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Suzanna Sherry

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THE BARKING DOG

*Suzanna Sherry**

Professor Tushnet, and indeed many of the participants in this symposium, seem to believe that *United States v. Lopez*¹ will have some lasting significance. Those participants who disagree have suggested that the case's lack of significance will stem from inadequacies of the test set out by the Court: it is easily evaded by Congress, or it does not vary much from prior cases, or it applies only in narrow circumstances. I agree that *Lopez* will have little significance, but its minimal impact has little to do with the specifics of the test. Instead, I believe that *Lopez* will join a growing list of cases that have been a nine-days wonder: cases that appear to be startling changes in direction and therefore create great joy and great consternation when first decided, but that are subsequently ignored by the Court. In one of these cases, the Supreme Court was described as having created "islands in [the] stream,"² and *Lopez* fits this description admirably.

All the cases on this list share two characteristics with *Lopez*. First, they lie in a doctrinal area in which the Court has consistently warned that some particular power has constitutional limits, but has never found any limits. This circumstance makes the Court look like a dog whose bark is worse than its bite. Thus, in order for the Court's warnings to be taken seriously, it has to bite someone occasionally—and it does not much matter whom. The second aspect of these cases, however, creates a bit of a problem for the Court when it decides to bite: following the precedent in the (somewhat randomly) chosen case in which it "bites" would lead to unpalatable consequences. In order to solve this dilemma, the Court decides a case in a way that should, in theory, have great effect, but then proceeds to ignore it in later cases. In these brief com-

* Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota.

1. 115 S. Ct. 1624 (1995).

2. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 388 (2d ed. 1988).

ments, I will give some examples of these unheeded cases, and then explain why I think *Lopez* will eventually fall into the same category.

The first example has been mentioned by a number of participants in this symposium: *National League of Cities v. Usery*.³ This case, like *Lopez*, involved the limits of congressional Commerce Clause power, and it is the case that earned the original "island in the stream" designation. The Court had been warning Congress for some time that its power under the Commerce Clause was not unlimited, but it had not invalidated a congressional exercise of such power since 1937. In *National League of Cities*, then, the Court played "pick a statute, any statute," and demonstrated the soundness of its prior warnings by invalidating portions of the Fair Labor Standards Act.⁴ The case was then essentially ignored for nine years—during which time the Court unconvincingly attempted to distinguish indistinguishable statutes⁵—and was finally overruled.⁶ Had the Court actually followed *National League of Cities*, a large number of federal statutes would have been invalidated.

The second example of an "island in the stream" case is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁷ Since 1962, when the Court decided that Article I, or legislative, courts could exercise some but presumably not all of the power allocated to the judiciary by Article III of the Constitution,⁸ the Court had upheld every allocation of jurisdiction to Article I courts.⁹ Nevertheless, the Court continued to maintain that the

3. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

4. *Id.* at 852 (holding that Congress exceeded its constitutional authority by "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions").

5. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 236-42 (1983) (distinguishing the Age Discrimination in Employment Act of 1967); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761-70 (1982) (distinguishing the Public Utility Regulatory Policies Act of 1978); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 683-87 (1982) (distinguishing the Railway Labor Act), *overruled in part by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-88 (1981) (distinguishing the Surface Mining Control Act of 1977).

6. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

7. 458 U.S. 50 (1982).

8. *Glidden Co. v. Zdanok*, 370 U.S. 530, 533-34 (1962).

9. *See, e.g.*, *Palmore v. United States*, 411 U.S. 389, 390 (1973) (holding that "under its Art. I, § 8, cl. 17, power to legislate for the District of Columbia, Congress may provide for trying local criminal cases before judges who . . . are not accorded [an Art.

jurisdiction of Article I courts was not unlimited. In *Northern Pipeline*, the Court played "pick a legislative court, any legislative court," and invalidated the allocation of Article III jurisdiction to bankruptcy courts, thus proving that there were indeed limits to the jurisdiction of Article I courts.¹⁰ Although *Northern Pipeline* has not yet been overruled, it has been ignored.¹¹

The most egregious example of the Court's inadequate attempts to distinguish *Northern Pipeline* in subsequent cases came only three years later, in *Thomas v. Union Carbide Agricultural Products Co.*¹² In his plurality opinion in *Northern Pipeline*, Justice Brennan held that the allocation of Article III jurisdiction to Article I courts was valid in only three limited circumstances: military courts, territorial courts, and courts exercising jurisdiction in cases involving "public rights."¹³ Justice Brennan did not define "public rights," but noted that "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'"¹⁴ In *Union Carbide*, Justice Brennan concurred in upholding an allocation of jurisdiction to a legislative court, despite the fact that the suit was between two private parties.¹⁵ He distinguished *Northern Pipeline* by characterizing the issue as a "public right" and conveniently avoided his earlier description of public rights with a well-placed ellipsis: "The opinion made clear that 'the presence of the United States as a proper party to the proceeding is . . . not [a] sufficient means of distinguishing 'private rights' from 'public rights.'"¹⁶ A year later in *Commodity Futures Trading Commission v. Schor*,¹⁷ Justice O'Connor's majority opinion upholding a legislative court cited Justice White's dissent in *Northern Pipeline* near-

III judge[s] life tenure and protection against reduction in salary").

10. 458 U.S. at 87.

11. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-58 (1986) (upholding the jurisdiction of the Commodity Futures Trading Commission over state law counterclaims to Commodity Exchange Act violations); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584-86 (1985) (upholding the use of binding arbitration by the EPA to resolve disputes between participants in its pesticide registration program).

12. 473 U.S. 568 (1985).

13. 458 U.S. at 71.

14. *Id.* at 69 n.23.

15. 473 U.S. at 594 (Brennan, J., concurring).

16. *Id.* at 599 (Brennan, J., concurring) (alteration in original).

17. 478 U.S. 833 (1986).

ly as much as it cited either the plurality or concurring opinions.¹⁸ Had the Court actually followed *Northern Pipeline*, it is probable that much of the jurisdiction given to administrative agencies would have been held unconstitutional.

The final example of an apparently significant but later ignored case is *Bowsher v. Synar*.¹⁹ Again, the Court had never lived up to its warnings that the separation of powers doctrine placed some limits on Congress's creativity. In *Bowsher*, the Court played "pick a delegation, any delegation,"²⁰ and struck down the delegation of power to the Comptroller General. As with *Northern Pipeline*, following that case might have led to the invalidation of many administrative agency schemes as unconstitutional delegations. Instead, the Court ignored its own precedent, upholding similar delegations and intermingling of powers in two later cases.²¹

In light of this history, an amusing new parlor game for law professors might be to predict the next occasion on which the Court will "bite." When will it next depart from precedent in order to fulfill earlier warnings? I will start the game by suggesting an unusual twist on the practice, which would result in a surprising holding of *constitutionality*. The Court has recently insisted that strict scrutiny of affirmative action is *not* "strict in theory, but fatal in fact,"²² and, while intimating that some redistricting schemes designed to increase the voting power of minorities might be constitutional,²³ it has simultaneously invalidated every affirmative action program and redistricting scheme. In order to stay true to its assurances that affirmative action schemes can be constitutionally designed, it will have to uphold one sooner or later. It might be a

18. *Id.* at 847-59.

19. 478 U.S. 714 (1986).

20. Although the majority opinion did not specifically rely on the non-delegation doctrine, the case can be analyzed that way. See Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 781-90 (1986-87).

21. See *Mistretta v. United States*, 488 U.S. 361, 411-12 (1989) (distinguishing *Bowsher* based on the fact that, while the executive branch in this case has removal power over a member of the judicial branch, the judicial branch member in question had a nonjudiciary commission, hence judicial power was not infringed); *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (distinguishing *Bowsher* based on Congress's placement of the power to remove an independent counsel solely in the control of the executive branch).

22. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

23. See *Shaw v. Reno*, 113 S. Ct. 2816, 2828-31 (1993).

redistricting scheme (there are several on the Court's current docket) or it might be an affirmative action program (there are several working their way up through the courts). Either way, I predict that although the media will make much of the case, it will soon be forgotten as the Court returns to a scrutiny that is indeed strict in theory but fatal in fact.

It is easy to conclude with hindsight that *National League of Cities*, *Northern Pipeline*, and *Bowsher* were "islands in the stream." The more difficult question is whether *Lopez* will fall into that category. I have two reasons for believing that it will. First, the Supreme Court has already signalled that it is uninterested in aggressively following *Lopez*. Second, lower court applications of *Lopez* illustrate just how radical a change it would work on constitutional doctrine, suggesting that as with the earlier cases the implications of *Lopez* would be unpalatable.

In two cases and two denials of certiorari since *Lopez*, the Court has passed up an opportunity to continue the *Lopez* revolution. Less than a month after *Lopez*, the Court upheld a RICO conviction as consistent with the Commerce Clause.²⁴ Although the case involved an enterprise actually engaged in interstate commerce, and was thus distinguishable from *Lopez*, the Court engaged in some peripheral discussion of Congress's power to regulate activities with a substantial effect on interstate commerce.²⁵ It is significant that in the course of that discussion, the Court cited not *Lopez* but *Wickard v. Filburn*,²⁶ perhaps the broadest interpretation of the Commerce Clause to date. Later in the term, the Court decided *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²⁷ in which it upheld the Secretary of the Interior's broad construction of the Endangered Species Act. Although that interpretation prohibited private property owners from destroying wildlife habitats on their property—which seems to be an activity only speculatively related to interstate commerce—there was not a word about *Lopez* in the case (including Justice Scalia's dissent). In general, however, Justices Scalia and Thomas do seem more interested than the rest of the Court in aggressively pursuing *Lopez*. Justice Scalia dissented from a denial of certiorari in *United States*

24. *United States v. Robertson*, 115 S. Ct. 1732, 1733 (1995).

25. *Id.*

26. 317 U.S. 111 (1942).

27. 115 S. Ct. 2407, 2418 (1995)

v. Ramey,²⁸ in which a lower court had upheld the application of the federal arson statute to the arson of a residence whose only connection to interstate commerce was its utility connection; Justice Scalia would have reversed and remanded for reconsideration in light of *Lopez*.²⁹ Justice Thomas dissented from a denial of certiorari in *Cargill, Inc. v. United States*,³⁰ in which a lower court upheld the application of a federal wetlands statute to private property that sometimes provided a temporary resting place for migratory birds; Justice Thomas would have granted certiorari to decide whether the presence of these "airborne interstate travelers"³¹ was a sufficiently substantial connection to interstate commerce.

It should not be surprising that the Court is unwilling to follow where *Lopez* leads. Some lower courts have been willing to do so, and the results are spectacular. Three different federal district courts have held that *Lopez* necessitates invalidating portions of the Child Support Recovery Act of 1992 (the federal "deadbeat dads" statute).³² Two district courts have relied on the reasoning of *Lopez* to invalidate the federal Free Access to Clinic Entrances Act.³³ The Ninth Circuit struck down the application of the federal arson statute to a private residence with the previously sufficient utility connection, effectively following Justice Scalia's suggestion in *Ramey*.³⁴

Finally, *Lopez* could have an unanticipated effect in a relatively obscure area. The Court has just decided that, at least for the purposes of the Eleventh Amendment, the Indian Commerce Clause is identical in scope to the interstate Commerce Clause,³⁵ opening up a whole new field in which to apply the limitations of *Lopez*.

Following *Lopez*, then, might invalidate or at least endanger a great deal of important federal legislation. I doubt that the Supreme

28. 115 S. Ct. 1838 (1995), *denying cert. to* 24 F.3d 602 (4th Cir. 1994).

29. *Id.*

30. 116 S. Ct. 407, 407 (1995) (Thomas, J., dissenting).

31. *Id.* at 409.

32. See *United States v. Parker*, 1995 WL 683215, at *5 (E.D. Pa. Oct. 30, 1995); *United States v. Bailey*, 902 F. Supp. 727, 730 (W.D. Tex. 1995); *United States v. Mussari*, 894 F. Supp. 1360, 1363 (D. Ariz. 1995); *United States v. Schroeder*, 894 F. Supp. 360, 364 (D. Ariz. 1995).

33. See *Hoffman v. Hunt*, 1996 WL 192934, at *17 (W.D.N.C. Apr. 17, 1996); *United States v. Wilson*, 880 F. Supp. 621, 634 (E.D. Wis.) (relying on the Fifth Circuit's holding in *Lopez*), *rev'd*, 73 F.3d 675 (7th Cir. 1995).

34. See *United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995).

35. *Seminole Tribe of Fla. v. Florida*, No. 94-12, 1996 U.S. LEXIS 2165, at *30 (March 27, 1996).

Court is willing to follow that course. Thus, *Lopez*, like its three predecessors mentioned in this essay, is probably not a “constitutional moment.” Indeed, it is more of a torts moment: it is the Court’s one free bite before it resumes barking.

