The Rehnquist Court joins the Conservative Revolution

by Edward Spannaus

The Supreme Court has suddenly and thrillingly rediscovered the plain meaning of the Constitution. . . . Since 1937, after Franklin D. Roosevelt's villainous court-packing scheme, the Supreme Court has rubber-stamped statist legislation and justified nearly all of it under the Commerce Clause.

The result has been a dreadful erosion of property rights, economic freedom, states' rights, and the liberties of the people. More than any other legal perversion, the misuse of the Commerce Clause has fueled government power and hobbled the economy. It is the basis of everything from public housing to disabilities regulations to farm subsidies.

With last week's decision in *U.S. vs. Lopez,* this 58-year distortion appears to have come to an end.

—Llewellyn Rockwell, Jr., *Washington Times,* May 3, 1995

Before we talk about the *United States vs. Lopez* Supreme Court decision over which Rockwell can scarcely contain himself, it is useful to ask just who is Llewellyn Rockwell, and what does he mean by the "Constitution"?

Rockwell's favorite Constitution is not the U.S. Constitution, but rather the Constitution of the Confederate States of America, adopted in 1861. A few years ago, Rockwell wrote another column entitled "The Southern Solution," which offered the following solution to the nation's ills: "Bring the Constitution up to Confederate standards." He was serious. Among the features that Rockwell said he liked about the Confederate Constitution, were its elimination of the "general welfare" clause, its prohibition of protectionism and internal improvements, its line-item veto, and its elimination of entitlements.

Rockwell is also the president of the Ludwig von Mises Institute in Auburn, Alabama, named after one of the leading lights of the "Austrian School" of economics and a mentor of Friedrich von Hayek. The Mises-Hayek networks, operating through the fascist Mont Pelerin Society since the 1940s, are especially dedicated to destroying the United States as a constitutional republic. (See *EIR,* Feb. 17, 1995, "Phil Gramm's 'Conservative Revolution in America.' ") Rockwell doesn't only admire the Confederate Constitution: He genuinely wants to break up the United States. In the June 1992 issue of the von Mises Institute newsletter, Rockwell argued at length that secession from the United States might be the only way of freeing the states from the "tyrannical" federal government.

Why is such an enemy of our Republic so enthusiastic about what the Supreme Court did on April 26?

Crime and commerce

By a narrow 5-4 majority, the Supreme Court in the *Lopez* case invalidated a law passed by Congress in 1990, which made it a federal crime for anyone to possess a firearm within 1,000 feet of a school. In striking down the statute, Chief Justice William Rehnquist, writing for the majority, ruled that the statute exceeded the authority of Congress under the clause of the U.S. Constitution which gives Congress the power to regulate commerce "among the several States."

Rehnquist argued that the law, as a *criminal statute,* had nothing to do with interstate commerce or any sort of economic enterprise. The government, arguing in support of the statute, had contended that violent crime has a significant effect on education, which in turn has a significant effect on the overall national economy. Rehnquist proposed that, under this reasoning, there would be almost no limitation on federal power, "even in areas such as criminal law enforcement or education where the States historically have been sovereign."

Justice Anthony Kennedy—who voted with Rehnquist in

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this case—made the most sensible argument: that most states already have laws banning guns in or around school grounds, and that a federal law is not only unnecessary, but preempts local enforcement of local and state laws.

From the narrow standpoint of criminal law, the court's ruling is reasonable. The law which was invalidated was one of many instances in which acts which would normally be considered crimes under state law, have been improperly defined as federal crimes. The federal "mail fraud" and "wire fraud" statutes, for example, have been used for decades to transform state crimes into federal crimes falling under the jurisdiction of the FBI and other federal law enforcement agencies.

The framers of the Constitution never envisioned the type of national police force which today's FBI has become; under the Constitution, federal criminal jurisdiction should properly be limited to acts which impinge on the security of the nation, such as treason, espionage, and terrorism, and those which interfere with the proper exercise of powers granted the national government under the Constitution, i.e., credit and currency, commerce, etc., or to actions which threaten federal property or officials.

It must have pained Rehnquist and his closest allies on the court to have had to invalidate a federal criminal law to make their point; one could almost say that Bill Rehnquist never met a criminal law he didn't like. The Supreme Court "conservatives" carve out a gigantic exception for police-state measures, in their otherwise-axiomatic opposition to "big government."

But, as is clear from the opinion written by Rehnquist—and much more so in Clarence Thomas's concurring opinion (see *Documentation*)—they see themselves as using this case to get a foot in the door to reopen issues of the scope of federal economic power which were thought to have been settled in FDR's second term. This was made most explicit by Thomas, who suggested that current law is an "innovation of the 20th century," and who proposed that "the Court's dramatic departure in the 1930s from a century and a half of precedent" was a "wrong turn."

After all, if House Speaker Newt Gingrich (R-Ga.) and his gang of glassy-eyed freshmen can march on Capitol Hill threatening to roll back the so-called welfare state, the New Deal, and everything since the days of Herbert Hoover, why should the Supreme Court be left behind?

What happened in 1937?

Not without reason, did the *Lopez* ruling send shock waves through academic and political circles, and glee through the ranks of those who want to tear down the federal government and its constitutional powers. Listen again to the von Mises Institute's Llewellyn Rockwell:

"The majority's opinion bears an uncanny resemblance to *Schechter Poultry Corp. v. U.S.* (sic), the magnificent 1936 ruling that overturned Franklin D. Roosevelt's National Industrial Recovery Act."

Apart from the fact that Rockwell got the name and the date of the 1935 *Schecter* case wrong, he was astute enough to notice that this case and all the other landmark New Deal cases were cited throughout the more than 100 pages of concurring and dissenting opinions in the *Lopez* case. But what Rehnquist only hinted at (and what Kennedy cautioned against), Thomas plunged into enthusiastically: the dogma that the Supreme Court was right up until 1936, when it regularly struck down state and federal legislation attempting to establish minimum working conditions or other economic regulation.

In 1937, in the wake of FDR's sweeping electoral victory and the threat of his "court-packing" proposal, the Supreme Court reversed itself in a series of dramatic rulings which upheld state mininum wage laws, farm mortgage relief, the Wagner Labor Relations Act, and then federal and state programs for unemployment compensation and old-age relief (Social Security). The Social Security case was the first time that the Supreme Court had ever been called upon to rule upon the power of Congress to tax for the "general welfare."

By affirming the powers of Congress under the Constitution's general welfare and interstate commerce provisions, the Supreme Court, for the first time since the era of John Marshall, consigned to the scrap heap the British economic prescriptions of Adam Smith—against which Americans had launched a revolution in 1776.

Following our successful Revolutionary War, we Americans adopted a Constitution which was a total repudiation of Adam Smith and the British free-trade system, which gave the national government all the powers necessary to carry out the great purposes set forth in the Preamble: "to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our posterity."

President Washington then commissioned a series of reports from Treasury Secretary Alexander Hamilton, the famous Report on Credit, on a National Bank, and on the Subject of Manufactures, which provided the framework for what became known as "the American System of Political Economy." The American System became the envy of the world, but through constant British subversion it was lost to our nation, and certainly to the Supreme Court in the latter part of the 19th century and the first decades of the 20th century. But at least, since 1937, the Supreme Court has generally adhered to a broad view of federal economic powers under the general welfare and interstate commerce clauses.

Is it therefore any wonder that the pro-Confederate, prosecessionist Llewellyn Rockwell is so ecstatic about the recent *Lopez* ruling? It is not the New Deal or the modern "regulatory state" which is at stake, but the very existence of the United States as a sovereign, constitutional republic. It's as if Phil Gramm, Richard Armey, and Gingrich had just taken over the Supreme Court.

Documentation

U.S. Supreme Court in 'United States v. Lopez'

The following are excerpts from the opinion issued on April 26, in case No. 93-1260. The first are from the opinion of the court delivered by Chief Justice William Rehnquist. Legal citations have been omitted.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. 922(q)(1)(A). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States". . . .

Section 922(q) 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. . . .

The Government's essential contention, in fine, is that we may determine here that 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. . . .

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" 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. Under the theories that the Government presents in support of 922(q), 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. . . .

Justice Thomas, concurring: Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several states," but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life.

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. . . .

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century. . . .

As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. . . . [F]rom the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers. . . .

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

Dissenting opinions

Justice Stevens: The welfare of our future "Commerce with foreign Nations, and among the several States" is vitally dependent on the character of the education of our children. I therefore agree entirely with Justice Breyer's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools—just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with Justice Souter's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. . . .

Justice Souter: It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. . . . A look at history's sequence will serve to show how today's decision tugs the Court off course. . . .

Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. . . .

Because Justice Breyer's [dissenting] opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. . . .