

THE UNFINISHED REVOLUTION: THE REHNQUIST COURT AND DUAL FEDERALISM

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ABSTRACT: Academic treatments of the Rehnquist Court frequently refer to a “federalism revolution,” asserting that Rehnquist and his fellow justices reinvigorated the doctrine of dual federalism. On the contrary, the Rehnquist Court ultimately affected very little change to Commerce Clause jurisprudence, the main battleground of federalism controversy. While the Court stemmed the tide of Congressional power in U.S. v. Lopez, any possibility of a true “revolution” was dashed in Gonzales v. Raich. With no previous precedents overturned and a clear lack of unity between the supposedly federalist justices, the “federalism revolution” was, in reality, nonexistent.

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“Congress shall have the power . . . To regulate Commerce . . . among the several States . . .”

US Constitution, Article I, Section 8

Each chief justice’s tenure becomes known for one particular theme expressed in one, or sometimes several, crucial decisions over which he presides. In the case of the Rehnquist Court (1986-2005), the supposed “federalism revolution” was the most discussed and debated subject, particularly in the case of *U.S. v. Lopez*, 514 U.S. 549 (1995). Rehnquist is frequently credited with—or accused of—spearheading the revival of dual federalism, a conservative interpretive framework that limits federal power and reserves more power for the states. Yet the Rehnquist Court never truly effected a lasting or pervasive change in judicial interpretation as was made clear in the case of *Gonzales v. Raich*, 545 U.S. 1 (2005). Despite the triumphalism of some conservatives and corresponding denunciations of liberals, the “federalism revolution” of the Rehnquist Court ultimately remained unfinished due to disunity within the Court’s traditional voting blocs. The movement may have stemmed the tide of increasing federal power, but it did not reclaim any ground by clearly rejecting any of the existing precedents, particularly that of *Wickard v. Filburn*, 317 U.S. 111 (1942).

The clearest manifestations of conflict over federalism throughout the history of the Supreme Court have been cases dealing with the interpretation of the Commerce Clause, which

grants Congress the power “to regulate commerce among the several states.” Beginning with several cases pertaining to New Deal legislation, interpretation of the Commerce Clause has steadily increased the scope of Federal power for more than half a century. The most notable of these was *Wickard v. Filburn*, where the Court maintained a farmer’s choice to grow wheat on his own land within one state for his own consumption was subject to federal legislation under the Commerce Clause because it affected the interstate market by preventing the farmer from having to purchase from that market.¹ The Court later used the Commerce Clause to advance civil rights when it upheld anti-discrimination laws pertaining to private businesses on the grounds that the discriminatory policies of those businesses affected interstate commerce.² While further details and examples abound, after *Wickard* the Supreme Court rarely ruled that a piece of legislation exceeded the bounds of authority granted to Congress by the Commerce Clause.³

It therefore came as a shock when the Rehnquist Court did precisely that in *United States v. Lopez*. For the first time in the lifetime of many observers, the Supreme Court struck down federal legislation ostensibly grounded in the Commerce Clause as beyond the scope of that clause. When Alfonso Lopez, a high

1 *Wickard v. Filburn*, 317 U.S. 111, 111 (1942).

2 *See Heart of Atlanta Motel v. United States*, 379 U.S. 241(1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

3 While the Court did check the expansion of federal power in *Hammer v. Dagenhart*, 247 U.S. 251 (1918) and *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895), both rulings were essentially overturned shortly thereafter.

school student in Texas, was charged under federal law with possessing a gun in a school zone, he challenged the constitutionality of the federal legislation—the Guns-Free School Zones Act or GFSZA. The Supreme Court struck down the Act in a 5–4 decision that upheld the ruling of a federal appeals court. This ruling began the alleged “federalism revolution” of the Rehnquist Court.

The Court’s willingness to limit Congress’ powers under the Commerce Clause was significant in and of itself. As one commentator aptly put it, “Congress certainly had reason to believe [the Commerce Clause] was unencumbered by any judicially-enforceable limit” prior to *Lopez*.⁴ Even the Appeals Court that struck down the GFSZA stated that the courts must defer to Congress’ determination with regard to whether a given issue affects interstate commerce so long as there is a “rational basis” for Congress’ contention. What would become a “relatively stable” five-justice majority—Chief Justice Rehnquist and Justices O’Connor, Scalia, Thomas, and Kennedy—set down the limits for the first time in *Lopez*.⁵ Where previous rulings indicated that simply referencing the Commerce Clause in a piece of legislation would be sufficient for it to withstand judicial scrutiny, the *Lopez* decision examined the legitimacy of the alleged connection, applying the “rational basis” test more rigorously than Congress had expected or hoped.

4 Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y 761, 766 (2008).

5 Richard H. Fallon, Jr., *The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002).

Congress neglected to claim in the GFSZA that the power for creating the act stemmed from the Commerce Clause. Lopez's lawyers took full advantage of this omission, noting,

Congress made no effort to substantiate its action as a valid exercise of its Commerce Clause power. . . . Petitioner makes this argument [that the grounding in Commerce Clause power is implicit in the statute] without citing any case in which this Court has upheld a statute's constitutionality on the theory that findings [of a connection to commerce] were implicit in the statute itself.⁶

The Court indicated that it could still apply the rational basis test even when Congress failed to state an explicit connection to interstate commerce. Nevertheless, in *Lopez* the Court's application of the rational basis test was such that the GFSZA was overturned. Harkening back to the case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), Rehnquist acknowledged in the majority opinion that the language of the Commerce Clause itself implies that there are limits on Congress' power.⁷ By establishing limits and applying the rational basis test in a meaningful way, the Court circumvented the possibility of virtually unlimited Congressional power under the Commerce Clause.

6 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1994 TERM SUPPLEMENT 242,526 (Gerhard Casper & Kathleen M. Sullivan eds., 343 University Publications of America, 1996) [hereinafter LANDMARK BRIEFS].

7 *United States v. Lopez*, 514 U.S. 549, 553 (1995).

Yet even in *Lopez*, the watershed case of the supposed “federalism revolution,” the Court did not reject the decisions that had made a revolution necessary in the eyes of conservatives. As Richard Fallon pointedly observed, “Although its invalidation of the challenged statute was undeniably extraordinary, the Court purported not to overrule any previous decisions.”⁸ Rather, Chief Justice Rehnquist, allegedly the architect of the revolution, drew on the very cases abhorred by dual federalists to delineate three categories of legislation that were permissible under the Commerce Clause.

Rehnquist sketched at length the history of Commerce Clause jurisprudence, presenting it as a consistent pattern which can and should be upheld. He makes no criticism of the obliteration of distinctions between direct and indirect effects on commerce in *NLRB v. Jones and Laughlin Steel*, or of *Wickard v. Filburn*’s “aggregate effects” reasoning which the Court used to ignore the entirely non-commercial nature of Filburn’s activities. Instead, Rehnquist attempts to find in these decisions hints of limitations similar to that being imposed in the Court’s present ruling in *Lopez*.⁹ Mostly these hints amounted to seemingly impotent warnings that in spite of the increasing scope granted by the decision, Congress’ power was not unlimited.

Rehnquist then laid out three “broad categories” of legislation that fell within the authority granted by the Commerce

8 Fallon, *supra* note 5, at 453.

9 *Lopez*, 514 U.S. at 556-57.

Clause. Notably, the three categories are introduced as “consistent with this structure,” i.e. the previous decisions of the Court, including *Wickard*. The new guidelines were delineated as follows:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, *i. e.*, those activities that substantially affect interstate commerce, *Wirtz, supra*, at 196, n. 27.¹⁰

This new three-category test replaced the “rational basis test” with a “substantial effect” test, which the Court applied directly and independently rather than evaluating an application of the test by Congress.¹¹

The reasoning ultimately employed in striking down the GFSZA exemplifies the half-hearted nature of the erroneously named “federalism revolution.” The statute was struck down,

10 *Id.* at 558-59.

11 *Graglia, supra* note 4, at 768.

not because non-commercial activities that affect commerce are beyond the reach of Congress' authority but because this particular activity did not have such an effect on commerce.¹² In fact, Lopez's lawyers explicitly contended that "[t]he Gun-Free School Zones Act is unconstitutional *because gun possession within 1000 feet of a school does not substantially affect interstate commerce.*"¹³ There was no effort to challenge the notion that non-commercial, intra-state activities may be regulated if they admittedly affect commerce. With such limited objectives, the "federalism revolution" never even attempted to retake ground; like containment foreign policy, the ruling sought only to prevent further expansion.

The flagship accomplishment of the decision was the implied requirement that an activity be economic in order to be subject to Commerce Clause regulation. Even this requirement, later loosely applied in *Gonzales v. Raich*, was based in part on *Wickard*, a case scorned by dual federalists. In fact, Rehnquist explicitly references it, writing, "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."¹⁴ Furthermore, the *Lopez* decision revealed the seeds of disunity among the ostensibly conservative "federalist five." As Ann Althouse points out,

12 Richard A. Brisbin, Jr., *The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations, 1991-1997*, 28 PUBLIUS. 189, 197 (1998).

13 LANDMARK BRIEFS, *supra* note 6.

14 *Lopez*, 514 U.S. at 560.

Chief Justice Rehnquist's opinion in *Lopez*, by contrast, with its cry for the preservation of "first principles" of constitutional structure, was not able to get a majority." So it was not a monolithic group of Justices who supported the judicial enforcement of federalism. There were some who looked at it one way and there was a middle group that had a more flexible, pragmatic interpretation.¹⁵

While in some ways a step in the federalist direction, *Lopez* revealed the twin problems of underwhelming goals and a lack of unified methodology in the movement to revive dual federalism.

Ten years later, *Gonzales v. Raich* would reveal the ultimate failure of *Lopez* to change the direction of the Court's Commerce Clause rulings. The *Gonzales* case involved two California residents who cultivated marijuana for medicinal purposes under a California law called the Compassionate Use Act; however, federal agents acting under the Controlled Substances Act ("CSA") seized and destroyed marijuana plants belonging to one of the residents, Angel Raich. A federal appeals court reversed the initial decision of a federal district court by issuing a preliminary injunction against enforcement of the CSA on the grounds that it overstepped Congress' authority pursuant to the Commerce Clause. The Supreme Court, however, vacated that ruling, holding that the CSA did indeed fall within Congress' reach.¹⁶

15 Ann Althouse, *Chief Justice Rehnquist and the Search for Judicially Enforceable Federalism*, 10 TEX. REV. L. & POL. 275, 278 (2006).

16 *Gonzales v. Raich*, 545 U.S. 1 (2005).

The Court's decision in *Gonzales* represents the manifestation of the work that was left undone in *Lopez*. The continued use of *Wickard* is especially problematic for those claiming or hoping for the existence of a revolution; it remains the most far-reaching construction of the Commerce Clause and the one most irksome to conservatives. In many ways, the decision in *Gonzales* hinged on whether the case could be better tied to *Lopez* or to *Wickard*. In the majority opinion, Justice John Paul Stevens noted that *Wickard* was of "particular relevance" to the *Gonzales* case due to the "striking" resemblance between the two cases, while taking pains to distinguish the issues in *Gonzales* from those in *Lopez*.¹⁷ It was this determination of applicable precedent, which resulted from the limited aims and accomplishments of *Lopez*, that would cause the Rehnquist Court to halt any revolution that might have otherwise developed.

The larger context of the law in question was a crucial issue in the determination that *Wickard* was the precedent applicable to *Gonzales*. As with the Agricultural Adjustment Act provision that was the subject of *Wickard*, the CSA was part of a larger regulatory scheme. Furthermore, the activity involved was ruled to be at least "economic" if not "commercial," since the production of goods constitutes economic activity even if those goods are not sold in commerce.¹⁸ By deeming Raich's activity economic, the Court opened the door for the use of "aggregate effects" rea-

17 *Id.* at 17-23.

18 Graglia, *supra* note 4, at 782.

soning to establish a substantial impact on interstate commerce. Had the activity not been considered economic, the Court would have followed the *Lopez* and refused to consider the aggregate effects of non-economic activity. Once these distinctions were made and *Wickard*, not *Lopez*, was deemed the relevant case for consideration, the weight of the case naturally shifted in the government's favor.

The precedent of *Wickard* was not, however, the final word. In addition to arguing that the private growth of marijuana for personal, authorized, medical use was not economic activity, Raich and the other respondents contended that there was no proof that such private growth affected the interstate marijuana market. By making this assertion, they attempted to make the case relate to federalism and substantial effects rather than the economic or non-economic nature of the activities. To this end, Raich contended that a proper understanding of *Wickard* actually supported his own case. *Wickard* advocated concentration on the effect of an activity on commerce rather than the classification of that activity. Raich therefore argued that even if his activities were economic, their impact was not substantial enough to warrant Congressional regulation under the Commerce Clause that trumped the laws of the state of California.¹⁹

Raich and the other respondents had to rely on the argument that subtle differences did exist between their case and *Wickard* as opposed to launching an assault on its correctness. Their

19 LANDMARK BRIEFS, *supra* note 6, at 157-161.

recourse to this logic is instructive of just how limited the impact of *Lopez* was on Commerce Clause jurisprudence. If *Lopez* had explicitly disowned the precedent of *Wickard* or at least called it into serious question, the respondents could have focused their argument on the non-economic nature of Raich's marijuana-growing activities. Since the *Lopez* decision approved and even utilized *Wickard*, the respondents were reduced to analyzing the precise manner in which the farmer in *Wickard* had used the extra wheat he grew and comparing the impact of that use to the impact of Raich's use of marijuana.²⁰ If a true "revolution" had been initiated by the ruling in *Lopez*, with *Wickard* being dismissed as an overzealous extension of Congressional authority, no such painstaking distinction would have been necessary.

As the "federalism revolution" of the Rehnquist Court failed to achieve conservative hopes, one must consider why it never amounted to more than a prevalent myth. As has been established, the Court set its goals too low. While the *Lopez* case did "subject [*Wickard*] to powerful criticism," the Court contented itself with suggesting that "[a]t an appropriate juncture . . . we must modify our Commerce Clause jurisprudence" instead of tak-

20 *Id.* at 164. The respondents note that ("[T]he vast majority of the farm's wheat production [in *Wickard*] supported the farm's commercial operations, rather than feeding the farmer and his family," whereas "the cannabis at issue is not sold, bartered, exchanged . . . Angel Raich's caregivers cultivate enough cannabis for her own medical use, without any charge, for compassionate rather than economic reasons.")

ing the immediate opportunity presented in *Lopez*.²¹ In this opportune moment for redefining its Commerce Clause jurisprudence, the Court was unwilling to renounce the precedent of *Wickard* and instead settled to limit the extent of its application.

The choice to aim low is symptomatic of a deeper problem—the “federalist five” lacked the unity necessary to accomplish a significant, lasting change in jurisprudential patterns. As Lino Graglia points out, one of the main reasons that Rehnquist did not reject the “rational basis test” explicitly in *Lopez* was that such a gesture might have cost him the vote of Justice Kennedy.²² If Graglia’s speculation is correct, it seems likely that fear of losing Kennedy’s and perhaps even Scalia’s vote could have forestalled a more ambitious decision to attack openly the precedent of *Wickard*.

The problem of disunity would further manifest itself in *Gonzales*. After failing to reduce federal power in *Lopez*, the supposedly revolutionary Rehnquist Court actually reasserted the pervasiveness of Congress’ power to regulate under the Commerce Clause. This failure to at least toe the *Lopez* line was the result of the defection of Justices Scalia and Kennedy from the “federalist five.” The disagreement within what had typically constituted the conservative majority is exemplified in Justice O’Connor’s criticism of Justice Scalia in her dissent in *Gonzales*. Countering

21 LANDMARK BRIEFS, *supra* note 6, at 161. (citing *United States v. Lopez*, 514 U.S. 549, 602 (1995))

22 Graglia, *supra* note 4, at 781.

Scalia's contention that medical marijuana was "never more than an instant away from" the interstate market and therefore subject to regulation,²³ O'Connor stated:

Indeed, if it were enough in 'substantial effects' cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are 'never more than an instant from the interstate market' in guns already subject to extensive federal regulation²⁴

A disagreement significant enough to cause O'Connor to single-out Scalia for inconsistency with *Lopez* certainly represents a substantial divide in what is often casually treated as a firm alliance.

Furthermore, the majority in *Lopez* never attempted a clear movement toward originalism, thus precluding a methodological revolution that must necessarily precede a revolution of outcomes. A reader looks in vain through the pages of the *Lopez* opinion for an attempt to define "commerce" or "regulate" in terms of the Framers' understanding. None of the justices makes the original contention that the meaning of the word "regulate" would have been "make regular" or "standardize" in the minds of the framers. Under this definition, "substantial effects" reasoning becomes problematic. It is difficult to argue that prohibiting Raich from pri-

23 *Gonzales v. Raich*, 545 U.S. 1, 40 (2005) (Scalia, J., concurring).

24 *Id.* at 52 (O'Connor, J., dissenting).

vately growing marijuana for her own medicinal needs constitutes standardizing interstate commerce or making it regular. Without a move toward methodological agreement, the Court could hardly have effected a long-term change in Commerce Clause interpretation.

Finally, a variety of other concerns minimize the effectiveness of any of the changes, even small ones, that the Rehnquist Court did manage to implement. In showing a propensity for striking down federal statutes, the Court has focused on limiting federal power without simultaneously increasing state power. Furthermore, Congress may attempt to skirt even the modest rollback of power imposed by *Lopez* by leaning on the spending power rather than exclusively on the Commerce Clause. There are questions as to whether Congress has acknowledged the Court's ruling in any meaningful way since it has not appeared to scale back the scope of its legislation.²⁵ Without a judicial pattern consistent enough to give Congress second thoughts, it is unlikely that the stream of federal regulatory legislation will soon slow.

The federalism-related decisions of the Rehnquist Court leave observers—particularly conservatives sympathetic to the dual federalism cause—to contemplate what was and what might have been. In *Lopez*, the Court, for the first time in decades, struck down a federal law on the grounds that it exceeded the authority granted by the Commerce Clause, establishing that the Clause

25 J. Mitchell Pickerill, *Leveraging Federalism: The Real Meaning of the Rehnquist Court's Federalism Decisions for States*, 66 ALB. L. REV. 823, 826 (2003).

was not a *carte blanche* for Congress. Yet the failure to execute a more ambitious attack on federal power by overturning *Wickard v. Filburn* prevented any real “revolution” from occurring under Rehnquist. Any remaining hope was crushed by *Gonzales v. Raich* when the federalist consensus of *Lopez* was sundered. Plagued by a lack of ideological unity that prevented more sweeping reform, the so-called “federalist five” failed to go beyond the stop-gap *Lopez* ruling. Barring a new, more aggressive federalist alliance under Chief Justice John Roberts, the “federalism revolution” of the Rehnquist Court will remain unfinished.