the States lost all authority over issues such as congressional qualifications. As Professor Amar wrote, "Relocating sovereignty in the People of the

47. THE FEDERALIST No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961).

48. *Id.* at 245 (emphasis added).

49. *See generally* Amar, *supra* note 33, at 1451-66.

50. *See id.* at 1462. Amar concedes that the text of Article V does not on its face answer the question of whether States may secede. He argues, however, that "the plain import of that Article and the rest of the document is flatly inconsistent with the states' rights theory of popular sovereignty that underlies the claimed right of secession." *Id.* at 1462 n.162. Amar convincingly cites numerous quotes of the Framers for this proposition, along with the fact that "no major proponent of the Constitution sought to win over states' rightists by conceding that states could unilaterally nullify or secede in the event of perceived national abuses." *Id.*

51. THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. Amar, *supra* note 33, at 1460. Justice Thomas cited Amar's article in his dissent while noting that Amar reached "other conclusions." *U.S. Term Limits*, 115 S. Ct. at 1876 n.1 (Thomas, J., dissenting).

United States in the late 1780's did not obliterate all state lines; it only established that any power exercised by state Peoples and state governments was *ultimately* subject to the absolute control of the American People."[53] Indeed, "as a logical matter, the question whether the People of the state or of the Union were sovereign did not necessarily dictate the allocation of power between state and federal government."[54] In short, it is entirely consistent to believe both that the people of the United States as a whole are sovereign *and* that they have left wide authority with the peoples of the several States over matters such as congressional qualifications.

Justice Kennedy's vote with the majority, however, seems driven by a mistaken fear that to allow state-imposed qualifications is "to assert that the people of the United States do not have a political identity."[55] Indeed, Justice Kennedy spent over a page of his concurrence emphasizing the "political identity of the entire people of the Union."[56] Even if Justice Kennedy were correct in saying that the dissent's reasoning about sovereignty "runs counter to fundamental principles of federalism,"[57] Justice Kennedy still could have concurred with the dissenters' judgment that States may impose congressional qualifications.

Instead, Justice Kennedy followed the majority and allowed three "democratic principles" to override the default rule that "where the Constitution is silent, it raises no bar to action by the States or the people."[58] None of the three principles, of course, is objectionable in and of itself, and all are present in the American political tradition. Egalitarianism, for instance, is implicit in the declaration that "[a]ll Men are created equal."[59] The right of the

53. Amar, *supra* note 33, at 1465 (emphasis added). Amar defines sovereignty narrowly as the ultimate potential power in any political society. The fact that the people of the United States could, through constitutional amendment, alter any political arrangement in the nation, including even state boundaries, means that the people of the United States are "sovereign." *See id.* at 1465 n.167.

54. *Id.* at 1454.

55. *U.S. Term Limits*, 115 S. Ct. at 1872 (Kennedy, J., concurring).

56. *Id.* at 1873.

57. *Id.* at 1872.

58. *Id.* at 1875 (Thomas, J., dissenting) (characterizing the majority's argument); *see also* THE FEDERALIST No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.").

59. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

people to vote for whom they wish is similarly a fundamental principle of our representative democracy.[60] Finally, Justice Thomas himself admitted that "once the representatives chosen by the people of each State assemble in Congress, they form a *national* body and are beyond the control of the individual States until the next election."[61]

These principles, however, when considered either individually or collectively, are not determinative on the issue of whether States may impose additional congressional qualifications. When applied to this specific question, the Court's democratic principles do not provide any specific answers. If anything, these principles support the dissent's position that States *may* impose extra qualifications.

For example, the "egalitarian ideal" that "election to the National Legislature should be open to all people of merit" is itself qualified by the text of the Constitution. Not just anyone may be elected to Congress—the people of a State may not elect to Congress an eighteen-year-old or a noncitizen. The "egalitarian ideal" is thus like many values reflected in the Constitution: present but far from absolute. Determining how far this ideal extends is a difficult textual and historical question.[62] The Court, however, invoked democratic principles as the "most important[ ]" basis for its holding, independent of the Court's prior analysis of the text and history of the Constitution. Relying on the egalitarian ideal at this level of generality elevates that principle far beyond its moorings in the text of the Constitution.

Likewise, the principle that the people have the right to choose "whom they please to govern them" is far from an unqual-

60. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); U.S. CONST. amend. XVII, § 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .").

61. *U.S. Term Limits*, 115 S. Ct. at 1881 (Thomas, J., dissenting) (emphasis added).

62. It is legitimate for the majority to argue, for example, that the Qualification Clauses were meant to exclude additional qualifications under the maxim *expresio unius exclusio alterius*. *See U.S. Term Limits*, 115 S. Ct. at 1850 n.9. Justice Thomas responded that the most one can conclude from the Constitution's expression of nationwide qualifications is the exclusion of other *nationwide* qualifications. *See id.* at 1886 (Thomas, J., dissenting). One commentator expressed a similar principle: "The most natural reading of the Qualifications Clauses of Article I is that they set forth necessary, but not exclusive, qualifications for members of Congress. Other clauses in the Constitution impose additional qualifications, while other portions of the Constitution place limits on the nature of any additional state or federal qualifications." Ronald D. Rotunda, *Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution*, 73 OR. L. REV. 561, 578-79 (1994).

ified constitutional principle. As mentioned above, the Constitution already restricts whom the people may elect. Indeed, the Constitution is founded on the premise that the popular will should be checked by antimajoritarian processes and safeguards.[63] Moreover, the Court's popular-will principle easily can be used to support Justice Thomas's position. In ratifying Amendment 73, the people of Arkansas were expressing an opinion about "whom they pleased to govern them"—they were tired of long-term incumbents representing them in Congress.[64]

The Court thus provided feeble support for its holding when it invoked vague democratic principles that at times even undermined the Court's conclusions. Moreover, the Court's textual and historical analysis was not convincing. Despite the majority's repeated quotation of Madison's "open to merit of every description" language, for example, that language is ultimately ambiguous on the question of state-imposed qualifications. Justice Thomas's interpretation of Madison as saying that the Constitution imposes only the minimum qualifications is just as plausible as the Court's interpretation of Madison as saying the enumerated qualifications are exclusive.

Indeed, Hamilton's views in *The Federalist* support the dissent. When discussing the danger that the federal government would favor the wealthy, Hamilton explained this could be done only "by prescribing qualifications of property either for those who may elect or be elected."[65] But, he continued, "this forms no part of the power to be conferred *upon the national government.*"[66] If

63. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-7 (2d ed. 1988) (discussing the paradox of how antimajoritarian constitutional provisions exist "in a nation that traces power to the people's will").

64. The principle that the people have the right to choose their governors could have some substantive content, however, in distinguishing the legitimacy of term limits imposed by a state legislature from those imposed by direct actions of the people of a State. Those imposed by a legislature could arguably be seen as interfering with the people's right to choose.

Justice Thomas argued that a state legislature could legitimately impose term limits on behalf of the people of a State. *See U.S. Term Limits*, 115 S. Ct. at 1893 (Thomas, J., dissenting). Justice Thomas seemed to admit, however, the legitimacy of the contrary view: "[O]ne need not agree with me that the people of each State may delegate their qualification-setting power in order to uphold Arkansas' Amendment 73." *Id.* The amendment, of course, was enacted "at a direct election and inserted into the state constitution." *Id.*

Ironically, the majority dismissed in a footnote the possibility of any "distinction between state legislation passed by the state legislature and legislation passed by state constitutional amendment." *U.S. Term Limits*, 115 S. Ct. at 1858 n.19. The Court thus discarded the only potential substantive content in its principle that the people have the right to choose whom they please to govern them.

65. THE FEDERALIST No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

66. *Id.* (emphasis added).

the writers of *The Federalist* intended to proscribe state-imposed qualifications, Hamilton would have responded more generally that property qualifications were prohibited for representatives to the new National Government. Moreover, because the States undoubtedly had the power to establish property qualifications for "those who may elect," Hamilton apparently was admitting the possibility that the new government might favor the rich through state-imposed voter qualifications. But that, of course, implies that Hamilton also was not disputing state power to set qualifications for those "who may be elected."

Furthermore, when confronted with the fact that five States imposed qualifications of some kind shortly after the Constitution was ratified, the Court could muster essentially only two arguments: (1) that state practice is not a reliable indicator of constitutionality; and (2) that only five of the thirteen States imposed such qualifications.[67] Even if one grants the validity of these two responses, the most the majority can conclude is that the ability of States to impose qualifications has been a matter of dispute since the Founding.

Moreover, the Court should not have supported its decision by invoking the Founders' concern that States would undermine the Congress. To be sure, the Framers feared that States might not send any representatives to Congress.[68] The Court could have eliminated any concern about impossible qualifications, however, on obvious narrower grounds. Even the dissent admitted that "Congress *can* nullify state laws that establish impossible qualifications" using its "make or alter" power.[69]

In short, the Court's historical and textual analysis yields, at best, ambiguous evidence about the intent of the Qualifications Clauses, and the analysis certainly reveals no compelling threat to national sovereignty that mandates barring States from adding qualifications for their own representatives. With no vital reason

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67. *See U.S. Term Limits*, 115 S. Ct. at 1864-65.

68. Hamilton, for example, justified congressional power under the Elections Clause to "make or alter" state election regulations with the "plain proposition . . . that every government ought to contain in itself the means of its own preservation." THE FEDERALIST No. 59, at 362 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

69. *U.S. Term Limits*, 115 S. Ct. at 1899-900 (Thomas, J., dissenting). Likewise, the majority's concern is overblown regarding the link between Congress and the people of the United States as a whole. In the selection of congressional representatives, the only link mentioned in the Constitution between the people and Congress is the link "between the Representatives from each State and the people of that State." *Id.* at 1882. The dissent joked that this "arrangement must baffle the majority, whose understanding of Congress would surely fit more comfortably within a system of nationwide elections." *Id.*

to prohibit state-imposed qualifications, the Court should have fallen back on the proper default rule grounded in the text of the Tenth Amendment: "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."[70]

The Court, however, went beyond merely prohibiting States from adding direct qualifications. The Court held that a state law is unconstitutional "when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."[71] Justice Thomas justifiably worried that this broad holding would invalidate existing laws banning prisoners and the mentally incompetent from being elected to Congress,[72] as well as turn redistricting and campaign finance laws into issues under the Qualifications Clauses.[73] Oddly, however, the Court's specific language leaves open the possibility that a term limits provision would be constitutional if it had *any* purpose other than creating an additional qualification indirectly.[74]

Regardless of that possibility, the overwhelming popularity of term limits suggests that a permanent solution involving a federal constitutional amendment may not be far off.[75] The Court's devaluation in *U.S. Term Limits* of the basic federalist structure of the Constitution, however, likely would survive even such an amendment. By tampering with the essential default rule that

70. *Id.* at 1876.

71. *U.S. Term Limits,* 115 S. Ct. at 1871.

72. *See id.* at 1909 (Thomas, J., dissenting).

73. *See id.* at 1913.

74. The Court was incredibly sloppy in announcing its holding. The Court first stated its "primary thesis" that "a State-passed measure with the avowed purpose of imposing indirectly an additional qualification violates the Constitution." *U.S. Term Limits,* 115 S. Ct. at 1870-71. In its specific holding, however, the Court *narrowed* the scope of the decision by adding the conjunctive condition regarding the likely *effect* of a state measure. *See id.* at 1871. The Court also changed "avowed purpose" to "sole purpose," which obviously involves some change in meaning. Assuming the Court meant what it said in its specific holding, a term limits measure would be constitutional if either the purpose or the effect of the measure did not fall within the Court's holding.

75. Polls indicate that up to 80 percent of Americans support congressional term limits. *See* Katherine Q. Seelye, *House Turns Back Measures to Limit Terms in Congress,* N.Y. TIMES, March 29, 1995, at A1. In March, 1995 and prior to *U.S. Term Limits,* a constitutional amendment offered by Representative Bill McCollum which would have limited members of Congress to twelve years received 227 votes in the House of Representatives. *See id.* The proposed amendment thus received over a majority but fell short of the two-thirds vote needed.

States retain all power neither delegated to the National Government nor prohibited to them by the Constitution, the Court's decision in *U.S. Term Limits* will remain as damaging precedent in future cases concerning the scope of the Federal Government's power.

Todd Cornelius Zubler

CONSTITUTIONAL LIMITS ON RACIAL REDISTRICTING: *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

Three Terms ago, the Supreme Court in *Shaw v. Reno*[1] held a majority-black electoral district in North Carolina unconstitutional because the district's shape was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race."[2] The decision was seen as a major setback to states' efforts to draw electoral districts with black majorities, and some commentators[3] even compared *Shaw v. Reno* with the infamous cases of *Dred Scott v. Sandford*[4] and *Plessy v. Ferguson*.[5] Last Term, in *Miller v. Johnson*,[6] the Court relied on *Shaw* to strike down a majority-black electoral district in Georgia for violating the Equal Protection Clause[7] because the State had impermissibly assigned voters to the district based on their race. Although the Court characterized *Miller* as an application of the principles announced in *Shaw*, *Miller* demystified *Shaw*'s fascination with "bizarre" district shape by bringing the so-called *Shaw* claim in line with the Court's general equal protection jurisprudence. The Court's clarification in *Miller* will encourage litigation against other electoral districts that have been intentionally drawn to incorporate racial minorities, but the Court left States some limited opportunities to continue considering race in their redistricting plans.

1. 113 S. Ct. 2816 (1993).
2. *Id.* at 2832.
3. *See* A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, Shaw v. Reno: *A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1603 (1994).
4. 60 U.S. (19 How.) 393, 527-29 (1856) (holding that a slaveholder from a State where slavery is legal retains ownership of a slave in a territory where slavery is outlawed).
5. 163 U.S. 537, 551-52 (1896) (holding that a state law requiring separate railway carriages for whites and blacks did not violate the Fourteenth Amendment).
6. 115 S. Ct. 2475 (1995).
7. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

The 1990 national census showed that Georgia was entitled to an additional member in the U.S. House of Representatives.[8] In October 1991, Georgia's General Assembly submitted a congressional redistricting plan to the U.S. Attorney General to obtain preclearance approval, as required by section 5 of the Voting Rights Act.[9] The Department of Justice denied preclearance approval in January 1992, arguing that while Georgia's plan included two majority-black districts, the plan could have contained three majority-minority districts.[10] In March 1992, the Georgia General Assembly submitted a second redistricting plan to the Justice Department that once again contained two majority-black districts, and the Justice Department again rejected the plan on the same grounds as the first rejection.[11] Following these two denials, the General Assembly drafted a third plan that created three majority-minority districts—the second, fifth, and eleventh—and the Justice Department approved the plan in April 1992.[12]

In January 1994, five white residents of Georgia's Eleventh Congressional District, one of the three majority-minority districts created by the new redistricting plan, filed suit in federal court against various Georgia state officials.[13] Citing *Shaw v. Reno*, the plaintiffs alleged that the Eleventh District was an unconstitutional "racial gerrymander" in violation of the Equal Protection Clause.[14] Finding "overwhelming" evidence that the Eleventh District was a racial gerrymander,[15] a majority of the district

8. *See Miller*, 115 S. Ct. at 2483. Before the 1990 census, Georgia had ten congressional electoral districts. *See id.*

9. Because Georgia is covered by the Voting Rights Act, whenever Georgia seeks to alter "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," it must receive a declaratory judgment from the District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or submit the plan to the Attorney General and receive the Attorney General's approval. 42 U.S.C. § 1973c (1988). Congressional redistricting plans are covered by § 5 of the Voting Rights Act. *See* Beer v. United States, 425 U.S. 130, 133 (1976), *cited in Miller*, 115 S. Ct. at 2483.

10. *See Miller*, 115 S. Ct. at 2483-84.

11. *See* Johnson v. Miller, 864 F. Supp. 1354, 1364-65 (S.D. Ga. 1994) (per curiam).

12. *See id.* at 1366-67. Elections were held under the new congressional redistricting plan on November 4, 1992, and Georgia's three majority-minority districts elected black representatives to Congress. *See id.* at 1369.

13. *See Miller*, 115 S. Ct. at 2485. The United States intervened as a defendant.

14. *See id.* at 2485.

15. *See Miller*, 864 F. Supp. at 1374.

court's three-judge panel[16] held that the redistricting plan was unconstitutional because it did not pass strict scrutiny analysis under the Fourteenth Amendment.[17]

The State of Georgia appealed directly to the Supreme Court,[18] and in a five-to-four decision, the Supreme Court affirmed. Writing for the Court,[19] Justice Kennedy explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts."[20] Justice Kennedy argued that a State may not use race to separate its citizens into voting districts for the same reason that racial segregation in public parks, buses, golf courses, beaches, and schools is unconstitutional.[21]

Although the *Shaw* Court had stressed that the bizarreness of an electoral district's shape was an important element in a racial gerrymandering claim,[22] Justice Kennedy stated that bizarre shape was not a threshold requirement of proof.[23] According to Justice Kennedy, "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[24] To satisfy this burden, a plaintiff must demonstrate that "the legislature subordinated traditional race-neutral districting principles, including but not limited to

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16. Under 28 U.S.C. § 2284, "A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284 (1988).

17. *See Miller*, 864 F. Supp. at 1393. The majority decided that promoting proportional representation of minority groups was not a compelling state interest, *see id.* at 1379, but compliance with the Voting Rights Act could constitute a compelling interest. *See id.* The majority concluded, however, that the "narrow tailoring" prong of the strict scrutiny test was not satisfied because the creation of three majority-minority districts was "not reasonably necessary to comply with sections 2 or 5 of the [Voting Rights Act]." *Id.* at 1393.

18. A party "may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1988).

19. Justice Kennedy's opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas.

20. *Miller*, 115 S. Ct. at 2485-86.

21. *See id.* at 2486.

22. The *Shaw* Court stated that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993), *quoted in Miller*, 115 S. Ct. at 2487.

23. *See Miller*, 115 S. Ct. at 2486.

24. *Id.* at 2488.

compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[25]

After clarifying the standard for burden of proof, Justice Kennedy concluded that the district court correctly found that race was the "predominant factor" motivating the General Assembly's redistricting plan.[26] He stated that the Eleventh District's narrow land bridges were a deliberate attempt to bring black populations in outlying areas into the district,[27] and the General Assembly purposefully assigned black voters to the Eleventh District to satisfy the Justice Department's demand that Georgia create three majority-black districts.[28]

Because race was the predominant factor behind the drawing of the Eleventh District, Justice Kennedy explained that the redistricting plan could only be upheld if it passed strict scrutiny.[29] To satisfy strict scrutiny, a State must demonstrate that its redistricting plan serves a compelling interest, and is narrowly tailored to achieve that interest.[30] Justice Kennedy acknowledged that a State may have a significant interest in remedying the effects of past discrimination,[31] but the facts of the case, as well as the parties' briefs, raised the sole question whether compliance with the Voting Rights Act was a compelling interest.[32] Because Georgia's first two redistricting plans increased the number of majority-

25. *Id.*

26. *See id.*

27. *See id.* at 2489. According to the *Almanac of American Politics*, "Geographically, [the Eleventh District] is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." MICHAEL BARONE & GRANT UJIFUSA, ALMANAC OF AMERICAN POLITICS 356 (1994), *quoted in Miller*, 115 S. Ct. at 2484.

28. *See Miller*, 115 S. Ct. at 2489. In their brief to the Supreme Court, the Miller appellants conceded that "[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district." Brief of Appellants Miller, et al. at 30, Miller v. Johnson, 115 S. Ct. 2475 (1995) (Nos. 94-631, 94-797, 94-929), *quoted in Miller*, 115 S. Ct. at 2489. In explaining the redistricting plan, Speaker Thomas Murphy of the Georgia Assembly said, "What we did is we went into counties and precincts and picked up pockets of African-Americans to make a strong district with voting age black population so that it would guarantee a black would be elected from there." *Miller*, 864 F. Supp. at 1377. The district court also wrote that every state legislator testifying before the court had admitted that the districting plan was motivated by racial objectives. *See id.*

29. *See Miller*, 115 S. Ct. at 2490.

30. *See id.*; *see also* Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993) ("[T]he very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is 'benign.'").

31. *See Miller*, 115 S. Ct. at 2490 (quoting *Shaw*, 113 S. Ct. at 2831).

32. *See id.*

black districts from one out of ten (equal to 10.0%) to two out of eleven (equal to 18.2%), "[t]hese plans were 'ameliorative' and could not have violated § 5's non-retrogression principle."[33] Justice Kennedy concluded that the General Assembly's decision to adhere to other districting principles instead of drawing as many majority-black districts as possible did not reveal a discriminatory purpose, and Justice Kennedy criticized the Justice Department for being "driven by its policy of maximizing majority-black districts."[34] In conclusion, Justice Kennedy wrote, "Only if our political system and our society cleanse themselves of . . . discrimination will all members of the polity share an equal opportunity to gain public office regardless of race."[35]

Writing in concurrence, Justice O'Connor stated that a redistricting plan would be subject to strict scrutiny only after a plaintiff shows that the State has relied on race "in substantial disregard of customary and traditional districting practices."[36] According to Justice O'Connor, the vast majority of the country's 435 congressional districts, which have been drawn in accordance with customary districting principles, would not be subject to challenge even though race may have been considered in the districting process.[37] Only "extreme instances of gerrymandering" are covered by *Shaw*.[38]

Writing in dissent, Justice Ginsburg began by observing that all members of the Court agreed on several points: federal courts can respond to complaints that state action has diluted minority voting strength; state legislatures may consider race as a "highly relevant" factor when drawing district lines; and state legislatures may draw district lines along the boundaries of communities that have a particular racial or ethnic character.[39] Justice Ginsburg concluded, "To offend the Equal Protection Clause, all agree,

33. *Id.* at 2492. For a description of the requirements of § 5, see *supra* note 9.

34. *Miller*, 115 S. Ct. at 2492.

35. *Id.* at 2494. Justice Kennedy curiously did not conclude his strict scrutiny analysis with a clear statement that the Eleventh District had failed the test, although his analysis leads to such a conclusion. Earlier in the opinion, Justice Kennedy wrote that "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 2491. Because the Voting Rights Act does not require the maximization of black-majority districts, the State of Georgia cannot assert that the Voting Rights Act creates a compelling interest in maximizing black-majority districts. Georgia's redistricting plan, therefore, fails strict scrutiny.

36. *Id.* at 2497 (O'Connor, J., concurring).

37. *See id.*

38. *Id.*

39. *See Miller*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting). Justice Ginsburg's dissent was joined by Justices Stevens and Breyer, and in part by Justice Souter.

the legislature had to do more than consider race. How much more, is the issue that divides the Court today."[40]

Justice Ginsburg argued that the new *Miller* standard authorized strict judicial scrutiny not only when traditional districting practices had been abandoned, as in *Shaw*, but also when traditional practices are "subordinated to" race.[41] Although the Georgia General Assembly had considered race in drafting the redistricting plan, traditional districting practices had not been discarded as in *Shaw*.[42] For example, Georgia's Eleventh District was not "bizarre," "extremely irregular," or "irrational on its face,"[43] nor did the Eleventh District excessively violate the boundaries of political subdivisions.[44] Because the *Miller* standard will allow plaintiffs to challenge electoral districts whenever other districting factors are given less consideration than race, Justice Ginsburg concluded that "[t]his invitation to litigate against the State seems to me neither necessary nor proper."[45]

Writing a lone dissent, Justice Stevens joined Justice Ginsburg's "excellent opinion without reservation," but wrote separately to emphasize that the plaintiffs "have not suffered any legally cognizable injury."[46] If the white plaintiffs from the Eleventh District are thought to suffer "representational harms"—harms that would occur if a black representative from a black-majority district neglects the interests of white residents—the Court would be guilty of the same "offensive and demeaning" generalizations about racial voting that were condemned by the majorities in both *Miller* and *Shaw*.[47] Furthermore, the plaintiffs cannot argue that they are the victims of "racially polarized voting" because the majority held that a *Shaw* claim is "'analytically distinct' from a

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40. *Id.*

41. *Id.* at 2499-500.

42. *See id.* at 2502.

43. *Id.* at 2502-03 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2824, 2825, 2848 (1993)).

44. *See Miller*, 115 S. Ct. at 2503 (Ginsburg, J., dissenting).

45. *Id.* at 2505.

46. *Id.* at 2497 (Stevens, J., dissenting) (citing United States v. Hays, 115 S. Ct. 2431 (1995)). In *Miller*, Justice Stevens's opinion appears before Justice Ginsburg's.

47. *Id.* at 2497-98. In the majority opinion in *Miller*, Justice Kennedy wrote that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 115 S. Ct. at 2486 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993)). According to Justice Stevens's reasoning, both race-based districting and a "representational harms" injury assume that members of the same race share the same political interests. The majority would contradict itself if it denied the assumption in one context but not the other.

vote dilution claim."[48] According to Justice Stevens, the majority's comparison of race-based districting with the Court's desegregation decisions was "inappropriate" because Georgia's redistricting plan serves the public interest in promoting "diversity and tolerance."[49] In conclusion, Justice Stevens wrote that he did "not see how a districting plan that favors a politically weak group can violate equal protection."[50]

In *Miller v. Johnson,* the Court demystified *Shaw*'s reliance on bizarre district shape and brought the *Shaw* claim in line with the Court's general equal protection jurisprudence. What matters most, in the Court's view, is not drawing bizarre district shapes, but assigning voters to districts on account of race. To facilitate plaintiffs' challenges against "racial gerrymanders," the Court clarified *Shaw*'s requirements for burden of proof and confirmed that *Shaw*'s standing requirements are virtually nonexistent. Although the five-Justice majority sent a strong message to state legislatures that race-based districting is subject to judicial review, *Miller* does not foreclose all opportunities to consider race as a factor in redistricting. As courts and lawyers sort out *Miller*'s implications for the rest of the country's electoral districts, it will also be necessary to consider the deeper conflict, as evidenced by the Court's five-to-four split, regarding the role of race in democratic politics.

Justice Kennedy's majority opinion provided much needed clarification about the importance of district shape in a *Shaw* claim. In *Shaw,* the Court stated "reapportionment is one area in which appearances do matter,"[51] but the Court also explained that it was not expressing any opinion whether a district lacking bizarre shape could still be challenged as a racial gerrymander.[52] This ambiguity led the dissenting district judge in *Miller* to argue that a district's "[h]ighly irregular shape . . . is the critical element" of an equal protection challenge under *Shaw.*[53] Although Justice Kennedy claimed that he was simply extending the Court's reasoning from *Shaw,*[54] his opinion in *Miller* accom-

48. *Miller,* 115 S. Ct. at 2498 (Stevens, J., dissenting) (quoting *Miller,* 115 S. Ct. at 2485).
49. *Id.*
50. *Id.* at 2499.
51. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).
52. *See id.* at 2828.
53. *Miller,* 864 F. Supp. at 1395 (Edmondson, J., dissenting). Judge Edmondson is a circuit judge who sat on the district court panel.
54. Justice Kennedy claimed that "the logical import of our reasoning [in *Shaw*] is that evidence other than a district's bizarre shape can be used to support the claim." *Miller,*

plished far more. *Miller*'s main contribution to the *Shaw* claim is that it disentangled the cause of action from the burden of proof. If voters are assigned to an electoral district on account of race, the districting plan must satisfy strict scrutiny. This suspicion of racial classifications, even in "benign" situations, is consistent with the Court's general equal protection jurisprudence, which imposes strict scrutiny on all racial classifications by federal, state, or local governments.[55] A plaintiff can demonstrate that an electoral district is a racial gerrymander by presenting either indirect evidence of district shape or direct evidence of legislative purpose. Thus, the substantive cause of action for a *Shaw* claim follows the same strict scrutiny model affirmed in *Adarand v. Pena.*[56] District shape is only one type of proof that is relevant to an equal protection challenge in the districting context.

In addition to deciphering *Shaw*'s discussions of bizarre district shapes, Justice Kennedy also made clear that a *Shaw* claim imposes virtually no standing requirements on a plaintiff. Justice Kennedy ignored Justice Stevens's argument that the standing requirements of a *Shaw* claim are hollow, and in his only sentence on standing, Justice Kennedy cited *United States v. Hays*[57] to support his conclusion that the *Miller* plaintiffs had standing because they resided in the Eleventh District.[58] To apprehend the standing requirements of a *Shaw* claim, therefore, it is necessary to move from *Miller* to *Hays*. In *Hays*, the Court held that the plaintiffs lacked standing to challenge an electoral district as a racial gerrymander because they did not live in the district.[59] To determine standing generally, a court must decide whether the plain-

115 S. Ct. at 2487. Justice Kennedy also wrote that "[w]e recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Id.* at 2487 (citing *Shaw*, 113 S. Ct. at 2825). But in *Shaw*, the Court actually stated that "[t]hese principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw*, 113 S. Ct. at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). The *Shaw* Court was content to infer racial motivation from district shape, without actually obtaining direct evidence of racial motivation. Despite Justice Kennedy's protests to the contrary, *Miller* does break new ground.

55. *See* Adarand v. Pena, 115 S. Ct. 2097 (1995), *cited in Miller*, 115 S. Ct. at 2482. The Court decided *Adarand* on June 12, seventeen days before it decided *Miller*.

56. 115 S. Ct. 2097 (1995).

57. 115 S. Ct. 2431 (1995).

58. *See Miller*, 115 S. Ct. at 2485 (citing *Hays*, 115 S. Ct. at 2436).

59. *See Hays*, 115 S. Ct. at 2436.

tiff has suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent."[60]

Justice Kennedy evaded the standing issue in *Miller* because the Court had already announced in *Hays*, decided the same day as *Miller*,[61] that the standing requirements of *Shaw* plaintiffs would be almost completely waived. In *Shaw*, the Court listed two types of harms from race-based districting: it can stigmatize individuals because of their membership in a racial group, and it may lead to "representational harms" when an elected representative only represents members of the district's majority racial group.[62] In *Hays*, the Court first explained that a plaintiff has standing if he has "personally" suffered these types of injuries,[63] but because "[d]emonstrating the individualized harm our standing doctrine requires may not be easy in the racial gerrymandering context," the Court ultimately decided that standing is satisfied "[w]here a plaintiff resides in a racially gerrymandered district."[64] As announced in *Hays* and applied in *Miller*, the standing requirements for a *Shaw* claim are satisfied by a general allegation of state wrongdoing, without any showing of personal injuries and unsubstantiated by any evidence.[65]

Although *Shaw* and *Miller* severely limit state legislatures' ability to draw race-based districts, the Supreme Court left open the availability of race-based districting under the Voting Rights Act. Because section 5 of the Act prohibits retrogression in a racial group's voting rights,[66] section 5 could justify race-based districting when a state's redistricting plan denied or abridged the right to vote on account of race, but section 5's retrogression principle would only allow race-conscious districting to restore the status quo that existed before the drafting of the challenged redistricting plan.

A more proactive use of racial redistricting perhaps could be authorized by section 2 of the Voting Rights Act. In *Miller*, Justice Kennedy addressed only section 5, and not section 2, even though the United States had argued that section 2 justified

60. *Id.* at 2435.

61. The Court decided both *Miller* and *Hays* on June 29, 1995.

62. *Hays*, 115 S. Ct. at 2436 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2824, 2827 (1993)).

63. *See id.* at 2435.

64. *Id.* at 2436.

65. Thus, *Shaw's* standing requirements fall well below the Court's requirements for standing in other contexts. *See supra* text accompanying note 60.

66. For the relevant portions of § 5, see *supra* note 9.

Georgia's redistricting plan.[67] Under section 2, an electoral district can be challenged on the grounds that it dilutes a minority group's voting strength.[68] To prevail on a section 2 claim and force a State to draw a majority-minority district, a plaintiff must satisfy the three conditions set forth in *Thornburg v. Gingles*.[69] In *Miller*, however, the section 2 justification was not realistically available to Georgia because the Eleventh District, with its narrow corridors and dispersed black population, would have failed *Gingles*'s first prong regarding geographical compactness.[70]

By inverting Justice Kennedy's explanation of the requisite burden of proof under *Shaw*, it is possible to find a safe harbor for racial districting in addition to the Voting Rights Act. A legislature may consider race in its redistricting plan so long as it respects traditional race-neutral districting principles, such as compactness and contiguity, and recognizes political subdivisions or communities of shared interests.[71] Under these conditions, racial redistricting will be possible only when a geographically concentrated minority community can fit into a compact and contiguous district that does not have a bizarre shape.[72] Such re-

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67. *See* Brief for the United States at 36-38, Miller v. Johnson, 115 S. Ct. 2475 (1995) (Nos. 94-631, 94-797, 94-929).

68. Section 2 is violated when a voting standard, practice, or procedure offers a racial group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (1988).

69. There are three preconditions for a section 2 claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). Although the specific section 2 claim in *Gingles* concerned a multimember district, the Court explicitly extended its holding to the gerrymandering context. The Court stated that

> [i]n a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

Id. at 51 n.16.

70. The district court found that "the [Eleventh District] is not compact for purposes of section 2 of the [Voting Rights Act]. The populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." *Miller*, 864 F. Supp. at 1389.

71. For Justice Kennedy's statement of the burden of proof, see *supra* text accompanying notes 24-25.

72. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 617 (1993) ("'Naturally'

strictions certainly will prevent legislatures from drawing odd-shaped districts as in *Shaw* and *Miller*, but at the margin, when a legislature has a choice between districting plans that all satisfy traditional districting principles, a district can be drawn to incorporate, or exclude, minority voters.[73]

The Court's five-to-four split signals a division regarding not only the constitutionality of race-conscious districting, but also the proper role of race in the U.S. political system. The majority in *Miller* feared that racial gerrymandering "may balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters."[74] On the other hand, Justice Ginsburg's dissenting opinion supported race-based districting "so long as the delineation does not abandon familiar apportionment practices,"[75] and Justice Stevens commented that "[t]he Court's refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting."[76]

The majority on the Court aspires for a political system in which race does not matter, but, at present, race remains one of the most important factors in American politics.[77] If a multiracial society such as the United States can someday become colorblind, will racial redistricting impede or promote progress toward that goal? In the alternative, if race must always remain part of a multiracial society's consciousness, is racial redistricting the best way to incorporate race into the political system?

By deliberately drawing an electoral district on racial lines, the government actively promotes racial politics even among voters who were not race-conscious prior to racial districting. Race-conscious districting infuses racial politics into the country's most

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drawn reapportionment plans may well yield majority-minority districts, if minority communities are large and dense enough . . . .").

73. The district court concluded that

> race can be a factor for the legislature, meaning one factor given no more prominence than various others, without triggering strict scrutiny. The legislature may intentionally consider race in redistricting—and even alter the occasional line in keeping with that consideration—without incurring constitutional review. It is the *abuse* of that privilege, exposed to the world via perverse district shapes "unexplainable on grounds other than race," that sparks further examination.

Miller, 864 F. Supp at 1373.

74. *Miller*, 115 S. Ct. at 2486 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993)).

75. *Id.* at 2506 (Ginsburg, J., dissenting).

76. *Id.* at 2499 (Stevens, J., dissenting).

77. *See* KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 21 (1993).

fundamental political institution—the electoral system—and it forces voters to define their political identity in racial terms. Once racial consciousness has entered the fabric of political institutions, the American political system cannot be free of racial politics until the institutions regain a race-neutral character.[78] Striking down race-based districting is disappointing in the short run because minority representation in Congress likely will fall. But the Court's decisions in *Shaw* and *Miller* at least preserve the possibility that at some point in the future, if and when private individuals no longer consider race politically relevant, political institutions will not prevent racial politics from fading away.

If, on the other hand, race-conscious politics is an indelible feature of multiracial societies such as the United States, our political institutions should better represent the country's multiracial population. Race-based redistricting would still be a flawed solution, however, because the government should not actively encourage racial politics. A better way to promote the political inclusion of geographically dispersed racial minorities, while still retaining the racial neutrality of political institutions, would be to design an electoral system explicitly based on proportional representation.[79]

The main virtue of proportional representation is that it lets voters determine for themselves which of their political identities—class, race, religion, region—is most significant. Proportional representation would allow minorities to be represented in accordance with their share of the general population, but it would also function well for an electorate that was concerned primarily with nonracial issues. Because the implementation of proportional representation would constitute a major institutional

78. As one commentator explained, "When the decisions of public institutions turn on race, race consciousness becomes legitimized throughout society. Every issue begins to assume racial overtones, with all the attendant poisonous effects." J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1015 (1995). *But see* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1638 (1993) ("In balancing the fears of balkanization against observations about existing alienation, I conclude that exclusiveness is a greater evil than controversy, that passivity does not equal contentment, and that differences need not be permanently enshrined in the electoral configuration.").

79. *See* AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 150 (1984) ("[T]he basic aim of proportional representation is to represent both majorities and minorities and, instead of overrepresenting or underrepresenting any parties, to translate votes into seats proportionally.").

reform, and recognizing that it also has disadvantages,[80] proportional representation cannot serve as an immediate substitute for race-based districting. Some advocates of electoral reform, however, argue that it may be possible to achieve limited proportional representation within the United States' current system of geographical districting.[81] There are alternatives to race-based districting that can preserve the political system's racial neutrality and thereby survive strict scrutiny.

Inspired by *Adarand*'s more stringent approach to equal protection, the *Miller* Court clarified the burden of proof, standing, and strict scrutiny analyses under a *Shaw* claim. Although Justice O'Connor is probably correct that most of the country's congressional districts are safe from attack, Justice Ginsburg is also correct that *Miller* nonetheless will subject many districts to challenges. At the time of writing, Georgia's state legislators have yet to agree on a revised redistricting plan, and lawsuits already have been brought against districts in Florida, Louisiana, North Carolina, Ohio, and Texas.[82] The Supreme Court has not spoken its last word on race and electoral districting.

Mark S. Nagel

GOVERNMENT REGULATION OF FEDERAL EMPLOYEE SPEECH: *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995).

In *Waters v. Churchill*,[1] the Supreme Court reiterated its view "that the government as employer . . . has far broader powers . . . than does the government as sovereign."[2] The *Waters* Court concluded the reason for this difference rested in the government's "mission as employer"[3] and the "practical realities of government employment."[4] The government's interest in the efficient and ef-

80. *See id.* at 157 (noting that some political scientists have criticized proportional representation for encouraging the proliferation of parties, but also observing that "in our set of countries with long records of reasonably stable democracy, the majority have multiparty systems").

81. *See, e.g.*, Guinier, *supra* note 78, at 1593.

82. *See* Kevin Sack, *Georgia Trying to Redraw Race-Based Voting Districts*, N.Y. TIMES, Aug. 15, 1995, at A12.

1. 114 S. Ct. 1878 (1994).

2. *Id.* at 1886 (O'Connor, J., plurality opinion).

3. *Id.* at 1887.

4. *Id.*

fective delivery of public services thus affords it greater control over its employees' speech than over that of the general public.[5]

The *Waters* Court, however, refrained from specifying how differently the commitment to free speech would operate in the government-as-employer context. Last Term, in *United States v. National Treasury Employees Union*,[6] the Court revisited the issue and determined that courts must weigh governmental interests in regulating employee speech against both the interests of employees in speaking on matters of public concern and the public's interests in receiving information.[7]

The *Treasury Union* decision unnecessarily backed away from a line of cases that supported greater government authority when acting as an employer. In its zeal to curtail the government's authority as an employer, the Court departed from existing precedent, overlooked arguments that could have avoided the constitutional question, and imposed a flawed remedy on the parties. The Court also failed to provide clear guidance on the question when government lawfully may restrict public employees' speech.

The 1989 Quadrennial Commission on Executive, Legislative and Judicial Salaries (the "Quadrennial Commission") released a report[8] that indicated a 35% decline in government salaries, in constant dollars, over the prior two decades.[9] But the report also found that members of Congress and other federal government employees had begun "supplementing their official compensation by accepting substantial amounts of 'honoraria' for meeting with interest groups which desire[d] to influence their votes."[10] The Quadrennial Commission recommended that top government officials receive salaries approximately equal to 1969 pay levels (in constant dollars) and that Congress enact legislation to prohibit receipt of honoraria.[11]

5. *See id.* at 1888. The plurality commented that "our profound national commitment to the freedom of speech . . . must of necessity operate differently when the government acts as employer rather than as sovereign." *Id.* at 1890 (internal quotations and citation omitted).

6. 115 S. Ct. 1003 (1995).

7. *See id.* at 1012.

8. *See* FAIRNESS FOR OUR PUBLIC SERVANTS: REPORT OF THE 1989 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES vi (Dec. 1988) [hereinafter the Quadrennial Report], *cited in Treasury Union*, 115 S. Ct. at 1009.

9. *See Treasury Union*, 115 S. Ct. at 1009.

10. *Id.*

11. *See id.*

Congress responded and raised salaries 25% for members of Congress, federal judges, and executive branch employees grouped in the GS-16 pay scale and above.[12] Additionally, Congress prohibited nearly all federal government employees from receiving honoraria.[13] The legislation, as amended in 1992, defined "honoraria" as:

> a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) . . . excluding any actual and necessary travel expenses . . . to the extent that such expenses are paid or reimbursed by another person . . . .[14]

Two federal employee unions and several executive branch employees filed a suit challenging the constitutionality of the honoraria ban.[15] The district court granted summary judgment for the plaintiffs, finding the statute unconstitutional as applied to executive branch employees.[16] The U.S. Court of Appeals for the D.C. Circuit affirmed.[17]

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12. *See* 5 U.S.C. § 5318 note (1994).

13. *See* Ethics Reform Act, Pub. L. No. 101-194, Title VI, 103 Stat. 1716, 1760-63 (1989) (codified at 5 U.S.C.App. §§ 501-505 (1994)). The Congressional Operations Appropriations Act of 1992, Pub. L. No. 102-90, 105 Stat. 447 (1991) (codified at 5 U.S.C. § 5318 (1994)), applied the ban to United States senators, who, as a group, had escaped the earlier ban.

14. Ethics Reform Act, § 505(3). Regulations promulgated by the Office of Government Ethics allowed for reimbursement of various expenses incurred when providing an appearance, speech, or article. These regulations also limited the scope of the ban by delineating the boundaries of those terms. *See* 5 C.F.R. § 2636.201-205 (1995).

15. *See Treasury Union*, 115 S. Ct. at 1010. The District Court for the District of Columbia certified a class, represented by the National Treasury Employees Union, that included "all Executive Branch employees below grade GS-16, who—but for [the ban]—would receive honoraria." *Id.* The class consisted of approximately 1.7 million current members. *See id.* at 1017.

16. *See* National Treasury Employees Union v. United States, 788 F. Supp. 4, 13-14 (D.D.C. 1992). Although it considered the ban "content-neutral," the court enjoined enforcement of the act because it went "farther than necessary" to achieve the government's legitimate interests. *Id.* at 9-10. The court also concluded the act was overinclusive as to the speech it sought to regulate and underinclusive as to the scope of the term honoraria. *See id.* at 11.

17. *See* National Treasury Employees Union v. United States, 990 F.2d 1271 (D.C. Cir. 1992). The appeals court reasoned that the government failed to demonstrate "some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 1275. To remedy the situation, the court of appeals severed the part of the statute that covered executive branch employees and left standing the law as it applied to Congress and the federal judiciary. *See id.* at 1279. The court of appeals denied a petition for rehearing en banc over two dissents. *See* National Treasury Employees Union v. United States, 3 F.3d 1555 (D.C. Cir. 1993).

In a six-to-three decision, the Supreme Court affirmed in part, reversed in part, and remanded for further proceedings.[18] Writing for the majority,[19] Justice Stevens concluded that section 501(b) of the Ethics Reform Act of 1978, as amended,[20] contravened the free speech protections of the First Amendment[21] and he struck down the prohibition on honoraria to the extent it operated against the respondent class of executive branch employees.

Justice Stevens first observed that the government sought to restrict its employees' speech on matters of public concern rather than on matters of employment concern. Justice Stevens then proceeded to employ the balancing test prescribed in *Pickering v. Board of Education*.[22] In accordance with that test, Justice Stevens discussed the competing interests and their respective weights. On the government's side, the Court recognized that "operational efficiency" is a "vital interest"[23] and agreed that the "underlying concern . . . that federal officers not misuse or appear to misuse power" is "undeniably powerful."[24]

On the other side of the equation, the Court identified several problems with the far-reaching restriction. First, the ban constituted a significant burden on speech that, "with few exceptions," had no relationship to the speaker's area of employment with the government.[25] The Court also was troubled by the ban's tendency to "chill potential speech before it happens."[26] Finally, the Court found that the law abrogated the public's right to receive ideas.[27] The last two problems with the ban, the Court explained, flowed from its elimination of the monetary incentive to engage in expressive activity; a federal employee had to forego monetary compensation for any contribution he might independently offer to American culture or learning.[28]

18. *See Treasury Union*, 115 S. Ct. at 1019. Justice O'Connor filed an opinion concurring in the judgment in part and dissenting in part. Chief Justice Rehnquist filed a dissenting opinion in which Justices Scalia and Thomas joined.

19. Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.

20. *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, Title VI, 103 Stat. 1716, 1760-63 (1989) (codified at 5 U.S.C. §§ 5318 (1994)).

21. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

22. 391 U.S. 563 (1968).

23. *Treasury Union*, 115 S. Ct. at 1016.

24. *Id.* at 1015-16.

25. *Id.* at 1012.

26. *Id.* at 1014.

27. *See id.* at 1015.

28. *See Treasury Union*, 115 S. Ct. at 1014.

The Court went on to assail the government's proffered justifications for the measure. Justice Stevens stated that although Congress reasonably could determine that a problem existed with high level officials receiving honoraria, there was little evidence suggesting that rank and file executive branch employees accepted honoraria in a manner deleterious to the efficient delivery of public services or harmful to the image of clean government.[29] Justice Stevens was most skeptical of the statute's differentiation between a single appearance, speech, or article (which were categorically banned), and a series of appearances, speeches, or articles (which were prohibited only to the extent they were "directly related to the individual's official duties or . . . status with the Government").[30] This selective application of the nexus requirement, the Court reasoned, belied the government's assertion that a broad, prophylactic rule was necessary to remove the threat that honoraria posed to clean and efficient public service.[31]

Finally, Justice Stevens argued that the "speculative benefits" provided by the ban failed to justify the "crudely crafted burden on respondents' freedom to engage in expressive activities."[32] Justice Stevens stressed the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[33]

Although it found a violation of the First Amendment, the Court refused to rework the statute to eliminate the entire executive branch from the scope of its coverage, as the Court of Appeals had done. The Court instead limited relief to the respondent class of federal employees below the GS-16 pay level and refused to enjoin the honoraria ban as against high level employees, not before the Court, who had received 25% salary increases when the honoraria ban went into effect.[34] The Court majority explicitly rejected the government's plea to construe the statute as requiring a nexus between an employee's speech and his status before the honoraria restriction would be triggered.[35]

29. *See id.* at 1016.
30. *Id.*
31. *See id.* at 1016-17.
32. *Id.* at 1018.
33. *Treasury Union*, 115 S. Ct. at 1018.
34. *See id.* at 1018-19.
35. *See id.* at 1019.

The Court, argued Justice Stevens, could not be sure that it would divine the same nexus requirement that Congress would have selected had Congress known that the ban would be limited.[36]

Justice O'Connor filed a separate opinion concurring in the judgment in part and dissenting in part. Justice O'Connor agreed that the honoraria ban "doubtless inhibits some speech on matters of substantial public interest" in violation of First Amendment free speech principles.[37] However, in Justice O'Connor's view, the statute indicated on its face the appropriate test by which the Court could determine how much of the statute was unconstitutional: a nexus between the subject matter of the speech and the individual's employment status.[38]

Writing in dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that the proper framework for analyzing the case derives from the line of cases regarding government restrictions on its employees' speech.[39] In the dissenters' view, these cases demonstrated the Court's deference to the government and its asserted employer interests.[40] The dissent prominently cited *Civil Service Commission v. Letter Carriers*,[41] in which the Court had upheld a similarly sweeping prohibition on expressive activity by validating the restrictions on partisan political activity by federal employees contained in the Hatch Act.[42]

Chief Justice Rehnquist also rejected the Court's claim that members of Congress and high-level officials constituted the only true targets of the ban. Contrary to the majority's statements regarding lack of evidentiary support for improprieties among rank and file employees, the Chief Justice cited a GAO report for evidence of potential and actual abuse of an honoraria program among lower-level employees.[43] The dissent also rejected the ma-

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36. *See id.*

37. *See id.* at 1020 (O'Connor, concurring in the judgment in part and dissenting in part).

38. *See Treasury Union*, 115 S. Ct. at 1023 (O'Connor, concurring in the judgment in part and dissenting in part).

39. *See id.* at 1025 (Rehnquist, C.J., dissenting).

40. *See* Waters v. Churchill, 114 S. Ct. 1878, 1887-88 (1994) (O'Connor, J., plurality opinion) (holding that the government's interest in efficiency and efficacy is "elevated" when acting as an employer rather than as sovereign); Connick v. Myers, 461 U.S. 138, 151 (1983) (recognizing the government's particular need for control in internal matters such as personnel management).

41. 413 U.S. 548 (1973).

42. *See* 5 U.S.C. § 7324(a)(2) (1980).

43. *See Treasury Union*, 115 S. Ct. at 1028 n.5 (Rehnquist, C.J., dissenting).

jority's use of a "narrow prism" of ideal plaintiffs as the basis of its First Amendment discussion.[44] The Court, according to Chief Justice Rehnquist, unfairly "focus[ed] solely on the burdens of the statute as applied to several carefully selected Executive Branch employees."[45]

In any event, the Chief Justice argued, "the ban neither prohibits anyone from speaking or writing, nor does it penalize anyone who speaks or writes; the only stricture effected by the statute is a denial of compensation."[46] For the dissenters, this reflected sensitivity to First Amendment principles and Congress's concern that the honoraria ban not impose too heavy a burden on First Amendment rights.[47]

Finally, the dissent quarreled with the remedy established by the Court. Chief Justice Rehnquist argued that the majority's complete severing of the offending components of the honoraria ban permitted any executive branch employee below GS-16 to receive honoraria for appearances, speeches, or articles, even if these had a direct relationship to the individual's employment with the government.[48]

The *Treasury Union* ruling signals a break from precedent that had established the government's authority to restrict its employees' speech to a greater extent than it could restrict the public's speech. The *Pickering* balancing test originally had been used in cases involving disciplinary actions against public employees whose speech or expressive activities were disapproved by government on business grounds. In *Civil Service Commission v. Letter Carriers*,[49] the Court extended the *Pickering* balancing test to ex ante regulations of public employees' expressive activity, upholding the Hatch Act's prohibition on partisan political activity by federal civil servants.

The decision in *Treasury Union* struck in an opposite direction by finding the government's interests inadequate to justify the sweeping ban on honoraria. The clash with existing precedents concerning governmental control over employee conduct was

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44. *Id.* at 1027.

45. *Id.* The Court referred to a mail handler who gave speeches on the Quaker religion, an aerospace engineer who provided lectures on black history, a microbiologist who provided written and oral reviews of dance performances, and a tax examiner who wrote articles about the environment. *See id.*

46. *Id.* at 1024.

47. *See id.* at 1029.

48. *See Treasury Union*, 115 S. Ct. at 1030-31 (Rehnquist, C.J., dissenting).

49. 413 U.S. 548 (1973).

unnecessary and unwarranted. In an effort to distinguish *Letter Carriers*, the *Treasury Union* Court unconvincingly argued that *Letter Carriers* protected rather than curtailed employees' rights. As the *Treasury Union* dissenters stated, the fact that the Hatch Act protected some employees from being coerced into political expression by government superiors did not preclude that others who wanted to participate in politics had their speech rights curtailed by virtue of their government employment.[50] The Court properly may have argued that the *Treasury Union* ban on honoraria possessed no similar benefit to counterbalance its restrictive component. This argument, however, fails to acknowledge that all federal employees remained free, in *Treasury Union*, to express any views at any time, an option *not* available to public employees in *Letter Carriers*. The honoraria ban merely prohibited the receipt of money for expression. Admittedly this may deter some speech, but it does not constitute a forfeiture of a right, as in *Letter Carriers*.

Another significant factor, apparently not considered by the majority or the dissent, involved the nature of the honoraria ban itself. The Supreme Court has stated that internal issues (that is, those about the operation of the "business") are matters of private concern and the government need not satisfy a "special burden" to justify employment actions against employees.[51] The situation before the *Treasury Union* Court was not appreciably different from a case in which a disgruntled employee complains about the pay scale offered by the government-employer. The only difference was that the employees in *Treasury Union* were protesting the government's "pay cut" equal to the amount of their former or foregone honoraria receipts. To the extent that the case involved "private" or "internal" matters as understood by the *Pickering* test, and to the extent that honoraria supplemented employee income, the employees in *Treasury Union* had little basis to argue for a heightened governmental burden to justify the honoraria restriction.[52]

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50. *See Treasury Union*, 115 S. Ct. at 1029 (Rehnquist, C.J., dissenting).

51. *Treasury Union*, 115 S. Ct. at 1013; *see, e.g.*, Connick v. Myers, 461 U.S. 138, 148-49 (1983) (holding that internal concerns such as complaints about changes in job responsibilities require no special burden of justification by the government).

52. The Court argued in Treasury Union that the employees were speaking on matters of public concern, thus escaping the government-as-employer context. However, the Court also cast the issue in terms of government employees making "enough [money] to supplement [their] income in a way that makes a difference." *Treasury Union*, 115 S. Ct. at 1010.

Moreover, the Court intruded on congressional factfinding and decisionmaking responsibilities when it precluded Congress from making the assumption that lower-level employees abuse the honoraria system. Under some circumstances, the Court may legitimately call into question congressional conclusions of fact,[53] but Congress made more than mere conclusory allegations in this case. Here Congress had evidence, notably a GAO study, to support its policy decision. Congress also possessed two commission reports[54] that identified a need or desire to combat the practice of accepting honoraria at *all* levels of the government, in all three branches.

The *Treasury Union* ruling also introduced an unnecessary new element to the nebulous *Pickering* balancing test by subjecting ex ante regulations on government employee speech to undeserved special scrutiny that differs from that reserved for ex post disciplinary actions. As Justice O'Connor indicated, this distinction is likely to impinge on the government-employer's managerial prerogatives.[55] Even if this distinction is conceptually plausible, the Court should not complicate the *Pickering* balancing test with new pigeonholes that merely enable lower courts to apply terms as a proxy for close analysis in a given case.

Finally, *Treasury Union* crafted a flawed remedy. As the dissent stated, the injunction imposed by the Court permits all executive branch employees below GS-16 to receive money for appearances, speeches, or articles—even when directly related to the employee's position in government.[56] The Court's response—leaving the issue of fixing the statute to the Congress—fails to recognize that any option now left to Congress is likely to be insufficient as a means of protecting the integrity and efficiency of government operations. The impropriety of receiving *any* money as a government official should be apparent. Individuals or groups hoping to influence government funnel money to gov-

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53. *See generally* United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress must do more than make bald assertions of a relationship between gun possession near schools and interstate commerce); Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (questioning the constitutional sufficiency of city zoning board's determination that a required easement was adequately related to the proposed development).

54. The first is the Quadrennial Report, and the second is the report of the President's Commission on Federal Ethics Law Reform. The president's Commission essentially endorsed the Quadrennial Commission's Report. *See Treasury Union*, 115 S. Ct. at 1009.

55. *See id.* at 1020 (O'Connor, J., concurring in the judgment in part and dissenting in part).

56. *See id.* at 1030-31 (Rehnquist, C.J., dissenting).

ernment officials *regardless* of the content of the speech. The purpose of honoraria, from the point of view of the "lobbyist," is to put money in officials' hands in such a way that officials are aware of the money's origin. The content of the speech is wholly irrelevant, making any nexus requirement unhelpful from the government's point of view.

Treasury Union's analysis and ruling thus possibly represent the worst of many worlds. The Court provided unconvincing explanations for its departure from precedent, overlooked arguments that could have avoided the constitutional question, and fashioned a flawed remedy. Most regrettable of all, the Court failed to clarify the extent to which government lawfully may restrict the speech of its employees, thus inviting more litigation in the future.

Kevin A. Banasik

SUSPICIONLESS DRUG TESTING AND THE FOURTH AMENDMENT: *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995).

Over the last several decades, the Supreme Court has jettisoned the conventional interpretation of the Fourth Amendment,[1] which generally requires warrants and probable cause,[2] in favor of a balancing approach that weighs the intrusiveness of the search against the magnitude of the state interest at stake in assessing the general "reasonableness" of governmental action.[3] Last Term, in *Vernonia School District 47J v. Acton*,[4] the Court upheld as "reasonable" a school board policy that authorized suspicionless drug testing of all student athletes in the District. *Vernonia* demonstrates that the Court's balancing analysis has unduly jeopardized the fundamental principle of personal privacy that underlies the Amendment. To safeguard individual liberty properly, without sacrificing either internal consistency or flexi-

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967).

3. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

4. 115 S. Ct. 2386 (1995).

bility, the Court should apply the familiar standard of strict scrutiny to Fourth Amendment issues as it has to those involving the First Amendment[5] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[6]

In 1989, in response to a "startling and progressive increase in students' use of drugs and alcohol,"[7] the Vernonia School District ("District") implemented the Student Athlete Drug Policy ("Policy"). The Policy required all student athletes to consent to mandatory urinalysis testing for drugs and alcohol to be eligible to participate in school-sponsored athletics.[8] In the Fall of 1991, the District refused to allow James Acton to play on his grade school football team when he and his parents refused to consent to the drug testing.[9] The Actons promptly sued in federal district court to enjoin the Policy's enforcement, contending that it violated the Fourth and Fourteenth Amendments to the United States Constitution.[10]

Relying on the now familiar "balancing" test, the district court[11] denied the Actons' claim. Weighing the relevant factors, the court found that the District had demonstrated "compelling need[s]"[12] for the program—preventing injury, deterring further drug use, and maintaining school order—and had "taken significant steps to limit the extent of the [test's] intrusion."[13] A three-judge panel of the Ninth Circuit Court of Appeals, however, reversed,[14] holding that, although the interests adduced by

5. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

6. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

7. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1356 (D. Or. 1992).

8. The Policy required that all athletes be tested at the beginning of the season, and that during the season 10% of the athletes be tested weekly on a random basis. *See id.* at 1358.

9. *See id.* at 1359.

10. *See Vernonia*, 115 S. Ct. at 2390. The Actons also claimed that the Policy violated Article I, § 9 of the Oregon Constitution. *See id.* The Supreme Court, however, limited its evaluation to the Fourth Amendment claim.

11. Judge Marsh delivered the district court opinion.

12. *Acton*, 796 F. Supp. at 1363.

13. *Id.* at 1364.

14. *See* Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994). Judge Fernandez authored the majority opinion, in which Judge Brunetti joined. Judge Reinhardt filed a concurring opinion.

the District were "not minimal," they were insufficiently compelling to warrant blanket suspicionless testing.[15]

In a six-to-three decision, the Supreme Court reversed.[16] Justice Scalia conceded in his majority opinion that a search instituted by law enforcement officials in a criminal prosecution generally implicates the strictures of the Warrant Clause.[17] Justice Scalia argued, however, that a full search,[18] unsupported by probable cause, could be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[19] Because of the need for administrative swiftness and flexibility in discipline, Justice Scalia reasoned, the public schools present a situation in which the "special needs" exception to probable cause is particularly appropriate.[20] In addition, Justice Scalia contended, the Policy's lack of an individualized suspicion component did not render the program per se unreasonable: "[T]he Fourth Amendment imposes no irreducible requirement of such suspicion."[21]

The text of the Fourth Amendment, Justice Scalia observed, literally prohibits only "unreasonable" searches. He asserted that the reasonableness, and thus constitutionality, of a particular government action should be "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[22] In performing this calculus, Justice Scalia first emphasized that the state's power over schoolchildren is "custodial and tutelary"[23] and that stu-

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15. *Id.* at 1526.

16. Justice Scalia delivered the opinion of the Court, in which the Chief Justice and Justices Kennedy, Thomas, Ginsburg, and Breyer joined. Justice Ginsburg filed a separate concurring opinion. Justice O'Connor filed a dissenting opinion, in which Justices Stevens and Souter joined.

17. The Warrant Clause provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

18. At the outset of his opinion, Justice Scalia cited the recent companion cases of Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), for the proposition that state-compelled urinalysis constitutes a "search" within the meaning of the Fourth Amendment. *See Vernonia*, 115 S. Ct. at 2390. Justice Scalia also reaffirmed the Court's ruling in New Jersey v. T.L.O., 469 U.S. 325 (1985), that the Fourth Amendment extends to searches undertaken by school officials as well as those instituted by police. *See Vernonia*, 115 S. Ct. at 2390.

19. *Vernonia*, 115 S. Ct. at 2391 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

20. *Id.* (citing *T.L.O.*, 469 U.S. at 340-41).

21. *Id.* (internal quotation marks and citations omitted).

22. *Id.* at 2390 (internal quotation marks and citations omitted).

23. *Id.* at 2392.

dents' privacy expectations are diminished significantly by the fact that public schools require routine physical examinations and vaccinations.[24] Justice Scalia next analyzed the character of the intrusion entailed in the testing procedures and found it to be negligible. Justice Scalia noted that the students tested produce the urine sample in private,[25] and that the test, the results of which are made available only to school personnel, is strictly limited to a search for traces of alcohol or drugs.[26] Finally, Justice Scalia contrasted the minimal invasion of privacy occasioned by the search to the significant state interests at issue. Citing medical evidence, Justice Scalia explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[27] Taking all of these factors into account, Justice Scalia concluded that the drug testing program was "reasonable and hence constitutional."[28]

Writing in dissent, Justice O'Connor chided the majority for dispensing with the traditional individualized suspicion requirement. Justice O'Connor emphasized that "[f]or most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment."[29] And in the context of intrusive personal searches, Justice O'Connor noted that the Court had upheld suspicionless searches only in those situations in which a suspicion-based regime "would likely be ineffectual."[30] Justice O'Connor argued that though a drug-testing program based upon particularized suspicion would be "*significantly* less intrusive"[31] of students' privacy interests, it would not be substantially less effective than the District's suspicionless approach because

24. *See Vernonia*, 115 S. Ct. at 2392. Justice Scalia argued that athletes' privacy expectations are further diminished by the locker room environment that necessarily accompanies school sports. *Id.* at 2392-93.

25. *See id.* at 2393. Males produce the sample fully clothed at a urinal along a wall while a monitor stands behind them. Females produce the sample in an enclosed stall while a monitor listens for sounds of tampering. *See id.*

26. *See id.* Scalia explained that the test does not look for "whether the student is, for example, epileptic, pregnant, or diabetic." *Id.*

27. *Id.* at 2395.

28. *Id.* at 2396. In a brief concurring opinion, Justice Ginsburg sought to emphasize that the Court's ruling comprehended only testing programs involving students who voluntarily participate in school sports, and reserved the question of "whether the District . . . constitutionally could impose routine drug testing . . . on all students required to attend school." *Id.* at 2397 (Ginsburg, J., concurring).

29. *Vernonia*, 115 S. Ct. at 2398 (O'Connor, J., dissenting).

30. *Id.* at 2401.

31. *Id.* at 2403.

the search subjects—the students—are "under constant supervision by teachers and administrators and coaches,"[32] who are in an excellent position to monitor for suspicious behavior. Justice O'Connor concluded that although she accepted the general proposition that the Fourth Amendment is more permissive in the public school context, she rejected categorically the Court's assertion that "it is so lenient that students may be deprived of . . . its strong preference for an individualized suspicion requirement."[33]

To maintain the preference for particularized suspicion, without sacrificing necessary consistency and flexibility, the Court should, as several commentators have suggested,[34] replace its freewheeling "reasonableness" analysis with the familiar standard of strict scrutiny in evaluating government searches.[35] A strict scrutiny standard is superior to the Court's balancing test in two significant respects. First, without sacrificing internal consistency, it establishes an objective standard by which both searching officers and reviewing judges can make principled determinations of reasonableness. Second, without unnecessarily shackling law enforcement efforts, it more accurately reflects the fundamentality of the liberty interests at stake in Fourth Amendment cases.

The Supreme Court traditionally has applied strict scrutiny in various First Amendment contexts,[36] as well as in the areas of substantive due process[37] and equal protection.[38] Stated in its most generic form, strict scrutiny requires the government to

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32. *Id.* Justice O'Connor cited numerous instances in the record in which a school official had observed a particular student acting in a manner that "gave rise to reasonable suspicion of in-school drug use." *Id.*

33. *Id.* at 2404.

34. *See* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1177 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 431 (1988).

35. The standard advocated is not the "'strict' in theory and 'fatal' in fact" standard that the Court presently employs in other contexts, in which the application of strict scrutiny leads, by definition, to invalidation. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Rather, Fourth Amendment strict scrutiny should involve genuine judicial inquiry into whether the challenged search constituted the least intrusive means for effecting a compelling government interest.

36. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217, 2229 (1993) (discussing free exercise); R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (discussing freedom of speech); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (discussing freedom of the press); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (discussing freedom of association).

37. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (discussing abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (discussing privacy).

demonstrate that its deprivation of a fundamental constitutional right is "necessary, and narrowly drawn, to a compelling state interest"[39] and that there exist no less restrictive means of accomplishing its purpose. Applied in the search and seizure context, a strict scrutiny standard would retain the conventional Fourth Amendment hierarchy—warrants, probable cause, and individualized suspicion—and require the government, in all constitutional challenges, to demonstrate not only that its objective in performing the search at issue was compelling, but also that its purpose could not have been achieved through a search predicated upon a more stringent Fourth Amendment standard.[40] Strict scrutiny would thus require the government to comply with traditional Fourth Amendment standards of suspicion unless it could demonstrate conclusively that "the nature of the problem being dealt with [was] such that these grounds [could not] be identified"[41] and that a suspicionless search therefore was a necessary means—and the least intrusive means—of achieving a compelling government purpose.[42]

The reasonableness balancing test suffers from two fundamental defects, both of which could be ameliorated by reliance on a standard of strict scrutiny. First, commentators consistently have

38. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112 (1995) (discussing suspect classes); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (discussing fundamental rights).

39. Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995).

40. The analysis essentially would begin with a default warrant requirement that the government could circumvent upon a showing of necessity. An identical inquiry would be made at the probable cause and individualized suspicion levels. Consequently, whenever the government conducted a warrantless search based upon probable cause—as it presently does, for instance, in the case of automobiles, *see* California v. Carney, 471 U.S. 386, 394-95 (1985)—it would bear the burden of demonstrating that a warrant requirement would be impracticable and would unduly frustrate the achievement of a compelling government interest. Similarly, when seeking to justify a search predicated solely upon particularized suspicion, rather than probable cause or the warrant requirement—as in the case of a *Terry*-stop, *see* Terry v. Ohio, 392 U.S. 1, 20-21 (1968)—the government would have to illustrate the absolute necessity of that course.

41. 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 10.6, at 347 (1st ed. 1978).

42. For instance, Professor Akhil Amar is no doubt correct that a probable cause standard (and even one of individualized suspicion) would be "downright silly," Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 783 (1994), in some situations, including airport weapons searches, housing code inspections, and roadside weigh stations. Because the activities targeted by these searches generally do not entail articulably suspicious behavior, a blanket or random search may well be the least intrusive means by which to effectuate a compelling governmental purpose. The same cannot be said, however, for the drug-testing policy at issue in *Vernonia*. In fact, the trial judge cited several instances in which school officials specifically observed student behavior that gave rise to articulable suspicion of drug use. *See Vernonia*, 796 F. Supp. at 1356-58. Consequently, a blanket testing regime was not necessary to the achievement of the District's purpose and would have been invalidated under a strict scrutiny analysis.

criticized the balancing test's vagueness and inherent subjectivity.[43] In his dissenting opinion in *New Jersey v. T.L.O.*,[44] Justice Brennan voiced his concern: "the presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good."[45] In contrast to the amorphous reasonableness calculus, which "permits—indeed, requires—judges to rely upon their personal values,"[46] a strict scrutiny standard would prescribe a detailed series of steps by which judges would proceed in their constitutional analysis.[47] By maintaining the traditional Fourth Amendment framework and providing that its proscriptions could be disposed of only when proven necessary, a strict scrutiny standard would thus provide superior guidance to both government officials and judges in evaluating the constitutionality of a particular search.[48]

In addition to—and in part because of—its vagueness, the balancing test "has become so subject to the political and social passions of the moment"[49] that it consistently undervalues the fundamental nature of the privacy safeguarded by the Fourth Amendment.[50] In *Wolf v. Colorado*,[51] the Court recognized that the privacy that the Amendment secures is "basic to a free society" and "implicit in 'the concept of ordered liberty.'"[52] Similarly, Justice Brandeis, in his famous *Olmstead* dissent, proclaimed that the Fourth Amendment "right to be let alone [is] the most comprehensive of rights and the right most valued by civilized

43. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 414 (1974); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 27 (1994).

44. 469 U.S. 325 (1985).

45. *Id.* at 370 (Brennan, J., concurring in part and dissenting in part).

46. Strossen, *supra* note 34, at 1184.

47. *See supra* note 40 and accompanying text.

48. *Cf.* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 854 (1994) (explaining that the traditional Fourth Amendment framework "represents a triumph of rules over standards" and provides necessary interpretive guidance).

49. Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512 (1991).

50. *Cf.* Strossen, *supra* note 34, at 1204 ("[T]he Court's regular weighing of the privacy and liberty rights of a single individual against the law enforcement interests of the collective national community inevitably predetermines the outcome.").

51. 338 U.S. 25 (1949).

52. *Id.* at 27; *see also* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (stating that Fourth Amendment rights "are not mere second-class rights but belong in the catalog of indispensable freedoms").

men."[53] Ironically, thirty-seven years later, in *Griswold v. Connecticut*,[54] Justice Brandeis's declaration became one of the cornerstone principles underlying the unenumerated, penumbral right of privacy, invasions of which the Court presently evaluates under a theory of strict scrutiny.[55] Certainly the Court should protect and uphold the Fourth Amendment—one of only a handful of fundamental freedoms that the Framers specifically set forth in the Bill of Rights—with equal vigor.

Justice Black once lamented that the "[m]isuse of government power, particularly in times of stress, has brought suffering to humanity in all ages . . . ."[56] As popular opinion continues to swell in support of a government that is "tough on crime" and as politicians mobilize for an all-out "war on drugs," the Supreme Court must ensure that the fundamental right to privacy guaranteed by the Fourth Amendment remains inviolate. As evidenced by *Vernonia*, however, the general reasonableness standard that presently guides the Court's search and seizure analysis is ill-suited to the task. By applying a standard of strict scrutiny to Fourth Amendment violations, as it does to intrusions upon other fundamental rights, the Court would acknowledge the principle, implicit in the text of the amendment, that "[p]rivacy is not a good that we hold at the pleasure of the government."[57]

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53. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
54. 381 U.S. 479 (1965).
55. *See id.* at 485.
56. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 879 (1960).
57. Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 51 (1974).