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The Next Constitutional Revolution

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SYMPOSIUM ARTICLES

The Next Constitutional Revolution

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INTRODUCTION

The history of the United States is a series of constitutional revolutions that have defined and redefined the nation and its people. Constitutional revolutions occur in many ways. They may emerge from expressions of popular will that manifest themselves through dialogic exchanges among courts, politicians, bureaucrats, social movements, and citizens.[1] They may alternatively spring from court-centric showdowns in which judges give concrete meaning to ambiguous or indeterminate

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1. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47 (1991).

constitutional rules that demand clarity for adjudicating a constitutional controversy.[2] Constitutional revolutions may also transpire in the battle to reconcile a nation's founding heritage with a constitution, either written or unwritten, whose content constitutes the principal battleground for political actors.[3]

But more than the constitutional revolutions themselves, it is the individuals behind those revolutions—the bold American constitutional revolutionaries—who have shaped the face of American constitutional law. From the founding to Reconstruction, from Jim Crow to the civil rights era, from the New Deal to the modern conservative resurgence, these and other seismic transformations in American history trace their beginnings to constitutional revolutionaries. To borrow from the late Thomas Carlyle, the story of America is but the biography of influential Americans.[4]

The protagonists—and their antagonists—in the story of America are familiar names. James Madison, Alexander Hamilton, and their fellow Federalists prevailed at the founding over the Anti-Federalist forces led by Patrick Henry, George Mason, and George Clinton.[5] Thomas Jefferson and John Adams, whose constitutional clash led to momentous changes in the modalities of presidential selection in the early nineteenth century, are two other central characters in the story of America.[6] So too is Abraham Lincoln, the peerless champion of social change, who stared down the leaders of the Southern Confederacy standing in the way of America's constitutional renewal.[7] And the constitutional visionary Franklin Delano Roosevelt, whose four terms as president reset the balance of powers between the federal and state governments, also stands among the great revolutionaries in the annals of American history.

Today, America stands on the edge of yet another constitutional revolution—one that could augur changes so colossal as to transform the very basis of legitimate authority in the nation. The constitutional revolutionary leading this transformative movement is neither a president nor a legislator nor an amorphous aggregation of political interests. It is instead a single, and indeed singular, individual who currently sits on the Supreme Court of the United States: Clarence Thomas. His judgments

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2. *See* ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM 159 (2000).

3. *See* GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 232 (2003).

4. Thomas Carlyle, *The Hero as Divinity*, *in* THOMAS CARLYLE'S COLLECTED WORKS ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 3, 34 (London, Chapman & Hall 1840) ("The History of the world is but the Biography of great men.").

5. *See* DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME (2002).

6. *See* JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 (2004).

7. *See* HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2004).

have come to constitute the intellectual core of an indefatigable movement to return the United States to its founding confederate design. That is the next frontier in American constitutional law.

The United States has, of course, long shed its founding skin. First conceived under the Articles of Confederation as a confederated union of states standing supreme above the national government,[8] the United States is today—and indeed has been since the adoption of the United States Constitution—more accurately described as a federation: an arrangement of two levels of government in which the national government occupies the only starring role and the states find themselves relegated to the periphery.[9] The primacy of the center over the states is nevertheless now a lived reality, achieved only as a result of fiercely fought battles over constitutional meaning in the course of America's coming of age.

But there remain many chapters still to be written in the story that is America. Whether the national government will retain its supremacy as a matter of political might and constitutional right, is equally unclear as whether the several states will reclaim ascendancy in the American project of democracy. For that is what looms ahead: an intensifying conversation that may erupt into a constitutional conflict about the proper balance between confederation and federation, the relative competencies of national institutions and their sub-national counterparts, and the appropriate role of the federal government in local affairs. In short, the future constitutional course of the United States will turn on just how compellingly citizens are moved by Justice Thomas's view that it is time to turn back the constitutional clock to the founding.

In these brief reflections, I shall illustrate how constitutional revolutions have shaped the United States by using three different examples of revolution leadership: legislative, presidential, and judicial. I will begin, in Part I, with the adoption of the United States Constitution where the founding statesmen—a super-legislature of sorts—gathered in Philadelphia to launch a convention-centric constitutional revolution. In Part II, I will turn to an example of president-centric constitutional revolution—the New Deal constitutional revolution led by President Roosevelt. In Part III, I will return to the present day to suggest that America may now find itself on the cusp of another constitutional revolution—a modern conservative judge-centric constitutional revolution that could change much of what lies at the foundation of the United States Constitution. Specifically, I will suggest that Clarence Thomas is a modern constitutional revolutionary whose vision for the United States is as transformative as those of Roosevelt, Lincoln, and the Federalists. Part V will then offer concluding observations.

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8. ARTICLES OF CONFEDERATION of 1781, art. II.
9. *See, e.g.*, U.S. CONST. art. VI.

I. AMERICA'S SECOND FOUNDING

The Articles of Confederation originally governed the United States. Its purpose, narrow in scope, was to bring together disparate entities in the national interest to establish a common front against external enemies.[10] Ten years later, the American founders re-envisioned the United States as a union that would have a purpose much grander: to make welfare, liberty, and justice the aspirations for the new republic.[11] True, the United States Constitution retained some key holdover terms from the Articles of Confederation,[12] but there is no doubt that the Constitution ushered in an entirely new regime of constitutional government.

A. The Rule of Unanimity

Those changes in constitutional government are fascinating in and of themselves. But what is perhaps more interesting is *how* the American founders pulled off this remarkable makeover from one constitutional structure to another. It was a constitutional revolution. The process by which the founders replaced the Articles of Confederation was a constitutionally irregular episode that set a new standard for political legitimacy in the United States by violating the then-governing constitutional rules.

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10. ARTICLES OF CONFEDERATION of 1781, art. III.

11. U.S. CONST. pmbl.

12. For example, both charters reserved all rights not expressly delegated to the several states. *Compare* ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled."), *with* 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."). Both charters also adopt the rule against holding concurrent legislative-executive offices. *Compare* ARTICLES OF CONFEDERATION of 1781, art. V, § 2 ("No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind."), *with* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created . . . , during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in office."). And both ensure reciprocity and full faith and credit to the official acts of state officials. *Compare* ARTICLES OF CONFEDERATION of 1781, art. IV, § 3 ("Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State."), *with* U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Consider that the 1787 Constitutional Convention charged with drafting the new United States Constitution required only a supermajority vote of the states to adopt the new charter. The Convention held fast to this new rule despite the text of the existing—and at the time still legally binding—Articles of Confederation, which insisted on the unanimous consent of each of the states in the union.[13] The new supermajority benchmark was a dramatically lower measure of agreement than had been stipulated in the constitution of the day and stood in direct conflict with the lawful constitutional text. The new supermajority ratification standard was therefore a departure from the boundaries set by the text of the prevailing constitution.

Though others may not similarly perceive America's second founding as revolutionary, they have nonetheless taken note of the irregularities associated with the adoption of the United States Constitution. Scholars have generally reached the same conclusion: that the second founding did not conform to the textual strictures of the Articles of Confederation.[14] This echoes objections raised on the floor of the Constitutional Convention, where some delegates decried that anything less than unanimous ratification would descend illegitimacy upon the new Constitution.[15] Even Akhil Amar, the leading scholar defending the legality of the founding, acknowledges that the ratification of the United States Constitution was "inconsistent" with the Articles of Confederation.[16] The broader point is worth considering: as a matter of constitutional theory, to find irregularity in the founding is to open the possibility to its unconstitutionality.

But was the supermajority ratification standard *really* unconstitutional? If the Constitutional Convention believed its actions would implicitly amend the Articles of Confederation to require a lower

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13. *See* ARTICLES OF CONFEDERATION of 1781, art. XII ("And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

14. *See, e.g.*, Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 874 (2007); Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer's* The People Themselves, 81 CHI.-KENT L. REV. 1007, 1010 (2006); Sanford Levinson, *"Imposed Constitutionalism": Some Reflections*, 37 CONN. L. REV. 921, 924 (2005); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 184–85 (1998); Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 185 (1998); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 528 n.185 (1994); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1057–58; Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1586 (1987).

15. *See* George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 24–25 (2001).

16. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047 (1988).

measure of consent—from thirteen to nine states—then one could perhaps craft a persuasive argument that the new standard was not in fact unconstitutional. On this theory, the founders, in amending the existing constitution according to terms that depart from those inscribed in its text, were implicitly repealing, revising, and enshrining new requirements for subsequent amendments to the constitution. This possible interpretation is not entirely implausible, nor is it inconsistent with the novelty of the founders' vision. They were simultaneously taking and giving a course in introductory constitutionalism. Written constitutions, the process of textual amendment, and the distinction between formal and informal amendments to a written constitution were brand new ideas at the time.[17] In light of this, it may be unreasonable to hold the American founders of the eighteenth century to our contemporary models of constitutionalism.

Perhaps the theory of implied amendment can help us defend the actions of the framers. If we can find supporting evidence from prior constitutional practice suggesting that political actors could indeed amend the Articles of Confederation with methods as unconventional as the ones the founders deployed, then we can more persuasively negate the argument that the founding was constitutionally irregular or extraordinary and, therefore, revolutionary. To find such evidence, we might probe successful efforts to amend the Articles of Confederation—attempts that were successful at the time despite achieving less than the unanimous consent of the states.

Can we discern from early American political practice any suggestion that the Articles of Confederation were amenable to amendment in this unconventional way? The answer appears to be no. Consider that in 1783, only four years prior to the Constitutional Convention, Congress had proposed to amend the Articles of Confederation to confer upon itself the power to tax states based on their populations instead of land values.[18] The amendment failed because it had fallen short of receiving unanimous support from the states.[19] But that is not our only evidence. Perhaps most telling of all is that Rhode Island, the smallest of all state signatories to the Articles of Confederation, had often blocked amendments that had otherwise mustered the impressive, but on its own insufficient, backing of each of the other twelve colonies.[20]

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17. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1457–58 (2001).

18. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL OF RTS. J. 1, 87 (1998).

19. Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 437–38 (1999).

20. *See* RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 11–12 (1993); Dan T. Coenen, *A Rhetoric for Ratification: The Argument of* The Federalist *and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 483 (2006); Lior Jacob Strahilevitz, *The Uneasy Case for Devolution of the Individual Income Tax*, 85 IOWA L. REV. 907, 914–15

The rule of unanimity, then, was not just for show. It was a very real constraint on political actors who wished to rewrite the rules of government in the republic—a constraint that the founders nevertheless found a way to circumvent by using revolutionary means to transform the American confederation into the United States. Indeed, had the Articles of Confederation been lawfully susceptible to amendment by anything less than unanimous consent, there would have been no reason for the founders to bother with the charade of seeking ratification by the states and their respective citizens. It would have been sufficient to secure the approval of a supermajority—or even a simple majority—of states as represented by their legislators. Indeed, even that would have been going above and beyond because the Constitutional Convention could have simply amended the Articles of Confederation instead of adopting an altogether new constitutional text for the United States.[21]

B. Popular Authority

This raises a critical point: where did the founders draw the authority to cast aside the binding amendment rules specified in the Articles of Confederation? They drew it from an authority even higher than the constitutional text: from the people themselves.[22] The founding was, in the moving words of Tomlins, no less than "a sacred act—an act of universal jurisdiction—at a *Messianic* moment."[23] It signaled the inception of a lasting convergence of popular will, natural law, and sovereign expression of self-definition. For James Madison, the Articles of Confederation were no more than a soluble treaty among several independent states, each of which retained sovereignty as distinct governmental entities. In contrast, the ratification of the United States Constitution was an act of civic sovereignty indicating the consent of citizens across the land, not necessarily tethered to a state affiliation, to renounce the Articles of Confederation.[24]

No existing law, no convention of political practice, nor even the legally binding constitutional text could trump this new rule of popular sovereignty. A fuller conception of democracy, represented here by active engagement in constitutional affairs of the new state, could therefore

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(2000); Brendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 U.C. DAVIS J. INT'L L. & POL'Y 267, 272–73 (1996).

21. JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 18–19 (2nd ed. 2008).

22. Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2125–26 (1996).

23. Christopher Tomlins, *The Threepenny Constitution (and the Question of Justice)*, 58 ALA. L. REV. 979, 989 (2007).

24. Patrick M. O'Neil, *The Declaration as* Ur-*Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 AKRON L. REV. 237, 240–41 (1995).

justifiably override the constitutional pre-commitments of the Articles of Confederation.[25] And never mind whether the founders had exceeded their authority in breaking with the rule of unanimity required by the Articles of Confederation. For the federalist advocates of the new charter, there were loftier principles hanging in the balance, namely infusing natural law into the terms of the refashioned state.[26] The ends clearly justified the means according to the founders. Their singular devotion to the revolutionary idea of a new republic could repair any supposed procedural misdeeds in dodging the stubborn rule of unanimity:

> [T]he charge against the Convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed, and that finally, if they had violated both their powers, and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.[27]

The Constitutional Convention recognized the irregularity of its own actions. Madison himself admitted that the Convention had defied the Articles of Confederation by spurning the rule of unanimity.[28] The delegates to the Convention consequently took measured steps to legitimize the unconstitutionality of their now supermajority ratification standard, opting to present their vision for a new state to their fellow citizens through the states as intermediaries rather than going directly to the people in a national referendum.[29] This strategy allowed them to keep the states involved as partners in the project of erecting a new constitutional democracy. Skirting the states would have surely alienated them because the states still regarded themselves as principals and the national actors as their agents, a view still then very much consistent with the Articles of Confederation.

Over two centuries later, the supermajority ratification standard continues to shape the practice and politics of constitutional change in the United States. It is now the core of Article V of the United States

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25. *See* Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1347 n.21 (2005).

26. *See* Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDISC. L.J. 549, 554–57 (1995).

27. THE FEDERALIST No. 40, at 267 (James Madison) (Jacob E. Cooke ed., 1961).

28. *See id.* at 263 (stating that "[i]nstead of reporting a plan requiring the confirmation *of the Legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*.").

29. Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 226 (1995).

Constitution, which specifies the textual rules for amending the Constitution.[30] The inspired choice of the Constitutional Convention to seek the approbation of the people through their state legislatures turned out to be more than a political strategy designed to palliate concerns about the centralizing tendencies of the new state. That it was a stroke of political genius is beyond dispute, if only because it held together the former British colonies and fused them into one nascent republic. But even beyond its political expediency, the supermajority ratification standard has been conferred a special status, becoming a constitutional precedent that remains in full force and effect to this day through the text and spirit of Article V.[31] Enshrined in the United States Constitution since its first use in 1787, this revolutionary supermajority rule now sets the hurdle that subsequent amendments to the constitution must successfully clear in order to become inscribed in the constitutional text.

This brings us full circle to where we began: the locus of legitimacy in the founding of a new constitutional order. When constitutional creators use irregular procedures to found a new state, the successful establishment of the state breathes legitimacy, both into the creators as proven masters of statecraft and into their irregular procedures as tools of institutional design. Founding a new state out of the ashes of a former regime resets the bases of statehood and citizenship and establishes new terms of reference for the future course of the state. That was both the intent and the consequence of the founders' constitutional revolution to re-found the United States.

II. THE NEW DEAL TRANSFORMATION

Just as a legislative assembly may trigger constitutional revolutions, so too may presidents. We have seen a number of president-centric constitutional revolutions in American constitutional history. From Thomas Jefferson's transformation of the presidency[32] to Andrew Jackson's entrenchment of tricameralism[33] and to Abraham Lincoln's renewal of America,[34] presidents have occupied a starring role in the story of American constitutionalism.

A. The Balance of Powers

Perhaps the leading example of a president-centric constitutional revolution was Franklin Delano Roosevelt's New Deal Revolution. In a

30. *See* U.S. CONST. art. V.

31. U.S. CONST. ART. V.

32. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).

33. *See* Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205 (1999).

34. *See* JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1991).

battle over the power of the central government to regulate the economy in the larger national interest, Roosevelt faced a Supreme Court resolved to stand in his way. We know now that this storied chapter in American history ends with a presidential victory vindicating national powers over state rights. But the triumph did not come easily, nor was it assured to begin with. It took presidential leadership—revolutionary presidential leadership—to transform the orientation of the Constitution from provincial to national.

The New Deal Revolution is well documented by constitutional historians and theorists.[35] But perhaps the best account of the revolutionary roots of the New Deal is Bruce Ackerman's rich study of constitutional change, which marries constitutional law and politics with political philosophy and history.[36] Ackerman makes the compelling case that the New Deal was revolutionary along at least two dimensions: procedurally and substantively. As a matter of procedure, argues Ackerman, the New Deal model of presidential leadership deployed in tandem with transformative judicial opinions effectively amended the United States Constitution, albeit without memorializing those changes in the form of a written constitutional amendment.[37] As a matter of constitutional law and politics, the New Deal changed the relationship between the center and the periphery, legitimizing an activist national regulatory state and repudiating the free-market economics that had until then given wide latitude to states.[38] On both counts, the New Deal proved transformative, and it all began with Roosevelt who, for Ackerman, was "the founder of the modern activist state."[39]

B. The Supremacy of the Center

What exactly does it mean to describe the national government as an activist institution? In the context of the federal politics of the New Deal, it refers to the way the national government used its enhanced regulatory powers. More power in the hands of the national government—which was the outcome of the New Deal—reset the balance of powers between the national government and the states, and in so doing fundamentally rewrote

35. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); *see also* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); Mark Tushnet, *Living in a Constitutional Moment?:* Lopez *and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995).

36. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

37. *Id.* at 271.

38. *See id.* at 11, 27, 284, 335, 353.

39. *Id.* at 279.

the old rules of federalism.[40] Whereas it may have been accurate in an earlier time to conceive of public authority in the United States flowing from the states to the center, the opposite became true under Roosevelt's leadership. The New Deal concentrated power in the hands of the national government, and the states, which had once been "separate and sovereign," ultimately became "subordinate and inferior."[41]

Activist, then, is the right term to describe the posture taken by the national government—with the acquiescence of the judiciary—in its interaction with the states during the New Deal era. The dominance of the national government manifested itself in three different ways, which Cass Sunstein identifies as the three categories of substantial changes the New Deal introduced to American constitutional structure: first, the national government saw a dramatic expansion in its power, almost to something approximating a general police power; second, the national government also took greater permissions in pursuing redistributionist policies in the interest of individual rights as opposed to purely private interests; and third, the executive branch acquired new authority—authority that was, importantly, not particularly tightly constrained by the separation of powers—by way of administrative agencies.[42]

History teaches us that the New Deal was wildly successful, both in terms of policy and public relations. So much so that by the end of the 1970s and early 1980s—nearly half a century after the New Deal—one could reasonably claim that "[t]he New Deal has become so much a part of the American Way that no political party that aspires to office even dreams of repudiating it."[43] Today, however, though we are not that far removed from the height of enthusiasm for the New Deal, that conventional wisdom no longer rings true.[44] No more is public reverence for the New Deal a requirement—as it once virtually was—for holding elected office in the United States. Nor does appointed office, including even judicial office, demand a similar fealty to the New Deal. Quite the contrary, pledging allegiance today to the New Deal is in some corners of the country the first step toward political death. Many politicians and political parties now proudly ride to victory on pledges of repudiating the New Deal.[45]

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40. Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 425 (1987).

41. Martha Derthick, *Federalism*, *in* UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 121, 130 (Peter H. Schuck & James Q. Wilson eds., 2009).

42. Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253–54 (1996).

43. CARL N. DEGLER, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 449 (3d ed. 1984).

44. *See, e.g.*, Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 2 (1993).

45. *See* David Woolner, *The Tea Party Movement: Successor to the American Liberty League?*, NEW DEAL 2.0 (July 1, 2010), *available at* http://www.rooseveltinstitute.org/new-roosevelt/tea-party-movement-successor-american-liberty-league (noting that one historian

There are many reasons why the present may be more equivocal than the past about the New Deal. Times may have changed. Social expectations may have recalibrated to a new standard. Political tastes may have evolved. All of those may be true and help explain why the New Deal no longer stands at the summit of American political achievement. But there is more to it than those three items.

The decline of the New Deal Revolution corresponds with the rise of powerful ideas that have spawned a counterrevolutionary movement exhibiting all of the elements of a new constitutional revolution. The new revolutionary movement is armed with a constitutional vision, an interpretive technique to explain and justify it, as well as new leaders to vindicate the new paradigm. The last of these is often the most important because as with all constitutional revolutions, the individuals themselves may sometimes matter just as much as the ideas.

In the battle to begin the New Deal counterrevolution, one leader has been especially adamant in his intellectual opposition to the principles that underpin the New Deal. And his impassioned opposition to the New Deal illuminates for us the third possible incarnation of constitutional revolution: a judge-centric constitutional transformation.

III. RECLAIMING CONFEDERATION

The Supreme Court of the United States has had many constitutional revolutionaries on its bench. From John Marshall's transformative rulings in the early years of the American republic[46] to Earl Warren's touchstone judgments for progressive constitutionalism,[47] the Court has been pulled in new directions by legal giants who have had in mind a purpose much larger than simply deciding the matter at hand. These constitutional revolutionaries have seen their role as smoothing the constitutional terrain for extraordinary changes in the interpretation or application of the Constitution, all in the service of an unconventional, irregular or contrarian vision of American constitutionalism. Today, there sits yet another constitutional revolutionary on the Supreme Court: Clarence Thomas.

Justice Thomas is an ardent federalist who has made it his judicial mission to stand as a sentinel for state sovereignty. Yet, it would be wrong to call Justice Thomas a mere federalist and to leave it at that because he is a very peculiar type of federalist: he is a confederalist.[48] We can trace the

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argues that the modern Tea Party Movement echoes the American Liberty League of the 1930s, which campaigned against the New Deal).

46. *See* Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421 (2006).

47. *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993).

48. In his masterful study of Justice Thomas's judicial philosophy, Scott Gerber describes Justice Thomas's federalism views as anchored in the compact theory. *See* SCOTT

intellectual lineage of confederalists to John Calhoun, a former secessionist Senator from South Carolina, and before him to the Anti-Federalists of the founding era.[49] But let us be careful not to ascribe to Justice Thomas the nullificationist sympathies of Calhoun because there is no evidence to make any such suggestion.[50] Nor may we claim that Justice Thomas today accepts the validity of the Articles of Confederation or even longs for a return to those days. Quite the contrary, to make that claim would be to ignore the very basis for Justice Thomas's judicial decision making: the original intent of the United States Constitution's drafters and ratifiers, who certainly meant to repudiate much of the Articles of Confederation.[51] Notwithstanding these important qualifications to affixing the confederalist label to Justice Thomas, the designation nonetheless proves useful in examining his constitutional theory because Justice Thomas does indeed hold confederalist, not simply federalist, views. To understand why this distinction matters, we need to probe the difference between a federation and a confederation, for that is where the seeds may lay for the next constitutional revolution.

Under prevailing theories of constitutional government, the difference between federation and confederation turns on the locus of sovereignty. Federations are created pursuant to the consent of the people of the entire nation, whereas confederations form on the agreement of several sovereign subnational entities.[52] In the former, the seat of sovereignty is the people constituted as a national organism, whereas in the latter, sovereignty sits in the states, which have delegated bounded authority to a central government they have created to discharge limited purposes.[53] We can therefore think of a federation as a nation-centric vision of federalism that acknowledges, and indeed invites, the centripetal force and moral claim of centralization. In contrast, a confederation is a state-centric conception that is more sympathetic to the centrifugal forces that serve as an embankment to the tide of centralization.

Confederalist theory is defined by three principles: state supremacy, state sovereignty, and suspicion of the center. A word on each of these is

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DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 169 (1999).

49. *See, e.g.*, David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1724–25 (2003); David M. Sprick, *Ex Abundanti Cautela (Out of an Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Continuing Dilemma Over "Federal" Power*, 27 CAP. U. L. REV. 529, 560 (1999).

50. Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 98–99 (1995).

51. *See* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to* Tribe *and* Kurland, 84 NW. U.L. REV. 437, 470 (1990).

52. Nicholas Aroney, *Formation, Representation and Amendment in Federal Constitutions*, 54 AM. J. COMP. L. 277, 312 (2006).

53. *Id.*

appropriate and useful. First, confederalists regard the sub-national entities as supreme in the two-tier arrangement of government with power flowing from states as separate and sovereign bodies down to the central government. Second, confederalists reject incursions by the national government into the sovereign empire of the states, which for them is inviolable. Third, confederalists are typically distrustful of the central government and unusually attentive to the aggrandizing designs of national institutions within the federal system. State supremacy, state sovereignty, and suspicion of the center—these are the three signposts of confederalist theory. Justice Thomas is correctly described as a confederalist because his revolutionary view of federalism echoes each of them.

A. Dual Sovereignties

Since Justice Thomas's confirmation to the Supreme Court, each of these three signposts of confederalist theory has moved closer from aspiration to reality. The result of the Court's deeper embrace of confederalist principles has been increasingly to define the United States and the several states as dual sovereignties. To be clear though, Justice Thomas has not actually been the face of the Court's revival of states' rights; quite the contrary, the renaissance of a robust vision of federalism began to take shape under Ronald Reagan's conservative appointments to the Supreme Court and the rise of more aggressive conservative public interest litigation efforts.[54] For his part, Justice Thomas has often been a dissenting or concurring voice in the most important federalism judgments during this modern era. But one can lead without being the general. And that is precisely what Justice Thomas has done. He has been the intellectual force behind the confederalist movement. This is evident in his opinions on each of the three signposts of confederalist theory: state supremacy, state sovereignty, and suspicion of the center.

Begin with state supremacy, which is perhaps the definitive pillar of confederalist theory. For confederalists, the concept of state supremacy means that the national government is derivative of the states. Under a confederalist reading of American history, the several states collectively consented to the creation of the national government and delegated to it provisional and constrained authority. Confederalists anchor their theory in two loci: first, in the Tenth Amendment; and second, in the very nature of the written Constitution. The text of the Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[55] For confederalists, it is no mystery why the Tenth

54. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 220–64 (2008).

55. U.S. CONST. amend. X.

Amendment echoes Article II of the Articles of Confederation,[56] which similarly conferred residual and reserve powers to the states: it marks an intentional continuity between the Articles to the Constitution, a clearly discernible intent to elevate the periphery above the center.

For confederalists, the concept of state supremacy is most compelling when the Tenth Amendment is weighed in tandem with the discrete, definitive, limited, and enumerated quality of the national government's powers as specified in the Constitution. That the framers would state with such specificity the powers of the national government—for instance the powers to "fix the Standard of Weights and Measures"[57] or to "promote the Progress of Science and useful Arts"[58]—suggests to confederalists that they considered, only to decline, conferring other and also greater powers upon the national government.

We can perceive Justice Thomas's confederalist orientation by examining his view of the Tenth Amendment. Any discussion of Justice Thomas's interpretation of the Tenth Amendment must begin with his dissenting opinion in *U.S. Term Limits Inc. v. Thornton*, a 5-4 decision in which the majority invalidated a state constitutional amendment, duly adopted by Arkansas voters, imposing term limits on candidates for Congress.[59] Joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, Justice Thomas unveiled a nuanced interpretation of federalism. "The ultimate source of the Constitution's authority," wrote Justice Thomas, "is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[60] What Justice Thomas was gesturing toward in this passage is the Tenth Amendment. As discussed further below, for Justice Thomas, the Tenth Amendment means that the states and their respective people hold reserve powers, but it does not tell us in any way whether those reserve powers rest with either the states or the citizens.[61]

This is a profoundly sophisticated, if unconventional, theory of constitutional authority. It could appeal to those who proclaim popular sovereignty as their battle cry just as it could appeal to federalists. Indeed, these may not be mutually exclusive groups. Nevertheless, Justice Thomas's constitutional theory has not yet gathered many adherents beyond the most conservative Supreme Court observers. For what sits at the core of Justice Thomas's theory of constitutional authority and political

56. ARTICLES OF CONFEDERATION of 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the united states in congress assembled.").

57. U.S. CONST. art. I, § 8, cl. 5.

58. U.S. CONST. art. I, § 8, cl. 8.

59. 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

60. *Id.* at 846.

61. *See* HENRY MARK HOLZER, THE SUPREME COURT OPINIONS OF CLARENCE THOMAS, 1991–2006: A CONSERVATIVE'S PERSPECTIVE 37 (2007).

legitimacy is the very confederalist terms that the Anti-Federalists of the founding era adopted as their watchwords: state supremacy. This is evident in two ways. First, Justice Thomas conceives of the Constitution as devolving powers upon the center from the states.[62] Justice Thomas rejects the view that authority flows from the national government to the states—that the national government stands prior to or indeed enjoys primacy over the states—and affirms that "[t]he Constitution derives its authority instead from the consent of the people of the States."[63]

Second, Justice Thomas sees all reserved powers as remaining in the hands of either the state or its citizens, with the choice to be determined according to state political processes.[64] Therefore, for Justice Thomas, each state must come to its own indigenous answer as to with whom each reserved power rests: "The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government."[65] If one holds this confederalist interpretation of the Constitution—with the Tenth Amendment as its flagstaff—the only reasonable decision in *U.S. Term Limits* was the one Justice Thomas reached: that Arkansas voters have the right to impose eligibility requirements on their congressional candidates precisely because the Constitution is silent on the issue.[66] And where the text is silent, the matter is reserved for resolution in the political process by the states and their people under the Tenth Amendment.[67]

There are other data points on this score. An equally instructive illustration of Justice Thomas's confederalist inclination appears in his concurrence in *Printz*,[68] a controversial case in which the Supreme Court invalidated a congressional mandate requiring the Attorney General to command local law enforcement officers to discharge certain executive and administrative tasks.[69] Although Justice Thomas joined the Court's majority opinion with no reservation as to any of its parts, he felt compelled to write separately to stress what he regarded as a critical point on the limited nature of the national government.[70] Justice Thomas began his concurrence wishing to "emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers . . . . Accordingly, the Federal

62. *Id.* at 38.
63. *U.S. Term Limits, Inc*., 514 U.S. at 851 (emphasis omitted).
64. *See* HOLZER, *supra* note 61, at 38.
65. *U.S. Term Limits, Inc*., 514 U.S. at 847.
66. *Id.* at 845.
67. *Id.*
68. Printz v. United States, 521 U.S. 898 (1997).
69. *Id.* at 935.
70. *See id.* at 936–39.

Government may act only where the Constitution authorizes it to do so."[71] He added, for emphasis anew, that "[t]he Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority."[72] He concluded with what he really wanted readers to take away from his concurrence—that the best way to interpret the Constitution was to return to the founding conception of statehood and the allocation of powers: "we must," he insisted, "return to an interpretation better rooted in the . . . [Constitution's] original understanding."[73] The strategy of invoking the original understanding of the Constitution serves the purpose of confederalism because the founding design may be plausibly, though certainly not definitively, described as regarding the states and the center as dual sovereigns.

There is a deep interconnection between originalism and confederalism. All originalists are not confederalists, but all confederalists are likely to be originalists. Here is why: the founding design of the United States Constitution exhibited many confederalist features, perhaps most notably in the language of Article I (which circumscribes the powers of Congress[74]), Article V (which grants a central role to the states in amending the Constitution[75]), and in the Tenth Amendment.[76] There are also several clauses in the text of the Constitution that highlight the significant power states retained when they ratified the Constitution: the power of state legislatures to appoint their chosen representatives to the United States Senate,[77] the Full Faith and Credit Clause,[78] and of course the Ratification Clause without which the Constitution never would have come into force.[79]

But that is only one side of the story. The Constitution cannot be said conclusively to have endorsed the notion of state supremacy to which confederalists ascribe; the Supremacy Clause extinguishes that possibility.[80] What further supports a nationalist reading of the Constitution is that the text requires a state to obtain congressional consent before taking certain steps, which weakens the claim that all power derives from states. For instance, a state must secure approval from Congress before laying duties on imports or exports,[81] keeping troops in time of

71. *Id.* at 936–37.

72. *Id.* at 937.

73. *Id.*

74. U.S. CONST. art. I, § 1 (stating that only those "legislative Powers *herein* granted shall be vested in a Congress of the United States . . . .") (emphasis added).

75. U.S. CONST. art. V.

76. U.S. CONST. amend. X.

77. U.S. CONST. art. I, § 3, cl. 1.

78. U.S. CONST. art. IV, § 1.

79. U.S. CONST. art. VII.

80. U.S. CONST. art. VI, cl. 2.

81. U.S. CONST. art. I, § 10, cl. 2.

peace,[82] or entering into an agreement with another state.[83] The Constitution also imposes outright prohibitions on actions states may wish to take, namely entering into treaties,[84] coining money,[85] or passing certain kinds of laws.[86] The first confederalist signpost—state supremacy—is therefore not at its strongest from an originalist perspective. But the same is not true of the second signpost of confederalism: state sovereignty.

For confederalists like Justice Thomas, originalist interpretative techniques lead to outcomes supporting state sovereignty. Confederalists understand sovereignty in terms of dominion over a bounded territory, here a state, which they believe ought to remain free from incursions by other entities unless those entities are invited to exercise their powers within the state or are endowed with superseding claims of authority. Absent those types of conditions, a state remains sovereign over its own empire and cannot have rules or obligations that undermine its territorially-bounded authority foisted upon it. That, for confederalists, is the meaning of state sovereignty. And it is precisely what, according to confederalists like Justice Thomas, the incorporation doctrine—an innovation of national courts—has improperly reversed.[87]

At the founding, the Bill of Rights did not constrain the actions of the states. The Bill of Rights applied only to the federal government. Indeed, in an early nineteenth-century Supreme Court case, one of Chief Justice Marshall's final opinions, the Court left no doubt about the states' immunity to the commands of the Bill of Rights: "These amendments [in the Bill of Rights] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."[88] As separate sovereigns, states stood impervious to the invasive requirements of the Bill of Rights compelling public actors to comply with an extensive menu of rights and liberties.[89] The Court interpreted those rights and liberties as obliging only federal public actors, not state public actors, on the theory that the sovereign states, which had created the national government, had chosen expressly to apply the Bill of Rights only to those national institutions.[90] As architects of the national government, the states

82. U.S. CONST. art. I, § 10, cl. 3.

83. *Id.*

84. U.S. CONST. art. I, § 10, cl. 1.

85. *Id.*

86. *Id.*

87. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 367 (1995) (Thomas, J., concurring) (lamenting that the Court has not exercised more restraint in its application of the several Amendments).

88. Barron v. Baltimore, 32 U.S. 243, 251 (1833).

89. *See id.* at 249.

90. *Id.* at 247.

imposed duties upon it and reserved for themselves wide latitude to manifest their sovereignty within their own borders.[91]

This rule of state sovereignty survived for many years into the life of the new republic. Nearly a century after the adoption of the Constitution, in 1875 the Supreme Court confirmed that the Bill of Rights "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone."[92] Later in 1884, the Court applied the theory of state sovereignty to refuse to hold that states were required to abide by the same criminal defense provisions in the Bill of Rights that the national government must respect.[93] Still later in 1886, the Court again affirmed this rule, declaring that the Bill of Rights "is a limitation only upon the power of congress and the national government, and not upon that of the state."[94]

But things began to change at the dawn of the twentieth century. The Supreme Court began slowly to relegate the notion of state sovereignty to secondary importance behind its increasingly heightened solicitude for individual rights and liberties. Deploying an interpretive device that has come to be known as the incorporation doctrine—pursuant to which courts apply the rigors of the Bill of Rights to the states through the Fourteenth Amendment—the Court took a more active role in protecting rights and liberties against incursions by state governments. Once the Court issued its first ruling incorporating the Bill of Rights against the states,[95] it was only a matter of time before other similar cases followed. And so it began. Over the next few years, the Court issued at a rapid pace a number of judgments that have left only few provisions of the Bill of Rights not yet interpreted as restricting what states can do.[96]

The confederalist position rejects this kind of national intrusion upon state sovereignty. If states are sovereign—and, for confederalists, they are—how can states, without their express consent, fall subject to national standards that compromise their sovereignty? Confederalists raise two principal objections to the rise of the incorporation doctrine, the first being procedural and the second substantive. As to the first, for confederalists, the incorporation doctrine suffers from a debilitating and delegitimizing procedural weakness insofar as it has been imposed by the judiciary and has not been adopted willingly by the states and their citizens. Second, confederalists simply do not agree with the principle behind incorporation: that states can ever be subject to foreign rules that change the relationship

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91. *See id.* at 250.

92. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

93. Hurtado v. California, 110 U.S. 516, 520–21 (1884).

94. Presser v. Illinois, 116 U.S. 252, 265 (1886).

95. *See* Gitlow v. New York, 268 U.S. 652 (1925).

96. *See, e.g.*, *In re* Oliver, 333 U.S. 257 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Powell v. Alabama, 287 U.S. 45 (1932); Near v. Minnesota, 283 U.S. 697 (1931).

between citizens and their state government without an express sanction, by the state and its people, of that changed relationship. For confederalists, this does more than weaken the signpost of state sovereignty; it eviscerates it.

It should therefore come as little surprise that Justice Thomas questions the correctness of the incorporation doctrine.[97] This is most clearly discernible in Justice Thomas's opinions concerning the Establishment Clause,[98] which he believes should not apply against the states, contrary to the Court's earlier, and still binding, Establishment Clause ruling in 1947.[99] For Justice Thomas, the debate over the incorporation of the Bill of Rights is about neither rights nor liberties but more squarely about federalism and the nature of the relationship between the center and the periphery. The debate, for him, is not about the legitimacy of the Bill of Rights; it is about the legitimacy of the incorporation doctrine. He views incorporation as a development that has in many respects improperly shrunk the sphere of autonomy of states and forced historically unsupported obligations upon them. All of which, from the perspective of confederalists like Justice Thomas who believe deeply in state sovereignty, combines to chip away at incorporation's moral force of reason.

In addition to the twin confederalist signposts of state supremacy and state sovereignty, what likewise characterizes confederalist theory is a sharp suspicion of the center. To be suspicious of the center is to fear the great vortex of the national government, which seems to gather increasing size and power over time. Once the nationalizing trend of consolidation takes hold, it is very difficult to stop. The Anti-Federalists knew well this lesson and tried mightily to spread their gospel. "There is no way, therefore," wrote Brutus, "of avoiding the destruction of the state governments, whenever the Congress please to do it," cautioning that it was critical to "restrain" the national government.[100] The Anti-Federalists even articulated fears that the Constitution would "subvert and abolish all the powers of the state government."[101] This was quite clearly a dubious vision

97. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3088 (2010) (Thomas, J., concurring in part and concurring in the judgment) (suggesting that if the protections of the Bill of Rights are to apply to the states, the proper vehicle through which to incorporate those rights is the Privileges or Immunities Clause, not the Due Process Clause, as has historically been the case).

98. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Thomas, J., concurring); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring).

99. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

100. Brutus VI (Dec. 27, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 280, 282 (Ralph Ketcham ed., 1986).

101. Brutus XII (Feb. 7 and 14, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 298, 301.

of the new national charter and its new national institutions. The Anti-Federalists moreover worried that the states would "soon dwindle into insignificance" because of federal encroachments.[102]

To make eminently clear the Anti-Federalists' distrust of the national government, Brutus stressed the point even further, making two pointed remarks. First, he lamented that the Constitution would ultimately gut the states of their powers and prerogatives because it had been "calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national."[103] In his second volley, which followed directly from his first, Brutus answered how the Constitution itself could accomplish that sinister objective: with the complicity of courts.[104] Courts, he predicted, would gradually expand the scope of national powers and simultaneously contract the range of state authority: "Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people."[105]

But the Anti-Federalists' advocacy had little effect at the time. They lost the founding battle when the Constitution was duly ratified by the ninth state. Worse still from the contemporary confederalist perspective, the Anti-Federalists may still yet lose the larger war. Indeed, the modern Supreme Court appears to have managed to accomplish precisely what the Anti-Federalists foretold, pinching down on the powers of the states relative to the national government and multiplying the powers of the center over the periphery. Proof positive, for confederalists, is the Supreme Court's prevailing interpretation of the Commerce Clause.

Confederalists have had some meaningful victories in the unfolding of the Commerce Clause's interpretation. In their pre-New Deal heyday, confederalists applauded the Supreme Court for carving out and then vigorously defending an inviolable sanctuary for states. Cases like *United States v. E.C. Knight Co.*,[106] *Hammer v. Dagenhart*,[107] *A.L.A. Schechter Poultry Corp. v. United States*,[108] *United States v. Butler*,[109] *Carter v. Carter Coal Co.*,[110] and *Ashton v. Cameron County Water Improvement*

102. Melancton Smith (June 25, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 350, 353.

103. Brutus XV (Mar. 20, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 304, 308.

104. *Id.*

105. *Id.*

106. 156 U.S. 1 (1895).

107. 247 U.S. 251 (1918).

108. 295 U.S. 495 (1935).

109. 297 U.S. 1 (1936).

110. 298 U.S. 238 (1936).

District[111] vindicated states and their sovereignty and held at bay the aggrandizing designs of the national government. But those victories did not last. The New Deal heralded what was, for confederalists, a troubling era of judicial decisions that made real the Anti-Federalists' founding fears about courts gradually extending the reach of the national government into the domain of the states. Those New Deal decisions and others are well known in the pantheon of progressive constitutional law: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[112] *United States v. Darby*,[113] *Wickard v. Filburn*,[114] *Heart of Atlanta Motel v. United States*,[115] and *Katzenbach v. McClung*.[116] Those cases were great victories for the New Deal and Civil Rights eras. But they were significant setbacks for confederalists.

Today, though, the tide may be turning back to something more closely resembling the pre-New Deal era. Beginning in the 1990s, the Supreme Court, possessed of a majority of Republican appointees, issued judgments that were more deferential to state sovereignty than the Court had been in its recent past. The Court invalidated congressional action as violative of the Commerce Clause as it began more emphatically to assert limits on what Congress could do in relation to states and their governments. It appeared to many that the Court had resolved to affix constitutional handcuffs on Congress. *United States v. Lopez*,[117] *Printz v. United States*,[118] *United States v. Morrison*,[119] *New York v. United States*,[120] *Alden v. Maine*,[121] and other cases gave court watchers all the proof they needed to conclude that they were witnessing the genesis of a conservative revolution in the name of federalism.[122] Yet, more than breathing new life into federalism, these cases can be seen as beginning to rebuild the barriers that once separated the center from the periphery and as slowly pulling the Republic back to an era when states operated as separate sovereigns. Justice Thomas joined the majority in each of these cases.

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111. 298 U.S. 513 (1936).
112. 301 U.S. 1 (1937).
113. 312 U.S. 100 (1941).
114. 317 U.S. 111 (1942).
115. 379 U.S. 241 (1964).
116. 379 U.S. 294 (1964).
117. 514 U.S. 549 (1995).
118. 521 U.S. 898 (1997).
119. 529 U.S. 598 (2000).
120. 505 U.S. 144 (1992).
121. 527 U.S. 706 (1999).
122. *See* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 508 (2006).

B. The Seeds of Conservative Revolution

Justice Thomas has long been a champion of confederalist principles. Even before his appointment to the Supreme Court, Clarence Thomas, then-Chairman of the Equal Employment Opportunity Commission, intimated his great reverence for the decentralized federalism of the founding era. Urging that the United States Constitution be interpreted in light of the Declaration of Independence, Justice Thomas argued that institutional design was critical to the entrenchment of American values, perhaps foremost among these being, for him, liberty: "the problem is not *replacing* good intentions with good institutions but rather having good institutions that protect and reinforce good intentions."[123] According to Justice Thomas, federalism is one such *good institution*, that which makes possible the virtues of civil society and of individuals themselves.

For Justice Thomas, the apex of a good public institutional design of federalism is confederation. It is, in his view, the best institutional form of federalism for the United States. What makes it his first choice is not necessarily that it is normatively more appealing than a more centralized form of federalism but, rather, that it more closely approximates what he interprets to be the founding design. That—the founding design and its animating principles—is what impels Justice Thomas to decide cases the way he does. He holds an abiding fidelity to the Constitution's text and its origins, and only the very rarest of modernity's intervening changes should, to his mind, compromise the way we apply that text of old to today. Therein lie the seeds of the conservative revolution he stands closer than ever before to sewing.

The next constitutional revolution has been underway for years.[124] The mission of the conservative revolution has remained unchanged since its beginnings when Ronald Reagan took office as president. It is to stand on the pillars of federalism, limited government, and enumerated national powers to undo much of the New Deal's expansion of the central government.[125] It is also, by implication, to return to the several states the powers they once enjoyed under a judicial regime that did not interpret the congressional commerce power as a repository of nearly infinite legislative authority. All of which, it should be noted, is what Justice Thomas already believes is correct as a matter of constitutional law and history.

But the conservative constitutional movement has never quite yet evolved into a real revolution, at least not one that has been consummated. Having on more than one occasion reached points very close to revolution,

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123. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 989 (1987).

124. *See, e.g.*, LEE EDWARDS, THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA 2–3 (1999); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051 (2001).

125. *See* GEORGE THOMAS, THE MADISONIAN CONSTITUTION 129–30 (2008).

the movement has been short-circuited, though not irremediably so, in the face of spirited counterforces mobilizing successfully to slow it down. In the words of Linda Greenhouse, the conservative movement has been "fitful" without fail, finding ways to stall itself at the inopportune moments when decisive victory appeared possible.[126] There have been at least two such occasions since the election of Ronald Reagan to the presidency.

One of the first moments that disrupted the rising conservative constitutional movement is forever memorialized by a new verb in the lexicon of American constitutional politics: "bork" as in "to be borked." Being "borked" is a reference to the giant conservative legal scholar, Robert Bork, whom Reagan had nominated to the Supreme Court in 1986, only to see the Senate reject his candidacy by a margin of 58-42.[127] For conservatives who believe that Bork was eminently qualified to be a Supreme Court justice, a candidate is "borked" when she is unfairly rejected despite her stellar credentials for the job.[128] Perhaps the more neutral definition of the term—if there can be such a thing—is the one given by Terry Eastland of the *Legal Times*, who suggested that being "borked" occurs when "[y]our opponents attack you on a matter involving law and criticize you in terms of policy outcomes . . . . [but y]ou defend yourself by discussing the issue in legal jargon."[129] Eastland's definition is helpful because it points to just what felled Bork's nomination.

As a prominent conservative who espouses originalism as the basis for constitutional interpretation,[130] Bork was at the time seen as the vehicle through which the conservative movement would consolidate its revolutionary designs to dismantle many of the New Deal triumphs that had come to define the modern American state.[131] Progressives therefore felt so sufficiently alarmed about the very real possibility of a Justice Bork on the Court that they mobilized to do what had until then been unthinkable: in Gary McDowell's words, "it was the first time that the Senate chose to deny confirmation to a nominee whose professional qualifications and legal

126. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1556 (1996).

127. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 103, 162 n.30 (2005).

128. *See* LEWIS L. GOULD, THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE 288 (2005).

129. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 320 (2009).

130. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

131. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483 n.1 (1997); David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U.L. REV. 339, 414 (1996).

abilities were never in question."[132] The Bork confirmation mess struck a damaging blow to the conservative constitutional movement just as it was threatening to reach its ascendancy both in American politics and in law.

The second occasion where the conservative movement came close to consolidating its power is similar to the first insofar as it derives from a presidential defeat. On the heels of the election of George W. Bush as president, Jack Balkin posited that new winds would once again fill the sails of the conservative revolution, which would finally come to fruition with transformative judicial appointments to the Supreme Court.[133] He was right to put the stakes in these terms because we know that big changes to the constitutional landscape in our modern era come in the form of judicial opinions issued by revolution-minded judges.[134] As Bush settled into office and earned reelection, he made two appointments to the Supreme Court—Chief Justice John Roberts and Justice Samuel Alito—neither of whom changed the ideological orientation of the bench, given its composition at the time. But then, when the conservative cause needed a victory most,[135] it was denied to them: in both the 2006 congressional and 2008 presidential elections, the Republican Party suffered losses, ultimately costing the conservative movement a chance to consolidate its revolutionary aspirations with one or more transformative appointments to the Supreme Court. We know now that a Democratic president ultimately made the two subsequent Supreme Court nominations—one in 2009 and another in 2010—that could have otherwise been the privilege of a Republican president had the earlier elections gone the other way. That was the conservative movement's second missed opportunity to move closer toward consolidating its constitutional ambitions.

The conservative constitutional movement now finds itself on the verge of another opportunity to transform its powerful movement into a constitutional revolution. We will know very soon whether that movement is likely to morph into a revolution or whether it will once again be stopped in its tracks, perhaps this time for good. There are two key events that will determine the future of the conservative constitutional movement: first, the presidential election of 2012; and second, the fate of the health care law passed by congressional Democrats and the President in the spring of 2010.

Begin first with the coming presidential election. The current trend of opinion polling suggests that the strength of the Republican Party is on the

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132. Gary L. McDowell, *Bork Was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection*, 39 U. RICH. L. REV. 809 (2005).

133. Jack M. Balkin, *Legitimacy and the 2000 Election*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 210, 226–27 (Bruce Ackerman ed., 2002).

134. *See* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

135. *See* Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1060 (2005).

rise according to political analyst Michael Barone.[136] When coupled with the declining approval ratings recorded for President Barack Obama—two years and a month after his inauguration, the President's approval rating has dropped 23%,[137] from 67[138] to 44%[139]—this bodes unfavorably for the President's reelection prospects. But these trends are manifesting themselves in real terms well beyond inconsequential polls. For instance, since President Obama's inauguration, his party has suffered electoral defeats, one after the other, in a string of devastating losses at the hands of the ascendant conservative movement. First came the Republican win in the special senatorial election in Massachusetts,[140] then the Republican successes in the Virginia[141] and New Jersey gubernatorial elections,[142] and of course most recently the great conservative triumph in the 2010 midterm congressional elections.[143] These are troubling times for Democrats because they risk losing not only their modest Senate majority but also the presidency in 2012[144] according to observers. And with the Senate back in Republican hands alongside a Republican presidency, the next Supreme Court appointment—which could come during the next four-year presidential term—could be the one that gives conservatives an unassailable majority on the high court for years to come.

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136. *See* Michael Barone, *Politics by the Numbers: Good Omens for the GOP in 2012*, RASMUSSEN REPORTS (Jan. 31, 2011), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_michael_barone/politics_by_the_numbers_good_omens_for_the_gop_in_2012.

137. *Obama Approval Index History*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/obama_administration/obama_approval_index_history (last visited Sept. 21, 2011).

138. *Obama Approval Index History (11/06/2008–01/20/2009)*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/obama_administration/obama_approval_index_history_11_06_2008_01_20_2009 (last visited Sept. 22, 2011).

139. *Obama Approval Index History*, *supra* note 137.

140. Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 19, 2010, at A1, *available at* http://www.nytimes.com/2010/01/20/us/politics/20election.html (last visited Oct. 23, 2011).

141. Jerry Hart & Heidi Przybyla, *Virginia Elects Republican Governor in Setback for Obama*, BLOOMBERG (Nov. 4, 2009, 01:06), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agybbtLRg2T8.

142. Kevin Hechtkopf, *Chris Christie Wins New Jersey Governor's Race*, CBS NEWS (Nov. 3, 2009, 2:09 AM), http://www.cbsnews.com/8301-503544_162-5517051-503544.html.

143. *See* Hendrik Hertzberg, *Electoral Dissonance*, THE NEW YORKER (Nov. 15, 2010), *available at* http://www.newyorker.com/talk/comment/2010/11/15/101115taco_talk_hertzberg ; *see also* Perry Bacon Jr., *After 'Shellacking,' Obama Continues to Point Finger at Himself*, WASH. POST (Nov. 15, 2010, 3:33 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/15/AR2010111504741.html.

144. *See* Charles Babington, *Bad News Democrats: 2012 Could Be Worse Than 2010*, ABC NEWS (Nov. 9, 2010), http://abcnews.go.com/Politics/wireStory?id=12099195.

The second critical moment that will help determine whether the current conservative constitutional movement will lead to the next constitutional revolution is the outcome of constitutional challenges to the new health care law. The Patient Protection and Affordable Care Act[145] is the subject of several lawsuits currently winding their way through federal courts across the country.[146] The case is expected to reach the Supreme Court sometime in the years ahead. It will be a terribly important case, with perhaps more at stake than any other in recent memory because it will pit national prerogatives versus state sovereignty and will require the Court to determine just how deeply into state boundaries the national government can reach. The health care law has therefore already become a great modern constitutional controversy whose resolution will shape American politics for years and maybe decades to come. And with reason because "[n]othing less than the ability of the United States to function as a modern nation may be at stake,"[147] to quote Garrett Epps, a constitutional law professor and political columnist for the Atlantic.[148]

Here are two big ifs about the constitutional controversy over the health care law. If the law survives these challenges at the Supreme Court, we will be able to read the ruling as a death blow to the conservative movement. It will appear to stop what is an increasingly deferential judicial posture toward states, it will breathe new life and legitimacy into the national government's regulatory prerogatives, and it will moreover reaffirm the federalist basis of the United States with federalism conditioned on the supremacy of the center over the periphery.

But if, however, the Supreme Court rules against the new health care law—perhaps a Supreme Court newly emboldened by a new conservative appointment—that will mark the consummation of the conservative constitutional revolution. A ruling restricting what Congress can do through the Commerce Clause to regulate the health of American citizens will stand for three constitutionally conservative revolutionary propositions. First, that the United States consists of fifty sovereign sub-national entities, each of which is entitled to express its sovereignty free from the intrusive regulatory reach of the national government. Second, that the national government enjoys only limited powers that cannot be

145. Pub. L. No. 111-148, 124 Stat. 119 (2010).

146. *See* Kevin Sack, *A Third Judge Validates Health Care Overhaul Law*, N.Y. TIMES, at A14 (Feb. 22, 2011), *available at*: http://www.nytimes.com/2011/02/23/health/policy/23health.html?_r=1&sq=health%20care%20law&st=cse (noting that there have been over 20 legal challenges filed against the health care law and so far, three out of five federal judges have ruled in favor of the Obama Administration).

147. Garrett Epps, *Health Care Suits: Separating Law from Spin*, THE ATLANTIC (Dec. 30, 2010, 10:15 AM), http://www.theatlantic.com/national/archive/2010/12/health-care-suits-separating-law-from-spin/68675.

148. *Garrett Epps*, THE ATLANTIC, http://www.theatlantic.com/garrett-epps#bio (last visited Oct. 29, 2011).

expanded in a way that divests the Tenth Amendment of its meaning. And third, that the Supreme Court sees itself as the defender of the rights of states against the self-aggrandizing tendencies of the national government. That will be the message to draw from a Supreme Court judgment that gives reason to state challenges against the constitutionality of the health care law. It will mark the culmination of decades of conservative constitutional advocacy about the respective roles of federal and state governments in the United States. And the heart of the movement will have been the confederalist theory of Justice Thomas, all along pulling the Court closer to reclaiming the nation's confederalist roots.

CONCLUSION

All constitutional revolutions face obstacles standing in their way. Constitutional revolutions pit challengers and incumbents, the former mobilizing to displace the current constitutional orthodoxy and the latter marshalling their own forces to stand on guard in defense of the dominant constitutional regime of the day. That is the narrative that runs through the constitutional revolutions that have shaped the American constitutional edifice and indeed the whole of American constitutional culture. America's second founding and the New Deal Transformation are only two of the many vivid illustrations of how America has been shaped and reshaped by constitutional conflict and reconciliation. Today, the United States Constitution is the battleground for what may become yet another constitutional revolution in American history.

When the Supreme Court greeted its newest member in the fall of 1991, the conservative movement was already building momentum toward achieving ascendancy in both American law and politics. But Justice Thomas's confirmation battle and its aftermath coincided with the onset of even greater political changes in American constitutional politics.[149] Shortly after Justice Thomas's installation, the Court issued the first in a string of conservative judgments reviving Tenth Amendment limits on the central government and reinforcing the boundary separating states from the national capital.[150] Ronald Reagan had been elected, reelected, and later ceded the reins to his Vice President, George H.W. Bush who, like Reagan, successfully nominated a justice to the Supreme Court. Edward Meese had, at the time, given what has since become a landmark speech, celebrated in some circles but influential in all, calling on courts to use originalist interpretative techniques and proclaiming that "an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each

149. *See* CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS 143–48 (1993).

150. *See* New York v. United States, 505 U.S. 144 (1992).

era."[151] Soon thereafter, Republicans scored a historic victory in the 1994 midterm congressional elections, securing majorities in both houses of Congress—a remarkable feat by modern conservative standards.[152]

The conservative movement has since come closer and closer to achieving the transformative constitutional change it longs for. The movement has survived some demoralizing defeats along the way, but nothing yet destructive enough to extinguish it. Whether the movement becomes a constitutional revolution, however, remains uncertain—and this will remain unknown until American constitutional politics resolves two outstanding questions: who will win the 2012 presidential election, and how will the Supreme Court rule on the new health care law?

But amid these doubts about the future course of American constitutional law, two things remain certain. First, Justice Thomas will continue to interpret the United States Constitution in confederalist terms, concerned first, and above all, with promoting state supremacy, protecting state sovereignty, and neutralizing the concerns that give him and others reason to be suspicious of the power-arrogating tendencies of the national government. Justice Thomas is a jurist of principle who heeds only what he believes to be right, not what he regards as expedient. And for him, what is right as a matter of constitutional law and founding history is to reclaim America's confederalist roots.

The second thing we can be sure of is the continuing influence of Justice Thomas. Even if the current conservative movement fails to consummate its revolutionary aspirations, there will nevertheless remain hope for the movement's revival sometime in the future because Justice Thomas is not expected to retire anytime soon. He only recently entered his 60s.[153] He could very well remain on the bench for the next two to three decades. We could see another conservative movement spring between now and then. And with Justice Thomas still likely to be on the bench when it does, the next conservative movement may very well be the one that becomes the next constitutional revolution.

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151. Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985).

152. Barry C. Burden & Aage R. Clausen, *The Unfolding Drama: Party and Ideology in the 104th House*, *in* GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S, at 152 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998).

153. *See* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 3 (2007).