

# Clarence Thomas's Originalist Understanding of the Interstate, Negative, and Indian Commerce Clauses

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During his twenty years on the Supreme Court, Justice Clarence Thomas has pursued an original understanding approach to constitutional interpretation. He has been unswayed by the claims of precedent—by the gradual build-up of interpretations that, over time, completely distort the original understanding of the constitutional provision in question and lead to muddled decisions and contradictory conclusions.<sup>1</sup> Like too many layers of paint on a delicately crafted piece of furniture, precedent based on precedent—focusing on what the Court said the Constitution means in past cases as opposed to focusing on what the Constitution actually means—hides the constitutional nuance and detail he wants to restore. Thomas is unquestionably the Justice who is most willing to reject this build-up, this excrescence, and to call on his colleagues to join him in scraping away past precedent and getting back to bare wood—to the original understanding of the Constitution.

In what follows, Section I describes Thomas's originalism and contrasts it with Antonin Scalia's different kind of originalism. Section II explores Thomas's originalist understanding of the limits of Congress's power under the Interstate Commerce Clause. Section III focuses on Thomas's rejection of the Court's claim of power to invalidate state laws burdening interstate commerce under the negative Commerce Clause on originalist grounds. Section IV addresses Thomas's rejection of the view that the Indian Commerce Clause gives the Congress plenary power in Indian country and his call in *United States v. Lara*<sup>2</sup> for the Court to "examine more critically our tribal sovereignty case law."<sup>3</sup> Section V concludes.

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1. Additionally, as Thomas Hobbes reminds us, "Precedents prove only what was done, but not what was well done." THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 129 (Joseph Cropsey ed., Univ. of Chicago Press, 1971) (1681).

2. 541 U.S. 193 (2004).

3. *Id.* at 223.

## I.

The two Supreme Court Justices who unabashedly identify themselves as originalists are Clarence Thomas and Antonin Scalia. Yet, they are different in their approaches. I begin with Scalia's approach because he has a narrower view of originalism than Thomas. Thomas fundamentally accepts Scalia's original public meaning approach to constitutional and statutory texts but adds to it his original understanding approach.

Since his elevation to the Supreme Court, Justice Scalia has assiduously and consistently employed an original public meaning approach to interpretation.<sup>4</sup> He argues that primacy must be accorded to the text of the document being interpreted and that the job of the judge is to apply the clear textual language<sup>5</sup> of the Constitution or statute, or the critical structural principle necessarily implicit in the text.<sup>6</sup> If the text is ambiguous, yielding several conflicting interpretations, Scalia turns to the specific legal tradition flowing from that text<sup>7</sup>—to what it meant to the society that adopted it.<sup>8</sup> “Text and tradition” is a phrase that fills Justice Scalia's opinions. Judges are to be governed only by the “text and tradition of the Constitution,” i.e., by its original public meaning, not by their “intellectual, moral, and personal perceptions.”<sup>9</sup>

Given his original public meaning approach, Justice Scalia totally rejects reliance on legislative history or legislative intent and invariably refuses to join any opinion (or part of an opinion) that employs it.<sup>10</sup> Scalia

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4. RALPH A. ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION* (2006).

5. See Note, *Looking it Up; Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 (1994). Scalia searches out the ordinary meaning of the words used when the provision was adopted, frequently consulting dictionaries of the era. *Id.* In fact, he consults dictionaries more often than any of his colleagues. *Id.*

6. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989) (explaining that the separation of powers represents such a critical structural principle).

7. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (By the most specific legal tradition, Justice Scalia means “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”).

8. Antonin Scalia, Assoc. Justice, U.S. Supreme Court & Stephen Breyer, Assoc. Justice, U.S. Supreme Court, *Debate on Constitutional Relevance of Foreign Court Decisions* at American University, Washington College of Law (Jan. 13, 2005) (transcript available at <http://www.freerepublic.com/focus/news/1352357/posts>) (“[W]hat I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted. And I don't think it changes since then.”).

9. *Callins v. Collins*, 510 U.S. 1141 (1994).

10. See, for example, *Doe v. Chao*, 540 U.S. 614 (2004), in which the Court announced that “Souter, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Kennedy, and Thomas, JJ., joined, and in which Scalia, J., joined except as to the penultimate paragraph of Part III and footnote 8.” The penultimate paragraph begins: “This inference from the terms of the Commission's mandate is underscored by drafting

invariably criticizes his colleagues for turning to “[c]ommittee reports, floor speeches, and even colloquies between Congressmen” to ascertain what a law means because, as he declared in *Thompson v. Thompson*,<sup>11</sup> they “are frail substitutes for a bicameral vote upon the text of the law and its presentment to the President.”<sup>12</sup> As he declared in *Crosby v. National Foreign Trade Council*,<sup>13</sup> they are not

reliable indication[s] of what a majority of both Houses of Congress intended when they voted for the statute before us. The only reliable indication of that intent—the only thing we know for sure that can be attributed to all of them—is the words of the bill that they voted to make law.<sup>14</sup>

Scalia argues, therefore, that the Court is to interpret the text alone and nothing else. He will, however, occasionally turn to founding documents, especially *The Federalist*. But, he is quick to point out that he does so for a very narrow purpose. As he explained in *A Matter of Interpretation*:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus, I give equal weight to Jay’s pieces in *The Federalist*, and to Jefferson’s writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.<sup>15</sup>

Scalia’s refusal to consult even the debates over the drafting of the Constitution and the Bill of Rights occasionally keeps him from making as

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history showing that Congress cut out the very language in the bill that would have authorized any presumed damages.” *Id.* at 622. Footnote 8 contains the sentence: “Congress’s use of the entitlement phrase actually contained in the statute, however, is explained by drafting history.” *Id.* at 623 n.8. Personal Interview with Justice Antonin Scalia, Washington, D.C. (June 11, 2003) (Scalia’s refusal to join opinions that rely on legislative history is driven by his commitment never to join an opinion in which he does not agree with both the outcome and the reasoning).

11. 484 U.S. 174 (1988).

12. *Id.* at 191–92.

13. 530 U.S. 363 (2000).

14. *Id.* at 390–91.

15. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

strong an argument as he otherwise could.<sup>16</sup> One recent and high-profile example is his majority opinion in *District of Columbia v. Heller*.<sup>17</sup> In that case, Scalia gave a lengthy and detailed original public meaning argument that the Second Amendment “conferred an individual right to keep and bear arms” for purposes of self-defense.<sup>18</sup> In dissent, Justice John Paul Stevens argued that the Second Amendment protected only a “collective right” to possess and carry a firearm in connection with militia service and that, therefore, it was constitutional for the District of Columbia to have a total ban on handguns and require that lawfully-owned long guns in the home be kept nonfunctional even when necessary for self defense.<sup>19</sup> Stevens insisted that the Second Amendment “was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States,”<sup>20</sup> and that Madison, who had offered in the First Congress a series of amendments that ultimately became what we refer to as the Bill of Rights, had intended it merely to amend the Militia Clauses of Article I.<sup>21</sup>

Stevens knew better: he knew that Madison intended for his set of amendments to be incorporated into the text of the original Constitution—not appended at the end. Madison explained why:

[T]here is a neatness and propriety in incorporating the amendments into the constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong, than it will if they consist of separate and distinct parts. We shall then be able to determine its meaning without references or comparison.<sup>22</sup>

Madison failed, however, to persuade his colleagues to do so. Roger Sherman successfully argued that the amendments should be added at the end of the Constitution, as any attempt to “interweave” the amendments into the Constitution itself would “be destructive of the whole fabric. We might as well endeavor to mix brass, iron, and clay.”<sup>23</sup> Had Madison prevailed in his efforts to incorporate the amendments into the text of the

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16. See Ralph A. Rossum, *Antonin Scalia and the Rule of Law: The Textualist Foundation of the “Law of Rules,”* in *FREEDOM AND THE RULE OF LAW* 115–36 (Anthony A. Peacock ed., 2010).

17. 554 U.S. 570 (2008).

18. *Id.* at 595.

19. *Id.* at 636 (Stevens, J., dissenting).

20. *Id.* at 637.

21. *Id.* at 659–62.

22. 1 ANNALS OF CONG. 735–36 (1789) (J. Gales ed., 1834) (remarks of Rep. James Madison on Aug. 13, 1789).

23. *Id.* at 734 (remarks of Roger Sherman).

Constitution itself, “the right of the people to keep and bear arms” would have been included in Article I, § 9 alongside other provisions securing individual rights including the habeas corpus privilege and the proscriptions against bills of attainder and ex post facto laws and would have been there together with his proposed protections for speech, press, and assembly. Stevens knew all this because the Respondent’s Brief expressly made this argument.<sup>24</sup> So, too, did Solicitor General Paul D. Clement during oral argument in response to a question from Stevens:

[I]f the Second Amendment had the meaning that the District of Columbia ascribes to it, one would certainly think that James Madison, when he proposed the Second Amendment would have proposed it as an amendment to Article I, Section 8, clause 16. He didn’t. He proposed it as an amendment to Article I, Section 9, which encapsulates the individual rights to be free from bills of retainder and ex post facto clauses.<sup>25</sup>

This “placement” argument is powerful, but Scalia never used it in his majority opinion to refute Stevens’s claim. Scalia’s original public meaning approach keeps him from consulting any form of legislative history, including the debates in the Constitutional Convention or the work of the First Congress,<sup>26</sup> even when doing so would allow him to strengthen his overall argument.

Thomas, pursuing an original understanding approach, incorporates Scalia’s narrower original public meaning approach. In doing so, he also asks what the text meant to the society that adopted it, while also widening the originalist focus and asking why the text (either constitutional or statutory) was adopted.<sup>27</sup> Concerning the Constitution and the Bill of

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24. Brief for Respondent at 32, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 336304.

25. Transcript of Oral Argument at 31–32, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 731297.

26. ROSSUM, *supra* note 4, at 37–44.

27. Thomas typically calls his approach one of “original understanding”: see his opinions in cases such as *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring), *U.S. Term Limits v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting), *Printz v. United States*, 521 U.S. 898, 936–37 (1997) (Thomas, J., concurring), *Lilly v. Virginia*, 527 U.S. 116, 144 (1999) (Thomas, J., concurring in part and concurring in the judgment), *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring), *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002), *Utah v. Evans*, 536 U.S. 452, 489, 491 (2002) (Thomas, J., concurring in part and dissenting in part), *Cutter v. Wilkinson*, 544 U.S. 709, 726–27 (2005) (Thomas, J., concurring), *Gonzales v. Raich*, 545 U.S. 1, 57–58 (2005) (Thomas, J., dissenting). See generally *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); *Meadwestvaco v. Ill. Dep’t of Revenue*, 553 U.S. 16, 32 (2008) (Thomas, J., concurring); *Baze v. Rees*, 553 U.S. 35, 94 (2008). Occasionally, Thomas uses both “original understanding” and “original meaning” interchangeably in the same opinion. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (Thomas, J., concurring in the judgment), *Rosenberger v. Rector & Visitors of*

Rights, Thomas reinforces Scalia's textualism by asking, when necessary to make his case more persuasive, the ends the framers (and members of the First Congress) sought to achieve, the evils they sought to avert, and the means they employed to achieve those ends and avert those evils when they proposed and ratified those texts. And, to answer these questions, he readily turns to *The Records of the Federal Convention of 1787*,<sup>28</sup> *The Federalist*, Elliot's *Debates*,<sup>29</sup> *The Founders' Constitution*,<sup>30</sup> *The Complete Anti-Federalist*,<sup>31</sup> *The Documentary History of the Ratification of the Constitution*,<sup>32</sup> and the *Annals of Congress* and incorporates what he finds in these and other founding-era sources into his opinions. His original understanding approach may, in fact, be described as simply: The text explained.

For example, in his opinion for the Court in *United States v. International Business Machines*,<sup>33</sup> Thomas turned to *The Records of the Federal Convention of 1787* to refute the federal government's claim that the Export Clause of Article I, § 9, cl. 5<sup>34</sup> should not be understood to prohibit the assessment of nondiscriminatory federal taxes on goods in export transit.<sup>35</sup> The government argued that because "the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South," and because the

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the Univ. of Va., 515 U.S. 819 (1995) (Thomas, J., concurring), *Saenz v. Roe*, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting), *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Thomas, J., concurring), and *Harris v. United States*, 536 U.S. 545, 572 (2002) (Thomas, J., dissenting). In *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), Thomas used exclusively the term "original meaning." When addressing the general public, he has even used the term "original intent." See Clarence Thomas, Walter B. Wriston Lecture to the Manhattan Institute for Policy Research: Judging in a Government by Consent (Oct. 16, 2008), available at <http://www.manhattan-institute.org/video/events/index.htm?c=10-16-2008%20Wriston%20-%20Judging%20Government%20Consent>.

28. MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1937) (four volumes).

29. *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787* (Jonathan Elliot ed., J. B. Lippincott Co. 2d ed., 1836) (five volumes) [hereinafter *DEBATES IN THE SEVERAL STATE CONVENTIONS*].

30. PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS' CONSTITUTION* (1987) (five volumes).

31. *THE COMPLETE ANTI-FEDERALIST* (Herbert J. Storing ed., 1981) (seven volumes).

32. *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (Merrill Jensen et al. eds., 1976) (twenty-two volumes).

33. 517 U.S. 843 (1996).

34. The Export Clause states, "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST., art. I, § 9, cl. 5.

35. *Int'l Bus. Machs.*, 517 U.S. at 846.

nondiscriminatory tax in question before the Court did not conflict with the policies embodied in the Clause, that the justices should sustain it.<sup>36</sup> But, as Thomas insisted, “While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language.”<sup>37</sup>

And, in his concurring opinion in *Cutter v. Wilkinson*,<sup>38</sup> Thomas turned to the *Annals* of the First Congress to contradict Ohio’s contention that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) impermissibly advanced religion by giving greater protection to religious rights than to other constitutionally protected rights and therefore violated the Establishment Clause. Thomas noted that the Establishment Clause “prohibits Congress from enacting legislation ‘respecting an *establishment* of religion’; it does not prohibit Congress from enacting legislation ‘respecting religion’ or ‘taking cognizance of religion.’”<sup>39</sup> He pointed out that “[a]n *unenacted* version of the [Establishment] Clause, proposed in the House of Representatives,” demonstrate[d] the opposite” of what Ohio was arguing.<sup>40</sup> “It provided that ‘Congress shall make no laws touching religion, or infringing the rights of conscience.’”<sup>41</sup> The “original understanding”<sup>42</sup> of the Establishment Clause, based on the words that were ultimately adopted, “Congress shall

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36. *Id.* at 859.

37. *Id.* at 859–60. Justice Thomas referenced the Founders’ debates to make his point. *Id.* at 860.

“Mr. King: ‘In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed.’” *Id.* (quoting 2 FARRAND, *supra* note 28, at 220).

“Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports.” *Id.* (quoting 2 FARRAND, *supra* note 28, at 305).

“Mr. Elseworth [sic]: ‘There are solid reasons agst. Congs taxing exports.’” *Id.* (quoting 2 FARRAND, *supra* note 28, at 360).

“Mr. Butler was strenuously opposed to a power over exports.” *Id.* (quoting 2 FARRAND, *supra* note 28, at 360).

“Mr. Sherman: ‘It is best to prohibit the National legislature in all cases.’” *Id.* (quoting 2 FARRAND, *supra* note 28, at 361).

“Mr. Gerry was strenuously opposed to the power over exports.” *Id.* (quoting 2 FARRAND, *supra* note 28, at 362).

38. 544 U.S. 709 (2005).

39. *Id.* at 728.

40. *Id.* at 730.

41. *Id.* (citing 1 ANNALS OF CONG. 731 (1789)).

42. *Id.* at 731.

make no law respecting an establishment of religion,” was, he noted, much narrower.<sup>43</sup>

Scalia would view all of this as legislative history and outside his original public meaning approach. But, there is perhaps an even bigger difference between Scalia’s and Thomas’s originalism: the Declaration of Independence. In *A Matter of Interpretation*, Scalia derisively dismissed what he called Professor Laurence Tribe’s “aspirational” theory of constitutional interpretation by declaring: “If you want aspirations, you can read the Declaration of Independence, with its pronouncements that ‘all men are created equal’ with ‘unalienable Rights’ that include ‘Life, Liberty, and the Pursuit of Happiness.’ Or you can read the French Declaration of the Rights of Man.”<sup>44</sup> But, he continued, “[t]here is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government.”<sup>45</sup>

By contrast, Justice Clarence Thomas takes the Declaration of Independence seriously, believes that its principles are foundational to the Constitution, and grounds his opinions explicitly in them. In the *Howard Law Journal*, Thomas declared that “the ‘original intention’ of the Constitution [was] to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it.”<sup>46</sup> He noted that

the Constitution makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is

43. *Id.* at 730. See Thomas’s opinion concurring in the judgment in part and dissenting in part in *Davis v. Washington*, 547 U.S. 813, 836 (2006), where in this confrontation clause case, Thomas cited W. Holdsworth’s *A History of English Law* (1926) and concluded that “Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to the . . . evidentiary practices, which the Framers proposed the Confrontation Clause to prevent.” *Id.*

44. SCALIA, *supra* note 15, at 134.

45. *Id.* AT 134. See also *Troxel v. Granville*, 530 U.S. 57, 91 (2000). Scalia wrote:

In my view, a right of parents to direct the upbringing of their children is among the “unalienable Rights” with which the Declaration of Independence proclaims “all Men . . . are endowed by their Creator . . . . The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts.

*Id.* Scalia occasionally invokes the Declaration; however, he does so merely to support a point he is making. See, for example, his dissent in *Neder v. United States*, 527 U.S. 1, 30–31 (1999), in which he argued that a criminal defendant has the right to have the jury determine his guilt of the crime charged and that this includes his commission of every element of the crime charged: “One of the indictments of the Declaration of Independence against King George III was that he had ‘subjected us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws’ in approving legislation ‘for depriving us, in many Cases, of the Benefits of Trial by Jury.’” *Id.*

46. Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *How. L.J.* 983, 985 (1987).

presented to the states for ratification by the Convention “the Seventeenth Day of September in the Year of our Lord one-thousand seven-hundred and eighty-seven of the Independence of the United States of America the Twelfth. . . .” The Declaration marks a *novus ordo seclorum*, a new order of the ages.<sup>47</sup>

In *Adarand Constructors v. Peña*,<sup>48</sup> in which the Court held that the strict scrutiny standard applies to *all* government classifications based on race,<sup>49</sup> Thomas declared: “As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”<sup>50</sup> He pronounced “the paternalism that appears to lie at the heart of this [racial preference] program” to be “at war with the principle of inherent equality that underlies and infuses our Constitution” and referenced the Declaration of Independence.<sup>51</sup> He elaborated in his *Grutter v. Bollinger*<sup>52</sup> dissent that “the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause”<sup>53</sup> was correctly identified by Justice John Marshall Harlan in his dissenting opinion in *Plessy v. Ferguson*: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>54</sup> His fullest statement to date in a Court opinion is in his opinion concurring in part and concurring in the judgment in part in *McDonald v. City of Chicago*: “As was evident to many throughout our Nation’s early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and *embedded in our constitutional structure*.”<sup>55</sup>

Thomas not only pursues his original understanding approach but also rejects past decisions that depart from that understanding. He wants to return to bare wood, and he invites his colleagues to join him by engaging

47. *Id.* at 987.

48. 515 U.S. 200 (1994).

49. *Id.* at 235–36.

50. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

51. *Id.* at 240 (citing THE DECLARATION OF INDEPENDENCE (1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”)). See also SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 36–65 (1999).

52. 539 U.S. 306 (2003).

53. *Id.* at 378.

54. 163 U.S. 537, 559 (1896).

55. 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring in part and concurring in the judgment) (citing 3 FARRAND, *supra* note 28, at 212 (remarks of Luther Martin); President Abraham Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 266 (R. Basler ed., 1953)).

in the hard jurisprudential work of scraping away the excrescence of misguided precedent and restoring the contours of the Constitution as it was originally understood by those who framed and ratified it. He has done so since early in his first year on the High Bench. In *White v. Illinois*,<sup>56</sup> decided January 15, 1992, Thomas “respectfully suggest[ed] that, in an appropriate case, we reconsider how the phrase ‘witness against’ in the Confrontation Clause pertains to the admission of hearsay.”<sup>57</sup> Likewise, in another early criminal procedure case, *Helling v. McKinney*,<sup>58</sup> he declared:

To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment*. The text and history of the Eighth Amendment, together with pre-*Estelle* [*v. Gamble*<sup>59</sup>] precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle*.<sup>60</sup>

Thomas wants to remove excrescence as well from the First Amendment. In his concurring opinion in one of the 2005 Ten Commandment cases, *Van Orden v. Perry*,<sup>61</sup> Thomas condemned the “incoherence of the Court decisions”<sup>62</sup> that had rendered “the Establishment Clause impenetrable and incapable of consistent application”<sup>63</sup> and called for a “return to the views of the Framers”<sup>64</sup> and to the adoption of physical “coercion as the touchstone for our Establishment Clause inquiry.”<sup>65</sup> And in his opinion concurring in the judgment in *McIntyre v. Ohio Elections Commission*,<sup>66</sup> he argued that “the phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting.”<sup>67</sup> Scalia dissented from the Court’s invalidation of Ohio’s statute prohibiting the distribution of anonymous leaflets on the grounds of “the widespread and longstanding traditions of

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56. 502 U.S. 346 (1992).

57. *Id.* at 366.

58. 509 U.S. 25 (1993).

59. 429 U.S. 97 (1976).

60. *Helling*, 509 U.S. at 42.

61. 545 U.S. 677 (2005).

62. *Id.* at 694.

63. *Id.*

64. *Id.* at 697.

65. *Id.*

66. 514 U.S. 334 (1995).

67. *Id.* at 359.

our people.”<sup>68</sup> He pointed out that the earliest statute of prohibiting this practice was adopted by Massachusetts in 1890, that by the end of World War I, twenty-four states had such bans,<sup>69</sup> and that in 1995 (the year of the Court’s decision), “every State of the Union except California ha[d] one, as d[id] the District of Columbia, and as d[id] the Federal Government where advertising relating to candidates for federal office [wa]s concerned.”<sup>70</sup> For Scalia, “[a] governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here.”<sup>71</sup> Thomas disagreed, stating,

While, like Justice Scalia, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when interpreting the Speech and Press Clauses.<sup>72</sup>

Thomas’s dissent in *Kelo v. City of New London*<sup>73</sup> is worthy of mention in this respect as well. In this takings case dealing with the meaning of the Public Use Clause, Thomas observed that “[s]omething has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.”<sup>74</sup> He regretted that the Court majority relied not on the constitutional text but “almost exclusively on this Court’s prior cases to derive [Kelo’s] far-reaching, and dangerous, result.”<sup>75</sup> The principles the Court should have employed to dispose of *Kelo*, he argued, were not to be found in precedent but rather in the Public Use Clause itself.<sup>76</sup> And, he concluded, “[w]hen faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.”<sup>77</sup>

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68. *Id.* at 375 (Scalia, J., dissenting).

69. *Id.* at 375–76.

70. *Id.* (internal citations omitted).

71. *Id.* at 376–77.

72. *Id.* at 370–71.

73. 545 U.S. 469 (2005).

74. *Id.* at 518 (Thomas, J., dissenting).

75. *Id.* at 523.

76. *Id.*

77. *Id.*

And, concerning matters that will be addressed at length below, in the Commerce Clause case of *United States v. Lopez*,<sup>78</sup> Thomas wrote a concurring opinion in which he declared,

Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.<sup>79</sup>

In his concurrence in *United States v. Morrison*,<sup>80</sup> he took a harder line:

[T]he very notion of a “substantial effects” test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. . . . Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.<sup>81</sup>

In his dissenting opinion in *Camps Newfound/Owatonna v. Town of Harrison*,<sup>82</sup> he urged his colleagues “to abandon th[e] failed jurisprudence” of the negative Commerce Clause; quite interestingly, however, he then offered a thoughtful alternative and invited them “to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role.”<sup>83</sup> He intensified his attack on the negative Commerce Clause in his opinion concurring in the judgment in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,<sup>84</sup>

As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court’s negative Commerce Clause jurisprudence.<sup>85</sup>

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78. 514 U.S. 549 (1995).

79. *Id.* at 584 (Thomas, J., concurring).

80. 529 U.S. 598 (2000).

81. *Id.* at 627 (Thomas, J., concurring).

82. 520 U.S. 564 (1997).

83. *Id.* at 610 (Thomas, J., dissenting).

84. 550 U.S. 330 (2007).

85. *Id.* at 349 (Thomas, J., concurring in the judgment).

In *United States v. Lara*,<sup>86</sup> Thomas won the begrudging admiration of many tribal leaders. He did so by pointing out that the Indian Commerce Clause did not confer upon the Congress plenary power to extinguish tribal sovereignty and by declaring that the Court must “reexamine the premises and logic of our tribal sovereignty cases.”<sup>87</sup>

Finally, as mentioned above, Thomas employs the same original understanding approach not only to constitutional, but also to statutory texts, and he seeks to remove the build-up of precedent there as well. Perhaps Thomas’s most determined and extensive effort in this regard is his opinion concurring in the judgment in *Holder v. Hall*,<sup>88</sup> in which he harshly criticized the Supreme Court’s interpretation of § 2 of the Voting Rights Act in *Thornburg v. Gingles*.<sup>89</sup> Convinced that the Court’s voting rights “jurisprudence has gone awry,”<sup>90</sup> he called for a systematic reexamination of the Act.<sup>91</sup> He continued:

The “inherent tension”—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the federal judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate understanding of the Act.<sup>92</sup>

## II.

In cases involving the Interstate Commerce Clause, Thomas is known primarily for his concurring and dissenting opinions.<sup>93</sup> His first major

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86. 541 U.S. 193 (2004).

87. *Id.* at 214 (Thomas, J., concurring in the judgment).

88. 512 U.S. 874 (1994).

89. *Id.* at 944 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1985)).

90. *Id.* at 913.

91. *Id.* at 892.

92. *Id.* at 944.

93. *But see* *Pierce Cnty. v. Guillen*, 537 U.S. 129 (2003). Justice Thomas held for a unanimous court that the 1995 amendments to the Intermodal Surface Transportation Efficiency Act of 1991, 105 Stat. 1978, protecting information “compiled or collected” in connection with certain federal highway safety programs from being discovered or admitted in certain federal or state trials, was a valid exercise of Congress’s authority under the Commerce Clause. *Id.* at 147–48. Both the 1991 act and the 1995 amendments “can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress’ Commerce Clause power.” *Id.* at 147.

opinion was his concurring opinion in *United States v. Lopez*.<sup>94</sup> For the first time in almost six decades, the Supreme Court in *Lopez* invalidated a federal law—in this case, the Gun-Free School Zones Act of 1990—for exceeding the scope of the Commerce Clause. Chief Justice William Rehnquist held for a five-member majority that the Act, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone,”<sup>95</sup> “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce”;<sup>96</sup> consequently, it “exceeds the authority of Congress ‘to regulate Commerce. . . among the several States.’”<sup>97</sup>

Rehnquist began by answering what prior case law had left as an open question, namely, for an activity to be within Congress’s power to regulate under the Commerce Clause, is it enough that it merely “affect” interstate commerce, or must it affect it “substantially”? He concluded for the majority that the “proper test” was that the regulated activity must “substantially affect” interstate commerce.<sup>98</sup> Applying that test, he concluded that “[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”<sup>99</sup>

Both the federal government in its brief to the Court, and Justice Stephen Breyer in his dissent, argued that the possession of a gun in a school zone did substantially affect commerce. Rehnquist summarized their argument as follows: “[T]he presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being.”<sup>100</sup> The problem with that argument,

94. 514 U.S. 549 (1995).

95. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (current version at 18 U.S.C. § 922(q)(1)(A) (2006)). “School zone” was defined as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” *Id.* § 921(a)(25).

96. *Lopez*, 514 U.S. at 551.

97. *Id.* (citing U.S. CONST., art. I, § 8, cl. 3).

98. *Id.* at 559.

99. *Id.* at 567. The Act, Rehnquist argued, has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

*Id.* at 561.

100. *Id.* at 563.

Rehnquist contended, was that it made it impossible “to posit any activity by an individual that Congress is without power to regulate.”<sup>101</sup> In fact, he continued, that argument “would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>102</sup> While he acknowledged that “some of our prior cases have taken long steps down that road,”<sup>103</sup> he declined “to proceed any further.”<sup>104</sup>

The dissenters uniformly complained that the majority had abandoned “[t]he practice of deferring to rationally based legislative judgments.”<sup>105</sup> For Justice David Souter, the “touchstone” of constitutionality was “rational possibility,”<sup>106</sup> i.e., “whether the legislative judgment is within the realm of reason.”<sup>107</sup> There was no evidence in the record that Congress had found that the presence of a gun within a school zone substantially affected interstate commerce, but, Souter insisted, “The legislation implies such a finding, and there is no reason to entertain claims that Congress acted *ultra vires* intentionally.”<sup>108</sup> Justice Breyer reminded the majority that the Constitution requires the Court to judge “the connection between a regulated activity and interstate commerce, not directly, but at one remove.”<sup>109</sup> The Court must therefore give Congress “a degree of leeway”<sup>110</sup> when determining whether there is a sufficiently “significant factual connection”<sup>111</sup> between the two, not only because the Constitution “delegates the commerce power directly to Congress”<sup>112</sup> but also because that determination “requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words ‘rational basis’ capture this leeway.”<sup>113</sup>

Interestingly, Breyer was unwilling to give Congress as much “leeway” as Souter. While Souter inferred a connection between guns in

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101. *Id.* at 564.

102. *Id.* at 567.

103. *Id.*

104. *Id.*

105. *Id.* at 600.

106. *Id.* at 614.

107. *Id.* at 613.

108. *Id.*

109. *Id.* at 616.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 617. Breyer asserted, but without much conviction, that

[t]o hold this statute constitutional is not to “obliterate” the “distinction between what is national and what is local”; nor is it to hold that the Commerce Clause permits the Federal Government to “regulate any activity that it found was related to the economic productivity of individual citizens,” to regulate “marriage, divorce, and child custody,” or to regulate any and all aspects of education.

*Id.* at 624 (Breyer, J., dissenting) (internal citations omitted).

school zones and their effect on interstate commerce from the fact that Congress enacted the measure in question, Breyer felt obliged to prove the “empirical connection” that, while he claimed Congress could have made with greater “accuracy,” Congress had not bothered to make at all.<sup>114</sup> Thus, Breyer spent six pages of his dissent (and added a fourteen page appendix of citations)<sup>115</sup> to justify the “leeway” he was willing to give Congress that its unstated “empirical judgment” concerning the impact of guns on education and therefore on the economy was rational.<sup>116</sup>

Justice Thomas wrote a separate concurrence to comment on how far the Court’s case law had drifted “from the original understanding of the Commerce Clause”<sup>117</sup> and to distance himself from the “substantial effects” test: “We have said that Congress may regulate not only ‘Commerce. . . among the several states,’ but also anything that has a ‘substantial effect’ on such commerce. This test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”<sup>118</sup> He reasoned that

we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.<sup>119</sup>

He noted that “on this crucial point,” the majority and Justice Breyer agreed in principle: namely, that “[t]he Federal Government has nothing approaching a police power.”<sup>120</sup> However, while Breyer acknowledged that there are limits to federal power, Thomas observed that Breyer could not “muster even one example”<sup>121</sup> of something Congress could not regulate and that “[w]hen asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words.”<sup>122</sup> Unlike Breyer and U.S. Solicitor General Drew S. Days III, who argued for the Government, Thomas was not at a loss for words, and mustered several examples:

[T]he power to regulate “commerce” can by no means encompass authority over mere gun possession, any more than it empowers

114. *Id.* at 618–19.

115. *See id.* at 619–25, 631–44.

116. *Id.* at 616–17.

117. *Id.* at 584 (Thomas, J., concurring).

118. *Id.*

119. *Id.*

120. *Id.* at 584–85.

121. *Id.* at 600.

122. *Id.*

the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.<sup>123</sup>

Thomas then focused on “the text, structure, and history of the Commerce Clause.”<sup>124</sup> He began by turning to dictionaries of the era and found that, “[a]t the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”<sup>125</sup> He then cited a variety of Federalist and Anti-Federalist sources to demonstrate that “during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably.”<sup>126</sup> He then quoted Hamilton from several numbers of *The Federalist* and delegates from the Massachusetts and New York Ratifying Conventions to support his argument that “the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture.”<sup>127</sup>

And, even though he had earlier in his opinion indicated that a further reconsideration of the Court’s “substantial effects” test should be deferred to some “appropriate case” in the future,<sup>128</sup> he felt compelled to observe that

[t]he Commerce Clause does not state that Congress may “regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In contrast, the Constitution itself temporarily prohibited amendments that would “affect” Congress’ lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Clearly, the Framers could have drafted a Constitution that contained a “substantially affects interstate commerce” clause had that been their objective.<sup>129</sup>

Thomas then introduced one of the key rationales in his opinion. The Court’s “substantial effects” test combined with its reading of the Necessary and Proper Clause had rendered “wholly superfluous” many of “Congress’ other enumerated powers under Article I, § 8.”<sup>130</sup>

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123. *Id.* at 585.

124. *Id.*

125. *Id.*

126. *Id.* at 586.

127. *Id.*

128. *Id.* at 585.

129. *Id.* at 587–88 (internal citations omitted).

130. *Id.* at 588.

After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to “punish Piracies and Felonies committed on the high Seas,” cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.<sup>131</sup>

Thomas insisted that an interpretation of the Interstate Commerce Clause, based on the “substantial effects” test, “that makes the rest of § 8 superfluous simply cannot be correct.”<sup>132</sup> Yet, he continued, this is what both the majority and dissenting opinions had endorsed. “The power we have accorded Congress has swallowed Art. I, § 8 . . . something we can assume the Founding Fathers never intended.”<sup>133</sup>

To this point in his *Lopez* concurrence, Thomas was making what might be called an original public meaning interpretation based simply on the text of Article I, § 8 and original meaning of that text. But Thomas continued and explained the text based on his original understanding interpretation of “commerce among the several States.”<sup>134</sup> He began in this respect by acknowledging that “early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other—that each ‘substantially affected’ the others.”<sup>135</sup> This made perfect sense: “[I]tems produced by farmers and manufacturers were the primary articles of commerce at the time.”<sup>136</sup> But, Thomas continued, “despite being well aware that

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131. *Id.* at 588–89.

132. *Id.* at 589.

133. *Id.*

134. *Id.* at 588.

135. *Id.* at 590.

136. *Id.* Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other. *Id.* (quoting 4 DEBATES IN THE SEVERAL STATE

agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress.”<sup>137</sup> He quoted Hamilton in *Federalist No. 17*, as denying that the federal government could regulate agriculture and like concerns: “The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.”<sup>138</sup> Thomas continued to quote from Hamilton: If the federal government were to attempt to exercise authority over such matters, such an attempt “would be as troublesome as it would be nugatory.”<sup>139</sup>

And, Thomas noted, where the framers intended to grant federal authority over an activity substantially affecting interstate commerce, they specifically enumerated a power over that particular activity. He offered two examples: Madison in *Federalist No. 42* spoke of the bankruptcy power as being “intimately connected with the regulation of commerce,”<sup>140</sup> and Hamilton in *Federalist No. 24* declared that “if we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavor as soon as possible to have a navy.”<sup>141</sup> The Framers expressly delegated to Congress in Article I, § 8 both of those powers; they drew the “constitutional line” between the activities that substantially affect interstate commerce that Congress could regulate because the power to do so was delegated to it, and those it could not, and, Thomas insisted, the Court must respect that line.<sup>142</sup>

Because Breyer had argued in his dissent that Chief Justice Marshall established in *Gibbons v. Ogden*<sup>143</sup> that Congress could control all local activities that significantly affected interstate commerce and that Marshall’s opinion in *Gibbons* was the traditional method of interpreting the Commerce Clause,<sup>144</sup> Thomas felt obliged to respond. He reviewed *Gibbons* and subsequent case law and concluded: “I am aware of no cases prior to the New Deal that characterized the power flowing from the

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CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 20 (J. Elliot ed., Philadelphia, J. B. Lippincott & Co. 1836) (William Davie at North Carolina Convention).

137. *Id.* at 591.

138. *Id.* (citing THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (J. Cooke ed., 1961)).

139. *Id.* (quoting THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (J. Cooke ed., 1961)).

140. *Id.* at 592 (quoting THE FEDERALIST NO. 42, at 287 (James Madison) (J. Cooke ed., 1961)).

141. *Id.* (quoting THE FEDERALIST NO. 24, at 157 (Alexander Hamilton) (J. Cooke ed., 1961)).

142. *Id.* at 593.

143. 22 U.S. (9 Wheat.) 1 (1824).

144. *Lopez*, 514 U.S. at 631 (Breyer, J., dissenting).

Commerce Clause as sweepingly as does our substantial effects test.”<sup>145</sup> To the contrary, his review of these cases established “a simple point: From the time of the ratification of the Constitution to the mid-1930’s, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause.”<sup>146</sup> The substantial effects test was an “innovation of the 20th century”<sup>147</sup> and a clear departure from “the original understanding of the Constitution.”<sup>148</sup>

*Lopez* was decided in Thomas’s fourth year on the Court; at that point, he was not as bold as he would later become in rejecting precedent and removing excrescence. Thus, he concluded somewhat tentatively: “This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.”<sup>149</sup> He ended that sentence by dropping a footnote that read:

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145. *Id.* at 596 (Thomas, J., concurring).

146. *Id.* at 599.

147. *Id.* at 596.

148. *Id.* at 599. *See* *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari). The question in this case was “whether the Army Corps of Engineers [could], under the Clean Water Act, constitutionally assert jurisdiction over private property based solely on the actual or potential presence of migratory birds that cross state lines.” *Id.* at 955–56. Thomas declared, “In light of *Lopez*, I have serious doubts about the propriety of the Corps’ assertion of jurisdiction over petitioner’s land in this case.” *Id.* at 958. He summarized the Corps’ claim as follows:

[T]he self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps’ assertion of jurisdiction over any standing water that could serve as a habitat for migratory birds. As the Court of Appeals admitted, the Corps’ expansive interpretation of its regulatory powers under the Clean Water Act may test the very “bounds of reason,” and, in my mind, likely stretches Congress’ Commerce Clause powers beyond the breaking point.

*Id.* at 958. Thomas insisted that he was not challenging “Congress’ power to preserve migratory birds and their habitat through legitimate means.” *Id.* at 959. But, he insisted that did

not give the Corps *carte blanche* authority to regulate every property that migratory birds use or could use as habitat. The point of *Lopez* was to explain that the activity on the land to be regulated must substantially affect interstate commerce before Congress can regulate it pursuant to its Commerce Clause power.

*Id.* He pointed out that “[o]ther than the occasional presence of migratory birds,” there was no showing that petitioner’s land use would have any effect on interstate commerce, much less a substantial effect. Nor was there any showing that the cumulative effect of land use involving seasonal standing water—water that is wholly isolated from any water used, or usable, in interstate commerce—would have a substantial effect on interstate commerce. This case raises serious and important constitutional questions about the limits of federal land use regulation in the name of the Clean Water Act that provide a compelling reason to grant certiorari in this case.

*Id.*

149. *Lopez*, 514 U.S. at 601 (Thomas, J., dissenting) (footnote omitted).

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.<sup>150</sup>

He did assert, however, that “we ought to temper our Commerce Clause jurisprudence”<sup>151</sup> so that it would not be “a blank check”<sup>152</sup> to Congress allowing it to regulate everything “under the guise of the Commerce Clause.”<sup>153</sup>

In *Printz v. United States*,<sup>154</sup> Thomas built on his *Lopez* concurrence. In *Printz*, the Court considered the constitutionality of those provisions of the Brady Handgun Violence Prevention Act that commanded the “chief law enforcement officer” (CLEO) of each local jurisdiction to conduct background checks on prospective handgun purchasers on an interim basis until a national instant background check system could become operational.<sup>155</sup> Justice Scalia held for a five-member majority that this congressional command was “fundamentally incompatible with our constitutional system of dual sovereignty” and was, therefore, unconstitutional.<sup>156</sup>

In his concurring opinion, Thomas described his approach as a “revisionist” one in which, as he explained in *Lopez*, “the Federal Government’s authority under the Commerce Clause . . . does not extend to the regulation of wholly *intra* state, point-of-sale transactions.”<sup>157</sup> If, as he believed, Congress lacked “the underlying authority to regulate the intrastate transfer of firearms,”<sup>158</sup> then “Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations.”<sup>159</sup> And, he continued, even if the Court were to construe Congress’s authority to regulate interstate commerce to encompass those intrastate transactions that “substantially affect” interstate commerce, he questioned whether Congress had the power to regulate these particular transactions.<sup>160</sup>

The Constitution, he reminded his colleagues, delegated certain enumerated powers to Congress, but also placed “whole areas outside the

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150. *Id.* at 601 n.8.

151. *Id.* at 601.

152. *Id.* at 602.

153. *Id.* at 600.

154. 521 U.S. 898 (1997).

155. *Id.* at 902.

156. *Id.* at 935.

157. *Id.* at 937 (Thomas, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.*

reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech.'"<sup>161</sup> Interestingly, Thomas went on to anticipate the majority opinion in *District of Columbia v. Heller* when he wrote: "The Second Amendment similarly appears to contain an express limitation on the government's authority."<sup>162</sup> He recognized that the Court had "not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment."<sup>163</sup> But, he declared, if "the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections."<sup>164</sup> Since the parties did not raise this argument, he agreed that there was no need to consider it in the present case.<sup>165</sup> Nonetheless, he wondered, "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'"<sup>166</sup>

By the time of his concurring opinion in *United States v. Morrison*,<sup>167</sup> Thomas had become considerably bolder in articulating his views in *Lopez* and attacking the substantial effects test. In *Morrison*, the Supreme Court held, by a five-to-four vote, that Congress lacked the constitutional authority to enact a key provision of the Violence Against Women Act ("VAWA") of 1994 under either the Commerce Clause or Section 5 of the Fourteenth Amendment, both of which Congress had explicitly identified as sources of its authority to legislate in this area.<sup>168</sup>

In his majority opinion, Chief Justice Rehnquist expressed concern that if the Court were to uphold Congress's authority under the Commerce Clause to enact VAWA, the result would be "to completely obliterate the Constitution's distinction between national and local authority."<sup>169</sup>

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate

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161. *Id.* at 938 (quoting U.S. CONST. amend I).

162. *Id.* at 937–38.

163. *Id.* at 938.

164. *Id.* (quoting U.S. CONST. amend II).

165. *Id.* at 938–39.

166. *Id.* at 939 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (Boston, Hilliard, Gray & Co. 1833)).

167. 529 U.S. 598 (2000).

168. *Id.* at 626–27.

169. *Id.* at 615.

commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.<sup>170</sup>

Rehnquist feared that a Court decision affirming the constitutionality of VAWA would provide Congress with authority to legislate on matters of family law as well:

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded [VAWA] from being used in the family law context. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.<sup>171</sup>

Thomas declared in his concurrence that the majority opinion correctly applied *Lopez*, and he joined the majority opinion in full.<sup>172</sup> He wrote, separately, however, to renew his attack on the substantial effects test, which he declared

is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.<sup>173</sup>

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170. *Id.*

171. *Id.* at 615–16.

172. *Id.* at 627 (Thomas, J., concurring).

173. *Id.* In *Jones v. United States*, 529 U.S. 848 (2000), Justice Ruth Bader Ginsburg delivered the unanimous opinion of the Court and held that the federal arson statute did not cover the arson of an owner-occupied dwelling not used for any commercial purpose. *Id.* at 859. The defendant had tossed a Molotov cocktail through a window into a home owned and occupied by his cousin and was convicted in federal court of arson, in violation of 18 U.S.C. § 844(i). *Id.* at 851. On appeal, the defendant argued the statute did not apply to buildings not used for commercial purposes, and, relying on *Lopez* challenged the

In *Gonzales v. Raich*,<sup>174</sup> the Court addressed an action by the respondents seeking injunctive and declaratory relief prohibiting the federal government from enforcing the federal Controlled Substances Act (“CSA”) and preventing them from, consistent with California’s Compassionate Use Act (passed in 1996 as a ballot initiative), possessing, obtaining, or manufacturing marijuana for their personal medical use.<sup>175</sup> The District Court for the Northern District of California denied their motion for a preliminary injunction,<sup>176</sup> but the Ninth Circuit reversed.<sup>177</sup> It found that the respondents had demonstrated a strong likelihood of success on the claim that the CSA, as applied, was an unconstitutional exercise of Congress’s Commerce Clause power to the intrastate, non-commercial cultivation and possession of marijuana for personal medical purposes as recommended by a patient’s physician pursuant to this valid California state law.<sup>178</sup> The court relied heavily on *Lopez* and *Morrison* to hold that this separate class of purely local activities was beyond the reach of federal power.<sup>179</sup>

Justice Stevens’s opinion for a five-member majority overturned the Ninth Circuit and held that the regulation of marijuana under the CSA was squarely within Congress’s commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market.<sup>180</sup> In light of the enforcement difficulties in distinguishing between marijuana cultivated locally and marijuana grown elsewhere, as well as concerns about diversion of medical

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constitutionality of such an application. *Id.* at 851–52. The government, however, argued that the residence was “used” in interstate commerce because it received natural gas and had a mortgage and an insurance policy. *Id.* at 854–55. The Supreme Court granted certiorari and framed the question as follows: “Whether, in light of *United States v. Lopez* (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, 18 U.S.C. § 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.” *Id.* at 852. Ginsburg avoided the constitutional question that would have arisen had the Court read the statute to render the traditionally local criminal conduct a matter for federal enforcement by holding that the provision covered only property currently used in commerce or in an activity affecting commerce and an owner-occupied residence not used for any commercial purpose did not qualify. Thomas wrote a concurring opinion, in which Scalia joined, indicating that when an appropriate case arose, he would be open, in light of *Lopez*, to considering the constitutionality of applying the federal arson statute even to certain commercial buildings. *Id.* at 860. “In joining the Court’s opinion, I express no view on the question whether the federal arson statute, 18 U.S.C. § 844(i) as there construed, is constitutional in its application to all buildings used for commercial activities.” *Id.*

174. 545 U.S. 1 (2005).

175. *Id.* at 5–6.

176. *Id.* at 8.

177. *Id.* at 9.

178. *Id.*

179. *Id.*

180. *Id.* at 32–33.

marijuana into illicit channels, Stevens concluded that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a “gaping hole” in the CSA and that Congress was acting well within its authority under the Commerce Clause.<sup>181</sup>

Surprisingly to many, Justice Scalia concurred in the judgment.<sup>182</sup> He argued that activities that merely have a substantial effect on interstate commerce are not part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.<sup>183</sup> He also stated that Congress’s regulatory authority over intrastate activities that are not part of interstate commerce derives from the Constitution’s Necessary and Proper Clause and that if it is necessary to make a regulation of interstate commerce effective,<sup>184</sup> Congress has the power to regulate even those intrastate activities that do not substantially affect interstate commerce.<sup>185</sup> As he declared, in the CSA,

Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. . . . To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.<sup>186</sup>

Thomas, in his second major Commerce Clause opinion, felt compelled to dissent on original understanding grounds.<sup>187</sup> He opened with the following salvo:

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181. *Id.* at 22.

182. *Id.* at 33 (Scalia, J., concurring in the judgment).

183. *Id.* at 34.

184. *Id.*

185. *Id.* at 35.

186. *Id.* at 39–40.

187. *But see* *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001). In this case, the United States obtained an injunction from the U.S. District Court for the Northern District of California prohibiting the Cooperative and its director from distributing medical marijuana, authorized under California’s Compassionate Use Act of 1996 but in violation of the federal government’s Controlled Substances Act. *Id.* at 486–87. The Court subsequently rejected the Cooperative’s motion to modify the injunction to permit marijuana distributions that purportedly were medically necessary. *Id.* at 488. The United

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.<sup>188</sup>

Thomas insisted that the respondents' conduct was "purely intrastate and noncommercial" and therefore beyond Congress's reach.<sup>189</sup> "Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction."<sup>190</sup> Moreover, he pointed out, there was "certainly no evidence from the founding"<sup>191</sup> to suggest that "commerce" included "the mere possession of a good or some purely personal activity that did not involve trade or exchange for value."<sup>192</sup> Thomas made clear how far the *Raich* majority had departed from the original understanding of the Commerce Clause: "In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."<sup>193</sup>

Thomas acknowledged that "[o]n its face, a ban on the intrastate cultivation, possession, and distribution of marijuana"<sup>194</sup> may be necessary and proper, and therefore "plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers and users could swell both the

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States Court of Appeals for the Ninth Circuit reversed the District Court's refusal to modify the injunction and remanded the case to the District Court, instructing it to consider the criteria for a medical-necessity exception to the CSA's prohibitions. *Id.* Thomas wrote the majority opinion reversing the Ninth Circuit and holding that, with respect to marijuana, there was no medical-necessity exception, for it was clear from the text of the Act that Congress had made a determination that marijuana had no medical benefits worthy of an exception. *Id.* at 498–99. On first blush, this conclusion would seem contrary to what he would argue in his dissent in *Raich*, but it was not. As Thomas noted near the end of his opinion, the question of the constitutionality of the CSA had not been addressed by the courts below and this case was not the proper vehicle to address that issue. *Id.* at 494.

Finally, the Cooperative contends that . . . the statute exceeds Congress' Commerce Clause powers, violates the substantive due process rights of patients, and offends the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments . . . . [We do not] consider the underlying constitutional issues today . . . . Because the Court of Appeals did not address these claims, we decline to do so in the first instance.

*Id.*

188. *Raich*, 545 U.S. at 57–58 (Thomas, J., concurring).

189. *Id.* at 59.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 61.

supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate.”<sup>195</sup> But, he noted that the respondents did not challenge the CSA on its face.<sup>196</sup> Instead, they challenged it as applied to their conduct.<sup>197</sup> “The question is thus whether the intrastate ban is ‘necessary and proper’ as applied to medical marijuana users like respondents,”<sup>198</sup> i.e., “seriously ill Californians”<sup>199</sup> subject to the strict regulations of California’s Compassionate Use Act and suffering from such diseases as “cancer, AIDS, or arthritis” for whom cannabis can relieve their pain.<sup>200</sup> And, because “[n]o one argues that permitting use of these drugs under medical supervision has undermined the CSA’s restrictions,” Thomas insisted that it was not necessary to apply the CSA to them.<sup>201</sup>

Congress’ goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress’ aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.<sup>202</sup>

As in his concurrences in *Lopez* and *Morrison*, Thomas again criticized the “rootless and malleable”<sup>203</sup> substantial effects test as “not tethered to either the Commerce Clause or the Necessary and Proper Clause.”<sup>204</sup> Once Stevens for the majority had defined economic activity to include “the production, distribution, and consumption of commodities,”<sup>205</sup> the test allowed the Court to hold that the CSA applied to the respondents. Thomas complained, however, that the definition of economic activity combined with the substantial effects test

carve[d] out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison’s assurance to the people of New York [in *Federalist No. 45*] that the “powers delegated” to the Federal Government

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 62.

200. *Id.* at 63.

201. *Id.* at 64.

202. *Id.*

203. *Id.* at 67.

204. *Id.*

205. *Id.* at 25 (majority opinion) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1996)).

are “few and defined,” while those of the States are “numerous and indefinite.”<sup>206</sup>

Thomas concluded by insisting that while “Congress is authorized to regulate ‘Commerce,’”<sup>207</sup> what Monson and Raich were engaged in did not qualify “under any definition of that term.”<sup>208</sup> He reasoned that the majority opinion illustrated “the steady drift away from the text of the Commerce Clause.”<sup>209</sup> Under the Court’s “inexorable expansion [of] commerce,”<sup>210</sup> the power of the federal government “expands, but never contracts,”<sup>211</sup> because the Court “is not interpreting the Commerce Clause, but rewriting it.”<sup>212</sup>

Thomas speculated that this “rewriting” may have been “rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively.”<sup>213</sup> He continued, however,

[T]he Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *interstate* commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intrastate* commerce—not to mention a host of local activities, like mere drug possession, that are not commercial.<sup>214</sup>

He declared that one would search “in vain” in the majority opinion for “any hint of what aspect of American life is reserved to the States.”<sup>215</sup> Until the Court is willing either “to enforce limits on federal power [or] to declare the Tenth Amendment a dead letter,”<sup>216</sup> there will be “no measure of stability to our Commerce Clause jurisprudence.”<sup>217</sup> He proposed to remove excrescence and to re-establish stability “by discarding the stand-alone substantial effects test and revisiting our definition of ‘Commerce . . . among the several States.’”<sup>218</sup>

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206. *Id.* at 69.

207. *Id.*

208. *Id.*

209. *Id.* at 70.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 71.

217. *Id.*

218. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). In *Gonzales v. Oregon*, Justice Anthony Kennedy upheld for a six-member majority a challenge by the State of Oregon to the

Thomas's "original understanding" approach in *Lopez*, *Printz*, *Morrison*, and *Raich* is powerful, but also somewhat myopic, in that it does not address the question of how adherence to the original understanding of the text is to be secured. Thomas assumes it is the duty and role of the Court to enforce the text as explained. The framers, however, understood that the means to ensure that the Commerce Clause (or any other delegated power for that matter) would not become a "blank check" by which Congress could regulate everything and that the reserved powers of the states would be protected, was the mode of electing (and, perhaps more importantly, re-electing) the U.S. Senate.<sup>219</sup> Until the Seventeenth Amendment, Senators were elected by state legislatures, and the significance of that structural feature of the Constitution was clear to the members of the founding generation. It was perfectly captured in a July 1789 letter to John Adams, in which Roger Sherman emphasized that "[t]he senators being eligible by the legislatures of the several states, and dependent on them for reelection, will be vigilant in supporting their rights against infringement by the legislative or executive of the United States."<sup>220</sup>

On May 31, 1787, very early in the Constitutional Convention, the assembled delegates rejected Resolution 5 of the Virginia Plan by a vote of

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statutory interpretation of U.S. Attorney General Alberto Gonzales of the CSA that would have disrupted physician assisted suicide under Oregon's Death with Dignity Act (2003). 546 U.S. 243, 274–75 (2006). Thomas dissented from this opinion, contrasting the majority opinion in *Oregon* with the majority opinion in *Raich*. *Id.* at 299 (Thomas, J., dissenting).

When Angel Raich and Diane Monson challenged the application of the Controlled Substances Act to their purely intrastate possession of marijuana for medical use as authorized under California law, a majority of this Court (a mere seven months ago) determined that the CSA effectively invalidated California's law because "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner."

*Id.* Yet, he noted, "Today the majority beats a hasty retreat from these conclusions." *Id.* He pointed to the "stark contrast" between "*Raich*'s broad conclusions about the scope of the CSA as it pertains to the medicinal use of controlled substances" and *Oregon*'s conclusion that the CSA was "merely concerned with fighting 'drug abuse' and only insofar as that abuse leads to 'addiction or abnormal effects on the nervous system.'" *Id.* at 300. He found "puzzling" the "majority's newfound understanding of the CSA as a statute of limited reach" because, as he noted, it rested on "constitutional principles that majority of the Court rejected in *Raich*." *Id.* The states' "traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens," were completely ignored in *Raich* but suddenly figured prominently in *Oregon*. *Id.* at 300–01. He concluded: "The Court's reliance upon the constitutional principles that it rejected in *Raich*—albeit under the guise of statutory interpretation—is perplexing to say the least. Accordingly, I respectfully dissent." *Id.* at 302.

219. See RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY (2001).

220. 2 THE FOUNDERS' CONSTITUTION 232 (Philip B. Kurland & Ralph Lerner eds., 1987).

seven-to-one.<sup>221</sup> This plan had proposed that the “second branch of the National Legislature ought to be elected by those of the first,” doing so by a vote of seven states “no,” three states “yes.”<sup>222</sup> Instead, on June 7, they unanimously accepted a motion by John Dickinson and seconded by Roger Sherman providing for the appointment of the Senate by the state legislatures.<sup>223</sup>

The delegates were apparently persuaded by Dickinson’s argument that the “sense of the States would be better collected through their Governments; than immediately from the people at large”<sup>224</sup> and by George Mason’s observation that election of the Senate by state legislatures would provide the states with

some means of defending themselves [against] encroachments of the [National Government]. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment?<sup>225</sup>

During the New York Ratifying Convention, Hamilton explicitly connected the mode of electing the Senate with the protection of the interests of the states as states, and with ensuring that Congress would not abuse the exercise of its delegated powers.

[W]hen you take a view of all the circumstances which have been recited, you will certainly see that the senators will constantly look up to the state governments with an eye of dependence and affection. If they are ambitious to continue in office, they will make every prudent arrangement for this purpose, and, whatever may be their private sentiments or politics, they will be convinced that the surest means of obtaining a re-election, will be a uniform attachment to the interests of their several states.<sup>226</sup>

221. *Id.*

222. 1 FARRAND, *supra* note 28, at 52.

223. *Id.* at 156.

224. *Id.* at 150.

225. *Id.* at 155–56. In Robert Yates’s “Notes” for the same day, Dickinson observed that “this mode will more intimately connect the state governments with the national legislature,” and Mason is reported as saying: “[T]he second branch of the national legislature should flow from the legislature of each state, to prevent the encroachments on each other and to harmonize the whole.” *Id.* 157. Rufus King recorded Mason as follows: “[T]he Danger is that the national, will swallow up the State Legislatures—what will be a reasonable guard agt. this Danger, and operate in favor of the State authorities—The answer seems to me to be this, let the State Legislatures appoint the Senate.” *Id.* at 160.

226. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 29, at 294.

He also declared: “Sir, the senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states. Will not this form a powerful check?”<sup>227</sup>

The framers favored election of the Senate by state legislatures not simply because it provided, in Hamilton’s words from *Federalist No. 59*, incentives for senators to remain vigilant in their protection of the “States, in their political capacities.”<sup>228</sup> They also favored this mode of election because it helped them sidestep what Madison described in *Federalist No. 37* as the “arduous” task of “marking the proper line of partition, between the authority of the general, and that of the State Governments.”<sup>229</sup>

An episode at the very outset of the Convention tells it all. On May 31, the Convention, meeting as a committee of the whole, had just taken up Resolution 6 of the Virginia Plan that proposed, inter alia, that “the National Legislature ought to be empowered. . . to legislate in all cases to which the separate States were incompetent.”<sup>230</sup> Charles Pinckney and John Rutledge “objected to the vagueness of the term *incompetent*, and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition.”<sup>231</sup> While Edmund Randolph, Governor of Virginia and therefore head of the Virginia delegation, quickly “disclaimed any intention to give indefinite powers to the national Legislature,”<sup>232</sup> Madison took a different tactic and explained the reason for the language. He expressed his “doubts concerning [the] practicability”<sup>233</sup> of “an enemeration [sic] and definition of the powers necessary to be exercised by the national Legislature.”<sup>234</sup> Despite having come to the Convention with a “strong bias in favor of an enemeration [sic],”<sup>235</sup> he owned that, during the weeks before a quorum gathered in Philadelphia (during which he and his fellow Virginia delegates drafted the Virginia Plan, including the language in Resolution 6), “his doubts had become stronger.”<sup>236</sup> He declared that he would “shrink from nothing,” including, he implied, abandoning any attempt to enumerate the specific powers of the national government, “which should be found essential to such a form of [Government] as would provide for the safety, liberty, and happiness of the Community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be

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227. *Id.* at 304.

228. THE FEDERALIST NO. 59, at 401 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

229. THE FEDERALIST NO. 37, at 234 (James Madison) (Jacob E. Cooke ed., 1961).

230. FARRAND, *supra* note 28, at 53.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

submitted to.”<sup>237</sup> Madison would later elaborate on this same “means-ends” argument in *Federalist No. 41*, when he declared that “[i]t is vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.”<sup>238</sup>

On May 31, Madison merely foreshadowed the argument he would later develop more fully in *Federalist No. 51*, namely, that the power of the new federal government was to be controlled, not through an exact enumeration, i.e., through the use of “parchment barriers,”<sup>239</sup> but by “so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>240</sup> Nonetheless, his words were obviously reassuring, for the Convention voted at the conclusion of his speech to accept that portion of Resolution 6 by a vote of nine states voting “yes” and one state “divided.”<sup>241</sup>

The Convention apparently shared Madison’s doubts about the “practicality” of partitioning power between the federal government and the states through an enumeration of the powers of the former. Spending almost no time debating what specific powers the federal government should have, it focused instead, and almost exclusively, on the question of constitutional structure. Thus, the only resolution pertaining to the powers of the federal government forwarded by the delegates to the Committee of Detail (charged with taking “the proceedings of the Convention for the establishment of a Natl. Govt.” and “prepar[ing] and report[ing] a Constitution conformable thereto”<sup>242</sup>) stated only that

the Legislature of the United States ought to possess the legislative Rights vested in Congress by the [Articles of] Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which

237. *Id.* Madison appreciated the difficulty of attempting to put into words a precise enumeration. As he argued in *Federalist No. 37*, even “[w]hen the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.” THE FEDERALIST NO. 37, at 236–37 (James Madison) (Jacob E. Cooke ed., 1961).

238. THE FEDERALIST NO. 41, at 270 (James Madison) (Jacob E. Cooke ed., 1961). Also see Alexander Hamilton’s similar statements in *THE FEDERALIST NO. 31*, at 194 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), in which Hamilton describes as “maxims in ethics and politics . . . that the means ought to be proportioned to the end; that every power ought to be commensurate with this object, [and] that there ought to be no limitation of a power destined to effect a purpose, which is itself incapable of limitation.”

239. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

240. THE FEDERALIST NO. 51, at 347–48 (James Madison) (Jacob E. Cooke ed., 1961). The mode of electing the Senate was obviously one such contrivance that the framers employed to keep the general government in its proper place.

241. FARRAND, *supra* note 28, at 54.

242. 2 FARRAND, *supra* note 28, at 95.

the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>243</sup>

Not even when the Committee of Detail created out of whole cloth what ultimately became Article I, § 8, did the Convention systematically scrutinize the powers enumerated therein. Thus, for example, on August 16, when the language of the Committee of Detail concerning “commerce” first came up for discussion, Madison simply reported in his Notes: “Clause for regulating commerce with foreign nations &c. agreed to nem. con.”<sup>244</sup> There was no discussion of Congress’s power to regulate commerce “among the several States,” and, interestingly, Madison did not even allude to that portion of what will become the Interstate Commerce Clause, but mentions only foreign commerce.<sup>245</sup>

The delegates did not even object to the proposed Necessary and Proper Clause. On August 20, when the Convention first took up the language proposed by the Committee of Detail that Congress have the power “to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the Government of the U. S. or any department or officer thereof,”<sup>246</sup> the only discussion centered on a motion by James Madison and Charles Pinckney “to insert between ‘laws’ and ‘necessary’ ‘and establish all offices,’ it appearing to them liable to cavil that the latter was not included in the former.”<sup>247</sup> Madison reported in his Notes that “Mr. Govr. Morris. Mr. Wilson, Mr. Rutledge and Mr. Elsworth urged that the amendment could not be necessary,” and it was defeated by a vote of nine states “no,” two states “yes.”<sup>248</sup> With that matter resolved, Madison then reported that “[t]he clause as reported was then agreed to nem con.”<sup>249</sup>

The conclusion is clear: Rather than rely on precisely drawn lines demarcating the powers of the federal and state governments, the framers preferred instead to rely on such structural arrangements as the election of the

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243. *Id.* at 131–32.

244. *Id.* at 308.

245. There was no reference in Madison’s Notes at that time to the Indian Commerce Clause either because the Virginia Plan that served as the first draft of the Constitution included no language for federal authority over Indian affairs. James Madison corrected his oversight on August 18, when he proposed language that would grant to the new federal government the power to “regulate affairs with the Indians as well within as without the [United] States.” *See id.* at 324.

246. *Id.* at 344–45.

247. *Id.*

248. *Id.*

249. *Id.* While both Edmund Randolph and Elbridge Gerry eventually mentioned the Necessary and Proper Clause among their reasons for refusing to sign the Constitution, they never objected to its wording or sought its elimination when the Convention was reviewing the work of the Committee of Detail. *See id.* at 563, 632.

Senate by the state legislatures to ensure that the vast powers they provided to the national government would not be abused.

Finally, the framers relied on the mode of electing (and re-electing) the Senate and the self-interest of senators, not on the Supreme Court, to prevent Congress from treating the Commerce Clause as a “blank check.” They clearly did not expect that the Supreme Court would protect the reserved powers of the states or would interfere with Congress’s decision of where to draw the line between federal and state powers. They understood that drawing a line between federal and state powers involves prudential considerations beyond the Court’s legal capacity to pass judgment. They understood that, to the extent that the Constitution authorized the Court to exercise the power of judicial review (and whether it did so was itself a major question),<sup>250</sup> it was only in those cases in which the popular branches had acted, in the words of *Federalist No. 78*, “contrary to the *manifest tenor* of the Constitution.”<sup>251</sup> The Court was not to invalidate congressional measures in close cases. As James Wilson, a vigorous defender of judicial review,<sup>252</sup> acknowledged in the Constitutional Convention: “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be *so unconstitutional* as to justify the Judges in refusing to give them effect.”<sup>253</sup> Rather, as Hamilton made clear in *Federalist No. 78*, the Court was to

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250. Several delegates to the Convention clearly believed that the Court would have the power of judicial review. Governor Morris, for one, observed that the judiciary should not “be bound to say that a direct violation of the Constitution was law.” *Id.* at 299. Luther Martin, for another, argued against a proposed Council of Revision on the grounds that “the Constitutionality of laws . . . will come before the Judges in their proper official character. In this character they have a negative on the laws.” *Id.* at 76. *See also* Gerry’s comments at *id.* at 97. The problem with these statements, however, is that they imply neither a general power to expound the Constitution nor an obligation on the part of the other branches to regard a judicial decision on the constitutionality of their actions as binding. Moreover, statements were also made by other Convention delegates unequivocally rejecting judicial review. Thus, for example, John Mercer “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable [sic].” *Id.* at 298. So, too, did Dickenson, who argued that, “as to the power of the Judges to set aside the law, . . . no such power ought to exist.” *Id.* at 299. *See* GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 47–48 (1989). Anastaplo, proceeding “section by section” through the Constitution, concludes that the Constitution tends toward legislative supremacy and that judicial review is highly suspect; noting the “complete silence in the Constitution about judicial review,” he wonders if it is “likely . . . that judicial review was indeed anticipated, when nothing was said about it, considering the care with which [for example] executive review was provided for.” *Id.* *See also* Ralph A. Rossum, *The Least Dangerous Branch?*, in *THE AMERICAN EXPERIMENT: ESSAYS ON THE THEORY AND PRACTICE OF LIBERTY* 241–58 (Peter Augustine Lawler & Robert Martin Schaefer eds., 1994).

251. *THE FEDERALIST NO. 78*, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

252. *See* Ralph A. Rossum, *James Wilson and the “Pyramid of Government”*: *The Federal Republic*, 6 *POL. SCI. REVIEWER* 113, 133–34 (1976).

253. 2 *FARRAND*, *supra* note 28, at 73 (emphasis added).

invalidate measures only in cases in which Congress's disregard for "certain specified exceptions to the legislative authority" was akin to its passage of a bill of attainder or an *ex post facto* law.<sup>254</sup> Decisions by Congress regarding where federal power ends and state power begins were of a different character; they did not implicate "specified exceptions" to Congress's legislative authority but rather merely involved prudential judgments, agreed to by a Senate elected by state legislatures, concerning the outer reaches of the delegated powers of Congress. As a consequence, these decisions could never be held unconstitutional by the Court because they never could be regarded as clearly contrary to the Constitution's "manifest tenor."<sup>255</sup>

Hamilton's discussion in *Federalist No. 33* of the Necessary and Proper Clause is also instructive in this regard, for, in it, he did not so much as allude to the Supreme Court when he answered his own question of "who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union?"<sup>256</sup> For Hamilton, Congress was to judge "in the first instance . . . the proper exercise of its powers, and its constituents [and for the Senate, that meant the state legislatures] in the last."<sup>257</sup> If Congress were to use the Necessary and Proper Clause "to overpass the just bounds of its authority and make a tyrannical use of its powers," Hamilton argued that "the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify."<sup>258</sup> Again, he made no reference to the Supreme Court exercising judicial review to negate such congressional actions.

That all changed with the adoption and ratification of the Seventeenth Amendment, which provided for direct election of the Senate.<sup>259</sup> After an

254. THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Here is the entire passage:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

*Id.*

255. *Id.*

256. THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

257. *Id.*

258. *Id.* As Hamilton made clear in both *Federalist No. 59*, and during the New York Ratifying Convention, one way the people could "redress the injury" caused by congressional infringement on the "residuary sovereignty" of the States was by electing state legislators who would hold senators responsible for this infringement. THE FEDERALIST NO. 59, at 401 (Jacob E. Cooke ed., 1961); DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 29, at 306, 317–18.

259. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 29, at 306, 317–18.

eighty-six year campaign, the Seventeenth Amendment was approved by Congress in 1912 and ratified by the states in 1913 to make the Constitution more democratic.<sup>260</sup> The consequences of the ratification of the Seventeenth Amendment on what the framers regarded as the crucial constitutional means for ensuring that Congress would not act in ways that exceeded its delegated powers went completely unexplored by those who adopted and ratified it.<sup>261</sup> These consequences may be of little moment to non-originalist justices, but they should be troubling to an originalist like Thomas. They raise the question of why it is appropriate to secure the original understanding of the Commerce Clause by means (judicial review) inconsistent with how the framers understood that clause would be secured. This is more of a problem for an original understanding Justice like Thomas than it is for an original public meaning Justice like Scalia.

### III.

As he began his 2008 Wriston Lecture to the Manhattan Institute, Thomas teased his audience by threatening to talk about the negative Commerce Clause (his typical term, but that night he called it the dormant Commerce Clause).<sup>262</sup> “For years, I have wanted to give a talk on the dormant Commerce Clause,” but, he continued, “they have hidden the audience for that talk someplace with Osama bin Laden.”<sup>263</sup> Indicating that the topic was “an intriguing thing” and “pretty fascinating when you think about it,”<sup>264</sup> he assured those assembled that he would “reserve that talk for another time” and spoke instead on “Judging in a Government by Consent.”<sup>265</sup>

The negative (or dormant) Commerce Clause is a legal doctrine that provides that the Commerce Clause of Article I, § 8 not only grants power to Congress to regulate commerce among the states but also confers power on the Court to protect the “‘right’ to engage in interstate trade free from restrictive state regulation.”<sup>266</sup> According to negative Commerce Clause jurisprudence, “the very purpose of the Commerce Clause was to create an area of free trade among the several States”<sup>267</sup> and that the Clause “by *its*

260. See C. H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* (1995).

261. ROSSUM, *supra* note 219, at 219–20.

262. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, Thomas indicated why he typically uses the term, negative Commerce Clause. 520 U.S. 564, 609 n.1 (1997). “Although the terms ‘dormant’ and ‘negative’ have often been used interchangeably to describe our jurisprudence in this area, I believe ‘negative’ is the more appropriate term.” *Id.*

263. Thomas, *supra* note 27.

264. *Id.*

265. *Id.*

266. *Dennis v. Higgins*, 498 U.S. 439, 448 (1991).

267. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402 (1984) (quoting *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977)).

*own force* created an area of trade free from interference by the States.”<sup>268</sup> Therefore, irrespective of whether Congress has itself acted on the basis of its delegated power to prohibit this interference, it holds that the Court is constitutionally authorized to protect this “area of free trade” and to vindicate this right to engage in interstate commerce free from state interference by weighing the burdens that state regulation of commerce imposes against the benefits it provides and invalidating all discriminatory burdens it concludes are unjustified. Based on original understanding grounds, Thomas has become a fierce critic of the negative Commerce Clause, but it was not always the case.

In the 1994 case of *Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*,<sup>269</sup> Thomas wrote the opinion for a seven-member majority holding that Oregon offered no legitimate reason to subject waste generated in other states to a discriminatory surcharge and that its imposition of that surcharge was therefore facially invalid under the negative Commerce Clause.<sup>270</sup> He cited *Chemical Waste Management v. Hunt*,<sup>271</sup> a negative Commerce Clause case he joined during his first year on the High Bench,<sup>272</sup> and declared, “We deem it. . . obvious here that Oregon’s \$2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the \$0.85 per ton charge imposed on solid in-state waste.”<sup>273</sup> The statutory determinant for which fee applied to any particular shipment of solid waste to an Oregon landfill was whether or not the waste was “generated out of state.”<sup>274</sup> In making that geographic distinction, the surcharge patently discriminates against interstate commerce.”<sup>275</sup>

Later that same year, Thomas held in *Associated Industries of Missouri v. Lohman*<sup>276</sup> for an eight-member majority that Missouri’s use tax violated the negative Commerce Clause in those local jurisdictions in the state where the use tax exceeded the local sales tax.<sup>277</sup> He observed that “[a]lthough the Commerce Clause is phrased merely as a grant of authority to Congress to ‘regulate Commerce . . . among the several States,’ it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade.”<sup>278</sup> That same year, he

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268. *Id.* at 403 (quoting *Boston Stock Exch.*, 429 U.S. at 328) (emphasis added).

269. 511 U.S. 93 (1994).

270. *Id.* at 107–08.

271. 504 U.S. 334 (1992).

272. *Oregon Waste Sys.*, 511 U.S. at 95.

273. *Id.* at 99.

274. *Id.* (quoting OR. REV. STAT. § 459.297(1) (1991)).

275. *Id.* at 100.

276. 511 U.S. 641 (1994).

277. *Id.* at 656–57.

278. *Id.* at 646.

complained in *Northwest Airlines v. County of Kent*<sup>279</sup> that the case should have been remanded so that the lower courts have been “given the opportunity to consider the merits of petitioners’ dormant Commerce Clause challenge.”<sup>280</sup> Northwest Airlines and other carriers had argued that because Michigan’s Kent County International Airport charged commercial airlines 100% of their allocated air operations and terminal/concession costs but general aviation only 20% of their allocated costs, the airport discriminated against interstate commerce in favor of primarily local traffic, in violation of the negative Commerce Clause.<sup>281</sup>

In 1995, Thomas took for granted the validity of the negative Commerce Clause in his unanimous opinion for the Court in *National Private Truck Council v. Oklahoma Tax Commission*.<sup>282</sup> In 1996, he readily joined Justice David Souter’s unanimous opinion in *Fulton Corporation v. Faulkner*<sup>283</sup> that North Carolina’s intangibles tax discriminated against interstate commerce in violation of the negative Commerce Clause.<sup>284</sup>

All of that changed in 1997 with his dissent in *Camps Newfound/Owatonna v. Town of Harrison*.<sup>285</sup> Justice John Paul Stevens held in a five-to-four decision that a Maine statute, which exempted charitable organizations from real estate and personal property taxes if they operated principally for the benefit of state residents but not if they operated principally for the benefit of nonresidents, violated the negative Commerce Clause.<sup>286</sup> In his words, the Commerce Clause “not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States [but] immediately effected a curtailment of state power” that the Court could enforce.<sup>287</sup>

Thomas experienced an epiphany; he began his dissent by pointing out that “[t]he tax at issue here is a tax on real estate, the quintessential asset that does not move in interstate commerce.”<sup>288</sup> By invalidating Maine’s tax assessment on the real property of charitable organizations primarily serving nonresidents, the Court majority had worked “a significant, unwarranted, and, in my view, improvident expansion in our ‘dormant,’ or ‘negative,’ Commerce Clause jurisprudence”<sup>289</sup>—one that compelled him to “revisit[. . .] the underlying justifications for our involvement in the

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279. 510 U.S. 355 (1994).

280. *Id.* at 382 (Thomas, J., dissenting).

281. *Id.*

282. 515 U.S. 582 (1995).

283. 516 U.S. 325 (1996).

284. *Id.* at 347.

285. 520 U.S. 564 (1997).

286. *Id.* at 595.

287. *Id.* at 571.

288. *Id.* at 609 (Thomas, J., dissenting).

289. *Id.*

negative aspects of the Commerce Clause.”<sup>290</sup> While this expansion found “some support in the morass of our negative Commerce Clause case law,”<sup>291</sup> for Thomas that only served “to highlight the need to abandon that failed jurisprudence,”<sup>292</sup> and—here his original understanding approach was on display—“to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role.”<sup>293</sup> Declaring that “the tax (and tax exemption) at issue in this case seems easily to survive Import-Export Clause scrutiny; I would therefore, in all likelihood, sustain Maine’s tax under that Clause as well, were we to apply it instead of the judicially created negative Commerce Clause.”<sup>294</sup>

Thomas asserted what Scalia had declared a decade before in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*<sup>295</sup> and *Bendix Autolite Corp. v. Midwesco Enterprises*,<sup>296</sup> namely, that “[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”<sup>297</sup> It has led the Court to “make policy-laden judgments that we are ill equipped and arguably unauthorized to make.”<sup>298</sup> Therefore, he urged the Court to “confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce,”<sup>299</sup> i.e., “Article I, § 10, cl. 2, of the Constitution provid[ing] that ‘[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports.’”<sup>300</sup>

Thomas acknowledged that as a result of the Court’s decision in the 1869 case of *Woodruff v. Parham*,<sup>301</sup> the Clause had come to be understood as prohibiting states from levying imposts and duties on goods imported from or exported to foreign nations.<sup>302</sup> But, Thomas insisted and proceeded to go to great lengths to document how *Woodruff* was “wrongly decided.”<sup>303</sup> Citing scores of founding-era sources, Thomas made the

290. *Id.* at 612.

291. *Id.* at 610.

292. *Id.*

293. *Id.*

294. *Id.*

295. 483 U.S. 232, 259–65 (1987) (Scalia, J., dissenting).

296. 486 U.S. 888, 895–98 (1988) (Scalia, J., concurring).

297. *Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting).

298. *Id.* at 618.

299. *Id.* at 620.

300. *Id.* at 621. He also added that if the Court would abandon the negative Commerce Clause and confine itself to interpreting the Import Export Clause, it would leave to Congress “the policy choices necessary for any further regulation of interstate commerce.” *Id.* at 620.

301. 75 U.S. 123 (1869).

302. *Id.* at 140.

303. *Camps Newfound*, 520 U.S. at 636 (Thomas, J., dissenting).

compelling case that “for the Constitution’s Framers and ratifiers—representatives of States which still viewed themselves as semi-independent sovereigns—the terms ‘imports’ and ‘exports’ encompassed not just trade with foreign nations, but trade with *other States* as well.”<sup>304</sup>

Thomas noted that because of the “wrongly decided” *Woodruff* opinion, “much of what the Import-Export Clause appears to have been designed to protect against has since been addressed under the negative Commerce Clause.”<sup>305</sup> The Court’s “rule that state taxes that discriminate against interstate commerce are virtually *per se* invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself.”<sup>306</sup> Thomas conceded that “[w]ere it simply a matter of invalidating state laws under one clause of the Constitution rather than another, I might be inclined to leave well enough alone.”<sup>307</sup> But, he insisted,

[W]ithout the proper textual roots, our negative Commerce Clause has gone far afield of its core—and we have yet to articulate either a coherent rationale for permitting the courts effectively to legislate in this field, or a workable test for assessing which state laws pass negative Commerce Clause muster.<sup>308</sup>

Always wanting to remove excrescence and restore the original understanding, Thomas asserted that “[p]recedent as unworkable as our negative Commerce Clause jurisprudence has become is simply not entitled to the weight of *stare decisis*.”<sup>309</sup>

If the Court were to shed itself of its nontextual negative Commerce Clause and simply apply the relevant Import Export Clause, Thomas was convinced that “this would seem to be a fairly straightforward case” and decided on behalf of the State of Maine.<sup>310</sup> The Maine property tax at issue was not an impost, “for, as 18th-century usage of the word indicates, [and the several examples Thomas supplies establish,] an impost was a tax levied on *goods* at the time of *importation*.”<sup>311</sup> And, it was not a duty: “The tax at issue here is nothing more than a tax on real property. Such taxes were classified as ‘direct’ taxes at the time of the framing, and were not within the class of ‘indirect’ taxes encompassed by the common understanding of the word ‘duties.’”<sup>312</sup>

304. *Id.* at 621. Justice Thomas makes his detailed argument from pp. 621–37.

305. *Id.* at 636.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 637.

311. *Id.*

312. *Id.* at 640.

Thomas's originalist approach to the negative Commerce Clause differs from Scalia's in two particulars. First, while both Scalia<sup>313</sup> and Thomas<sup>314</sup> stress that the negative Commerce Clause has no basis in the text of the Constitution, for Scalia the inquiry ends there but it does not for Thomas. Given his original public meaning approach, Scalia is content simply to reject the negative Commerce Clause, while Thomas, given his original understanding approach, proceeds in *Camps Newfound* to identify the Import Export Clause as the appropriate "textual mechanism with which to address the more egregious of state actions discriminating against interstate commerce."<sup>315</sup>

Second, while Scalia is willing on *stare decisis* grounds to enforce the negative Commerce Clause in cases where the doctrine is not expanded further, Thomas is not. In *Itel Containers International Corporation v. Huddleston*,<sup>316</sup> Scalia announced that "on *stare decisis* grounds," he would "enforce a self-executing, 'negative' Commerce Clause in two circumstances."<sup>317</sup> The first is "against a state law that facially discriminates against interstate commerce,"<sup>318</sup> and the second is "against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court."<sup>319</sup>

By contrast, in every case since *Camps Newfound*, Thomas has rejected the negative Commerce Clause and refused to join any opinion that enforces it. In *Hillside Dairy Inc. v. Lyons*,<sup>320</sup> for example, Thomas concurred in part but dissented from that part of an otherwise unanimous opinion that dealt with the negative Commerce Clause.

Although I agree that the Court of Appeals erred in its statutory analysis, I nevertheless would affirm its judgment on this claim because "[t]he negative Commerce Clause has no basis in the text

313. *Am. Trucking Ass'n v. Smith*, 496 U.S. 167, 202 (1990).

314. *Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting).

315. *Id.* at 636.

316. 507 U.S. 60 (1993).

317. *Id.* at 78–79 (Scalia, J., concurring in part and concurring in the judgment). He has repeated this announcement in *West Lynn Creamery v. Healy*, 512 U.S. 186, 210 (1994), *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 332 (1992), and *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997).

318. *Itel Containers Int'l*, 507 U.S. at 78–79 (Scalia, J., concurring in part and concurring in the judgment). See Scalia's concurring or dissenting opinions in which he debates with his colleagues whether a particular state regulation or tax is, in fact, "facially discriminatory," in *Am. Trucking Ass'n v. Scheiner*, 483 U.S. 266, 305 (1987) (Scalia, J., dissenting), *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 280 (1988), *Amerada Hess Corp. v. New Jersey Dept. of the Treasury*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring in the judgment), *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (concurring in part and concurring in the judgment), and *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 387 (1991) (concurring in the judgment).

319. *Itel Containers Int'l*, 507 U.S. at 78–79.

320. 539 U.S. 59 (2003).

of the Constitution, makes little sense, and has proved virtually unworkable in application,” and, consequently, cannot serve as a basis for striking down a state statute.<sup>321</sup>

And, in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,<sup>322</sup> Thomas went further. In this recent case, Chief Justice John Roberts, proceeding on judicial minimalist grounds, attempted to narrow somewhat the reach of the negative Commerce Clause, but for Thomas, no negative Commerce Clause at all was far preferable to a somewhat circumscribed one. “As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court’s negative Commerce Clause jurisprudence.”<sup>323</sup> He criticized the Court for its “erroneous assumption” that it had to “choose between economic protectionism and the free market,”<sup>324</sup> for the Constitution “vests that fundamentally legislative choice in Congress.”<sup>325</sup> He continued, “To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States’ power to regulate commerce.”<sup>326</sup> When Congress is silent, the States are free to balance protectionism and the free market as they wish.<sup>327</sup> However, rather than accept “this constitutional reality, the [Court clings to its] negative Commerce Clause jurisprudence [which] gives nine Justices of this Court the power to decide the appropriate balance.”<sup>328</sup>

As for Roberts’s minimalism, Thomas offered the following consideration: Rather than acknowledging that its “negative Commerce Clause jurisprudence, created from whole cloth, [is] illegitimate [and] repudiat[ing] that doctrinal error,”<sup>329</sup> Roberts “further propagates the error by narrowing the negative Commerce Clause for policy reasons—reasons that later majorities of this Court may find” to be entirely unpersuasive.<sup>330</sup>

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321. *Hillside Dairy Inc.*, 539 U.S. at 68 (Thomas, J., concurring in part and dissenting in part) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting)). Thomas also quoted the same language from *Camps Newfound* in *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in the judgment), and *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 439 (2005) (Thomas, J., concurring in the judgment).

322. 550 U.S. 330 (2007).

323. *Id.* at 349 (Thomas, J., concurring in the judgment).

324. *Id.* at 352.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 355.

330. *Id.*

He concluded in frustration: “[T]oday’s majority trifles with an unsound and illegitimate jurisprudence yet fails to abandon it.”<sup>331</sup>

#### IV.

In *United States v. Lara*,<sup>332</sup> Justice Breyer, writing for the majority of the Court, held that the Indian Commerce Clause<sup>333</sup> grants Congress “plenary and exclusive” powers to legislate with respect to Indian tribes.<sup>334</sup> Based on this, Congress had the power to relax the restrictions on the tribes’ inherent sovereignty to enforce their criminal laws against nonmember Indians<sup>335</sup> that had previously been imposed by the political branches through treaties negotiated by the president with the tribes or through congressional enactments. Concurring in the judgment, Thomas declared, “I cannot agree that the Indian Commerce Clause ‘provides Congress with plenary power to legislate in the field of Indian affairs.’”<sup>336</sup> He found Breyer’s assertion, based on decades of relevant precedent, “implausible,” “troubling”, and “very strained,” and, wishing to restore the original understanding of the Indian Commerce Clause, he indicated that he “would be willing to revisit the question.”<sup>337</sup>

Thomas was right when he attributed “the confusion reflected in our precedent” to “two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.”<sup>338</sup> He was

331. *Id.* Thomas stated that the negative Commerce Clause should be “discard[ed].” *Id.* at 349. Also, see Justice Thomas’s opinions in *Meadwestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 33 (2008) (Thomas, J., concurring), and *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 361 (2008) (Thomas, J., concurring in judgment).

332. 541 U.S. 193 (2004).

333. U.S. CONST., art. I, § 8, cl. 3 delegates to the Congress the power “to regulate Commerce . . . with the Indian Tribes.”

334. *Id.* at 200.

335. *Id.* at 210. *Lara* reached the Supreme Court as a double jeopardy case. *Id.* at 197. Breyer held for the majority that when Congress in 1991 authorized tribes to prosecute nonmember Indians, it was a relaxation of previous restrictions that it had placed on the exercise of the tribes’ inherent sovereign authority and not a delegation of federal prosecutorial power to them; therefore, a federal prosecution of Billy Jo Lara for assaulting a federal police officer did not violate the Double Jeopardy Clause of the Federal Constitution’s Fifth Amendment, even though he had previously been prosecuted for “violence to a policeman” under the law of an Indian tribe to which he was not a member. *Id.* at 210.

336. *Id.* at 224 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)).

337. *Id.*

338. *Id.* at 214–15.

accurate when he described federal Indian policy as “schizophrenic”<sup>339</sup> in that, with regard to the question of whether “the tribes either are or are not separate sovereigns, . . . our federal Indian law cases untenably hold both positions simultaneously.”<sup>340</sup> And he was correct when he concluded that “until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.”<sup>341</sup> However, he was wrong on the original understanding of the Indian Commerce Clause.<sup>342</sup>

The original understanding of the Indian Commerce Clause begins with Article IX of the Articles of Confederation, which conferred to “the United States in Congress assembled . . . the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the *Indians*, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.”<sup>343</sup>

This language completely muddled the issue; while it seemed to reserve the power of the States over Indians who were “members of any of the States,”<sup>344</sup> it did not define who those “members” were, and, while it protected the States’ “legislative rights within [their] own limits,”<sup>345</sup> it did not define the scope of those rights. As James Madison would observe in *Federalist No. 42*, this provision was “obscure and contradictory.”<sup>346</sup>

What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.<sup>347</sup>

This confusion was not removed until 1788 when the U.S. Constitution was ratified. The framers granted to Congress in Article I, §

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339. *Id.* at 219.

340. *Id.* at 225.

341. *Id.* at 226.

342. RALPH A. ROSSUM, *THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION INDIANS* 36–53 (2011).

343. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

344. *Id.*

345. *Id.*

346. *THE FEDERALIST NO. 42*, at 284–85 (James Madison) (Jacob E. Cooke ed., 1961).

347. *Id.* at 275.

8, cl. 3 the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>348</sup> The contrast between the Constitution and the Articles of Confederation could not have been clearer. Compared to the ambiguous language of Article IX of the Articles, Article I, § 8 conferred an explicit, broad, and exclusive grant of power to the federal government to deal with Indian tribes.<sup>349</sup> And, because its language authorized Congress to regulate trade among various types of sovereigns, it made clear that the tribes possessed sovereignty of a nature different than foreign sovereign nations or the states of the union.

With the ratification of the Constitution, the ability of the First Congress under its various Article I, § 8 powers to establish Indian policy was established and on immediate display. But first it is necessary to discuss the First Congress: David P. Currie has described the First Congress as “a sort of continuing constitutional convention.”<sup>350</sup> Not only had many of its members—e.g., James Madison, Oliver Ellsworth, Elbridge Gerry, Rufus King, Robert Morris, Pierce Butler, William Johnson, and William Paterson—helped to draft and ratify the Constitution, but the First Congress was responsible for taking the generalities of the Constitution—what Chief Justice John Marshall would later call its “great outlines”<sup>351</sup>—and translating them into concrete and functioning institutions.<sup>352</sup> As Currie points out, the First Congress determined its own procedures; established the great executive departments of War, State, Justice, and Treasury; set up the federal judiciary; enacted a system of taxation; provided for payment of Revolutionary War debts; created a national bank; provided for national defense; regulated relations with Indian tribes; advised the president on foreign affairs (the Senate); passed statutes regarding naturalization, patents, copyrights, and federal crimes; regulated relations with existing states and admitted new ones; provided for the administration of the territories; established a permanent seat of government; and adopted a bill of rights.<sup>353</sup> By the time the First Congress adjourned on March 3, 1791, “the country had a much clearer idea of what the Constitution meant than it had had when that body had first met in 1789.”<sup>354</sup> It is not surprising that, two months into the Second Congress, Fisher Ames, a Massachusetts Congressman, lamented in a November 24, 1791 letter to William Tudor that

Congress is not engaged in very interesting work. The first acts were the pillars of the federal edifice. Now we have only to keep

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348. U.S. CONST. art. I, § 8, cl. 3.

349. *Id.*

350. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 3 (1997).

351. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

352. ROSSUM, *supra* note 219, at 125.

353. CURRIE, *supra* note 350, at 4.

354. *Id.* at 5.

the sparks from catching the shavings; we must watch the broom, that it is not set behind the door with fire on it, [etc. etc.] Nobody cares much for us now, except the enemies of the excise law, who remonstrate and make a noise.<sup>355</sup>

The work of the First Congress illustrates how well the members of this “continuing constitutional convention” acted in conformity with the understanding of the delegates to the Philadelphia Convention.

During the first five weeks of the First Congress’s first session, it passed thirteen statutes, four of which dealt in whole or in part with Indian affairs.<sup>356</sup> On August 7, 1789, it passed legislation establishing the Department of War and authorized the president to assign to it responsibility “relative to Indians affairs.”<sup>357</sup> On that same day, it re-enacted the Northwest Ordinance of 1787,<sup>358</sup> which included in the second sentence of Section 14, Article 3 (immediately after these famous words, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged”),<sup>359</sup> the following:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>360</sup>

On August 20, it appropriated \$20,000 to defray “the expense of negotiating and treating with the Indian tribes.”<sup>361</sup> And on September 11, it set the salary for the “superintendent of Indian affairs in the northern department.”<sup>362</sup> In passing these four statutes, Congress used its delegated powers to declare war, govern the territories, and spend money.

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355. 2 WORKS OF FISHER AMES, 887 (Seth Ames ed., 1983).

356. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 36 (2005).

357. An Act to Establish an Executive Department, to be denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 50 (1789).

358. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50.

359. *Id.* at 52.

360. *Id.*

361. An Act Providing for the Expenses which may attend Negotiations or Treaties with the Indian Tribes, and the Appointment of Commissioners for Managing the Same, Act of ch. 10, § 1, 1 Stat. 54, 54 (1789).

362. An Act for Establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks, ch. 13, § 1, 1 Stat. 67, 68 (1789).

And, then, on July 22, 1790, Congress exercised for the first time its power to regulate commerce with the Indian tribes. It passed “An Act to regulate trade and intercourse with the Indian tribes.”<sup>363</sup> In Section 1, it declared

[t]hat no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under and hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose;<sup>364</sup>

in Section 2 it provided for the recall of that license for the “transgress[ion of] any of the regulations or restrictions provided”;<sup>365</sup> in Section 3 it authorized the forfeiture of “all the merchandise” of those trading without that license;<sup>366</sup> in Section 4, it forbade the “sale of lands made by Indians, or any nation or tribe of Indians within the United States” to any person or state “unless the same shall be made and duly executed at some public treaty, held under the authority of the United States”;<sup>367</sup> and in Section 5, it provided for the punishment of non-Indians committing crimes and trespasses against the Indians.<sup>368</sup> Section 5 clearly did not address an issue of commerce or trade, and it reads as follows:

[I]f any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment.<sup>369</sup>

The First Congress’s belief that the Indian Commerce Clause delegated to it the power to pass such legislation is significant, for it set in motion the first of many federal laws predicated on the assumption that the federal government has plenary power over Indian tribes.

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363. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

364. *Id.* at 137.

365. *Id.*

366. *Id.* at 137–38.

367. *Id.* at 138.

368. *Id.*

369. *Id.*

This first Indian Trade and Intercourse Act was subsequently expanded by additional Trade and Intercourse Acts in 1793,<sup>370</sup> 1796,<sup>371</sup> and 1799.<sup>372</sup> All of these acts were temporary and contained language indicating how long they would remain in force.<sup>373</sup> On March 30, 1802, the Seventh Congress enacted the first permanent Trade and Intercourse Act, which declared in Section 22 that it “shall be in force” thereafter.<sup>374</sup> It carried forward the policies already adopted while adding a new one of particular interest. Section 6 provided that

if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians, in amity with the United States, such offender, on being thereof convicted, shall suffer death.<sup>375</sup>

This is clearly another example of how broadly the early Congresses construed the Indian Commerce Clause. In contrast to Thomas’s narrow interpretation of the Indian Commerce Clause in *Lara*, these acts show how expansively that clause was understood by the founding generation.

The Indian Commerce Clause also figured prominently in another respect. In *Cherokee Nation v. Georgia*,<sup>376</sup> the Cherokee Nation of Indians, claiming the status of a foreign nation, brought suit in the United States Supreme Court under its original jurisdiction against the State of Georgia.<sup>377</sup> It did so under those provisions of Article III, § 2 of the Constitution giving the Supreme Court jurisdiction in cases and controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens, or subjects thereof, are parties and original jurisdiction in all cases in which a state shall be a party.<sup>378</sup> The Cherokee Nation sought an injunction to prevent the execution of various Georgia

370. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 5, 1 Stat. 329, 333 (1793).

371. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier, ch. 30, § 22, 1 Stat. 469, 474 (1796).

372. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 46, § 21, 1 Stat. 743, 749 (1799).

373. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 5, 1 Stat. 329, 333 (1793); An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier, ch. 30, § 22, 1 Stat. 469, 474 (1796); An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 46, § 21, 1 Stat. 743, 749 (1799).

374. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 13, § 22, 2 Stat. 139, 146 (1802).

375. *Id.* at 142.

376. 30 U.S. 1 (1831).

377. *Id.* at 2.

378. U.S. CONST. art. III, § 2.

laws that sought to assert control over Cherokee lands within the state that were protected by a 1790 U.S. treaty with the Cherokee.<sup>379</sup> The issue for the Court was whether the Cherokee Nation was a foreign nation in the sense in which that term was used in the Constitution (and, therefore, whether the Court had jurisdiction to hear the case).<sup>380</sup> Justice Marshall concluded that it was not.<sup>381</sup>

Justice Marshall noted that the relation of the Indians to the United States “is perhaps unlike that of any other two people in existence”<sup>382</sup> and “is marked by peculiar and cardinal distinctions which exist no where [sic] else.”<sup>383</sup> Foreign nations, he observed, do not owe a “common allegiance . . . to each other.”<sup>384</sup> But, he insisted that it was necessary to consider the tribes. Their territory is “part of the United States,” and “in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States.”<sup>385</sup> The tribes “acknowledge themselves in their treaties to be under the protection of the United States,”<sup>386</sup> and the “right to the lands they occupy”<sup>387</sup> can be “extinguished by a voluntary cession to our government.”<sup>388</sup> They could not, therefore, be “denominated foreign nations.”<sup>389</sup> Rather, he insisted, they were “more correctly . . . denominated domestic dependent nations.”<sup>390</sup> They occupied land to which the United States asserts “a title independent of their will.”<sup>391</sup> They are, he declared, in “a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>392</sup>

After all, he continued, the tribes look to the United States “for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”<sup>393</sup> And, foreign nations consider the tribes as “so completely under the sovereignty and dominion of the United States”<sup>394</sup> that any attempt by them to acquire tribal

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379. *Cherokee Nation*, 30 U.S. at 1.

380. *Id.* at 2–3.

381. *Id.*

382. *Id.* at 12.

383. *Id.* at 16.

384. *Id.*

385. *Id.* at 17.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

lands, or to form a political alliances with them would be regarded as an “invasion” of U.S. territory and a clear “act of hostility.”<sup>395</sup>

Marshall found that his conclusion that tribes are not foreign nations—and therefore not authorized to pursue “an action in the courts of the United States”—was strengthened by the text of Article I, § 8, cl. 3 of the Constitution.<sup>396</sup> The Commerce Clause “clearly contradistinguished” the Indian tribes from both foreign nations and the several states composing the union.<sup>397</sup> They were “designated by a distinct appellation.”<sup>398</sup> The Constitutional Convention, he concluded, “considered them as entirely distinct.”<sup>399</sup>

A major consequence based on the tribes’ status as “domestic dependent nations” and therefore on what the Supreme Court in *County of Oneida v. Oneida Indian Nation*<sup>400</sup> called “the unique trust relationship between the United States and the Indians,”<sup>401</sup> has been the development of a distinctive set of canons of construction for federal Indian law.<sup>402</sup> These canons require that treaties, treaty substitutes, statutes, and executive orders be liberally construed in favor of the Indians, that all ambiguities shall be resolved in their favor, and that tribal property rights and sovereignty be preserved unless Congress’s intent to the contrary is clear and unambiguous.<sup>403</sup> In addition, treaties and treaty substitutes are to be construed as the Indians would have understood them.<sup>404</sup>

These canons were first developed in the context of treaty interpretation. Beginning with the treaties that formed the foundation of *Cherokee Nation v. Georgia*,<sup>405</sup> the Supreme Court read treaties broadly in favor of the tribes, resolved ambiguous expressions in favor of the tribes, interpreted treaties as the Indians would have understood the treaty and the negotiations, and considered the history and circumstances behind the treaty in question.<sup>406</sup> The canons were developed because the tribes were regarded as wards of the federal government, their guardian; as the third branch of that federal government, the Court had to act in the tribes’ best interests. Additionally, the Court recognized the manner in which treaties were negotiated with tribes—they were initiated by the United States and

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395. *Id.* at 18.

396. *Id.* at 20.

397. *Id.* at 18.

398. *Id.*

399. *Id.*

400. 470 U.S. 226 (1985).

401. *Id.* at 247

402. See Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 434 (2007).

403. *Id.*

404. COHEN, *supra* note 356, at 119–21.

405. 30 U.S. 1 (1831).

406. ROSSUM, *supra* note 342, at 51.

drafted by the United States, not the tribes, and they were written and explained in English, a language very few Indians spoke and none could read, meaning that the tribes had to rely on the representations and promises of the federal representatives.<sup>407</sup> The canons of construction thus arose from the disadvantaged bargaining position that Indians often occupied during treaty negotiations. As a result, as the Supreme Court declared in *United States v. Winans*, “[W]e have said we will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection.’”<sup>408</sup>

Over time, the Supreme Court in a series of cases consistently extended these canons beyond treaties to treaty substitutes,<sup>409</sup> statutes,<sup>410</sup> and executive orders.<sup>411</sup> The Supreme Court has determined that federal legislation, orders, and regulations relating to Indians are to be given a liberal construction, and doubtful expressions are to be resolved in favor of the interests of the tribes whose members are wards of the nation and dependent wholly on its protection and good faith.<sup>412</sup> Courts, as well as all federal agencies, are to follow the general rule that federal statutes passed for the benefit of Indians are to be liberally construed.<sup>413</sup>

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407. COHEN, *supra* note 356, at 122–24.

408. 198 U.S. 371, 380 (1905).

409. *Winters v. United States*, 207 U.S. 564 (1908).

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.

*Id.* at 576–77.

410. *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976). “Finally, in construing this ‘admittedly ambiguous’ statute, we must be guided by that ‘eminently sound and vital canon’ that ‘statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’” *Id.* at 392 (internal citations omitted).

411. *Arizona v. California*, 373 U.S. 546 (1963).

The Court in *Winters* concluded that the Government, when it created [by executive order] that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.

*Id.* at 600.

412. *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

413. While the Supreme Court will typically employ these canons of construction, there are several qualifications that need to be noted. To begin with, as the Court made clear in *Hollowbreast*, it will not apply these canons if the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members. *Id.* at 655 n.7. Additionally, the Court has announced in a series of opinions that there are three categories of federal law where the canons do not presumptively apply; these include unexpressed exceptions from

Nonetheless, these canons are essentially rules of interpretation that the Justices are free to apply or ignore. They have been described by Philip P. Frickey in his famous article, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, as nothing more than “quasi-constitutional” rules that members of the Court can recognize or reject at their discretion.<sup>414</sup> Few Justices have been more inclined to reject these canons than Thomas.

*Cohen’s Handbook of Federal Indian Law* mentions “a recent Supreme Court case [that] confirms that these canons remain vital”:<sup>415</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>416</sup> In that case, the Tribe sued the State of Minnesota to enforce an 1837 treaty in which the Tribe had ceded lands to the United States but retained the right to hunt, fish, and gather in those areas.<sup>417</sup> Minnesota claimed, however, that those rights had been extinguished by an 1855 treaty, in which the Tribe agreed to “fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.”<sup>418</sup> Even though that broad language would seem to have ceded all of the Tribe’s usufructuary rights, Justice Sandra Day O’Connor relied on the canons and concluded that the Tribe’s rights were not abrogated.<sup>419</sup> She pointed out that the sentence did not mention the 1837 Treaty and did not mention hunting, fishing, and gathering rights.<sup>420</sup> “The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling . . .”<sup>421</sup>

O’Connor declared that “to determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including ‘the history of the treaty, the negotiations, and the practical construction adopted by the parties.’”<sup>422</sup> Such an examination of the historical record would, she insisted, provide

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federal taxation, *Chickasaw Nation v. United States*, 534 U.S. 84, 93–95 (2001); most federal criminal laws, *United States v. Dion*, 476 U.S. 734, 738–40 (1986), and the reach of the Federal Power Act, *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

414. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 424 (1993).

415. COHEN, *supra* note 356, at 121.

416. 526 U.S. 172 (1999).

417. *Id.* at 175.

418. *Id.* at 184.

419. *Id.* at 175–76, 196, 202.

420. *Id.* at 195.

421. *Id.*

422. *Id.* at 196.

insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.<sup>423</sup>

Once her historical examination was complete, O'Connor summarized her findings as follows: the historical record provided no support for the theory that the 1855 Treaty was designed to abrogate the usufructuary privileges guaranteed under the 1837 Treaty.<sup>424</sup> It merely supported "the theory that the Treaty . . . was designed to transfer Chippewa land to the United States."<sup>425</sup> And, "[a]t the very least," it "refute[d] the State's assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges."<sup>426</sup> Again explicitly invoking the canons, she declared that "[g]iven this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights. We have held that Indian treaties are to be interpreted liberally in favor of the Indians and that any ambiguities are to be resolved in their favor."<sup>427</sup>

Thomas dissented in this case because he was more concerned with how the Court had "exact[ed] serious federalism costs" by imposing limitations "upon Minnesota's sovereign authority over its natural resources"<sup>428</sup> than he was with abiding by the canons. He pointed out that unlike other contemporaneous Indian treaties, the Chippewa Treaty of 1837 did not reserve "a *right* to fish, hunt, or gather on ceded lands" but only "a *privilege*" to do so.<sup>429</sup> He was unwilling to understand these terms as the Chippewa of the 1830s would have, and he declared, "[I]n the appropriate case we must explain whether reserved treaty *privileges* limit States' ability to regulate Indians' off-reservation usufructuary activities in the same way as a treaty reserving *rights*."<sup>430</sup>

423. *Id.*

424. *Id.* at 200.

425. *Id.*

426. *Id.*

427. *Id.* (internal citations omitted).

428. *Id.* at 221 (Thomas, J., dissenting).

429. *Id.* at 223.

The 1837 Treaty at issue here did not reserve "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" like those involved in *Tulee* and *Puyallup Tribe*. Rather, it provided: "The *privilege* of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States."

*Id.* at 226 (quoting 1837 Treaty with the Chippewa, art. 5, 7 Stat. 536, 537 (1837)).

430. *Id.*

Thomas was in dissent when he rejected the canons in *Mille Lacs Band* but wrote for a seven-member majority when he rejected the canons in *South Dakota v. Bourland*.<sup>431</sup> The Fort Laramie Treaty of 1868 established the Great Sioux Reservation and provided that it be held for the “absolute and undisturbed use and occupation” of Sioux Tribes.<sup>432</sup> In 1944, however, Congress passed the Flood Control Act authorizing the establishment of a comprehensive flood control plan along the eastern border of the Cheyenne River Sioux Reservation (part of what was once the Great Sioux Reservation) and mandating that all water project lands be open for the general public’s use and recreational enjoyment.<sup>433</sup> Ten years later in the Cheyenne River Act, the Cheyenne River Sioux Tribe conveyed all interests in 104,420 acres of former trust lands to the United States for the Oahe Dam and Reservoir Project.<sup>434</sup> Among the rights the Act reserved to the Tribe or tribal members was a “right of free access [to the taken lands,] including the right to hunt and fish, subject. . . to regulations governing the corresponding use by other [United States] citizens.”<sup>435</sup>

Until 1988, the Tribe enforced its game and fish regulations against all violators, while petitioner South Dakota limited its enforcement to non-Indians.<sup>436</sup> In that year, however, the Tribe announced that it would no longer recognize state hunting licenses, prompting South Dakota to file an action in federal district court against tribal officials, seeking to enjoin the Tribe from excluding non-Indians from hunting on nontrust lands within the reservation.<sup>437</sup> After the district court permanently enjoined the Tribe from exerting such authority, the Court of Appeals for the Eighth Circuit reversed and remanded, ruling that the Tribe had authority to regulate non-Indian hunting and fishing on the 104,420 acres, because the Cheyenne River Act did not clearly reveal Congress’s intent to divest the Tribe of its treaty right to do so.<sup>438</sup> The Supreme Court granted certiorari and reversed.<sup>439</sup>

Thomas began with a truism, “Congress has the power to abrogate Indians’ treaty rights,” but then admitted that “we usually insist that Congress clearly express its intent to do so.”<sup>440</sup> And, while acknowledging that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” he declared that “[o]ur

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431. 508 U.S. 679, 681 (1993).

432. *Id.* at 682.

433. *Id.* at 683.

434. *Id.*

435. *Id.* at 684 (quoting Cheyenne River Act, Pub. L. No. 83-776, § 10, 68 Stat. 1191, 1193 (1954)).

436. *Id.* at 685.

437. *Id.*

438. *Id.* at 685–86.

439. *Id.* at 687.

440. *Id.*

reading of the relevant statutes persuades us that Congress has abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project."<sup>441</sup>

Thomas not only ignored the canons; he reversed them. Instead of finding express congressional intent to abrogate Tribal rights, he focused on the lack of express congressional intent to protect them: "If Congress had intended by this provision to grant the Tribe the additional right to regulate hunting and fishing, it would have done so by a similarly explicit statutory command."<sup>442</sup> And, while the Eighth Circuit had concluded that because the terms of the Cheyenne River Act preserved to the Tribe mineral, grazing, and timber rights, Congress had preserved the right of the Tribe to regulate use of the land by non-Indians as well and had not abrogated the Tribe's pre-existing regulatory authority,<sup>443</sup> Thomas declared, "We disagree. Congress' explicit reservation of certain rights in the taken area does not operate as an implicit reservation of all former rights."<sup>444</sup>

Thomas would again reject the canons of federal Indian law in his majority opinion for the Court in *Carcieri v. Salazar*.<sup>445</sup> At issue in this recent case was the language in the Indian Reorganization Act ("IRA"), enacted in 1934, authorizing the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians," and defining "Indians" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."<sup>446</sup> In a six-to-three decision, Thomas defined the ambiguous word "now" narrowly and held it applied only to tribes that were under federal

441. *Id.*

442. *Id.* at 690.

443. *Id.*

444. *Id.* at 693. Thomas was not at all persuaded by Justice Harry Blackmun's argument in dissent:

The majority supposes that the Tribe's right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe's right to regulate was therefore lost when its right to exclusive use was abrogated. This reasoning fails on two counts. First, treaties "must . . . be construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." I find it implausible that the Tribe here would have thought every right subsumed in the Fort Laramie Treaty's sweeping language to be defeated the moment they lost the right to exclusive use of their land. Second, the majority's myopic focus on the Treaty ignores the fact that this Treaty merely confirmed the Tribe's pre-existing sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its *inherent* authority to regulate such hunting and fishing continued.

*Id.* at 700–01 (Blackmun, J., dissenting) (internal citations omitted).

445. 555 U.S. 379 (2009).

446. *Id.* at 379.

jurisdiction in 1934; he refused to define “now” liberally and in the best interests of the Narragansett Indian Tribe by holding that it also meant tribes currently under federal jurisdiction.<sup>447</sup> Thomas noted that that “elsewhere in the IRA, Congress expressly drew into the statute contemporaneous *and* future events by using the phrase ‘now or hereafter.’”<sup>448</sup>

This prompted Justice Stevens to complain in his dissent that the majority had engaged in a “cramped reading of the statute Congress intended to be ‘sweeping’ in scope,” and had “ignor[ed] the ‘principle deeply rooted in [our] Indian jurisprudence,’ that ‘statutes are to be construed liberally in favor of the Indians.’”<sup>449</sup>

## V.

This Article has addressed one narrow aspect of Thomas’s originalist and restorative jurisprudence by focusing on his understanding of the Commerce Clause. Thomas’s definition of commerce in *Lopez* was certainly consistent with its original public meaning, as was his discussion of how the substantial effects test had the capacity to render superfluous all the other enumerated powers in Article I, § 8. And by turning to *The Federalist* and other materials from the Founding, he was able to demonstrate that the Court’s employment of the substantial effects test was a Twentieth Century innovation and a clear departure from the original understanding of the Constitution. His depiction in *Morrison* of the substantial effects test as “rootless and malleable” and as encouraging the Federal Government to believe that the Commerce Clause has no limits was compellingly made. Similarly compelling was his call to replace the Court’s existing Commerce Clause jurisprudence with a standard more consistent with the original understanding that could better withstand Congress’s continuing appropriation of the police powers of the states. His conclusion in *Raich* that those who framed and ratified the Constitution would have found it “unthinkable” that Congress could prohibit the local cultivation, possession, and consumption of marijuana, his recognition that the founding generation was concerned about the danger of concentrating either too much or too little power in the Federal Government, and his call for the Court to discard its substantial effects test were consistent with his originalist understanding that the enumerated powers of Article I, § 8 are “few and defined” while the reserved powers of the States are “numerous and indefinite.”

As noted, however, Thomas’s originalist understanding of what powers were to be exercised by the Federal Government, and why, does not extend to an appreciation that the means to ensure that the Commerce

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447. *Id.* at 379–80, 382–84.

448. *Id.* at 389.

449. *Id.* at 413–14.

Clause would not be a “blank check” by which Congress could regulate everything and that the reserved police powers of the states would be protected was mode of electing the U.S. Senate. Enforcing the original understanding of the Commerce Clause by relying on non-originalist means is something to date about which Thomas does not appear to have given much thought.

By contrast, Thomas has given considerable thought to the negative Commerce Clause. After initially accepting this legal doctrine in several early opinions, he has, beginning with his dissent in *Camps Newfound*, become its fiercest critic. Finding it to have no basis in the text of the Constitution—and hence “illegitimate,” and finding it to have thrust justices into the role of policy makers, he argues that it should be discarded and refuses to join any opinion that enforces it. And, given his commitment to original understanding—to connecting means to ends, Thomas explains how the framers drafted the Import Export Clause as the appropriate check on particularly egregious state burdens on interstate commerce that the Court can legitimately apply. It is an impressive illustration of his original understanding jurisprudence.

Thomas’s understanding of the Indian Commerce Clause remains largely inchoate. In *Lara*, he was troubled by the argument that the clause’s language gave Congress plenary and exclusive power over the tribes.<sup>450</sup> Moreover, he was perplexed that the Court’s case law toward Indian tribes was “schizophrenic,” viewing them as sovereign, yet completely subject to congressional whim; he therefore invited his colleagues to think through these issues “honestly and rigorously.”<sup>451</sup> Thomas appears unwilling to concede that the Indian Commerce Clause gives Congress plenary power over the tribes and the ability to regulate all aspects of life in Indian country, because that would seem to suggest that the Interstate Commerce Clause gives Congress an equally “blank check” to exercise an unlimited police power over the American citizenry. However, that apprehension keeps him from appreciating that the original understanding of the Indian Commerce Clause was fully revealed in the actions of the early Congresses when they enacted a whole series of Trade and Intercourse Acts. That same apprehension appears to keep him from accepting what other justices have accepted and made clear in their opinions, namely, that it is “well established that the Interstate Commerce and Indian Commerce Clauses have very different applications.”<sup>452</sup> As Justice Stevens has pointed out in *Cotton Petroleum Corp. v. New Mexico*, “while the Interstate Commerce Clause is concerned with maintaining free trade among the States . . . , the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of

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450. *United States v. Lara*, 541 U.S. 193, 193 (2004).

451. *Id.*

452. *Cotton Petroleum Corp. v. New Mexico*, 460 U.S. 136, 192 (1989).

Indian affairs.”<sup>453</sup> Further, the Court’s case law under the Interstate Commerce Clause is premised, in Stevens’s words, “on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.”<sup>454</sup>

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Thomas may not always have gotten everything right as he has pursued his original understanding of the Constitution, but—and this is of critical importance—he has always and faithfully pursued an originalist understanding. On a Court filled with justices more concerned with the “consequences” of a particular decision than with its fidelity to the Constitution,<sup>455</sup> or more obsessed with casting the swing vote than a correct vote,<sup>456</sup> or more committed to making minimalist adjustments on the margin than to repudiating judicial error,<sup>457</sup> Thomas insists that the Constitution must be understood as it was understood by those who drafted and ratified it. He remains committed to advancing that noble sentiment so eloquently expressed by James Madison: If the sense in which the Constitution was accepted and ratified is not the guide in expounding it, “there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.”<sup>458</sup>

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453. *Id.*

454. *Id.* See also Chief Justice Rehnquist’s words in this opinion for the Court in *Seminole Tribe of Fla. v. Florida*, which Thomas joined:

If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

517 U.S. 44, 62 (1996). Thomas’s willingness to sign unto that sentence may be explained by the fact that *Seminole Tribe* invalidated Congress’s power under the Indian Commerce Clause to abrogate state sovereign immunity in the Indian Gaming Regulatory Act. *Id.* at 76.

455. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* (2010); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* (2006).

456. HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 199 (2009).

457. See, for example, Justice Alito’s plurality opinion in *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007).

458. 9 THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910).