State and Local Government Power and the 1994-1995 Term of the United States Supreme Court

Frank J. Macchiarola

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The 1994-1995 term of the United States Supreme Court continued the trend of shifting power from traditional federal domain to state and local governments. The power of the national government has not been as challenged by the countervailing political power of the states since the New Deal. The Supreme Court decisions expanding the power of state and local government are not the only steps taken towards increasing state power. Attempts to modify the post-New Deal federal system of government have taken many forms.

I. Setting the Stage for Increased State Power

The increase in the power of state and local government was exemplified in the Supreme Court's 1992 decision *New York v. United States.* In this opinion, the Court invalidated the Federal Waste Act, eliminating the provision which required New York to dispose of its nuclear waste in a manner mandated by federal guidelines. In the majority opinion, Justice O'Connor determined that Congress had invaded New York State's sovereignty by rewriting its law to compel state expenditures in order to comply with federal requirements. The Court reasoned that Congress was blurring the lines of authority, and therefore accountability,
that separate the state and national governments.\(^5\) With budget constraints foreseeable, the Supreme Court warned Congress not to encumber state government with such costly requirements.\(^6\)

In another important decision, *Shaw v. Reno*,\(^7\) the federal requirements of the Voting Rights Act\(^8\) were scaled back considerably, sending a similar message, that a state’s authority to create legislative districts should not be impinged.

This call for increased state power is clearly reflected in legislative proposals advocating block grant programs, calling for the downsizing of the national government, and of course, in the GOP’s “Contract with America.” Indeed, one of the most significant consequences of the 1994 national elections has been the attempt of the Republican controlled Congress to shift the political power to state and local governments. Congress has clearly indicated that state and local control of government programs, even those which are federally funded, is preferred over a national bureaucracy.

Such sentiment is evidenced by the proposed “Personal Responsibility Act.”\(^9\) This program would supplant the current federal benefits program, Aid to Families with Dependent Children\(^10\) (“AFDC”), with block grants to the states. Currently, states must adhere to a considerable number of federal regulations to receive AFDC funds. In order to tailor the benefits program to their specific needs, states must first apply for a federal waiver. Although the granting of waivers has become more frequent because of state protest, the process of obtaining approval is often difficult and

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\(^5\) N.Y., 505 U.S. at 168 (indicating that compliance with federal policy choices is ultimately up to state residents); see also U.S. Const. amend. X (providing for separation of state and national governments); Frank J. Macchiarola, *The Courts in the Political Process: Judicial Activism or Timid Local Government*, 9 ST. JOHN’S J. LEGAL COMMENT. 703, 703 (1994) (suggesting erosion of separation of powers doctrine as result of blurring of line separating branches of government).

\(^6\) N.Y. v. United States, 505 U.S. 144, 168 (1992). Citizens of a state can choose to deny a federal grant or choose to have the federal government rather than the state pay the costs of a federally mandated program. *Id.*

\(^7\) 113 S. Ct. 2816 (1993).


time consuming. Block grants, on the other hand, limit restrictions of state discretion.

The shift away from federal control, however, transcends party lines. Many Democrats, especially state governors, have expressed considerable dissatisfaction with the supervision of the national government's bureaucracy and the application of federal rules. Vermont Governor Howard Dean, speaking on behalf of the National Governors' Association regarding the Personal Responsibility Act, stated that: "Governors have called for increased flexibility in welfare programs. We believe there is no one-size-fits-all solution to welfare, and states must have the flexibility to develop these programs and services that will address the unique characteristics of their welfare population and economic conditions within their individual states."11 State officials have long protested the intrusive nature of the federal government and the strength of the federal bureaucracy to shape and control decisions which are more appropriately made at local levels.

President Bill Clinton has also expressed his support of greater state autonomy. While Governor of Arkansas, President Clinton often proposed that the federal government grant greater flexibility to the states. Since taking office, President Clinton has granted states certain exemptions from federal rules in order to structure their own programs. The Clinton administration, for instance, has granted waivers to twenty-nine states seeking to tailor the AFDC program. Although President Clinton favors welfare reform, he opposes the block grant solution introduced by the "Contract with America." While speaking to the National Governors' Association, President Clinton remarked: "I'm opposed to welfare reform that is really just a mask for Congressional budget cutting, which would send you a check with no incentives or requirements on states to maintain your own funding support for poor children and child care and work."12

President Clinton's January 1996 State of the Union Address, however, indicated continued support for the trend toward greater local power. He expressed his belief that a new smaller government must work together with all citizens through state and local

12 President William Jefferson Clinton, Remarks to the National Governors' Association, 31 WEEKLY COMP. PRES. DOC. 1342 (July 31, 1995).
governments. Furthermore, he announced the elimination of 16,000 pages of unnecessary rules and regulations, which would shift certain decision-making power out of Washington and back to the states and local communities. While President Clinton did claim that the era of big government was over, he also cautioned against returning to the era where states had to fend for themselves.13


The Judicial effect of Executive and Legislative proposals regarding changes to the federal government has yet to be fully determined. The following decisions from the 1994-1995 term of the Supreme Court, however, tend to support increased state and local government power.

Perhaps the most illustrative of these Supreme Court decisions is United States v. Lopez.14 In Lopez, the Court struck down a provision of the Gun-Free School Zones Act of 1990,15 which prohibited the knowing possession of a gun in a school zone.16 The Court's action was based on the determination that Congress had exceeded its authority in enacting such legislation under the Commerce Clause of the United States Constitution.17 The Court explicitly found that possession of a gun in a school zone was not an economic activity that would substantially affect interstate commerce.18 This was an extraordinary departure from a line of cases commencing in the New Deal era, which provided Congress with unfettered authority to use the Commerce Clause as the basis for enacting virtually any legislation with some type of national purpose. In fact, the trend was so ingrained in tradition that congressional findings regarding the impact of the law on interstate commerce were not even included in the legislative record.19

13 President William Jefferson Clinton's State of the Union Address: "America Must Lead", N.Y. TIMES, Jan. 24, 1996, at A15 (indicating President's concern of returning to time when states were fending for themselves).
15 Id. at 1626.
17 U.S. Const. art. I, § 8, cl. 3. (empowering Congress to regulate Commerce among states).
18 Lopez, 115 S. Ct. at 1631 (stating that Gun-Free School Zones Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").
The five-to-four majority in *Lopez* was limited in focus, making it difficult to predict whether the opinion will affect future decisions involving the Commerce Clause. In any event, *Lopez* will now require Congress to be more attentive in determining whether the activity it seeks to regulate falls within the ambit of federal concern. Given the longstanding practice of enacting federal legislation under the Commerce Clause, *Lopez* represents an important adjustment in Congress's approach in passing legislation.\(^20\)

Two other cases, *City of Edmonds v. Oxford House, Inc.*,\(^21\) and *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*,\(^22\) however, subordinated the powers of local and state government to superior federal statute and First Amendment claims. In *City of Edmonds*, the City argued that its local zoning code did not permit for a group home, housing ten to twelve recovering alcoholics and drug addicts.\(^23\) The Federal Government argued that the City's zoning code did not comport with the Fair Housing Act ("FHA"), prohibiting discrimination against persons with disabilities by exempting group homes from local zoning code prohibitions.\(^24\) The City argued that this FHA constraint was not applicable since the zoning code was designed only to restrict the maximum number of occupants permitted to occupy a dwelling.\(^25\) The Court disallowed the City this exemption, finding that while the exemption was designed to cover population density, the City was attempting to define the size and composition of a family, and hence it was promoting a classic land use restriction.\(^26\)

In *Hurley*, the Supreme Court considered the right of a homosexual group to march in Boston's St. Patrick's Day Parade. The organizers of this parade, South Boston Allied War Veterans Council, were a private group. This group had been prevented from barring participation by the homosexual marchers pursuant to Massachusetts' state law prohibiting denial of access to public

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\(^20\) See Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 St. John's J. Legal Commen. 151, 165 (1994) (noting Supreme Court's demand that Congress clearly articulate constitutional basis for its actions when it attempts to expand its power).


\(^23\) City of Edmonds, 115 S. Ct. at 1779.

\(^24\) Id. at 1779; see 42 U.S.C. § 3601 (1994).

\(^25\) City of Edmonds, 115 S. Ct. at 1776.

accommodations on the basis of a number of grounds, including sexual orientation. In agreement with a lower court case on a similar matter involving New York City's St. Patrick's Day Parade, the Supreme Court ruled that the parade organizers' right to bar the homosexual participants was protected by the First Amendment. The Court held that the freedom of speech gave the parade organizers the right to bar groups who did not adhere to their point of view, notwithstanding state law.

Furthermore, the Hurley Court determined that the state's interpretation of its law had, in effect, required private parade promoters to modify the content of their own expression. Justice Souter, writing for a unanimous Court, found this an improper objective. Since no other legitimate objective was advanced by the State, the application of state law to this situation was a violation of free speech, as protected by the First Amendment.

**Legislative Apportionment of Districts**

Other areas of considerable significance to state and local government that came before the Supreme Court included political concerns such as legislative apportionment of districts and term limitations for Congress. In *Miller* v. *Johnson*, the Supreme Court elaborated on the rule previously established by *Shaw* v. *Reno*. *Shaw* had invalidated congressional districts in North...
Carolina as a violation of the Equal Protection Clause of the United States Constitution. Justice O'Connor, writing for a five to four majority, found that the decision creating districts was based on race. Subsequent to the 1990 census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. The North Carolina General Assembly enacted a reapportionment plan which was subsequently rejected by the United States Attorney General, as violative of Section Five of the Voting Rights Act. As a result, the General Assembly created a new districting plan. The question before the Court was whether the revised plan, consisting of irregularly shaped boundaries, represented an unconstitutional racial gerrymander. The Court found that minority groups, African-Americans, in this case, would be favored in congressional elections.

In Shaw, the complainants had not protested that the plan diluted the white vote, rather, they alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process. The Court stated that race-conscious decision-making is not per se unconstitutional. It concluded, however, that when districting is so irregular, it can only be seen "as an (1964) (stating that overriding goal of legislative apportionment is "fair and effective representation for all citizens").

Shaw, 113 S. Ct. at 2827.

42 U.S.C. § 1973(c) (1994). This section prohibits jurisdictions from implementing changes in a "standard, practice, or procedure with respect to voting" without federal authorization. Id. The jurisdiction must obtain either a judgment from the United States District Court for the District of Columbia declaring that the proposed 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 administrative pre-clearance from the Attorney General. Id.; see also Shaw, 113 S. Ct. at 2819-21. The Court noted the unusual shapes of the two majority-black districts at issue formed through gerrymandering. Id.


Shaw, 113 S. Ct. at 2824 (rejecting appellants' argument that apportionment was per se unconstitutional because it was race-based).

Shaw v. Reno, 113 S. Ct. 2816, 2824 (1995) (making distinction between race-conscious and race-based decision making); see Gomillian v. Lightfoot, 364 U.S. 339, 340 (1960) (holding that changing of boundaries of city from square to "twenty-eight-sided figure" was deemed to be race-based). But see Shaw, 113 S. Ct. at 2842 (White, J., dissenting) (arguing redistricting met strict scrutiny standard).
effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."  

In describing the composition of the new districts in North Carolina, Justice O'Connor quoted a legislative member as saying, "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." Justice O'Connor found that the composition of the districts was designed in a manner that would be "unexplainable on grounds other than race." Justice Stevens, in a concurring opinion, indicated that the process "bears an uncomfortable resemblance to political apartheid."  

Two years later, in Miller v. Johnson, the Court invalidated the method by which Georgia had manipulated the composition of its congressional districts as violative of the Equal Protection Clause. The Georgia districts were deemed problematic because "[t]he populations of the . . . district[s] 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." Georgia defended the redistricting plan as being in compliance with pre-clearance standards of Section Five of the Voting Rights Act. Indeed, the State had been in compliance with the Justice Department’s interpretation of the Voting Rights Act.  

Arguably, such districting effectuated the election of more African-Americans from the State of Georgia to Congress. In Miller,

40 Shaw, 113 S. Ct. at 2824.  
41 Id. at 2821.  
42 Id. at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).  
43 Shaw, 113 S. Ct. at 2827 (asserting that such districting fosters perception that those of same skin color share political philosophies).  
45 Id. at 2493 (noting purpose of Voting Act is to erase racial gerrymandering); see Robert A. Curtis, Race-based Equal Protection Claims After Shaw v. Reno, 44 DUKE L.J. 298, 300 (1994) (positing that after Shaw, plaintiffs are more likely to survive motion to dismiss under Equal Protection Clause). See generally U.S. CONST. amend. XIV, § 1 (providing, in relevant part, that "[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws").  
46 Miller, 115 S. Ct. at 2490-91 (finding mere compliance with Justice Department’s standards was not persuasive argument or excuse); cf. David G. Savage, Rebuilding Affirmative Action: The Court ‘Strict Scrutiny’ for all Official Race-Based Programs, 81 A.B.A. J. 42, 42 (1995) (detailing effect of O’Connor’s opinion in Shaw).  
47 42 U.S.C. § 1973(c) (1994) (establishing violation of right to vote based on race or color through voting qualifications).  
48 See 42 U.S.C. § 1973(c); Miller, 115 S. Ct. at 2484-85 (describing lengths to which state went in complying with standard set by Justice Department).
the Court's analysis went beyond the bizarre shape of the districts and invalidated them pursuant to the Equal Protection Clause. The plurality opinion of Justice Kennedy, adopted by Justices Rehnquist, Scalia and Thomas, with whom Justice O'Connor concurred, examined the plan under the strict scrutiny standard of review. The Court rejected the argument that such districting had been insisted upon by the United States Department of Justice.\textsuperscript{49} The Court's analysis made it clear that race-based factors, rather than the traditional notions of "compactness, contiguousness, geographical boundaries, or political subdivisions," predominated in the re-districting plan.\textsuperscript{50}

The standard enunciated in \textit{Miller} would seem to require that every state with a substantial minority population using the traditional approach to the Voting Rights Act, face review of its districting. The difficulty was also compounded in \textit{Miller}, because the Court failed to clarify the proper standard of review.

The standards of the Voting Rights Act as established by the preceding case law, and by the interpretation of the Justice Department,\textsuperscript{51} did require the kind of gerrymandering that was in-


\textsuperscript{50} See Shaw v. Reno, 113 S. Ct. 2816, 2821 (1993) (noting that traditionally districting had been determined by "compactness, contiguousness, geographical boundaries, or political subdivisions"); see also Michael J. Moffett, Note, \textit{The Death of the Voting Rights Act or an Exercise in Geometry—Shaw v. Reno Provides More Questions Than Answers}, 22 PEPP. L. REV. 727, 782 (1995) (concluding that since Voting Rights Act was enacted, protection of minority voting rights has been prevalent).

\textsuperscript{51} Miller, 115 S. Ct. at 2493 (citing Beer v. United States, 425 U.S. 130, 141 (1976)). The Department of Justice followed a plan drafted by the American Civil Liberties Union titled the max-black plan. \textit{Id.} at 2492. A key element of the plan was the Macon/Savannah trade whereby "the dense black population in the Macon region would be transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population would be offset by extending the Eleventh to include black population in Savannah." \textit{Id.} at 2484. Pointing to the General Assembly's refusal to enact the Macon/Savannah swap into law, the Justice Department concluded that Georgia had "failed to explain adequately its failure to create a third majority-minority District." \textit{Id.} Representative Tyrone Brooks is quoted as recalling that the Attorney General "specifically told states covered by the [Voting Rights] Act that wherever possible, you must draw majority black districts." \textit{Id.} at 2492. The Justice Department took the position that if alternative plans demonstrated that more minority districts could be drawn than the state was proposing to draw that did in fact violate the Voting Rights Act. \textit{Id.} According to the opinion of the United States District Court for the Southern District of Georgia, the Department of Justice adopted a maximization policy and "followed it in objecting to Georgia's first two plans." \textit{Id.} One of the two Department of Justice line attorneys overseeing the Georgia preclearance process disclosed that "what we did . . . was to take a map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength." \textit{Id.} at 2492-93. In utilizing Section Five to require states to create majority-minority districts wherever possible, the Department of Justice
validated in both Shaw and Miller. The Court held that the Department's maximization policy was far removed from the purpose of Section Five of the Voting Rights Act, which was to "insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Further, since districts are held to extremely strict standards of population equality, finding even one congressional district within a state to be infirm would require virtually every other district within the state to be involved in any solution to such a deficiency. This creates an enormous problem in terms of judicial and political inconsistencies.

In a somewhat tenuous concurring opinion, Justice O'Connor sought to mollify those fears by claiming that most of the nation's congressional districts were not in jeopardy. The basis for her position stands alone between two opposing blocs. The difficulty of defending a middle ground in the face of strong opposition makes it probable that the issue of voting rights and the legitimacy of creating special districts for minority groups will soon be revisited by the Supreme Court.

As with many other related cases this session, Miller was met with spirited opposition from dissenting members of the Court. Justice Stevens related the districting matter to the historic mistreatment of minorities in the electoral process. Accordingly, he sought to apply a more lenient standard of review.

Justice Ginsburg, in a separate dissent, argued that imposition of a standard which eradicated districts based on "race as a dominant factor," would improperly take the re-districting function from the legislature. It would grant powers to judges that have expanded its authority under the statute beyond what Congress intended and the Court has upheld. Id. at 2493.

52 Miller, 115 S. Ct. at 2493 (citations omitted).
53 See, e.g., Shaw, 113 S.Ct. at 2820 (describing process by which jurisdiction must pass before implementing change in voting practice).
55 Id. at 2498 (suggesting that plan in Miller served more meaningful purpose by increasing representation in black community).
56 Id. at 2500 (noting reasons for reapportionment of district lines were based on race); see also Vera v. Richards, 861 F. Supp. 1304, 1331 (S.D. Tex. 1994) (analyzing role race played in formation of districts); Shaw v. Hunt, 861 F. Supp 408, 431 (E.D.N.C. 1994) (applying "race-a-motivating-factor" triggering test).
historically and inherently resided with the legislative branch of government. 57

Since Miller, other states have initiated suits challenging the apportionment of congressional districts. 58 As promised, the matter again came before the Supreme Court during the 1995-1996 term. Cases heard during December of 1995 involved the constitutionality of legislative districts in North Carolina and in Texas. The oral arguments focused on Justice O'Connor's position, since she was the swing vote in Miller. Moreover, arguments against the race-based districting plans contend if race is the motivating factor in the creation of a legislative district, the district must fail under the strict scrutiny test. 59

B. Term Limits

In United States Term Limits, Inc. v. Thornton 60 the Supreme Court restricted the rights of states to enact legislation contrary to the United States Constitution. In the five-to-four decision, the Court was strongly divided and the opposition to the Court's opinion took the form of a strong and remarkably expansive view of state power. The term limits controversy forced judicial inquiry into the question of whether the individual states may limit the terms of their Representatives in Congress. 61 Although the Court responded to this question in the negative, a deep split among the Court's members surfaced as to the proper division of authority between the states and the federal government.

The controversy commenced when Arkansas voters modified their state constitution to prohibit any person who had already served three terms in the House or two terms in the Senate from appearing on the ballot for Congress. 62 This provision was similar to term limit provisions that had been adopted either by statute or

57 See Miller, 115 S. Ct. at 2500 (stating that political issues are better left to legislature).
58 See, e.g., Vera, 861 F. Supp. at 1304; Hunt, 861 F. Supp. at 408; see also Paul M. Barrett, O'Connor Suggests Path on Race Based Redistricting, WALL ST. J., Dec. 6, 1995, at B8 (addressing one hispanic "tow block" congressional district in Texas).
60 115 S. Ct. 1842, 1854 (1995) (stating that states retain measure of sovereign immunity, but "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government").
61 Id. at 1875.
62 Id. at 1847.
by state constitutional amendment in twenty-two other states. The issue raised concerned the ability of the states to qualify the criteria for election to the Congress in this manner.

*Term limits* was decided against the backdrop of several Federal Constitutional provisions addressing congressional representation. These provisions were the Qualifications Clauses which set forth specific requirements for Congressional membership. The key question in *Term Limits* became whether these clauses provided the exclusive requirements for membership in Congress or whether they were merely, "minimum requirements" that the states were free to supplement.

One of Arkansas' claims was that its provision was merely a ballot-access measure and thus a permissive regulation regarding the holding elections. Justice Stevens, writing for a five-member majority of the Court, struck down the Arkansas provision as being beyond the State's constitutional authority. The Court concluded that a contrary ruling would undermine the entire framework of federalism.

*Term Limits* was based upon *Powell v. McCormack*, which held that Congress could not add qualifications for membership in the House or Senate to those already contained in Qualifications Clauses. In *Powell*, Congress was not permitted to bar New York Representative Adam Clayton Powell from taking the Congressional seat to which he had been elected in the prior term. While this ruling did not address the question of state mandated qualifications, the majority took the position that "the people should choose whom they please to govern them." Arkansas had argued

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63 Id.; see, e.g., Ariz. Const. art. VII, § 18; Colo. Const. art. VI, § 49(b); Calif. Elec. Code § 2500 (3)(a) (West 1996).
64 U.S. Const. art. I, § 2, cl. 1-3 (noting requirements for members of House of Representatives and Senate).
65 United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1845 (1995); see also U.S. Const. art. I, § 2, cl. 2 (requiring each member of House to be at least 25 years old, to have been citizen of United States for at least seven years, and to be resident of state from which she is elected); U.S. Const. art. 1, § 2, cl. 3 (requiring each member of Senate to be at least 30 years of age, having nine years of national citizenship and residence in state).
66 Term Limits, 115 S. Ct. at 1851.
67 Id. at 1871.
68 Id. at 1851. "Permitting individual states to formulate diverse qualifications for their [congressional] representatives would result in a patchwork of state qualifications undermining the uniformity and the national character that the Framers envisioned and sought to ensure." Id.
70 Id. at 550.
71 Id. at 533-34.
that since there are no Constitutional restraints denying this power it resides with the states.\textsuperscript{72}

Justice Thomas's dissent took the position that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the nation as a whole."\textsuperscript{73} Justice Thomas said that although the Founders discouraged a Congressional amendment to the Qualifications Clause, this did not preclude state initiated alterations. According to Justice Thomas, one reason the Founders wanted to prevent Congress from prescribing the qualifications of its own members was that incumbents could have used this power to perpetuate themselves in office.\textsuperscript{74} Today, the dissent argued, incumbents have an electoral advantage, further compelling the preclusion of congressional prescription.\textsuperscript{75} The dissent contended, however, that the Constitution is silent on the issue of whether the states may supplement the Constitution's congressional eligibility requirements, and that "where the constitution is silent about the exercise of a particular power . . . [t]he federal government lacks that power and the States enjoy it."\textsuperscript{76}

The majority and the dissent of \textit{Term Limits} agreed that a key issue was whether the Framers intended the Qualifications Clauses to be the exclusive qualifications for congressional membership.\textsuperscript{77} Justice Thomas found that a role for the states was not forbidden by the Qualifications Clause. His view was that the Framers were ambiguous as to the exclusivity of the Qualifications Clauses.\textsuperscript{78} Justice Thomas agreed with the majority that in-

\textsuperscript{72} United States Term Limits, Inc. v. Thorton, 115 S. Ct. 1842, 1852 (1995); U.S. Const. amend. X (providing that "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").

\textsuperscript{73} Term Limits, 115 S. Ct. at 1875 (Thomas, J., dissenting); see also Henry P. Monaghan, \textit{We the People, Original Understanding, and Constitutional Amendment}, 96 COLUM. L. REV. 121, 122 (1996) (discussing recent court decision over dual character of federal government between state centered approach based on Tenth Amendment and national approach as seen in \textit{Term Limits}).

\textsuperscript{74} Term Limits, 115 S. Ct. at 1877 (Thomas, J., dissenting).

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 1876 (Thomas, J., dissenting). See generally Pete DuPont, \textit{Pleading the Tenth: With the Demise of Liberalism, Can Federalism Be Brought Back To Life?} 47 NAR'L. REV. 50 (1995) (discussing relative unimportance of Tenth Amendment during period of liberalism between state centered approach based on Tenth Amendment and national approach as seen in \textit{Term Limits}).


\textsuperscript{78} United States Term Limits, Inc. v. Thorton, 115 S. Ct. 1842, 1894-95 (1995) (discussing Framer's diverse views concerning Qualification Clause's exclusivity nature in order to
dividuals have the right to "choose whom they please" to represent them in Congress, but he believed that the right is held on a state-by-state basis. Justice Thomas's dissent shook the "liberal establishment." The New York Times, commented that, "it is only a slight exaggeration to say that the dissent brought the Court a single vote shy of reinstalling the Articles of Confederation, the affiliation of sovereign states that the Constitution replaced with the federal system in 1789."81

Affirmative Action

In Adarand Constructors, Inc. v. Pena, another significant case of the 1994-1995 term, the Supreme Court ruled that the strict scrutiny test should be applied to evaluate the validity of an affirmative action program used as the basis for denying a construction contract to the lowest bidder. The case did not directly involve a state or local government but rather involved a federal program which under prior case law had been reviewed under the less stringent "intermediate scrutiny" standard.83

In Adarand, the Supreme Court overruled Metro Broadcasting, Inc. v. FCC and determined that all affirmative action programs, whether federal, state or local government sponsored, should be conclude that clause is ambiguous); see also Joshua Levy, Note, Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits, 80 GEO. L. J. 1879, 1923-34 (1992) (discussing qualification clauses from period of Constitution Convention through present in support of proposition that congressional term limits are constitutional). See generally Daniel A. Farber, The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding, 94 Mich. L. Rev. 615, 622 (1995) (discussing new post-federalism versus Term Limits based on historical approach to power given to states during Constitution's creation).

Term Limits, 115 S. Ct. at 1891 (Thomas, J., dissenting). "The Arkansas constitutional provision here remains fully within the control of the people of Arkansas. If they wanted to repeal it [despite the 20 point margin, by which they enacted it less than three years ago] they could do so by simple majority vote." Id. 80 See Daniel H. Lowenstein, Are Congressional Term Limits Constitutional? 18 Harv. J.L. & Pub. Pol'y 1, 48, 50 (1994) (declaring argument of dissent that Qualifications Clause restrictions apply only to congressional action as inconsistent with language of Constitution and distorts meaning of Framers of Constitution); Ronald D. Rotunda, Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution, 73 Or. L. Rev. 561, 575 (1994) (discussing fact that additional qualifications exist in Article VI, Clause 3 which prohibit state or federal government from imposing religious qualifications while mandating certain disqualifications such as age, U.S. citizenship, and state residency).


84 Id.
held to the same standard of review. In an indirect way, the Court enhanced the status of state and local government. By doing so, it circumscribed the ability of localities to set programs in place to benefit members of certain racial, ethnic or gender groups. In her dissent, Justice Ginsburg commented upon the significance of the change of position by the Court:

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue . . . . It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress's [sic] institutional authority to overcome historical racial subjugation and the states' lesser power to do so.85

D. Education

The Supreme Court decided three cases this term that influenced state and local government that involved issues arising in educational settings.86 The first of these cases, Rosenberger v. Rector & Visitors of the University of Virginia87, addressed the First Amendment,88 the Establishment Clause,89 and Freedom of Speech90 issues arising when schools provide funding for student publications. In a five-to-four decision, Justice Kennedy, writing for the majority, held that a public school may not refuse funding for the publication costs of a student religious organization's newspaper for the sole reason that the paper manifested a particular religious belief.91 The Court held that it could not distinguish

85 Adarand, 115 S. Ct. at 2125 (Ginsberg, J., dissenting).
88 U.S. CONST. amend. 1. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." Id.
89 Id. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ." Id.
90 Id. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." Id.
the case from those situations where secular groups are permitted to receive funds for doing exactly what the religious groups sought to do, namely, to present their ideas on particular matters. To bar them from receiving funds on that basis alone violates their right to freedom of speech.

Further, the Court held that granting access to funding on a religious-neutral basis to a wide spectrum of student groups would not amount to an establishment of religion.

The Court based its decision on the fact that "no public funds flow directly to [the newspaper's] coffers." Further, the organization publishing the newspaper was not found to be a "religious organization" as defined by either the university's own regulations or case precedent. Justice Souter's dissent, joined by Justices Stevens, Ginsburg and Breyer, objected to the fact that, for the first time in history, the Supreme Court approved direct funding of core religious activities by a state government.

In *Missouri v. Jenkins*, the Supreme Court again was divided five to four. In this case, the Court reviewed the desegregation of a Kansas City, Missouri school district. The United States District Court of the Western District of Missouri had imposed expenditure requirements on the Kansas City School District to address the effects of segregation. The school district was ordered to fund salary increases for virtually the entire staff of instructional and non-instructional personnel in the district. Due to low student achievement levels, the district was ordered to continue to fund remedial programs which had a significantly high cost.

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92 Id. at 2517.
93 Id. at 2516.
94 Id. at 2523.
95 Id. at 2524.
98 See Jenkins, 115 S. Ct. 2038, 2042 (1995). The net result of this funding increase would have been "high schools in which every classroom will have air conditioning, an alarm system, and 15 micro-computers." Id. at 2044. It also provided for a: 2000-square-foot planetarium; green houses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and
District court required inter-district relief by forcing the state of Missouri to participate in the remedy.

Chief Justice Rehnquist, delivering the majority opinion, found that inter-district relief was too broadly constructed since the discrimination attack was intra-district. The difficulty was that the school districts were transferring students, an action which they did not have the direct remedial power to perform. Justice O'Connor concurred, stating that in order for such a remedy to be justified, it could be "only upon a showing that there has been a constitutional violation within one District that produces a significant segregative effect in another District." Justice Souter, in his dissent, found it unnecessary to examine the inter-district nature of the remedy. If required to examine the remedy, Justice Souter contended that the plan was acceptable since there had been inter-district effects from the de jure segregation historically in place in Kansas City Schools.

Justice Thomas articulated a persuasive anti-federalist argument against remedial powers like those exerted by the Missouri District Court. He further contended that such powers might allow "federal courts to explain the Constitution according to the reasoning spirit of it, without being confined to the words or letter . . . . This would result in the growth of federal powers and the entire subversion of the legislative, executive and judicial powers of the individual states."

The broadening of a local school district's power to monitor student conduct in the area of drug testing was challenged in Vernonia School District 47J v. Acton. The question was

animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3500-square-foot dust-free diesel mechanics room; a 1875-square-foot elementary school animal rooms for use in a zoo project; swimming pools; and numerous other facilities.

Id. at 2049 (outlining three-part framework from prior cases to guide lower courts in exercising their remedial authority).

Id. at 2057.

Id. at 2070-71. "What the federal courts cannot do at the federal level they cannot do against the states . . . . [They] must take into account the interest of the state and local authorities in managing their own affairs." Id. at 2070-71, 2049. All this is "[i]n light of the intrusion into the area of education where historically the states have been sovereign and to which states lay claim by right of history and expertise." Id. at 2061 (quoting United States v. Lopez, 115 S. Ct. 1624, 1632-33, 1641 (1995)).

whether the policy adopted by the school district in Vernonia, Oregon, authorizing random urinalysis drug testing of students participating in the school’s athletic programs violated the protection of the Fourth and Fourteenth Amendments to the United States Constitution. In Vernonia, the Court held that drug testing was a search within the auspices of the Fourth Amendment. Such a search, however, was found not to require a warrant or probable as long as it is “reasonable under the circumstances.” The circumstances are weighed against the government’s interest in conducting the search.

The majority in Vernonia concluded that a minor’s participation in a school athletic program constitutes a voluntary relinquishment of a privacy right. They concluded that the search was justified given the crises of drug use among young American students. The majority contended that the Fourth Amendment’s compelling state interest requirement should be construed as “important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.” While holding that Oregon’s policy satisfied this test, the majority contended that “the necessity for the State to act is magnified by the fact that the evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.”

Justices O’Connor, Stevens and Souter, dissented in Vernonia. They noted that the greatest threats to constitutional freedoms develop during times of crisis. The dissenters believed that as government responses can be hysterical overreactions, a compel-

104 U.S. CONST. amend. IV. The Fourth Amendment guarantees that the Federal Government shall not violate “. . . the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . . .” Id.; U.S. CONST. amend. XIV. The Fourteenth Amendment provides: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Id.
106 Vernonia, 115 S. Ct. at 2390 (citing U.S. CONST. art. IV.)
107 Vernonia, 115 S. Ct. at 2392-93.
108 Id. at 2394.
109 Id. at 2395.
ling state interest must be strictly construed in order to justify an intrusion on a constitutional right.\textsuperscript{110}

**Conclusion**

As the cases in the 1994-1995 Supreme Court term indicate, there is no doubt that the recent decisions of the Court are shifting power to state and local governments. In this respect, the Court joins other political forces in an effort to transfer greater political power to the state and local level. This shift is further fueled by public hostility toward a federal government which many feel is intrusive and is limiting of individual rights. With many decisions in the area decided by a five-to-four margin, however, it becomes difficult to predict how far these changes will carry.
