

1996

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Jesse H. Choper

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Recommended Citation

Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement within the Supreme Court"?*, 46 Case W. Res. L. Rev. 663 (1996)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol46/iss3/6>

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DID LAST TERM REVEAL “A REVOLUTIONARY STATES’ RIGHTS MOVEMENT WITHIN THE SUPREME COURT”?

*Jesse H. Choper**

The major role of a commentator, as everyone knows, is to disagree with the principal paper. But I have no real quarrel with the Supreme Court decision-making theories that Professor Nagel has addressed.¹ Indeed, if anything, I would be even more hesitant than he is in finding a “revolutionary states’ rights movement within the Supreme Court,”² especially in respect to the decisions of last Term. And that, after all, is what prompts this symposium, entitled “The New Federalism After *United States v. Lopez*.”

I.

I do believe, however, in an enhanced “Future of Federalism,” which is the subtopic for this discussion, although perhaps it might more accurately be described as “an increased concern for states’ rights.” But, in my judgment, the support for that movement is not primarily coming from the Supreme Court.

This is not to say that the judicial branch will be inactive in this area. Indeed, at least in the absence of any changes in personnel, I believe that the principle of *New York v. United States*,³ which establishes that the Tenth Amendment prevents Congress from “commandeering” a state’s legislative process, will be implemented further by the Court. In particular, we should watch the

* Earl Warren Professor of Public Law, University of California Law School at Berkeley (Boalt Hall).

1. Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996).

2. *Id.* at 643 (quoting Timothy M. Phelps, *Judicial Revolution; Recent Cases Slant Towards States*, NEWSDAY, May 29, 1995, at A13).

3. 505 U.S. 144, 144 (1992).

constitutional challenge to the Brady Handgun Violence Prevention Act,⁴ which requires state law enforcement officers to conduct background checks on all purchasers of handguns.⁵ Indeed, it may even be that a majority of this Court will overrule *Garcia v. San Antonio Metropolitan Transit Authority*⁶ and return to the philosophy (if not the result) of *National League of Cities v. Usery*.⁷ But the cases that I have just mentioned involve attempts by Congress to regulate, as the Court put it in *National League of Cities*, the "States as States."⁸ This area is plainly distinguishable from *United States v. Lopez*, which involved no attempt by Congress to regulate the states at all, but rather to govern the activities of private persons within the states.⁹ It was in this setting that the Supreme Court, for the first time in more than half a century, invalidated an act of Congress of this kind as falling outside of the commerce power.¹⁰

Still, I think that the stronger efforts on behalf of states' rights are going to come from the political branches. The return of welfare to the states represents a rather perverse congressional concern for states' rights—another example of Congress (and the President) making a lot of noise without putting anything up. Much more important for the furtherance of state interests are the restrictions on unfunded mandates, even though they may be limited in their first iterations as Professor Nagel suggests.¹¹

II.

I would like to underline my agreement with Professor Nagel that *Lopez* is a very narrow decision.¹² That position is contrary to much conventional wisdom, most notably disclosed by the view of criminal defense lawyers who are raising constitutional challenges

4. See *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) (upholding constitutionality of the Brady Act).

5. 18 U.S.C. § 922(s) (1994).

6. 469 U.S. 528, 556 (1985) (holding that the political process, rather than judicial enforcement, is the "principal and basic limit on the federal commerce power").

7. 426 U.S. 833, 852 (1976) (finding legislation enacted under the commerce power as an unconstitutional invasion of state sovereignty), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

8. *Id.* at 837.

9. 115 S. Ct. 1624, 1626 (1995).

10. *Id.* at 1634.

11. See Nagel, *supra* note 1, at 645.

12. *Id.* at 661.

to what seems to be every federal criminal statute in the United States Code.¹³ My limited appraisal of *Lopez*'s impact is also contrary to the result in several important lower court decisions. The most significant of these is from the Ninth Circuit, *United States v. Pappadopoulos*.¹⁴ *Pappadopoulos* involved the federal arson statute, which requires the government to prove a connection between the arson and interstate commerce in each prosecution.¹⁵ In the case before the court, the house that was set on fire consumed natural gas delivered from out-of-state sources.¹⁶ The Ninth Circuit relied on the Supreme Court's opinion in *Lopez* for its conclusion that the federal statute could not be constitutionally applied to these facts on the basis that the interstate effect of this particular house's receipt of natural gas from interstate commerce was not "substantial," and therefore the matter was beyond Congress's power under the Commerce Clause.¹⁷

I disagree with the *Pappadopoulos* analysis, and believe that the Supreme Court would also differ with the Ninth Circuit's reasoning and result.¹⁸ Nonetheless, using a similar rationale, several federal courts have ruled that prosecutions under the Child Support Recovery Act of 1992, the federal "deadbeat dads" law, are also beyond congressional power.¹⁹

13. See Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712 (1995) ("In the first three months after *Lopez* was decided, the lower courts issued more than three dozen opinions exploring the bounds of *Lopez*."); *id.* at 712-28 (describing the range of cases that are raising constitutional challenges to federal criminal statutes); see also Stephanie Stone, *Lopez Defense Meets Little Success in Stopping Federal Crime Prosecutions*, WEST'S LEGAL NEWS, Oct. 3, 1995, at 1 ("Courts have weighed in on the constitutionality of 12 federal offenses already, and an Aug. 30 report by the Bureau of National Affairs details 24 more that could be potential targets for attack. One lawyer was quoted by *The Washington Times* as advocating raising the *Lopez* defense against charges under the statutes until appeals courts take a stand on each one.").

14. 64 F.3d 522 (9th Cir. 1995) (as amended on denial of rehearing and rehearing en banc).

15. *Id.* at 524 (citing 18 U.S.C. § 844(i) (1994)).

16. *Id.* at 525.

17. *Id.* at 527.

18. The defendants in *Pappadopoulos* were also convicted of mail fraud and received a concurrent sentence. *Id.* at 534. After unsuccessfully petitioning for a rehearing en banc in the Ninth Circuit, the government decided against seeking review in the Supreme Court. *But see* Ramey v. United States, 24 F.3d 602, 610 (4th Cir. 1994) (upholding conviction under the federal arson statute on facts clearly no stronger than in *Pappadopoulos*), *cert. denied*, 115 S. Ct. 1838 (1995).

19. See, e.g., United States v. Mussari, 894 F. Supp. 1360, 1368, *recons. denied*, 1995 U.S. Dist. LEXIS 20011 (D. Ariz. 1995); United States v. Bailey, 902 F. Supp. 727, 730 (W.D. Tex. 1995). *But see* United States v. Murphy, 893 F. Supp. 614, 616-17 (W.D. Va. 1995) (holding that the Child Support Recovery Act is constitutional because it is limited

A careful reading of the Court's opinion in *Lopez* indicates that Congress has two possible means of achieving essentially (if not exactly) what it sought to accomplish by the statute that the Court invalidated. First, it appears that Congress could reenact the identical statute, as long as it produced findings showing that possession of guns near schools had a substantial effect on interstate commerce.²⁰

Second, the *Lopez* opinion made even clearer that Congress could enact another statute prohibiting guns near schools, as long as it included a jurisdictional element as part of the offense.²¹ This would require that the prosecution prove some nexus to interstate commerce in each case.²²

III.

Another decision that Professor Nagel pointed to—and that commentators and journalists have also raised—as a “pro-states’ rights” decision of the Supreme Court last term is *Missouri v. Jenkins*,²³ which held that a federal court may not mandate, as part of a desegregation remedy, that a school district become a magnet to attract white students from outside the district.²⁴ The Court relied on the principle that an interdistrict remedy can only

to matters having a substantial effect on interstate commerce); *United States v. Hampshire*, 892 F. Supp. 1327, 1330 (D. Kan. 1995) (upholding the constitutionality of the Child Support Recovery Act by finding its jurisdiction to be limited to actions having an effect on interstate commerce).

20. In fact, Congress has already done so by an amendment in 1994, two years after the *Lopez* prosecution began. See Gun-Free School Zones Act, ch. 44, sec. 320904, § 922(q)(1)-(3), 108 Stat. 1776, 2125-26 (1994).

21. *Lopez*, 115 S. Ct. at 1631 (“[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.”).

22. See *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (holding that congressional intent to require even a minimal nexus between interstate commerce and firearm possession is sufficient to satisfy the Commerce Clause).

This element of the offense would be very easy to satisfy because, as I understand it, virtually every firearm used in this country is produced in one of two states: Connecticut or Massachusetts. Therefore, every gun outside Connecticut and Massachusetts has had a direct connection with interstate commerce. Indeed, the appeals court had earlier noted “that a BATF agent was prepared to testify that *Lopez*’s gun had been manufactured outside of the State of Texas.” *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993).

23. 115 S. Ct. 2038 (1995). See Nagel, *supra* note 1, at 645 (pointing to *Jenkins* as evidence that “State’s rights seem at least momentarily ascendant”).

24. *Jenkins*, 115 S. Ct. at 2051.

be imposed for an interdistrict constitutional violation,²⁵ and found that there was no such violation in Kansas City.²⁶ This decision, however, was not at all surprising, nor, for that matter, especially "conservative" for the area of desegregation remedies. Three years earlier, the Court acted at least as "conservatively" in *Freeman v. Pitts*²⁷—and at least as favorably for states' rights—in ruling that a federal district court could withdraw supervision over certain aspects of a school desegregation process when it had achieved unitary status (such as teachers) even if there were still other aspects in the school system (such as students) that had not been fully remedied.²⁸

IV.

The third major decision, and probably the one that received the greatest media attention, offered as support for the resurgence last Term of the Court's interest in federalism, is *United States Term Limits, Inc. v. Thornton*.²⁹ There, the Court held that Article I's age, citizenship, and residency requirements for federal legislators are exclusive, and therefore a state's addition of another qualification, term limits, is unconstitutional.³⁰ First, it should be noted that although the ruling imposes a limit on state power, it is not a core federalism decision. If basic questions of federalism involve the allocation of power between the national government and the states, the *U.S. Term Limits* ruling fell outside this realm because the Court clearly limited *all* power in respect to qualifications, the authority of Congress as well as that of the states.³¹ *U.S. Term Limits*, in contrast to rulings like *Lopez*, is much more like the Court's decisions restricting all government power in favor of individual rights, at least in the analytical structure that categorizes decisions as concerning either (a) federalism, (b) separation of powers, or (c) individual rights.³²

Nonetheless, it is certainly true that Justice Thomas's dissent,

25. *Id.* at 2048 (citing *Milliken v. Bradley*, 418 U.S. 717, 745 (1974)).

26. *Id.* at 2050.

27. 503 U.S. 467 (1992).

28. *Id.* at 485-500.

29. 115 S. Ct. 1842 (1995).

30. *Id.* at 1852.

31. *See id.*

32. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 1-2 (1980) (proposing such an analytical structure).

as both Professor Nagel and the media have pointed out, has potentially far-reaching implications for the state authority secured by the Tenth Amendment. It is also true that his opinion was joined by the Chief Justice and Justices Scalia and O'Connor. However, I think that lineup was more a function of the dynamics of Supreme Court decision-making and opinion-writing than a reflection of a uniform statement of views, most clearly for Justice O'Connor, and perhaps for the others as well.

V.

More telling, in my view, was the fact that Justice O'Connor did not join Justice Thomas's very forceful (indeed, revolutionary) concurrence in the *Lopez* case. The majority struggled (unsuccessfully, as Professor Nagel has pointed out³³) to draw some analytic line between what Congress may and may not regulate pursuant to its commerce power. Justice Thomas did not agonize. He forthrightly called for a return to the "original understanding" of the Commerce Clause, and a reconsideration of current doctrine to impose "real limits on federal power."³⁴ Historically, he reasoned, "commerce consisted of selling, buying, and bartering, as well as transporting for these purposes," and "was used in contradistinction to productive activities such as manufacturing and agriculture,"³⁵ and certainly did not comprehend all activities that substantially affect interstate commerce.³⁶

Whether one agrees or disagrees with Justice Thomas's position, his effort to put real limits on congressional power must be conceded. More importantly, however, his approach plainly does not represent the views of a majority of the Supreme Court. Justices O'Connor and Kennedy filed a very narrow concurrence in *Lopez*³⁷ and indeed, as already indicated, Chief Justice Rehnquist (joined by Justice Scalia, who made no additional comment) produced a very restrictive opinion for the Court.³⁸ None went along with Justice Thomas.

As is most often true, only time will tell whose view will

33. Nagel, *supra* note 1, at 652-53.

34. 115 S. Ct. at 1642 (Thomas, J., concurring in the judgment).

35. *Id.* at 1643.

36. *Id.* at 1644.

37. *See id.* at 1634-42 (Kennedy, J., joined by O'Connor, J., concurring in the judgment).

38. *See id.* at 1626-34; *see also supra* text accompanying notes 20-22.

ultimately prevail. I believe that some of the lower court decisions mentioned earlier³⁹ will soon reach the Supreme Court and we will have an opportunity to hear more from the Justices. Until then, I think that it is fairly telling that in lower court decisions upholding federal power since *Lopez*, the Supreme Court has either affirmed on the merits⁴⁰ or denied certiorari.⁴¹

VI.

I want to make a final point, one of personal privilege. I fully agree with Professor Nagel's analysis of the unresolvable dilemma that he describes.⁴² On the one hand, as we all know, the Constitution grants the national government only limited powers. On the other hand, some of the powers given, particularly the Commerce Clause, at least as interpreted, are broad enough to allow Congress to regulate virtually all aspects of human affairs.⁴³ I also fully agree with Professor Nagel that the history of the Court's attempts to put limits on the Commerce Clause, and that includes its renewed effort in *Lopez*, is "littered with one failed and discarded doctrine after another."⁴⁴ Therefore, it should come as no surprise to anyone familiar at all with my work that this confirms my view that the Supreme Court should not treat these questions as justiciable.⁴⁵

My argument has been that issues of federal power versus states' rights are highly pragmatic in nature. That is, the fundamental issue turns mainly upon the relative competence of different levels of government to deal with national societal problems—the

39. See *supra* note 19 and accompanying text.

40. See, e.g., *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995) (rejecting Commerce Clause challenge to RICO conviction); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 839-40 (1995) (reading the Federal Arbitration Act as evidencing Congress's intent to fully exercise its Commerce Clause power so as to prevent a state from applying its own anti-arbitration law).

41. See Merritt, *supra* note 13, at 735-38 (discussing such cases where the Court has denied certiorari).

42. See Nagel, *supra* note 1, at 647.

43. See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995) ("[W]e have a collection of doctrinal rules that, if we take them seriously, allow Congress to do anything it wants under the commerce power.").

44. See Nagel, *supra* note 1, at 654.

45. See CHOPER, *supra* note 32, at 171-259 (arguing that "there is little justification for the Court's stamping its imprimatur on so many exercises of national power to protect against so few constitutional violations of the federalism precept").

ultimate question being whether this is a problem that requires a national solution. In respect to that type of inquiry, the Supreme Court is inherently no more capable than Congress and the President in making a correct judgment. Indeed, history has confirmed that the Court is less capable. Therefore, it ought to leave these questions to the political process. This is particularly true because, in contrast to the forces and values that are at stake in respect to individual rights, states' rights are well represented in the national political process.⁴⁶ Thus, Supreme Court review on behalf of states' rights, in contrast to its interventions on behalf of individual rights, which are not usually well represented in the political process, is neither desirable nor needed.

46. *But see* Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 798 (1995) ("The political power that Wechsler and Choper say the states have over national politics often will not be used to promote constitutional federalism. Indeed, just the opposite may well be the case.").