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Introduction to Symposium, The New Federalism After United States v. Lopez

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INTRODUCTION

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Arguments about the proper role of the federal government have been a staple of American political life. That topic was at the core of the debate over ratification of the Constitution, and it remains a central issue in contemporary politics.[1] Although the arguments typically have a strong pragmatic aspect (e.g., whether public policy is made more effectively at the state or local level than at the national level), much of the debate explicitly invokes constitutional values. This is neither surprising nor inappropriate, because the Constitution is more than "what the judges say it is."[2] It also provides the framework for our government and our politics. In light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[3] we should expect our fundamental charter to figure in public discourse. The Constitution, after all, is an important part of our culture as well as of our law.[4]

At the same time, the proper role of the national government has become the subject of litigation. That, too, should come as no surprise to anyone familiar with Tocqueville's famous observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[5]

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1. Indeed, the key phrase in the title of this symposium, "The New Federalism," is a hardy perennial. Proposals to limit the scope of the national government have gone under that title for at least a quarter-century. *See* TIMOTHY J. CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN (1988); DAVID R. MAYHEW, DIVIDED WE GOVERN 90, 98 (1991).

2. ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 139 (1908), *quoted in* LOUIS FISHER, CONSTITUTIONAL DIALOGUES 245 (1988).

3. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

4. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 381-400 (1986); SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-33 (1988).

5. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Phillips Bradley ed., Henry Reeve trans., 1945). I was going to say that every schoolchild has heard some variation of this statement, but Professor Frickey persuaded me not to. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and*

A substantial proportion of the legal debate concerning federal power has involved the Commerce Clause. Much of that debate can be traced to *Gibbons v. Ogden*,[6] the foundational case interpreting that provision. Chief Justice Marshall characterized congressional power in this field as "plenary"[7] and, in the same paragraph, suggested that the judiciary had no role in constraining federal authority.[8] But a few pages later, Marshall conceded that the states might have some power to regulate articles of commerce before they became part of interstate or foreign commerce.[9] The Court struggled with the tensions implicit in *Gibbons* for more than a century before the New Deal transformation ushered in a doctrinal structure suggesting that there were no judicially enforceable limits on the commerce power.

Against this background, the decision last spring in *United States v. Lopez*,[10] which invalidated the Gun-Free School Zones Act of 1990,[11] came as a distinct surprise. The last case in which the Court had struck down a federal statute under the Commerce Clause was *Carter v. Carter Coal Co.*,[12] decided in 1936 at the height of the constitutional conflict over the New Deal. Chief Justice Rehnquist's majority opinion sought to harmonize the ruling with six decades of expansive Commerce Clause jurisprudence. Both he and concurring Justice Kennedy noted several deficiencies in the Gun-Free School Zones Act, including the absence of a jurisdictional element linking the possession of a firearm within 1,000 feet of a school to interstate commerce, the omission of congressional findings justifying federal regulation, and the primacy of state authority over both education and street crime. Nevertheless, *Lopez* was widely viewed as a major development portending significant change in constitutional doctrine.[13] Justice Thomas's

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United States v. Lopez, 46 CASE W. RES. L. REV. 695, 696 n.10 (1996).

6. 22 U.S. (9 Wheat.) 1 (1824).

7. *Id.* at 197.

8. "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *Id.*

9. *Id.* at 203 (discussing state inspection laws, which "act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose").

10. 115 S. Ct. 1624 (1995).

11. Crime Control Act of 1990, § 1702, Pub. L. No. 101-647, 104 Stat. 4789, 4844-45 (codified as amended at 18 U.S.C. § 922(q) (1994)).

12. 298 U.S. 238, 297-310 (1936).

13. For a summary of the commentary to this effect, by both supporters and critics of

concurrence, calling for a return to the original understanding of a much more limited commerce power, also implied the potential significance of the case.

The notion that we might be seeing a resurgence of judicially imposed limits on "big government" drew some support from the Court's recent Tenth Amendment decisions. Although that provision was dismissed as a mere "truism" more than fifty years before *Lopez* in *United States v. Darby*,[14] it seemed to take on new life in *National League of Cities v. Usery*.[15] Despite the demise of *National League of Cities* a few years later in *Garcia v. San Antonio Metropolitan Transit Authority*,[16] the impassioned dissents in that case, and the recent decisions in *Gregory v. Ashcroft*[17] and *New York v. United States*,[18] suggest the continuing allure of Court-policed federalism doctrines.

To explore the meaning and implications of *Lopez*, the *Case Western Reserve Law Review* assembled more than a dozen distinguished legal scholars at a symposium held November 10 and 11, 1995. This issue contains the major papers and many of the commentaries delivered there, as well as a student Comment addressing one of the many federal statutes whose validity has been called into question by the *Lopez* decision.

Robert F. Nagel, author of the first principal paper, expresses skepticism that *Lopez* signals a major transformation in constitutional doctrine. Professor Nagel says that the Court failed to apply its announced substantial-effects test and that this failure has expansive rather than restrictive implications for federal power. Rather than criticize the Court's apparent waffling, he suggests five possible judicial responses to the interpretive problem presented by a Constitution that purports to delegate only enumerated powers to the federal government but includes some powers that are potentially infinite if taken at all seriously. The actual results of recent

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the idea, see Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 643 (1996). *See also* Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, Mar. 28, 1996, at A1 (suggesting that Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (limiting congressional authority to abrogate states' Eleventh Amendment immunity) reflects continuation of the Court's rethinking of federalism that began in *Lopez*).

14. 312 U.S. 100, 124 (1941).
15. 426 U.S. 833 (1976).
16. 469 U.S. 528 (1985).
17. 501 U.S. 452 (1991).
18. 505 U.S. 144 (1992).

decisions in a variety of areas imply that even the Court's conservatives, despite some rhetorical bows in the direction of decentralization, are not as committed to a radical reduction in federal authority as many observers believe.

Commentaries by Jesse H. Choper, Melvyn R. Durchslag, and Deborah Jones Merritt explore *Lopez* from a variety of perspectives. Dean Choper finds vindication for his skepticism that the judiciary can effectively police federalism disputes, while Professors Durchslag and Merritt offer differing analyses of the possibilities for more substantial doctrinal change.

The symposium turned next to the question of congressional findings. Philip P. Frickey points out that the absence of such findings was much more significant to the Fifth Circuit than to the Supreme Court. Chief Justice Rehnquist's opinion contains only three sentences on the subject, and those say only that findings are helpful but not mandatory. That is consistent with the Court's general approach to the matter, in cases arising both before and since the New Deal.

Cautioning against the prospect that legislative findings might degenerate to the level of boilerplate, Professor Frickey nevertheless sees three uses for findings suggested by *Lopez*. First, Congress might use findings to buttress the case for federal action by articulating the applicable judicial standard and then demonstrating how that standard has been satisfied through citation of facts gathered in legislative hearings or other investigations. Second, congressional findings might be used to satisfy "plain statement" rules articulated by the Supreme Court in cases involving the Tenth and Eleventh Amendments. These findings would demonstrate a clear legislative intent to regulate core state functions; their absence would justify a narrow interpretation of a statute, not invalidation. Third, findings might be a useful way to curb legislative excesses relating to certain noneconomic regulations that have traditionally been subject to rationality review.

The discussion, exemplified by the comments of Barry Friedman and Harold J. Krent, explored the value of findings for protecting the interests of state and local governments, and compared the more stringent requirement of findings by administrative agencies whose decisions are subject to judicial review.

Kathleen F. Brickey, author of the third principal paper, focused on a special feature of the Gun-Free School Zones Act: it created a federal crime for conduct that was simultaneously an offense under state law. Congress has federalized numerous state

crimes. This trend seems to have accelerated in recent years, to the dismay of the Judicial Conference of the United States and many observers of the federal courts. Nevertheless, the Supreme Court has never invalidated such a statute and did not purport to do so in *Lopez*, although Professor Brickey notes that judicial uneasiness was not hard to discern in some of the opinions. She explores the relationship between federal and state law in the case but, like many other observers, cannot explain why the state authorities dropped charges against Alphonso Lopez or why the federal prosecutor was so eager to pursue the case. Finally, she sees the Court's refusal, in the wake of *Lopez*, to overturn rulings in several cases raising Commerce Clause challenges to other federal criminal statutes as evidence that the decision is intended primarily as a cautionary message to Congress.

Much of the discussion following Professor Brickey's presentation focused on precisely how the Gun-Free School Zones Act might be amended to cure the defects the Court identified. Participants also explored in considerable detail other federal criminal statutes that are likely to be challenged on *Lopez* grounds, which led to consideration of possible constitutional limits on federalizing crimes that have traditionally been handled at the state level and on the rationales for creating new federal offenses.

The symposium concluded with an extended meditation by Mark Tushnet on the potential ramifications of *Lopez*. Professor Tushnet takes his inspiration from Bruce Ackerman's distinction between ordinary politics and episodes of extraordinary popular attention to fundamental issues of political theory and organization. He asks whether *Lopez* might represent part of the beginning of what Ackerman calls a constitutional moment.[19] Conceding that the decision (even when considered in conjunction with contemporaneous political events) does not rise to that level, Tushnet nonetheless finds that *Lopez* could have much more sweeping consequences than others predict. In particular, read in tandem with *Adarand Constructors, Inc. v. Peña*,[20] the decision goes to the heart of the governmental transformation effected by the Reconstruction Amendments. He suggests that the Court is actually less concerned with the scope of the federal government than with its structure, especially the pathologies produced by interest-group

19. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
20. 115 S. Ct. 2097 (1995).

politics. The Court, from this perspective, finds such pathologies in affirmative action programs that impose burdens on working-class whites and in symbolic legislation like the Gun-Free School Zones Act that simultaneously duplicates state laws and has little real impact on school violence. Noting that *Lopez* was argued on the day that Republicans won control of both houses of Congress for the first time in forty years,[21] Tushnet also sees the possibility of an evaporation rather than a devolution of governmental authority. In this, but perhaps not in much else, he agrees with Professor Nagel that the current popular mood may be less one of support for state and local governments than of hostility toward public authority at all levels.

This paper provoked wide-ranging discussion, as the comments by Larry Kramer and Suzanna Sherry indicate. The conversation focused on theoretical issues raised by Ackerman's thesis and Tushnet's analysis of the meaning of the New Deal transformation, as well as on the larger significance of the *Lopez* decision. Concerns were also raised about the implications for the future of democratic politics in a society in which transnational private interests have the ability to avoid meaningful regulation or control by any level of government.

This *Law Review* issue concludes with a Comment by Rebecca Wistner, one of the *Review*'s contributing editors. Her Comment addresses the constitutionality of the Child Support Recovery Act of 1992[22] in light of *Lopez*. This statute imposes criminal sanctions for willfully failing to pay child support when the child lives in another state. Several district courts have considered this issue and reached contradictory conclusions. Ms. Wistner analyzes the arguments as well as the policies underlying the statute, concluding that the Act passes constitutional muster but represents questionable use of federal resources.

Finally, a word about one aspect of the symposium that is not published here. To bring a more practical perspective to the deliberations, we asked U.S. Representative Thomas Sawyer to speak at dinner on the program's first evening. Representative Sawyer has no legal training but does participate in an informal House working group on the Constitution. Of greater significance for present pur-

21. In making this observation, Professor Tushnet does not suggest that "th' supreme court follows th' illiction returns." *The Supreme Court's Decisions, in* THE WORLD OF MR. DOOLEY 86, 89 (Louis Filler ed., 1962).

22. 18 U.S.C. § 228 (1994).

poses, his unusual background gives him a unique perspective on the issues raised by *Lopez* and the Gun-Free School Zones Act. Now in his tenth year as a member of Congress, he previously served as mayor of Akron, Ohio, and in the Ohio General Assembly. Before seeking elective office, he was a secondary school English teacher in Cleveland. One of his most memorable teaching experiences was taking a loaded gun from one of his students during class.

In short, the *Case Western Reserve Law Review* sought to put together a comprehensive program addressing the major aspects of *Lopez*. The two days of formal and informal discussion were remarkably stimulating for all the participants. If the published papers bring some of that excitement to a larger audience, the *Review* will count the project as an even larger success.