

Unconstitutional Theories "Justifying" Federal Gun Control - Gun Owners of America

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Much of this century has been a time when the federal government has ignored the limitations imposed on it by the Constitution. Recent cases decided by the by the Supreme Court indicate that the Justices are beginning to once again take the Constitution and their oath of office seriously. As Justice Clarence Thomas put it in the recent Lopez case, "our case law has drifted far from the original understanding ..." of the Constitution.

While there were wrong turns before this century, much of the unconstitutional rule from Washington dates back to the Great Depression and its war on crime and war on the bank crisis. There were many unconstitutional theories of government pursued to justify the power grab by Washington. One of the theories was to run an end run around constitutional limitations by entering into a treaty that would require passage of legislation accomplishing what, without the treaty, would have been unconstitutional.

President Franklin Delano Roosevelt's administration was an active participant in the Disarmament Conference of 1934. Roosevelt sought Senate ratification of an Arms Traffic Convention but was unsuccessful. Had the treaty been ratified, Roosevelt would have obtained the alleged authority to have Congress infringe on the right to keep and bear arms pursuant to the treaty powers of Article VI, paragraph 2.

Roosevelt then shifted to the unconstitutional, non-existent doctrine of emergency powers to justify enactment of gun control at the federal level. Calling for a War on Crime and Gangsters, Roosevelt persuaded Congress to pass a series of bills federalizing various crimes and compelling the registration of machine guns and sawed-off shotguns and rifles. The formula "War on Whatever" became a decades long federal government weapon for usurping powers not delegated to it.

Nowhere does the Constitution give the President or the Congress the power to federalize state crimes or enact gun control legislation -- not even in a national emergency. One reads the Constitution in vain for such a delegation of authority by "We, the People" through the several states. Very instructive on this point are the Kentucky Resolutions of 1798 which were written by Thomas Jefferson.

The federal government in 1798 enacted a law making it illegal to criticize a federal official (the Sedition Act). Kentucky and Virginia passed resolutions declaring that the national law was unenforceable in their states.

These are among the arguments that Jefferson made in the Kentucky resolutions:

...whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: ...that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself;...each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress. Jefferson went on to spell out that the only powers to punish crime delegated to the federal government were 1) treason, 2) counterfeiting the securities and current coin of the United States, 3) piracies and 4) offenses against the law of nations. In this context, Jefferson cited the Tenth Amendment as providing a limit to any expansion of authority for punishing crime by the federal government. He quoted it verbatim in the Kentucky resolutions: "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."

Jefferson addressed an argument in the Kentucky Resolutions that we still hear to this day. Namely, that Congress has the authority to pass all laws which shall be necessary and proper for doing whatever it does. Jefferson described this abuse of the "necessary and proper" clause as going,

to the destruction of all limits prescribed to their power by the Constitution: that words meant by the instrument to be subsidiary only to the execution of limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part to be so taken as to destroy the whole residue of that instrument...

A parallel argument is derived from the "supremacy" clause of Article VI. This clause makes treaties and laws passed by Congress the supreme law of the land. Jefferson is pointing out that the federal government is not empowered to take the limited powers it has been granted and convert them to unlimited powers that would destroy the nature of the Constitution. Similarly, the "general welfare" clause in Article I, Section 8 can hardly be a grant of unlimited power of action for the Congress since the section is one limiting the powers of Congress. Jefferson made this particular argument in his opinion against the national bank in 1791.

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It is the Commerce Clause that has become the most popular pillar of unconstitutional authority for federal gun control. It is interesting to note that in the early part of the twentieth century it was considered necessary to amend the Constitution to ban alcoholic beverages. After the bloating of the Commerce Clause to justify federal involvement in anything and everything following the key 1946 Supreme Court decision *Wickard v Filburn*, it was not felt to be necessary to amend the constitution to infringe something specifically named and protected -- like arms -- in the Constitution.

It is important to understand that the word regulate was applied to commerce in the sense of making regular rather than controlling. In an early case where the Commerce Clause was at issue, Justice Marshall in the *Gibbons steamboat* case, noted that had the Clause been intended to affect all economic activity, it would not have been included in the enumerated, or limited, powers section of Article One Section 8. Thus, the Commerce Clause affects interstate trade which involves more than one state. The idea was that Virginia could not tax Maryland tobacco to the point that it was kept out of its Commonwealth, and similarly, so that Maryland could not do the same.

Justice Thomas put it this way in his *Lopez* opinion: "...the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce."

Thomas went on to explain that, as an enumerated power, the Commerce Clause of Article I Section 8 cannot be used to justify a universal police power of the federal government:

After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities.... Put simply, much if not all of Art. I, Sec. 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of Sect. 8 superfluous simply cannot be correct.

To put it another way, the Court is now saying that they believe that the Tenth Amendment has to be observed. As Joe Sobran put it in a column in *The Washington Times* (May 30, 1995):

"From now on, the court will be debating basic principles. The federal government will have to walk through the metal detector of the 10th Amendment."

In the Wickard case, the Supreme Court agreed with the argument that even though farmer Filburn's wheat was not purchased nor sold in interstate commerce, the very fact that he did not enter interstate commerce negatively affected interstate commerce. With this totalitarian view of the reach of government, there was no limit to what the federal government could do. In many areas of social life, using this distorted interpretation of the Commerce Clause, Congress stepped up its suffocation of many kinds of private activity. Firearms were no exception.

Finally, in the 1995 Lopez decision, the Court has begun to return to constitutional government. Lopez was arrested at a Texas school for having a gun and thus violating the federal prohibition on having a firearm within 1000 feet of a school. The Court held that whatever the policy merits of the measure, the Congress had no authority to enact such a law.

(Regarding the policy issue, the most constitutionally consistent approach would be to make it illegal to have a gun at a school for the purpose of committing a violent crime. This would put the burden on the criminal by, in effect, adding an additional penalty to whatever other violent crime was committed. The burden would not go on the decent people, such as students who target practice with teams, parents who are going to or from hunting, and teachers and other adults who have a concealed carry permit for self-defense. Such a policy also assumes that criminals will violate any law that we pass, so the law should target only criminal behavior, and not criminalize good behavior.)

A proper understanding of the Commerce Clause indicates that the most the federal government can do in the firearms area is to keep one state from using taxation to adversely treat firearms which are made in another state and are for sale in the first state. As Justice Thomas put it in his opinion concurring with the majority in the Lopez case, the central issue of the wrong turn by the Court over the last 50 years was not being addressed head-on in Lopez, but it needs to be soon.

If the Court were to be consistently constitutional, all federal gun control legislation, starting with Roosevelt's 1934 National Firearms Act, would be thrown out. This could actually happen in view of the five federal courts which have now held another federal gun control law to be unconstitutional on similar grounds to that of Lopez. Five sheriffs have sued successfully under the Tenth Amendment holding that Washington had no authority to force them to carry out a background check under the Brady Law. This argument points right back to Article I Section 8 where we have already found that there is no authority given to the federal government for gun control legislation.

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If the United States is to return to a lawful, constitutional national government, one of the sure signs of that return will be the removal of the decades-long imposition of federal gun laws.

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