Dragooning State Officials into Federal Service

Roger Pilon*

In a century driven by the Progressive-Era view that ever-larger government can solve the manifold problems of life, the rebirth of American federalism toward century's end is more than a little remarkable. No fewer than three bills were introduced in the 104th Congress to restate our most basic constitutional principle, that ours is a government of delegated, enumerated, and thus limited powers. And on the day the 104th Congress was elected, awakening Washington from its century-long political drift, the Supreme Court heard oral argument in a case that six months later would awaken Washington from its sixty-year constitutional drift: invoking "first principles," the Court said, for the first time since the New Deal, that the power of Congress to regulate "commerce among the states" is not a power to regulate everything. *United States v. Lopez*, 115 S.Ct. 1624 (1995).

Unfortunately, as the 104th Congress peters out, its taste for principle seems to be going with it. The Court, however, is supposed to be above politics. We will test that principle this fall in a pair of cases that deal nominally with guns, as in *Lopez*, but more deeply with the same question the *Lopez* Court addressed, that most basic of constitutional questions: Has Congress been granted the power to do what it did?

What Congress did in 1993 to bring that question now before the Court was pass the Brady Act, 18 U.S.C. § 922(s), which amended the Gun Control Act of 1968 by imposing a waiting period of up to five days for the purchase of a handgun and subjecting purchasers to background checks during that period. Five years from the date of enactment, a national system for background checks is due for completion. In the meantime, the Act requires those checks to be performed by the chief law enforcement officer of the purchaser's place of residence--a state official--and therein lies the rub.

Jay Printz and Richard Mack are sheriffs in Montana and Arizona, respectively. As a practical matter, like others who have challenged it, they contend that the Act imposes duties that are hardly minimal. A purchase is unlawful if the purchaser is a fugitive, is an unlawful user of a controlled substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. A check must be completed within five days. And a rejected applicant is entitled to be given reasons for the rejection within 20 days.

As a legal matter, Printz and Mack argue, among other things, that the Court made it clear in *New York v. United States*, 505 U.S. 144 (1992), that the federal government is precluded under the Tenth Amendment from commanding state officers to assist in carrying out federal programs. The respective district courts agreed with Sheriffs Printz and Mack, but a divided panel of the Ninth Circuit reversed those decisions after consolidating the appeals. To date, the Second Circuit has sided with the Ninth, while the Fifth has gone the other way. At this writing, *Printz v. United States* is the lead case before the Court.

The circuit majority in *Printz* began its analysis by noting that "[n]o one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress. The issue for decision is whether the *manner* [of regulation] violates the Tenth Amendment." 66 F.3d 1025, 1028 (emphasis added). Given the tepid concurrence of Justices Kennedy and O'Connor in *Lopez*, it was doubtless prudent not to raise the more basic question of Congress's power to regulate intra or even interstate gun sales--which is not to say that the answer to that question is clear. Because only Justice Thomas, in his *Lopez* concurrence, entertained the possibility--indeed, the necessity--of the Court's eventually restoring a functional analysis of the Commerce Clause, we are left today, even after *Lopez*, to understand that Congress may regulate anything that "substantially affects" interstate commerce--which is almost everything--and to ask simply about any defects that might inhere in the means Congress has chosen.

There was a time--a short time--when an inquiry into the legitimacy of the means Congress had chosen would invoke the Necessary and Proper Clause--with "necessary" meaning "that without which" and "proper" pointing to restraints that might arise from the powers of other branches or of the states or from enumerated or unenumerated rights. We lost "necessary" in *McCulloch v. Maryland*, 17 U.S. 316 (1819), however, when Chief Justice Marshall read it to mean "appropriate"; and "proper" has only occasionally been read properly. Today, of course, congressional means are analyzed most often under the "rational basis" test that came from *United*

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States v. Carolene Products, 304 U.S. 144 (1938), which is no test at all, constitutionally. But means are truly scrutinized only when "fundamental" or at least "important" rights are implicated--categories with no constitutional foundation whatever--or when conflicting powers are at issue--and even then the concern about conflicting *state* powers has come back in fashion only of late.

Thus, after bowing to the New Deal Court's dismissal of the Tenth Amendment as "but a truism," *United States v. Darby*, 312 U.S. 100 (1941), the court below said that "[i]n recent years . . . the Tenth Amendment has been interpreted 'to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution'" (quoting *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988)). Hence, the question before it, the court said, is whether the requirements of the Act transgress "such an implied limitation on federal power." *Id.*

What an odd way to begin the analysis. Rather than ask directly, as a natural reading of the Tenth Amendment suggests, whether there is a federal power to "dragoon" state officials into federal service, as Judge Fernandez colorfully puts it in dissent, the majority looks instead for an "implied *limitation*" on federal power. The idea seems to be that if there is no such limitation--which the court concludes--then the federal power exists.

But that stands the Tenth Amendment on its head. The basic limit on federal power is the limit contained in the very premise of the Constitution, as set forth in the first words of Article I ("All legislative Powers *herein granted* . . .") and in the last documentary words to come from the founding period, the Tenth Amendment ("The powers *not delegated* to the United States by the Constitution, *nor prohibited* by it to the States, *are reserved* to the States respectively, or to the people."). A natural reading of the relatively straightforward language of both those passages would have us asking, one supposes, not whether there is some implied *limitation* on federal power but whether there is, to begin with, a federal power of the kind at issue. In short, in the words of Judge Fernandez, does the Constitution *grant* a power to the federal government to "conscript" state officials "to fulfill its purposes"?

Plainly, given the premise of the Constitution and the theory and history of dual sovereignty in this nation, those who would answer that question in the affirmative, as the court did, would seem to have an uphill battle. At the least, given no explicit grant in the Constitution of the kind of power at issue, one would expect a search not for some implied *limitation* on federal power--failing discovery of which the power is assumed--but a search for some implied *grant* of federal power--derived from, because implied by, an *explicit* grant.

The *Printz* court undertook no such search, however. Instead, it set forth a number of "ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals," concluding that against this background there appears to be "nothing unusually jarring" about the Act's requirements. 66 F.3d at 1029. Two problems beset the court's approach, however. First, none of the examples cited amounts to direct and unconditional federal conscription of state employees to carry out a federal program, as the Brady Act does. Second, each example predates the Court's decision in *New York*.

Responding to the latter problem, which Printz and Mack had raised, the court argued that "*New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act." 66 F.3d at 1030. In *New York*, Congress was attempting to coerce states to enact *state legislation* according to federal standards. Here, Congress is merely conscripting state employees for federal ends, the court seems to say. And since a limitation on that power is not implied by *New York*'s holding, the power must be legitimate.

Again, the Tenth Amendment is made to stand on its head. Like Justice Stevens in *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995), handed down only a month after *Lopez*, the *Printz* court seems to believe that the Tenth Amendment says "All that is not reserved is given," rather than "All that is not given is reserved." The gap between those two formulations, of course, is yawning.

The *Printz* case raises many other issues as well, including important questions about political accountability and institutional and personal liability, which are inevitable when one sovereign commands the employees of another. But no question will be more basic, and important, to our future as a free people than the inquiry into the ground and scope of authority. Far more than a practical question about sovereign relations, that inquiry reaches our First Principles as a nation. Indeed, it is nothing less than a question about political legitimacy. Fall politics aside, the Court will be hard pressed to avoid it.

**Roger Pilon directs the Cato Institute's Center for Constitutional Studies.*