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LIMITS ON THE FEDERAL POWER TO REGULATE FIREARMS

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I. INTRODUCTION

The federal government is the logical source of effective gun control legislation. Nonetheless, the federal government is also the source of rights for the individual and for the states, which many people assert would prevent the federal government from legally passing gun control statutes. This paper examines the validity of these assertions, and the source of federal power to pass such laws: the Second Amendment proclaims an individual's "right to bear arms;" the commerce clause empowers Congress to regulate interstate commerce; the Tenth Amendment prohibits federal commandeering of states; the states traditionally have police power; and the Fifth Amendment's "takings clause" prohibits certain government control over private property.

II. SECOND AMENDMENT

The Second Amendment states that "[a] well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." [No. 1] The Supreme Court has interpreted this provision as allowing Congress broad power to regulate firearms. [No. 2] Congress may impose firearms restrictions so long as the states' militia or police power is not impaired. [No. 3]

In United States v. Miller, virtually the only Supreme Court case discussing the Second Amendment's application to a federal gun law, the court upheld a federal law banning the transport in interstate commerce and subsequent ownership of sawed off shotguns. [No. 4] The Court noted that the purpose of the Second Amendment is to guarantee an effective militia, and the validity of gun legislation must be interpreted with this purpose in mind. [No. 5] Applying the test, the Court found that

sawed off shotguns may be prohibited because the possession or use of such weapons bears no "reasonable relationship to the preservation or efficiency of a well regulated militia." [No. 6]

The Supreme Court recently cited Miller in upholding a law restricting firearm possession by convicted felons. [No. 7] The Court reiterated the test set forth in Miller, stating that the Second Amendment does not guarantee a right to keep a firearm, if the possession or use of the weapon does not have some reasonable relationship to a well regulated militia. [No. 8]

Several federal appeals courts have also applied the Miller test. The Seventh Circuit, upholding a local ordinance prohibiting the possession of handguns, notes that "the right to bear arms is inextricably connected to the preservation of a militia." [No. 9] Thus, a regulation is valid so long as the militia remains intact. The Eighth Circuit has also followed Miller, stating that it is well settled that the Second Amendment is not an absolute bar to congressional regulation of firearms, but merely guarantees the right to possess weapons that bear a reasonable relationship to a well regulated militia. [No. 10] The Tenth Circuit has also rejected the argument that the Second Amendment grants an absolute right to bear arms. [No. 11] Citing Miller, the court refused to apply the Second Amendment to protect an unregistered machine gun since the defendant's possession or use of such a weapon bears no connection with the militia. [No. 12]

Because courts apply the test of whether the weapon bears a reasonable relationship to the state militia narrowly, the Second Amendment imposes almost no barrier to federal legislation restricting private gun ownership. Since the Miller decision in 1939, no federal court has found private ownership of any weapon to be reasonably related to a well regulated militia. [No. 13] Because a military use can be found for almost any type of lethal weapon, [No. 14] persons claiming a Second Amendment violation must prove either membership in a military organization or that their possession is in preparation for a military career. [No. 15] Furthermore, membership in an unorganized state militia and membership in a non-governmental military organization does not satisfy the requirement. [No. 16] Accordingly, the Second Amendment has not barred any federal gun control legislation in modern times.

III. COMMERCE CLAUSE

Congressional authority is limited to the enumerated powers granted by the Constitution. [No. 17] One such power of Congress is the authority to regulate interstate commerce. [No. 18] Most federal gun legislation is based on authority in this area.

A. Commerce Clause as Congress's Source of Authority

The commerce clause is broadly interpreted by the courts to allow federal regulation of a wide range of activities based upon their relation to interstate commerce. To sustain a law passed under the authority of the commerce clause, the government need only show that Congress has made either formal or informal findings that the regulated activity substantially affects interstate commerce. [No. 19] The courts will defer if there is any rational basis for the finding. [No. 20] In fact, one court notes that no Supreme Court decision in half a century has overturned a congressional determination that a relation to interstate commerce exists. [No. 21]

Courts traditionally have presumed the existence of a congressional finding that an activity affects interstate commerce, even when not explicitly stated, if the legislative record contains enough information to support such a conclusion. [No. 22] However, the question of whether Congress has exceeded its constitutional authority arises when it bases a law on its power under the interstate commerce clause, if the legislative record contains no evidence of the regulated activity's relationship to interstate commerce.

B. The Future of the Commerce Clause

This term, the Supreme Court will decide to what extent Congress must make findings implicating interstate commerce with the activity sought to be regulated. [No. 23] The Fifth Circuit ruled last year in United States v. Lopez that the federal Gun-Free School Zones Act of 1990 [No. 24] is unconstitutional. [No. 25] The Act makes it a crime to knowingly possess a firearm in a school zone. [No. 26] The Fifth Circuit found that Congress had made no attempt to link gun violence in schools with interstate commerce. [No. 27] Congress's failure to establish such a connection with interstate commerce brought the Act outside the scope of the commerce power. [No. 28] The Supreme Court has heard oral arguments in Lopez and will decide the case this term.

The Lopez case may alter the Supreme Court's interpretation of Congress's commerce power. If the Court upholds the Fifth Circuit decision, a likely scenario, at a minimum Congress will be required to state the regulated activity's connection with interstate commerce in the legislative record. Another more remote possibility is that the Court

may seize this opportunity to reduce Congress's power under the commerce clause by mandating that federally regulated activities have a stronger nexus to interstate commerce than what is required under current constitutional interpretation. Finally, the Court could maintain the status quo by overturning the Fifth Circuit's decision, leaving Congress virtually unrestrained to regulate in the area of interstate commerce.

Although the Lopez decision could have a major effect on Congress's commerce power, such a change will have little bearing on most federal gun control legislation, particularly laws regulating acquisition and possession of firearms by certain classes of persons. Guns often travel through more than one state in the path from manufacturer to distributor to seller, and finally to the consumer; Congress presumably would have little difficulty establishing a nexus between guns and interstate commerce. Furthermore, the Supreme Court has stated with regard to Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 that Congress did not intend any more than the minimal showing that the firearm had at some time traveled in interstate commerce. [No. 29]

IV. TENTH AMENDMENT

The Tenth Amendment to the United States Constitution reserves to the states powers not delegated to Congress. [No. 30] The Supreme Court recently interpreted the scope of Congress's power under the Tenth Amendment in New York v. United States. [No. 31] The Supreme Court held the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional under the Tenth Amendment. [No. 32] This provision gave states a choice between accepting ownership of radioactive waste or regulating according to congressional instructions. [No. 33] The Court found that the "choice" was one between unconstitutional options: the requirement that a state take title to radioactive waste amounts to the federal government commandeering the state to perform federal regulatory functions, while the alternative commands state governments to implement legislation enacted by Congress. [No. 34] The Court noted that Congress constitutionally may encourage, though not command, a state to act in a particular way. First, Congress may attach conditions to the receipt of federal funds, so long as such conditions bear some relationship to the funds. [No. 35] Second, Congress may offer the state the choice of regulating according to federal standards or having state law preempted. [No. 36] However, the take title provision falls into neither category; Congress may not simply command a state to implement legislation. [No. 37] The commandeering of the state legislature is unconstitutional whether it is viewed as exceeding Congress's commerce power or as infringing on a state's right under the Tenth Amendment. [No. 38]

Application to the Brady Act

The decision in New York v. United States has been followed by several federal district courts who have ruled a provision of the Brady Act [No. 39] unconstitutional. In fact, five federal courts have decided cases challenging the Brady Act, and four of these courts have invalidated a portion of the Act based on New York v. United States. [No. 40] The provision of the Act declared unconstitutional requires that the chief law enforcement officer in each jurisdiction perform a background check on individuals attempting to purchase guns. [No. 41] The only court upholding the Act based its decision on a narrow view of the New York v. United States holding. [No. 42]

All the cases challenging the Brady Act have been brought by sheriffs responsible for carrying out its provisions. The Act requires a five day waiting period for the purchases of handguns, [No. 43] during which time the chief law enforcement officer (CLEO) of the jurisdiction is required to "make a reasonable effort to ascertain. . . whether receipt or possession" of a handgun by the prospective purchaser would be in violation of the law. [No. 44] The CLEO performs the investigation based on the sworn statement provided by the prospective buyer. The CLEO must destroy the statement within twenty days if he or she determines that the sale would not violate the law. [No. 45] If the CLEO determines that the transfer would violate the law, he or she must provide reasons for the denial within twenty days of a request. [No. 46] The sheriffs, who are the CLEOs responsible for performing the background check, argue that the Act commandeers state executive officers to carry out a federal regulatory program. [No. 47]

The four courts striking down the background check provision, section 922(s)(2), follow similar lines of analysis. All view New York v. United States as dispositive and hold that the federal government cannot commandeer sheriffs to perform background checks. [No. 48] The United States argues that New York v. United States is distinguishable because it found compelled legislation

unconstitutional, whereas the Brady Act requires actions by members of the executive branch. [No. 49] However, the courts read the case as prohibiting the federal government from compelling states to administer federal regulatory programs. [No. 50]

Unlike the four courts relying on New York v. United States, one district court has upheld the background check provision of the Brady Act. [No. 51] This district court reasoned that New York v. United States alone does not control the analysis; instead the judge relied on FERC v. Mississippi. [No. 52]

The Supreme Court ruled in FERC v. Mississippi that the federal government could force state utility regulatory commissions to enforce federal law. [No. 53] The Court analogized state utility commissions to judicial tribunals, then relied on prior case law which held that the state judiciary must enforce federal law. [No. 54]

The district court in Koog read FERC v. Mississippi as permitting the federal government to impose minimal duties on state executive officers. [No. 55] Furthermore, the court found the duties imposed on the sheriff by the Brady Act to be a de minimis intrusion. [No. 56] The court also interpreted New York v. United States narrowly, applying it only to federal commandeering of state legislatures. [No. 57] Applying FERC v. United States, the court upheld the background check provision of the Brady Act. [No. 58]

It cannot yet be determined which interpretation of New York v. United States will prevail in the Brady Act cases since none have been appealed. However, the language in New York v. United States appears broad enough to include the executive branch as well as state legislatures. [No. 59]

Even if the sheriffs' commandeering argument succeeds at the appellate level, Congress could redraft section 922 (s)(2) to avoid an unconstitutional result. For instance, rather than requiring CLEOs to perform background checks, Congress could encourage them to carry out the provision by withholding federal funds from law enforcement agencies which do not perform background checks. As discussed previously, such congressional encouragement of states is permissible. [No. 60]

V. TAKINGS

If Congress were to completely ban the sale of guns, a manufacturer might make an argument that this constituted a taking of private property without just compensation. [No. 61] However, such an argument is unlikely to prevail since the prohibition of gun sales would probably not fall under the scope of the Fifth Amendment's takings clause.

Courts have been reluctant to award compensation for lost profits due to their speculative nature. [No. 62] In Andrus v. Allard, the Supreme Court considered whether federal laws prohibiting the sale of lawfully acquired eagle feathers constituted an unlawful taking under the Fifth Amendment. [No. 63] The Court viewed property rights as a bundle of many smaller rights and concluded that where only one strand of the bundle was destroyed, a taking does not occur. [No. 64] Though the feather owners were not permitted to sell their property, the Court noted they could still transport, donate, display, or devise the feathers. [No. 65] Moreover, the feather owners' claim of loss of future profits, without an additional physical property restriction, is insufficient to constitute a takings claim because courts are not able to perform the speculation that determination of lost profits requires. [No. 66] Accordingly, prohibition of the sale of firearms alone probably would not constitute a compensable taking.

Furthermore, liquor manufacturers challenging prohibition laws in the early part of this century were all unsuccessful. [No. 67] In one case, the Supreme Court noted that "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction." [No. 68] Under both Allard and the Prohibition cases, a ban on gun sales would not constitute a compensable taking.

The remote prospect of a total ban on gun sales brings up other issues which, though beyond the scope of this paper, are worthy of mention. Whether private owners would be permitted to sell their private collections to other individuals and whether the government could confiscate existing guns from their owners are two such questions.

CONCLUSION

Congress has broad authority to regulate firearms. The Second Amendment, commonly portrayed as the unqualified "right to bear arms," actually poses almost no barrier to federal gun control legislation. Congress may restrict any firearm so long as the law does not undermine the states' ability to maintain a well regulated militia. Furthermore, the courts' expansive reading of the commerce clause permits Congress to pass a wide range of firearms laws under its authority to regulate interstate commerce. The commandeering argument

of New York v. United States may eventually impose some limitation on Congress, but only insofar as Congress requires states to carry out its legislation. However, Congress can probably draft its statutes in such a way as to avoid commandeering the states. Finally, even if the sale of firearms were banned, a gun manufacturer making a takings argument would be unlikely to prevail.

NOTES

[No. 1] U.S. Const. amend. II.
[No. 2] United States v. Miller, 307 U.S. 174 (1939).
[No. 3] Id. at 178.
[No. 4] Id.
[No. 5] Id.
[No. 6] Id.
[No. 7] Lewis v. United States, 445 U.S. 55 (1980).
[No. 8] Id. at 65 n.8.
[No. 9] Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983).
[No. 10] Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), cert. denied, 409 U.S. 1010 (1972).
[No. 11] United States v. Oakes, 564 F.2d 384 (10th Cir. 1977).
[No. 12] Id. at 387.
[No. 13] United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (conviction on thirteen counts of unlawful possession of a machine gun and three counts of possession of an unregistered firearm).
[No. 14] Cases v. United States, 131 F. 2d 916, 922 (1st Cir. 1942).
[No. 15] Hale, 978 F. 2d at 1020 (conviction upheld because Hale presented no evidence showing his weapons' connection with a well regulated militia).
[No. 16] Id.
[No. 17] U.S. Const. amend. X.
[No. 18] U.S. Const. art. I, 8.
[No. 19] E.g., Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
[No. 20] E.g., Hodel, 452 U.S. 264.
[No. 21] United States v. Lopez, 2 F.3d 1342, 1363 n. 43 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (April 18, 1994).
[No. 22] E.g., Heart of Atlanta Motel, 379 U.S. at 355 (held the Civil Rights Act of 1964, as applied to a motel serving interstate travelers, is a constitutional exercise of Congress's commerce power).

[No. 23] Lopez, cert. granted, 114 S. Ct. 1536 (April 18, 1994).
[No. 24] 18 U.S.C. 922 (q).
[No. 25] Lopez, 2 F.3d 1342.
[No. 26] 18 U.S.C. 922 (q)(1)(A).
[No. 27] Lopez, 2 F. 3d at 1359.
[No. 28] Id. at 1367-68.
[No. 29] Scarborough v. United States, 431 U.S. 563, 575 (1977).
[No. 30] U.S. Const. amend. X.
[No. 31] 120 L. Ed. 2d 120 (1992).
[No. 32] Id.
[No. 33] Id. at 150.
[No. 34] Id.
[No. 35] Id. at 144 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
[No. 36] Id. at 145 (citing Hodel, 452 U.S. at 288).
[No. 37] Id. at 150.
[No. 38] Id. at 151.
[No. 39] Pub. Law No. 103-159, 107 Stat. 1536 (1993).
[No. 40] The cases invalidating 18 U.S.C. 922(s)(2) of the Brady Act are Frank v. United States, 860 F. Supp 1030 (D. Vt. August 2, 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. June 29, 1994); McGee v. United States, 863 F. Supp 321 (S.D. Miss. June 2, 1994); Printz v. United States, 854 F. Supp. 1503 (D. Mont. May 16, 1994). The case upholding the Brady Act is Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. May 31, 1994).
[No. 41] 18 U.S.C. 922 (s)(2).
[No. 42] Koog, 852 F. Supp. at 1388.
[No. 43] 18 U.S.C. 922(s)(1)(A)(ii).
[No. 44] 18 U.S.C. 922(s)(2).
[No. 45] 18 U.S.C. 922(s)(6)(B).
[No. 46] 18 U.S.C. 922(s)(6)(C).
[No. 47] E.g., Printz, 854 F. Supp at 1513.
[No. 48] Frank, 860 F. Supp. 1030; Mack, 856 F. Supp. 1372; McGee,

863 F. Supp. 321; Printz, 854 F. Supp. 1503.
[No. 49] E.g., Printz, 854 F. Supp. at 1513.

[No. 50] Id. (citing New York, 120 L. Ed. 2d at 158).
[No. 51] Koog, 852 F. Supp. 1376.
[No. 52] 456 U.S. 742 (1982).
[No. 53] Id.
[No. 54] Id. at 760 (relying on Testa v. Katt, 330 U.S. 386 (1947)).
[No. 55] Koog, 852 F. Supp. at 1388.
[No. 56] Id.
[No. 57] Id.
[No. 58] Id.
[No. 59] New York, 120 L. Ed. 2d at 158 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").
[No. 60] E.g., South Dakota v. Dole, 483 U.S. 203 (1987) (Congress may attach conditions to the receipt of federal funds).
[No. 61] U.S. Const. amend. V. ("[N]or shall private property be taken for public use without just compensation.").
[No. 62] Andrus v. Allard, 444 U.S. 51, 66 (1979).
[No. 63] Id. at 65-66.
[No. 64] Id.
[No. 65] Id. at 66.
[No. 66] Id.
[No. 67] E.g., Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920).
[No. 68] Jacob Ruppert, 251 U.S. at 303.