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THE SUPREME COURT: NEW HOPE FOR THE RESTORATION OF FEDERALISM

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The recent philosophical shift of the Supreme Court toward a more restrained or “conservative” approach to constitutional adjudication brings with it hope for the revitalization of federalism as a constitutional and political principle.

This is as it should be. The American people are not a monolith; what works for the folks in Montana is not necessarily what works in New Jersey. In addition, liberty is best preserved in the context of self government — that is, government as close to home as is practicable. The architects of federalism recognized these ideals and made brilliant accommodation for them by providing that the state governments, both logically and historically antecedent, would remain sovereign within their retained spheres of jurisdiction.

But at some point, this part of our constitutional legacy began to be neglected. Thus, by 1941 the United States Supreme Court had reduced the Tenth Amendment, which had been crafted to underscore the principles of federalism, to but an antiquated truism. It thereby trivialized what the Framers had regarded as fundamental *legal* principles.

Federalism became the bloodied casualty of an era of judicial activism in which Supreme Court justices propounded their own pet notions of sound social policy on such diverse issues as capital punishment, abortion, affirmative action, and pornography. The result was to place states and their respective lawmakers on Procrustean beds of public policy. The political inclinations and legislative judgments of the American people were displaced, fulfilling the prescient words of Thomas Jefferson: “The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting, with

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noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them."¹

As the Supreme Court demonstrates greater deference to the legitimate spheres of state authority, we will witness a renewed sense of self determination and a reinvigoration of the political and legislative processes on the state level. Indeed, evidence of this has already been seen in the unprecedented flurry of activity in the states following the historic *Webster v. Reproductive Health Services*² decision in 1989.

The American people are perfectly competent to govern themselves when unshackled from the arbitrary pronouncements of unelected and unaccountable judges. They now stand ready to do so. Regardless of one's personal views on capital punishment, abortion and other controversial social issues, it can hardly be gainsaid that this is a healthy development.

1. Letter from Thomas Jefferson to Judge Spencer Roane (Mar. 9, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 326 (1905).

2. 492 U.S. 490 (1989).