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TERM LIMITS, COMMERCE, AND THE
REHNQUIST COURT *

Bernard Schwartz†

I. INTRODUCTION

Just after the 1994 Term ended, a book on the Rehnquist Court appeared entitled The Center Holds.¹ A commentator stated, “the title is just one letter off. ‘It should be, The Center Folds.’”²

During the 1994 Term, did the Court center hold or did it fold? The center did both — depending upon the particular case decided. My analysis will focus upon two of the most important decisions during the Term: U.S. Term Limits, Inc. v. Thornton,³ in which the center definitely held, and United States v. Lopez,⁴ where the key votes of the center Justices resulted in a crucial decision limiting federal power.

II. TERM LIMITS AND FEDERALISM

In the Term Limits case, a bare majority ruled that the Arkansas limit on the terms of members of Congress was unconstitutional.⁵ Most striking to a Court student was the fact that all the opinions in the case focused upon core issues concerning the federal system, some of which had been debated at the time of the framing and some which were entirely new. The opinions were, in large part, excursions into the history of the Constitution and the intent of the Framers, as well

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  5. Term Limits, 115 S. Ct. at 1847.

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as the experience over the two centuries during which the Constitution has been in existence. In fact, the authority most frequently cited in the Term Limits opinions was The Federalist, which was, of course, written just before the Constitution was adopted, and the second most frequently cited was Joseph Story's Commentaries on the Constitution of the United States, published in 1833. Term Limits was a case in which the Court really went to the basic sources.

Term Limits could have been decided relatively easily under the Qualifications Clauses of Article I, which provide specifically that to be a United States Senator or Representative, the individual must be of a certain age, a citizen of the United States, and an inhabitant of the state from which that person is chosen. It would have been simple for the Court to rule, as it did in Powell v. McCormack with regard to congressional imposition of additional qualifications, that the listing of the three specific qualifications indicated a clear intent on the part of the Framers that those were to be the only qualifications. Instead, both the majority and the dissent discussed in great detail their own approaches to federalism, and more particularly the operation of the Tenth Amendment.

The majority opinion of Justice Stevens laid down a new Tenth Amendment rule: the powers reserved to the states can only include those powers which the states possessed at the time the Constitution was ratified. Under this rule, the states may not exercise a power under the Tenth Amendment which they had not exercised before ratification of the Constitution.

Applying this principle to the Term Limits case, the Court ruled that the states could not exercise any power related to operation of the government under the Constitution unless the power was specifically delegated to them. According to the Stevens opinion, the reserved powers do not include state power to add qualifications for congressional membership in addition to those stated in the Constitution. The power to add congressional qualifications is not within the

8. The Federalist was cited some 44 times in the Lopez opinions, and Story's Commentaries some 20 times.
11. Id. at 550.
13. Id. at 1854-55.
14. Id. at 1854.
states’ pre-Tenth-Amendment “original powers;”\textsuperscript{15} it is a new right arising from the Constitution itself, and is therefore not reserved.

Under \textit{Term Limits}, the Constitution is the exclusive source of qualifications for members of Congress, and it “divested” states of any power to add qualifications. Nor is the prescription of congressional term limits a permissible exercise of state power under the Elections Clause, which allows states to regulate the “Times, Places and Manner of holding Elections.”\textsuperscript{16} That clause was intended to grant states authority to protect the integrity and regularity of the election process by regulating election procedures, not to provide them with license to impose additional qualifications.

The dissent of Justice Thomas took an entirely different approach. It urged that Tenth-Amendment reserved powers are not restricted to those the states possessed before the Constitution.\textsuperscript{17} Instead, the states retain all authority not specifically denied to them. Hence, they need not point to any affirmative grant of power in order to prescribe qualifications for their representatives in Congress. It is enough that power is not denied in the Constitution.\textsuperscript{18}

The Thomas approach to the reserved power issue is simple — if not simplistic: In determining whether a power is one which the states do in fact possess, only two questions have to be asked: (1) is it a power which the Constitution delegates exclusively to the federal government; (2) is it a power which the Constitution denies to the states? If the answer is “no” to both questions, the states possess the power.\textsuperscript{19}

The \textit{New York Times} likened the Thomas approach to an attempt to reinstall the Articles of Confederation.\textsuperscript{20} One can only, with the famous Cardozo comment, “find hyperbole in [this] sanguinary simile.”\textsuperscript{21} It can in fact be argued that, in terms of strict federalism theory, Justice Thomas is closer to the historical intent in the matter. On the other hand, in terms of the need to meet today’s “felt necessities,”\textsuperscript{22} the majority decision may take a more realistic account of both the way in which the national government has developed and the tremendous powers which it has assumed. Even more important, the \textit{Term Limits} decision, in Justice Stevens’ words “vindicates the . . .

\textsuperscript{15} Id. at 1855.
\textsuperscript{16} U.S. Const. art. I, § 4, cl. 1.
\textsuperscript{17} Term Limits, 115 S. Ct. at 1876 (Thomas, J., dissenting).
\textsuperscript{18} Id. (Thomas, J., dissenting).
\textsuperscript{19} Id. (Thomas, J., dissenting).
\textsuperscript{21} See Jones v. SEC, 298 U.S. 1, 33 (1936) (Cardozo, J., dissenting).
\textsuperscript{22} OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (32d ed. 1938).
'fundamental principle of our representative democracy'... namely that 'the people should choose whom they please to govern them,' as well as the modern 'egalitarian ideal — that election to the National Legislature should be open to all people of merit.'

It is, of course, a fact that, when the Constitution was adopted, the United States was very far from a practicing democracy and that the Framers knew this and intended to keep it that way. During the ensuing two centuries, however, the great theme in our history has been the spread of both the democratic principle and the notion of equality. Both franchise and representation have been expanded from the restrictive conception that prevailed at the beginning to the point where virtually anyone who meets minimal qualifications of age, citizenship, and residence is permitted to vote and seek office.

Justice Thomas appears to have the better of the historical argument. During the first part of our history, the states did impose additional qualifications upon both voters and those who were seeking to run for public office. If we follow the Stevens reasoning, these qualifications were all unconstitutional. But Term Limits was deciding how the Constitution should be read in 1995, not how it was read in 1789 — a matter to which we shall return at a later point.

III. THE LOPEZ CASE: A COMMERCE CLAUSE TURNING POINT?

In its impact upon federal power, the 1994 Term's great case was United States v. Lopez. Its holding indicates that those who thought that the federal commerce power was unbounded may have to reconsider that conclusion. Since the Court's 1937 "constitutional revolution," when there were "sea changes in the Court's conceptions of... [the] Commerce Clause," it has become a constitutional cliché that the Commerce Clause has virtually no outer limits. This idea was strikingly demonstrated in another 1995 commerce case. During the

24. Id.
25. The most obvious, of course, was the sexual qualification that used to govern most elections.
26. The same is true of current qualifications in some states such as those listed by Justice Thomas. See Term Limits, 115 S. Ct. at 1909 (Thomas, J., dissenting) (listing qualifications such as mental incompetency, current imprisonment, and past vote fraud convictions).
29. Lopez, 115 S. Ct. at 1653 (Souter, J., dissenting).
argument there, Justice O'Connor asked the assistant solicitor general, "Is there any business enterprise in America that wouldn't be covered' by the Government's broad theory of the commerce power..."31 None, he answered, "'[i]n our economy in this day and age, I can't think of anything that is likely to happen in the real world' that would not be related to interstate commerce."32

In *Lopez*, on the contrary, the Court declared specifically, "congressional power under the Commerce Clause...is subject to outer limits."33 The *Lopez* decision was the first in over half a century to rule that a federal statute went beyond those limits. At issue was a law that made it a federal offense to possess a gun in or near a school.34 A student carrying a concealed handgun in his school was found guilty of violating this statute.35 The conviction was reversed on the ground that the law was beyond the reach of the commerce power.36

Chief Justice Rehnquist's opinion stated that there were three broad categories of activity that Congress may regulate under the commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce.37 Justice Rehnquist (as he then was) had stated the requirement of substantial effect in a 1981 case,38 but he then spoke only for himself. In *Lopez*, it was an opinion of the Court, not one by Rehnquist alone, that stated the effect-on-commerce test in terms that require a substantial effect on commerce.

If the *Lopez* statute was to be upheld, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. However, according to *Lopez*, a statute does not come within this category unless the activity regulated is a commercial

34. *Id.* at 1626.
35. *Id.*
36. *Id.*
37. *Id.* at 1629-30.
activity.\textsuperscript{39} The \textit{Lopez} law "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."\textsuperscript{40} \textit{Lopez} thus limits Congressional power under the third category to "regulations of activities that arise out of or are connected with a \textit{commercial} transaction."\textsuperscript{41} More than that, the activity must be one, "which viewed in the aggregate, \textit{substantially} affects interstate commerce."\textsuperscript{42}

It should be noted that Justice Breyer’s dissent also accepted the view that it is not enough that interstate commerce is affected in the given case; Breyer also said that there has to be more than just \textit{some} effect upon commerce.\textsuperscript{43} To Justice Breyer, the Chief Justice went too far: the activity does not have to \textit{substantially} affect interstate commerce; it only has to \textit{significantly} affect interstate commerce.\textsuperscript{44}e We can leave it to language purists to tell us the difference between \textit{substantially} and \textit{significantly}. But even the \textit{Lopez} dissenters recognized that the earlier cases had gone too far. It is not enough to have only a very remote effect — what Chief Justice Stone once called an effect through "a 'house that Jack built' chain of causation"\textsuperscript{45} or what Justice Roberts termed "the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses."\textsuperscript{46} All the Justices recognized in \textit{Lopez} that there has to be a real quantitative aspect (substantial or significant) to the effect that the given activity has on interstate commerce.

How did Chief Justice Rehnquist apply this approach in \textit{Lopez}? First, he decided, carrying a gun to school is not a commercial activity; hence, there was no commerce involved in this case.\textsuperscript{47} The cases during the past half century had indicated that, paradoxical though it may seem, the commerce power is not limited to regulating economic activity; thus, there could be Congressional regulation of activities that do not involve commerce.\textsuperscript{48} Now \textit{Lopez} has closed the door to that view.

\begin{itemize}
\item \textsuperscript{39} \textit{Lopez}, 115 S. Ct. at 1633.
\item \textsuperscript{40} \textit{Id.} at 1630-31.
\item \textsuperscript{41} \textit{Id.} at 1631 (emphasis added).
\item \textsuperscript{42} \textit{Id.} (emphasis added).
\item \textsuperscript{43} \textit{Id.} at 1657 (Breyer, J., dissenting).
\item \textsuperscript{44} \textit{Id.} (Breyer, J., dissenting).
\item \textsuperscript{45} Borden Co. v. Borella, 325 U.S. 679, 685 (1945) (Stone, C.J., dissenting).
\item \textsuperscript{46} Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 94 (1942) (Roberts, J., dissenting).
\item \textsuperscript{47} \textit{Lopez}, 115 S. Ct. at 1630-31.
\item \textsuperscript{48} \textit{See United States v. South-Eastern Underwriters Ass'n}, 322 U.S. 533, 549 (1944) (holding that "transactions [may] be commerce though non-commercial").
\end{itemize}
Even more important, the Lopez majority concluded that carrying a gun to school has no *substantial* impact on interstate commerce at all.\(^{49}\) Justice Breyer tried to show that there was what he called a *significant* effect, because guns in school have an adverse impact on the educational process and that in turn has an adverse effect on the nation's economy.\(^{50}\) The majority rejected this approach, saying that under the Breyer “reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”\(^{51}\) Under the dissenters’ theory,

it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the dissent’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.\(^{52}\)

Of course, nobody wants to allow pupils to carry guns to schools. But is this not the type of situation that should be dealt with by the states? In fact, most states have a law making it a crime to have a gun in school.\(^{53}\) In Lopez itself defendant was first charged under Texas law.\(^{54}\) Why should the United States Attorney have stepped in? Wasn’t this a local crime which should have been prosecuted locally?

The same questions can be asked about two 1995 circuit court cases in which defendants were convicted for burning down residential dwellings.\(^{55}\) Here, too, it may be asked whether arson is not a local crime that should be prosecuted locally. However, the defendants were convicted under an act of Congress that makes it a federal crime to destroy by fire “any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.”\(^{56}\) The Government argued that the houses destroyed were “used in” or “used in an activity affecting” commerce because they received electricity or natural gas, some of which came from out-of-state sources.\(^{57}\)

\(^{49}\) *Lopez,* 115 S. Ct. at 1634.

\(^{50}\) *Id.* at 1659-60 (Breyer, J., dissenting).

\(^{51}\) *Id.* at 1632.

\(^{52}\) *Id.*

\(^{53}\) See *id.* at 1641 (Kennedy, J., concurring).

\(^{54}\) *Id.* at 1626.

\(^{55}\) United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995); United States v. Ramey, 24 F.3d 602 (4th Cir. 1994).


\(^{57}\) *Pappadopoulos,* 64 F.3d at 525; *Ramey,* 24 F.3d at 607.
In a case decided the year before Lopez, the Fourth Circuit followed what it termed the "nearly boundless" pre-Lopez law and affirmed the conviction, stating "that connection of a house to an interstate power grid constitutes a sufficient use in an activity that affects commerce." Three months later, the Ninth Circuit reached a different result. That court stressed the Lopez requirement of "substantial" effect on commerce. "[A] house," it stated, "has a particularly local rather than interstate character. . . . The arson of such a structure has only a remote and indirect effect on interstate commerce." Hence, Lopez required reversal of the arson conviction:

Lopez demonstrates that the receipt of natural gas at the . . . residence from out-of-state sources is insufficient as a matter of law to confer federal jurisdiction . . . . The residence was not used at all for commercial activity. It was purely private. If the Commerce Clause were extended to reach the activity that the government seeks to punish here, we would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate."

What was at issue here was "a simple state arson crime. It should have been tried in state court."

The Ninth Circuit decision shows that Lopez may mark a new turning point in Commerce Clause jurisprudence. Whether it does will depend on future applications of the limitations stated in the Lopez opinion — in particular, what commercial activities will be found not to substantially affect interstate commerce. At a minimum, Lopez indicates that, despite the post-1937 jurisprudence, the commerce power, though broad, does not include the authority to regulate each and every aspect of local activities.

IV. A Touch of Gilbert and Sullivan

Term Limits aside, the center did not hold in the most important 1994 Term cases. Indeed, according to the New York Times survey of the term, "The center all but disappeared from the Court this term."
The headline for this article was “Farewell to the Old Order in the Court.”\footnote{Id.}

It is, however, too soon to conclude that the Chief Justice has finally triumphed in his continuing effort to remake constitutional jurisprudence in his own image. True, he is closer to that goal than at any time since his original appointment. On the Burger Court, Justice Rehnquist stood virtually alone on the extreme right. It was then that he received a Lone Ranger doll as a gift from his law clerks, who called him the “lone dissenter” during that period.\footnote{Id.} During his fourteen years as an Associate Justice, Rehnquist dissented alone fifty-four times — a Court record.\footnote{Id.}

After he became Chief Justice, Rehnquist received reinforcement from Justices Scalia and Thomas; the three become a majority when they are joined by Justices O'Connor and Kennedy. It was their votes that enabled the Chief Justice’s view to prevail in most of the Term’s important cases. But the majority is a fragile one and a shift by either or both of the “swing” Justices leaves Rehnquist and his more faithful allies in the minority — notably in the \textit{Term Limits} case.

The Rehnquist Court has become an extremely fragmented Court. It issued opinions in only eighty-two cases — the lowest number in almost forty years. Fewer than half of those cases were decided unanimously, and only one of the 9-to-0 decisions\footnote{See \textit{Hurley v. Irish-American Gay, Lesbian \\& Bisexual Group of Boston}, 115 S. Ct. 2338 (1995).} was in an important case. On the other side, sixteen cases — twenty per cent of the total — were decided by a bare majority. Twelve of those saw the Chief Justice and his allies on the winning side. The margin in most of them was provided by the O'Connor-Kennedy votes.\footnote{Greenhouse, \textit{supra} note 64, § 4.}

It should also be stressed that what used to be the center in the Burger Court is now the left. This is even more apparent if we compare the present Court with the Warren Court. At least after the retirement of Justice Frankfurter, that Court had seven members who were more to the left than any present Justice and there was no Justice as conservative as the Court’s conservative core today. The center swing Justices today — O'Connor and Kennedy — would definitely have been on the extreme right on the Warren Court, and, to a lesser

\footnote{BERNARD SCHWARTZ, \textit{THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION}\ 29 (1990).}
extent, that would be true as well of Justices Stevens, Souter, Ginsburg, and Breyer. From this point of view, the Rehnquist Court has seen a definite shift to the right.

One of the most interesting things about the 1994 Term has been the coming out of Justice Thomas. He has now become one of the Court’s most forceful voices, writing lengthy opinions on some of the most important issues of the day. They have been very interesting, very provocative, and should provide grist for the academic mills for years to come. Thomas, says one commentator, “seems eager to take the Court on a journey back to the nation’s founding and beyond.”

Unfortunately, most of his detailed excursions into constitutional history and intent are irrelevant. For example, in the *Lopez* case, he wrote a concurring opinion which goes in great detail into the original intent behind the Commerce Clause. It shows conclusively that those who drafted the Commerce Clause never intended it to have anything like the broad meaning it has had during the past half century. That may be pertinent, but scarcely as determinative as Justice Thomas makes it, in a case interpreting the Constitution in 1995. When the Framers wrote the Commerce Clause, we were only a small parochial, largely agricultural society. They could not even have dimly foreseen the type of post-industrial society we have come to be, with the new means of production, transportation, and the fantastic communications revolution that have been developed. Perhaps Justice Thomas is right on intent at the time the Constitution was drafted. But that is largely beside the point. The Court is not interpreting the Constitution in 1789; it is interpreting it to meet the needs of today’s society. If Justice Thomas and those who join with him on the “original intent” interpretation of the Constitution were to prevail, we would have a very different instrument and one which could not be adapted to the “ever-changing conditions of national... life.”

William H. Rehnquist is, of course, taken as the archetype of the conservative jurist. If anything, however, he is not a true conservative, whether you agree or disagree with his judicial approach, but a radical activist: “judicial activism, a phrase that conservatives once hurled as an epithet, easily fits Chief Justice Rehnquist’s... opinion[s].” To Supreme Court aficionados, Rehnquist showed his true radical colors

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70. Mauro, *supra* note 2, at S23.
when, early in 1995, he gave the high bench a new sartorial touch: four thick golden stripes on the upper part of each sleeve of the Rehnquist robe. This was the first change in Supreme Court attire since the Justices adopted the untrimmed, ordinary black robe which they have worn since about 1800.

"He designed the robe himself," the Court's public information officer stated, "after having seen a performance of Gilbert and Sullivan's 'Iolanthe' last June in which the lord chancellor wore a similar robe." It was added that the stripes "very likely will be permanent." They have been worn by the Chief Justice ever since.

Chief Justice Rehnquist was quoted in the press as defending the new attire by saying that a British Lord Chancellor's robe is decorated that way. The true Gilbert and Sullivan touch, however, is that the British Lord Chancellor does not wear anything like the Rehnquist robe. Rehnquist himself may be a Gilbert and Sullivan aficionado, who once appeared in a production of Trial by Jury. Yet even those masters of comic opera would have hesitated to portray a real Chief Justice who decided to wear a robe which he saw in a Gilbert and Sullivan operetta.

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74. The remainder of this article is derived from Bernard Schwartz, Decision: How The Supreme Court Decides Cases 20-21 (1996).