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# Shifts and Implications Of Federalism for Civil Rights

J. Clay Smith Jr.

# SHIFTS AND IMPLICATIONS OF FEDERALISM FOR CIVIL RIGHTS

By J. Clay Smith, Jr.[1]

In *United State v. Lopez*[2] the Court determined that a federal statute, the Gun-Free School Zone Act of 1990, which makes it a federal crime for any individual knowingly to possess firearms within a school zone, exceeded the powers of Congress under the Commerce Clause. While on its face this case may not appear to have relevance to civil rights, the present anti-government environment does not permit me to rest on an assumption that segments attempting to undermine civil rights laws will not at some point challenge the power of Congress to limit regulation in the area of civil rights.

Before addressing the issues raised in Lopez, I wish to muse about three important civil rights cases just to stretch our minds to the negative or positive potential of *Lopez*.

*Jim Crow Era: The Civil Rights Cases of 1883*

In 1875, during the Reconstruction era, Congress passed a public accommodations law which broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement." For the first time in American history

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[2] 115 S.Ct. 1624 (1995).

Black Americans believed that Congress had helped to advance equality in the area of public accommodations. They were right. But in 1883, shortly after the federal troops were withdrawn from the South and the collapse of the Reconstruction era was ongoing, the U.S. Supreme Court, in deciding *The Civil Rights Cases*, determined that the Act of 1875 was unconstitutional because the it failed to limit the categories of affected businesses to those impinging upon interstate commerce.[3]

While Black people in the South and North did not fully understand the jurisprudential basis of this decision, they understood that white businesses could, on the basis of race, exclude them from their inns, segregate them in their public conveyances on land and water; exclude them from or segregate them in their theaters and other places of amusement. Black Americans understood racial discrimination at will to be within the allowance of traditional governmental functions, popularly referred to as states' rights.

Black lawyers knew what had happened.[4] They knew that the U.S. Supreme Court had emboldened the principle of states' rights in the law against the equality of Black people in the country. Black lawyers and their allies knew full well that while government could not make Black people equal in the eyes of white people, its

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[3] The Civil Rights Cases, 109 U.S. 3 (1883).

[4] J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 221-222 (University of Pennsylvania Press, Philadelphia: 1993), where "[Richard] Greener [a Black graduate of the University of South Carolina's law school] called the court's decision 'the most startling decision. . . since [Dred Scott].'" *Id.* at 222.

actions and inactions could re-enslave them. Today, the notion of states' rights fall under a category that some scholars refer to as federal-based limits.

Federal-based limits is analogous to a separation of powers principle. Of course, we are well aware of the separation of powers principle applicable to the national government that checks the powers of the coordinate branches of government. The purpose of the doctrine is to limit the power of any branch of government so that no single branch is superior to the other, and to protect against tyranny. Over the years, political operatives, political pundits, law and political science scholars, lawyers, and court watchers have argued about and written volumes of books about horizontal separation of powers, and their concerns about and definition of tyranny. And so it is also with federal-based limits, which encompasses the vertical powers reserved to the states under the Tenth Amendment, the enumerated powers vested in Congress under the Commerce Clause and incidental powers of the national government expressed or implied in other provisions of the Constitution.

After the U.S. Supreme Court struck down the Civil Rights Act of 1875, unless state laws were passed to protect Black people from racial discrimination by private concerns, it has been said that the Congress by its silence to pass such laws, condoned affirmative acts of discrimination.[5]

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[5] *See* Hall v. DeCuir, 95 U.S. 485, 498 (1877)(Clifford, J., concurring, discussed in J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1098-

*The Heart of Atlanta Motel & Katzenback Motel Decisions*

Between 1883 and 1964, some local state governments did pass civil rights laws prohibiting various forms of discrimination,[6] but many of these laws were not comprehensive in coverage. Many of these laws were prohibitory in nature with no corrective provisions, and with no state agencies dedicated solely to the enforcement of these laws. The civil rights movement of the 1960s and the recognition by the business community and Congress that segregation in the South was an obstruction to American enterprise and morally wrong, passed Title II, Sec. 201 (a), of the Civil Rights Act of 1964, which provides:

> All persons shall be entitled to full and equal employment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination, segregation on the ground of race, color, religion, or national origin.

Section 201(b) of Title II establishes four classes of business establishments, each of which "serves the public" and "is a place of public accommodation" within the meaning of Sec. 201 (a) "if its operations affect commerce, or if discrimination or segregation by

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99 (1994).

[6] For example, in 1886, three years after the Court struck down the Civil Rights Act of 1875, a black lawyer named John W.E. Thomas, who was a member of the Illinois General Assembly, introduced, and the legislature adopted, a civil rights law with some of the provisions contained in the Civil Rights Act of 1875. EMANCIPATION, *supra* note 4, at 372-73.

it is supported by State action." Under the Act, Title II includes four categories termed as "establishments"; namely,

> any inn, motel, or other establishment which provides lodging to transient guest, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence....

Finally, 201(c) defines the phrase "affect commerce" as applied to the above establishments declaring that "any inn, hotel, motel, or other establishment which provides lodging to transient guest "affects commerce per se."

In 1964, the U.S. Supreme Court upheld the constitutionality of Title II in two major cases: *Heart of Atlanta Motel v. U.S.*,[7] and *Katzenbach v. McClung*.[8] The core underpinnings of the Court's determination in these cases is that Congress has the power to legislate against moral and social wrongs, and that discrimination in accommodations on account of race, color, religion or national origin under Title II is well within the powers of Congress. The Court determined that even without specific findings by Congress, its proceedings were sufficient to demonstrate that racism was a moral and social wrong[9] coupled with its "the disruptive effect

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[7] 379 U.S. 241 (1964).

[8] 379 U.S. 294 (1964).

[9] *Heart of Atlanta Motel*, 379 U.S. 257.

that racial discrimination has had on commercial intercourse."[10]

In *Katzenbach*, the Court upheld Title II on a challenge by Appellees claiming that the Act could not be sustained in the absence of findings by Congress. The Court determined that the absence of findings was of no consequence in the face of "an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes."[11] The Court opined that the aggregate affect of discrimination had a direct impact on interstate commerce without the need for particular findings per enterprise.[12]

*Federal-based Implications of Lopez*

Back to *Lopez*.

What was Congress attempting to achieve when it passed the Gun-Free School Zone Act of 1990? It was simply attempting to keep guns away from public schools and to demonstrate the extent to which intra-state fatalities of our young due to violence has a direct or indirect impact on commerce, indeed; the future of our nation.[13] Was the purpose and intent of the legislation appropriately grounded in the powers of Congress? A majority of

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[10] *Id.* The Court further opined that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Id.* at 258.

[11] *Katzenbach*, 379 U.S. 300.

[12] *Id.* at 301, citing Polish Alliance v. Labor Board, 322 U.S. 643, 648 (1944).

[13] *Lopez*, 115 S.Ct. 1651 (Justice Stevens, dissenting), Id. (Justice Souter, dissenting), 1657 (Justice Breyer, dissenting).

the Court held that the operative provision (sec. 922(q))[14] could not be justified because firearms possession within a local school zone did not substantially affect interstate commerce. Hence, sec. 922(q) of the Gun-Free School Act of 1990 was held to exceed authorized federal-based limits. Stated differently, the Act stepped on states' rights to regulate crime relevant to public schools.

As I see it, *Lopez* is part of an ongoing political and judicial debate on how much power the Congress has to regulate American life. A current sub-set of that inquiry is the extent to which Congress will **exercise its legitimate power** to regulate in the field of civil rights. Presently, affirmative action is at the core of this debate.[15] While affirmative action is not directly the subject of my talk, it is the match that is being used to ignite and spread the fire of intolerance to other civil rights fields.

My concern reaches back to *The Civil Rights Cases* of 1883 (and *Hall v. DeCuir* (1877))[16] where the U.S. Supreme Court held that civil rights laws prohibiting discrimination in public accommodation was unconstitutional.[17] Today, a legitimate question is whether current civil rights laws are within the sight of fire

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[14] *Id.* (*passim*).

[15] Kevin Merida, *Dole Aims at Affirmative Action*, WASH. POST, July 28, 1995, at A10; Louis Harris, *Affirmative Action and the Voter*, N.Y. TIMES, July 31, 1995, at A13; Benjamin Wittes, *An Affirmative Action Parable*, WASH. LEGAL TIMES, July 24, 1995, at 1.

[16] *See Justice and Jurisprudence, supra* note 5.

[17] *Civil Rights Cases*, 109 U.S. 3.

of a Court tilting fast to the far right and once again trapping Black people between cases like *The Civil Rights Cases* and *DeCuir*?[18]

*Federal-based Limits: The Next Century*

In the next century, could the Court declare that the Civil Rights Act of 1964 prohibiting, *inter alia*, racial discrimination in employment, housing, public accommodations, places of public amusement is beyond the reach of federal power? Could federal-based limits be turned against Black people, and others presently protected under the protection of the Civil Rights Act of 1964?

The *Lopez* decision does not immediately answer any of these questions. Some might even say that a general reading of *Lopez* makes my questions appear preposterous. If *Lopez* is a general concern about the limits of government, why do Justices O'Connor and Kennedy in their concurring opinions rightly assure us that two key civil rights decisions upholding the Civil Rights Act of 1964 are "authorities . . .within the fair ambit of the Court's practical conception of commercial regulation [that] **are not called in question by our decision today.**"[19]

I agree with Justices O'Connor and Kennedy. In fact, I am elated by the astute message that these two justices communicated to the civil rights community and to those whose aim is to dismantle federal power to regulate in civil rights areas covered by Titles II and VII of the Civil Rights Act of 1964, etc. What

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[18] *Justice and Jurisprudence, supra* note 5, at 1099.

[19] *Lopez*, 115 S.Ct. 1637 (emphasis added).

concerns me is what civil rights cases or laws may be called into question, if any?

With the possible exceptions of Justice O'Connor and Kennedy (and the four justices in dissent),[20] I cannot bring myself to believe that the aim of C.J. Rehnquist is isolated to the facts of *Lopez*, though, hopefully, my belief may ultimately prove to be misplaced. I believe that *Lopez* may give rise to a jurisprudential thrust that could deconstruct the power of Congress to regulate "subject matter activity" in the field of civil rights, and I believe that both Justices O'Connor and Kennedy are not only aware of this possibility, but could be concerned about it.

I'd like to press my case further: Just note the list of cases that Justice Rehnquist cites in *Lopez* following this statement: "But even...modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits [and that] the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[21] Note also the supporting footnote to the prior quote which says, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[22] Incidentally, both

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[20] *Supra* note 13.

[21] *Lopez*, 115 S.Ct. 1628-29.

[22] *Id.* at 1629, n.2, also citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 311 (1981).

*Heart of Atlanta Motel* and *Katzenbach* are listed among the four cases connected with the footnote.

What is the point? Does the quoted text (in *Lopez*) mean that the *per se* determination by Congress that any "inn, hotel, motel, or other establishment which provides lodging to transient guest affects commerce per se" as determined in *Heart of Atlanta Motel* is now under a cloud? I believe that Justices O'Connor and Kennedy have adequately answered this question in the negative, thereby sealing for now a solid majority to uphold *Heart of Atlanta Motel* and *Katzenbach*.[23]

My instincts cause me to be more than casually concerned about C.J. Rehnquist's preoccupation with Justice Black's concurring opinion in *Heart of Atlanta Motel*, cited in footnote 2 of the majority opinion, which states, "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally *only* by this Court."[24]

Query, after *Lopez*, absent findings or with them, how much of a record is enough of a record to sustain an action of Congress

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[23] *Lopez*, 115 S.Ct. 1637. Further, the holding of the Court in Katzenbach firmly supports the continued validity of *Heart of Atlanta Motel*. There Justice Clark stated, "We think in so doing that Congress acted well within its powers to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce." *Katzenback*, 379 U.S. 304.

[24] *Lopez*, 115 S.Ct. 1629, n.2 (emphasis added).

under the Commerce Clause? It is my opinion that in *Lopez* C.J. Rehnquist, whether purposely or inadvertently, has placed within the sights for judicial deconstruction the broad reach of acts of Congress in the field of civil rights and other social legislation that aid exceptionally affected groups, such as Black people, and the general population.

In exploring the quantum of such an inquiry, is the Court acting under the guise of "judgement" or "will?"[25] Will we now see the development of standards or weights of congressional proceedings emerge under civil rights legislation similar to the federal rules of evidence and procedure? Will more actions of Congress now be challenged? Will the prudential components now be further relaxed[26] allowing greater access to the courts to bring actions against laws passed by Congress? Will the potential reach of *Lopez* create in practice the supremacy of the states over the national government?

Is there a positive side to Lopez? Will civil rights groups take advantage of the liberal standing allotment in *Adarand v. Peña*,[27] to challenge acts of Congress that either transfer too much authority to the states or private concerns, perhaps, arguing that excessive grants of power to the states or allowing agencies to transfer public power to private concerns is violative of federal-

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[25] *See* Stone, Seidman, Sunstein & Tushnet, CONSTITUTIONAL LAW 19 (1991 edition).

[26] *See* Adarand v. Peña, 115 S. Ct. 2097, 2104 (1995).

[27] *Id.*

based limits imposed by the Commerce Clause or violative of the nondelegation doctrine, respectively? I wonder how the federal judiciary will resolve these questions.

I also note that nowhere in Justice Thomas's concurring opinion does he mention any civil rights cases or make mention of the concurring statement of Justices O'Connor and Kennedy that *Heart of Atlanta Motel* and *Katzenbach* decisions are "within the fair ambit of. . . commercial regulation and are not called in question by [Lopez]."[28]

*Squeals of Terror*

A "squeal of terror went up in some quarters"[29] when *Lopez* was announced by the Court. Some quarters argue that based on the facts of *Lopez*, the "squeals" raise a false alarm. I remind you that attempts were made to divert the attention of the Black community from similarly "squeals of terror" when the Court began to whittle away at the civil rights laws passed during the Reconstruction era.[30] Were these squeals misplaced?

The civil rights community and people of good will, who believe in fairness, and abhor harm that could befall Black people in this country must not be mislead or misdirected about the reaches of *Lopez* under the control of what appears to be a decision

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[28] *Lopez*, 115 S.Ct. 1637.

[29] *Federalism's Future*, NAT'L L.J., July 31, 1995, at A20.

[30] *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 297-343 (Alfred A. Knopf, N.Y.: 1970). *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Harper & Row, Publishers, N.Y.: 1988).

that invites a reexamination of the limits of federal-based power and so-called application of rules of original understanding[31] using formalism as the Court's tool of decisionmaking.

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[31] *Lopez*, 115 S.Ct. 1644, n.2 (Thomas, J., concurring).