Duquesne Law Review

Volume 42 | Number 4 Article 8

2004

Rescuing the Commerce Clause: Why the Federal Government May Not Constitutionally Regulate the Possession of Firearms

Samuel J. Toney IV

Follow this and additional works at: https://dsc.duq.edu/dlr

 Part of the Law Commons

Recommended Citation
Samuel J. Toney IV, *Rescuing the Commerce Clause: Why the Federal Government May Not Constitutionally Regulate the Possession of Firearms*, 42 Duq. L. Rev. 865 (2004).
Available at: https://dsc.duq.edu/dlr/vol42/iss4/8

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Rescuing the Commerce Clause: Why the Federal Government May Not Constitutionally Regulate the Possession of Firearms

I. INTRODUCTION

The federal government is a government of enumerated powers.[1] These powers are expressly granted by the people through the United States Constitution.[2] It is clear, therefore, that the United States government is one of limited powers, and can act pursuant only to the authority that is granted to it by the Constitution.[3] This grant of authority could be expressly made in the Constitution, or may be a necessary implication of an express grant.[4] Among the powers not granted to the federal government and reserved to the states is a general police power.[5]

"Congress has no general power to enact police regulations operative within the territorial limits of a state[.]"[6] It has been stated that a police power extends to "the making [of] regulations promotive of domestic order, morals, health, and safety."[7] This police power includes the power to define crimes, which the federal government may not define for a state unless the Constitution expressly permits federal regulation of the activity.[8] Despite the federal government's lack of a general police power and the limitations on its ability to enact criminal legislation within the states, an increasing desire to find national solutions to a variety of issues has prompted Congress to find justification for regulating ever-broadening areas of activity within the enumerated powers.[9] One enumerated power that has been frequently used by Congress in enacting such regulations is the power granted to Congress under the Commerce Clause.[10]

---

1. 16A AM JUR. 2D *Constitutional Law* § 223 (2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at § 328.
6. 16A AM. JUR. 2D *Constitutional Law* § 328 (2003).
7. R.R. Co. v. Husen, 95 U.S. 465, 470-71 (1877).
8. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 3.1 (2d ed. 2003).
9. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 119 (14th ed. 2001).
10. *Id.*

The Commerce Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[11] Among the regulations passed by Congress under its commerce power is the regulation of firearms. Along with other offenses, these regulations prohibit the possession of firearms by several classes of individuals, ranging from felons to juveniles.[12] Federal law also prohibits the types of firearms that all individuals may possess, regardless of the class of the individual.[13] Additionally, federal law prohibits the possession of a firearm in a school zone, as well as the theft of

---

11. U.S. CONST. art. I, § 8, cl. 3.

12. 18 U.S.C. § 922(g) and (x)(2) (2000). Section 922(g) states as follows:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (citation omitted);

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

***

(6) who has been discharged from the Armed Forces under dishonorable conditions;

***

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that could place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g) (2000). Section 922(x)(2) states as follows: "It shall be unlawful for any person who is a juvenile to knowingly possess—(A) a handgun; or (B) ammunition that is suitable for use only in a handgun." 18 U.S.C § 922(x)(2) (2000).

13. 18 U.S.C. § 922(o)(1) and (v)(1). Section 922(o)(1) provides that "[e]xcept as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun." 18 U.S.C. § 922(o)(1) (2000). Section 922(v)(1) states that "[i]t shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." 18 U.S.C. § 922(v)(1) (2000).

a firearm.[14] Although each of these acts was passed pursuant to congressional power under the Commerce Clause, these regulations do not deal with commerce directly. Rather, the statutes are aimed at regulating criminal activity that the states would typically regulate under their police power. If this is the case, the regulations overstep the authority granted to Congress under the Constitution, and are therefore unconstitutional.[15] In determining whether any congressional act is constitutional, it must first be decided "whether the enactment is made pursuant to one of the powers granted the federal government under the Constitution . . . ."[16] It must then be decided whether the law "violates some specific check on federal power such as those contained in the Bill of Rights."[17] In deciding whether the regulation of firearms possession is constitutional, it must first be determined whether these laws are a valid exercise of congressional authority under the Commerce Clause.[18] Should the regulations be found valid, it must then be decided whether there are any other sections of the Constitution that prohibit the federal government from regulating the possession of firearms.[19]

II. FEDERAL AUTHORITY UNDER THE COMMERCE CLAUSE

A. *The History of the Commerce Clause*

When analyzing whether the power to regulate firearms is granted to the Congress as part of its commerce power, it is important to look to the history of the Commerce Clause in order to de-

---

14. 18 U.S.C. § 922(q)(2)(A) and (u) (2000). Section 922(q)(2)(A) states that "[i]t shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (2000). Section 922(u) provides that:

> [i]t shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(u) (2000).

15. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 3.1 (3d ed. 1999). Because the federal government is one of enumerated powers, "[i]t can only act to effectuate the powers specifically granted to it, rather than acting for the general welfare of the populace." *Id.*

16. *Id.* at § 3.1.

17. *Id.* "Even if the federal government is acting pursuant to one of its enumerated powers, it may not disregard these constitutional limitations." *Id.*

18. *Id.*

19. *Id.*

termine the meaning and scope of this federal authority. During and following the Revolutionary War, the states were loosely bound together by the Articles of Confederation.[20] Under this system, the individual states were free to, and in fact did, enact tariffs and other regulations that were restrictive of trade, both between themselves and between a state and a foreign country.[21] These restrictions created severe impediments to the ability to trade and limited the power of the national government, so much so that a meeting of representatives from the several states was called to create a new form of government.[22]

As a solution to the problems with trade that developed between the states under the Articles of Confederation, this convention adopted the Commerce Clause as a part of the Constitution.[23] The reason for drafting the Commerce Clause was to ensure a system of trade that would not unduly burden the new nation.[24] This simple grant of authority has, however, given rise to a host of federal regulations in a variety of areas, as well as several Supreme Court interpretations of the scope of authority actually granted under the commerce power.[25]

Many early Supreme Court cases involving the Commerce Clause focused not on federal authority under the Commerce Clause, but rather discussed the limits of state authority under the "Dormant" Commerce Clause.[26] These early cases held that Congress had the authority to regulate commerce, but interpreted the power to regulate commerce as limited to matters that truly involved commerce among the states.[27] Some early commerce cases invalidated federal regulations that were based on the

---

20. ROTUNDA & NOWAK, *supra* note 15, at § 3.1.

21. *Id.*

22. *Id.* It appears clear, therefore, that problems with trade between the states and with foreign nations, and the national government's inability to regulate such trade, were major reasons why the convention that led to the drafting of the constitution was convened. *Id.* at § 4.3.

23. *Id.*

24. SULLIVAN & GUNTHER, *supra* note 9, at 119.

25. *Id.* at 119-20.

26. *Id.* at 122. "Under the 'Dormant' Commerce Clause, the Court invalidates some 'protectionist' state legislation, even in the absence of congressional preemption." *Id.* at 234. The Constitution does not expressly limit state power to regulate commerce; the Court has, however, understood the Commerce Clause to have the negative implication that the Commerce Clause, by granting to Congress the power to regulate commerce among the states, limits state regulation of such commerce even though Congress has not acted. *Id.*

27. Gibbons v. Ogden, 22 U.S. 1, 194-95 (1824), stated that the Commerce Clause extends to matters involving more than one state, but left to an individual state the regulation of an issue occurring entirely within its borders. *Id.*

Commerce Clause as beyond the scope of federal authority.[28] Other cases found regulations based on the clause to be valid. In each of these cases, however, the subjects regulated had a direct relation to interstate commerce.[29] Where the relationship to commerce was only indirect, the regulation was held not to be a valid exercise of Congressional authority.[30] This line between direct and indirect ties to commerce as a basis for validating congressional authority would change dramatically in the mid-1930's.

During the first years of President Franklin D. Roosevelt's administration, he lobbied for and signed into law several "New Deal" programs to combat the Great Depression.[31] These regulations were usually passed under Congress' commerce power, but were many times struck down by the Supreme Court as outside the scope of the Commerce Clause.[32] In 1936, President Roosevelt devised a plan that he believed would allow his programs to withstand Supreme Court scrutiny by sending proposed legislation to Congress that would permit the President to appoint additional Justices to the Supreme Court.[33] He reasoned that these Justices would share his views on the need for his "New Deal" legislation, and therefore, they would vote to uphold these programs.[34] Although this proposal was soundly defeated in Congress, subsequent rulings by the Supreme Court indicate that it was concerned about the possibility of a similar intrusion on the Court by a future President.[35]

The Supreme Court reversed its previous interpretation of the Commerce Clause within one year of President Roosevelt's efforts

---

28. *See* U.S. v. E.C. Knight, 156 U.S. 1 (1895) (finding unconstitutional a federal law regulating monopolies as beyond the commerce power granted under the constitution). *See also* U.S. v. Dewitt, 76 U.S. 41 (1869) (invalidating a law prohibiting the making for sale of certain oils, finding that the law was a police regulation and not within the commerce power of Congress).

29. *See* Houston East & West Texas Ry. Co. v. U.S., 234 U.S. 342 (1914) (upholding the validity of an Interstate Commerce Commission requirement that rail carriers charge the same rates for interstate and intrastate transportation of goods); and Swift & Co. v. U.S., 196 U.S. 375 (1905) (holding as constitutional a federal anti-monopoly statute against companies attempting to monopolize the sale of fresh meat among the states).

30. *See* Schechter Poultry v. U.S., 295 U.S. 495, 546-47 (1936).

31. CAROL BERKIN ET AL., MAKING OF AMERICA: A HISTORY OF THE UNITED STATES, VOL. II 815 (2d ed. 1999).

32. SULLIVAN and GUNTHER, *supra* note 9, at 135.

33. *Id.*

34. BERKIN, *supra* note 31, at 808-15.

35. *See* NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 193 (2d ed. 1999).

to alter the makeup of the Court.[36] In *National Labor Relations Board v. Jones & Loughlin Steel*,[37] the Court held that a law protecting the rights of employees to organize was a valid exercise of Congressional power under the Commerce Clause, despite the fact that the employees in the case were employed completely within the state of Pennsylvania.[38] This holding was in stark contrast to the Court's holding just one year earlier in *Schechter Poultry Corp. v. United States*,[39] where the Court stated that a statute that had only an indirect effect on interstate commerce was not a valid exercise of the commerce power.[40] Over the next sixty years, the Court consistently expanded the scope of the Commerce Clause and gave Congress a virtual blank check to enact any law under the guise of regulating commerce.[41] This power went so far as to regulate areas, such as crime, that had traditionally been reserved to the states under their police powers.[42] In 1995, however, the Supreme Court invalidated a regulation under the Commerce Clause for the first time since 1937.[43]

In *United States v. Lopez*,[44] the Supreme Court was faced with a high school senior that had brought a handgun to school, in violation of federal law.[45] Writing for the majority, Chief Justice Rehnquist examined the history of the Commerce Clause, and then concluded that there are three areas that Congress may regulate under the Commerce Clause. Congress can "regulate the use of the channels of interstate commerce;"[46] "the instrumentalities of interstate commerce, or persons or things in interstate commerce;"[47] and activities that "have a substantial relation to

36. Nat'l Labor Relations Bd. v. Jones & Loughlin Steel, 301 U.S. 1 (1937).
37. 301 U.S. 1 (1937).
38. *Jones & Loughlin Steel*, 301 U.S. at 27-28.
39. 295 U.S. 495 (1935).
40. *See Schechter Poulty*, 295 U.S. at 546-47.
41. *See* U.S. v. Darby, 312 U.S. 100 (1941) (upholding federal laws setting minimum wages and maximum hours for employees that produced goods to be shipped in interstate commerce); and Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a Department of Agriculture regulation limiting the amount of wheat that a farmer could produce was a valid regulation of commerce).
42. *See generally* Perez v. United States, 402 U.S. 146 (1971) (finding constitutional a law that prohibited loan sharking).
43. SULLIVAN & GUNTHER, *supra* note 9, at 119.
44. 514 U.S. 549 (1995).
45. *Id.* The law which Lopez violated was titled the Gun-Free School Zones Act, and it "[forbade] any 'individual knowingly to possess a firearm at a place that he knows . . . is a school zone." *Id.*
46. *Lopez*, 514 U.S. at 558 (citations omitted).
47. *Id.* (citations omitted).

interstate commerce."[48] The Court dismissed the first two categories in its analysis of the Gun-Free School Zone Act, stating that the law in question was neither a regulation of the channels of commerce or the instrumentalities of commerce.[49] The Court also found that the possession of firearms in a school zone did not substantially affect interstate commerce.[50] The Court was concerned it would require too great an inference to find that gun possession in a school zone has a substantial effect on interstate commerce and would transform Congress' limited commerce authority to that of a police power.[51] The Court was also concerned that the statute "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."[52]

The holding that federal regulation of gun possession in a school zone was unconstitutional as beyond Congress' commerce authority would appear to settle the issue of whether of whether the federal government may regulate the possession of firearms. If firearms possession in a school zone cannot be regulated by Congress under the Commerce Clause, it follows that no federal regulation of gun possession would be valid. Case law does not, however, reflect this logic. In the eight years since *Lopez*, federal courts have had no trouble convicting defendants of violating statutes prohibiting firearms possession, in spite of the Supreme Court's ruling in *Lopez*.[53] Additionally, even the law found unconstitutional in *Lopez* is now valid under the Commerce Clause because Congress amended the law to include a jurisdictional element requiring that the possessed firearm be "in or affecting commerce."[54] Because the possession of firearms is still being regulated by the federal government under the Commerce Clause, it is necessary to analyze

48. *Id.* at 558-59.
49. *Id.* at 559.
50. *Id.* at 567.
51. *Lopez*, 514 U.S. at 567.
52. *Id.* at 561-62.
53. *See* U.S. v. Hanna, 55 F.3d 1456, 1462 (9th Cir. 1995) (upholding a statute prohibiting the possession of a firearm by a felon as a valid use of the commerce power because the statute contained a nexus to commerce); and U.S. v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995) (ruling that a statute prohibiting the possession of a machine gun was a constitutional use of the commerce power).
54. SULLIVAN & GUNTHER, *supra* note 9, at 163. *See also* U.S. v. Danks, 221 F.3d 1037, 1038-39 (8th Cir. 1999) (holding that 18 U.S.C. § 922(q) (prohibiting possession of a firearm within 1000 feet of a school) is a valid exercise of Congress' commerce power because the Act was amended to require that the firearm to be regulated must have moved in or affected interstate commerce).

the validity of these regulations under the traditional view of the Commerce Clause, as well as under *Lopez*, in order to determine if Congress should have the authority to regulate gun possession.

B. *Why the Possession of Firearms Cannot Be Regulated by the Federal Government Under the Commerce Clause*

Based on the early understanding of the Commerce Clause, there can be little question that the mere possession of a firearm would not be an activity that could be regulated by Congress under the Commerce Clause. In *Gibbons v. Ogden,*[55] the Supreme Court discussed the scope of the Commerce Clause.[56] The Court stated that:

> The enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state.[57]

The Court concluded that the scope of the Commerce Clause included "those internal concerns which affect the [s]tates generally; but not to those which are completely within a particular [s]tate, which do not affect other [s]tates, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[58] The possession of a firearm that occurs within a state could not be regulated under the Commerce Clause because such possession occurred completely within a state and would be excluded from the enumerated power granted to Congress.

Later cases upholding congressional regulations under the Commerce Clause further illustrate that the Commerce Clause grants Congress a limited power and would not include the power to regulate the possession of firearms. For instance, in *Schechter Poultry,* the Court held that federal laws setting minimum wage and maximum hour requirements for employees because the goods

---

55. 22 U.S. 1 (1824).
56. *Gibbons,* 22 U.S. at 194-95.
57. *Id.*
58. *Id.* at 195.

they produced affected interstate commerce was unconstitutional because the effect on interstate commerce was only indirect.[59] The Court stated that:

> [w]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the Commerce Clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.[60]

This statement makes clear that the regulated activity must have a direct effect on interstate commerce and would be invalid if the effect were only indirect. The possession of firearms does not have a direct effect on interstate commerce, and under this understanding of the Commerce Clause, Congress should not be using this clause to regulate gun possession.

The decision in *Lopez* is further evidence that Congress does not have the authority to regulate firearms possession under the Commerce Clause.[61] Congress can regulate only three areas under the Commerce Clause.[62] Congress may regulate the channels of interstate commerce; the instrumentalities of interstate commerce, or things or people moving in interstate commerce; and things that have a substantial effect on interstate commerce.[63] In order for Congress to have the power to regulate firearms possession, it must fit into one of these three categories.

The channels of commerce refer to roads, waterways, and other avenues through which things or people may be moved.[64] Firearms clearly do not fall under the channels of commerce, making Congressional regulation of their possession impossible under this category.

An instrumentality is defined as "[a] thing used to achieve an end or purpose."[65] Things used to achieve the ends of interstate

59. *Schechter Poulty*, 295 U.S. at 550.
60. *Id* at 546.
61. *Lopez*, 514 U.S. at 558-68.
62. *Id.* at 558-60.
63. *Id.*
64. *See* U.S. v. Utah, 283 U.S. 64, 72 (1931).
65. BLACK'S LAW DICTIONARY 639 (7th ed. 2000).

commerce would seem to be the things used to transport goods interstate, such as railroads, trucks, and airplanes.[66] Under this definition, firearms are not instrumentalities of interstate commerce.

Although firearms do not fall into either the channels of commerce or instrumentalities of commerce theories, many would argue that these regulations of firearms are still valid uses of Congress' commerce power because the possession of firearms qualifies under the category of having a substantial effect on interstate commerce.[67] A major problem with this assertion is that it is difficult to demonstrate the substantial effect on interstate commerce caused by possession of a firearm. In *Lopez*, the United States argued that the cost associated with crime is substantial and that this cost is born by all of the citizens of the country because of insurance.[68] The government further asserted that higher crime would discourage travel, and decreased travel would have a substantial effect on commerce.[69] Under the traditional interpretation of the Commerce Clause, the effect of firearms possession on interstate commerce would be too indirect to permit Congressional regulation.[70] The majority in *Lopez* seemed to agree, stating that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[71]

Further, Chief Justice Rehnquist pointed out that even under the most expansive interpretations of the Commerce Clause, the scope of the clause still had limits.[72] In each of the cases that regulated intrastate activity, there was a clear economic activity being regulated.[73] The possession of firearms is not an economic activity in any sense, and the regulation has no relation to the regulation of economic activity because it is a criminal statute.[74] This distinction is important because the Commerce Clause allows

66. Houston E. & W. Texas Ry. Co. v. U.S., 234 U.S. 342, 351 (1914) (stating that interstate carriers are instruments of interstate commerce).
67. *Lopez*, 514 U.S. at 563-67.
68. *Id.* at 563-64.
69. *Id.*
70. *See Schechter Poultry*, 295 U.S. at 546-47.
71. *Lopez*, 514 U.S. at 567.
72. *Id.* at 560-61.
73. *Id.*
74. *Id.* at 561.

Congress to regulate commerce "among the several [s]tates . . . ."[75] Justice Marshall stated in *Gibbons* that commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[76] Under an expansive interpretation of the Commerce Clause, it is possible that Congress may regulate the sale of firearms under its commerce authority because such sales are economic activities that could arguably have a substantial effect on interstate commerce. The mere possession of firearms, however, does not fall within the definition of commerce discussed in *Gibbons* and therefore crosses the line from a regulation of commerce to a statute criminalizing activity that is properly within the jurisdiction of the states under their police power.

The theory that crime has a substantial effect on interstate commerce, and therefore Congress may regulate the possession of firearms under the Commerce Clause, creates a more disconcerting problem. Under this theory, Congress would have the power to regulate far more than the possession of firearms. Congress could enact criminal laws prohibiting any type of crime under the theory that crime has a substantial effect on interstate commerce. Regulation of crime is a police power exercised by the states within their borders and reserved to the states by the Tenth Amendment.[77] As a result, an interpretation of the Commerce Clause that would permit Congress to regulate crime, as it does by regulating possession of firearms within a state, would upset the balance of power between the federal government and the states and expand federal power far beyond the limits intended by the Founding Fathers and set forth in the Constitution.

Beyond the intrusion upon the authority of the states to regulate crime created by this interpretation of the Commerce Clause, the Court in *Lopez* discussed a more expansive problem this view of the Commerce Clause would create.[78] Chief Justice Rehnquist

---

75. U.S. CONST. art. I, § 8, cl. 3.

76. *Gibbons*, 22 U.S. at 189-90.

77. U.S. CONST. amend. X. *See* Champion v. Ames, 188 U.S. 321 (1903), stating that:

> [t]he power of the [s]tate to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the [s]tates, not surrendered by them to the [g]eneral [g]overnment, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police.

Id. at 364-65 (Fuller, C.J., dissenting).

78. *Lopez*, 514 U.S. at 564-67.

stated that, based on the reasoning set forth by the government for finding a substantial effect on interstate commerce, it would be difficult to think of any area of human life that could not be regulated by Congress under its commerce power.[79] Justice Rehnquist stated that this reasoning could be extended so far as to include marriage and issues concerning family life.[80] If family issues would be subject to Congressional regulation, it seems that there would be no area of human life outside Congress' regulatory authority under the Commerce Clause. This is a result clearly not intended by the framers of the national government when they designed a constitution of limited powers.

The Supreme Court in *Lopez* expressed concern that upholding regulations such as the one at issue in that case would essentially give Congress a plenary power over all areas of life, leaving the states with little regulatory authority.[81] The Court found that the possession of firearms within 1,000 feet of a school zone did not substantially affect interstate commerce, and therefore held that the statute at issue in the case went beyond the scope of the Commerce Clause.[82] However, subsequent rulings by lower federal courts as well as statutory developments indicate that simply requiring that the firearm in question had moved in interstate commerce at some point is enough to cure the constitutional defect and bring the regulation of firearms possession within the scope of the commerce power. Following the decision in *Lopez*, Congress amended the statute at issue in *Lopez* to require that the firearm possessed within 1,000 feet of a school zone must have moved in or affected interstate commerce in order for the statute to have been violated.[83] This minor drafting change seems to have made a significant difference in the constitutionality of the statute. In *United States v. Danks*,[84] the Eighth Circuit held that the statute was a valid exercise of congressional authority under the Commerce Clause because the amended statute contains a jurisdiction requirement that the firearm in question had moved in or affected commerce.[85]

---

79. *Id.* at 564.
80. *Id.*
81. *Id.* at 564-66.
82. *Lopez*, 514 U.S. at 558-68.
83. SULLIVAN & GUNTHER, *supra* note 9, at 163.
84. 221 F.3d 1037 (8th Cir. 1999).
85. *Danks*, 221 F.3d at 1038-39.

In other federal cases involving the possession of firearms, federal courts have reached similar conclusions with regard to their regulation. In *United States v. Singletary*,[86] the Third Circuit ruled that the federal statute prohibiting the possession of firearms by a felon is a valid exercise of congressional authority under the Commerce Clause because the statute requires that the firearm in question must have at some time in the past moved in interstate commerce.[87] A similar decision upholding the validity of the same law under the Commerce Clause was reached by the Sixth Circuit in *United States v. Turner*.[88] In *United States v. Bayles*,[89] the Tenth Circuit held that a federal statute prohibiting the possession of firearms by a person subject to a domestic violence protective order was a valid exercise of the commerce power because the statute requires that the firearms regulated had moved in interstate commerce.[90] These cases and numerous others illustrate that Congress need only require that a firearm moved in interstate commerce at some prior time in order to subject the firearm to federal regulation under the Commerce Clause.

Whether Congress should be able to regulate gun possession upon a simple showing that the firearm in question has moved in interstate commerce is the key issue for determination. Congress may regulate commerce among the states.[91] This power must be broad enough to enter the interior of a state where interstate commerce is transacted within the state.[92] Despite the extension of this power into the state, there must be a point at which the thing regulated ceases to be a thing in interstate commerce and becomes subject exclusively to the control of the state under its reserved police power. For instance, in *City of New York v. Miln*,[93] where the defendant sought to invalidate a New York law regulating people that had entered the state by arguing that the law was invalid because it was a regulation of commerce.[94] The Supreme Court found that the New York law was a valid police regulation, and was beyond Congress' commerce power.[95] So should it be with

86. 268 F.3d 196 (3d Cir. 2001).
87. *Singletary*, 268 F.3d at 204.
88. 77 F.3d 887 (6th Cir. 1996).
89. 310 F.3d. 1302 (10th Cir. 2002)
90. *Bayles*, 310 F.3d at 1307-08.
91. U.S. CONST. art. I, § 8, cl. 3.
92. *Gibbons*, 22 U.S. at 195-97.
93. 36 U.S. 102 (1837).
94. *Miln*, 36 U.S. at 132.
95. *Id.* at 132.

firearms; once the firearm has been received within the state, the good should be viewed as passing out of interstate commerce and Congress' regulatory authority, and thereafter may be regulated only under the police power of the state in which the possession occurred.

Hoke v. United States[96] provides further support for the proposition that there must be an end point to the movement of something in commerce so that the regulation after that point is exclusively within the purview of the states.[97] At issue in *Hoke* was a statute passed by Congress making it illegal to transport women and girls across state lines for "immoral purposes."[98] The defendants contended that the act was a regulation of *Hoke v. United States* prostitution, and because such regulation fell within the police power granted to the states, Congress was without power to regulate such conduct, even under the Commerce Clause.[99] The Court conceded that the states have the authority to control the morals of their citizens.[100] The Court further stated, however, that while Congress may not prohibit an activity within a state, it may prohibit interstate transportation.[101] The opinion makes clear that Congress has the authority to regulate things moving in interstate commerce, in this case women being transported for prostitution.[102] When the thing to be regulated ends its interstate journey, it is no longer a part of commerce and can only be regulated by the state.[103] The Court held that the state is to regulate prostitution, but Congress could regulate the transportation of women for that purpose.[104] A similar rule should exist with respect to firearms. Congress may regulate firearms while they are traveling in interstate commerce. When they are received in their state of destination, they should no longer be viewed as in commerce and subject to federal regulation.

By permitting Congress to regulate gun possession by simply requiring that the possessed firearm has moved in interstate commerce, the concerns discussed in *Lopez* regarding the limits of federal power are not sufficiently addressed. This is because al-

96. 227 U.S. 308 (1913).
97. *Hoke*, 227 U.S. at 316-17.
98. *Id.* at 316-17.
99. *Id.* at 319-20.
100. *Id.* at 321.
101. *Id.* at 322.
102. *Hoke*, 227 U.S. 323.
103. *See Hoke*, 227 U.S. at 322.
104. *Hoke*, 227 U.S. at 323.

most all firearms have at some time in the past moved in interstate commerce, making this a condition for federal regulation a formality at best.[105] More importantly, requiring that a firearm has moved in interstate commerce does not change the fact that the possession of firearms is not an economic activity, but rather a criminal statute. The *Lopez* Court stated that permitting Congress to use the Commerce Clause in this way would grant to Congress a police power,[106] a result that does not change by simply requiring that the firearm had at some point moved in interstate commerce.

The great breadth of regulatory authority Congress could enjoy using this interpretation of the Commerce Clause would allow Congress to regulate almost any area of society. This result would upset the federal-state balance established by the Constitution.[107] As a result, the Commerce Clause should no longer be given such an expansive interpretation, and Congress should not be constitutionally permitted to regulate the possession of firearms under the Commerce Clause.

Even assuming that the regulation of firearm possession under the Commerce Clause is a valid exercises of Congressional commerce authority, this analysis still requires further evaluation. The second prong of the test for the constitutionality of any federal regulation is whether the regulation conforms with other specific rights found in the Constitution.[108]

III. THE RIGHT TO BEAR ARMS AS A CHECK ON CONGRESSIONAL AUTHORITY TO REGULATE GUN POSSESSION

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear [a]rms, shall not be infringed."[109] The Second Amendment appears to ensure that people will be free to possess firearms. Federal courts, however, have interpreted the Second Amendment in a much more restrictive fashion. For instance, in *United States v. Pruess*,[110] Pruess argued that his conviction for violating a federal law, which prohibited a convicted felon from

105. SULLIVAN & GUNTHER, *supra* note 9, at 163.
106. *Lopez*, 514 U.S. at 567.
107. *See Lopez*, 514 U.S. at 567-68.
108. ROTUNDA & NOWAK, *supra* note 15, at § 3.1.
109. U.S. CONST. amend. II.
110. 13 Fed. Appx. 87 (4th Cir. 2001).

carrying a firearm that had moved in interstate commerce, should be overturned because the law violated the Second Amendment.[111] The court disagreed, stating that "because Pruess has not shown how his conviction interferes with the collective right of the people to maintain a well-regulated militia, we can discern no error of constitutional magnitude in this regard."[112]

The language in *Pruess* seems to indicate that, if any group of people organize and maintain a well-regulated militia, these people collectively have a right to keep and bear arms.[113] However, courts have further limited the "collective right" by holding that the Second Amendment confers only the right of a state to raise a militia.[114] The Sixth Circuit stated, in *United States v. Napier*, that since the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."[115] This language leaves little doubt that, in the eyes of the Sixth Circuit at least, no person or group of people has the Constitutional right to possess firearms. The Sixth Circuit vests this right exclusively in the states when it explains "the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."[116]

An interpretation of the Second Amendment as conveying a right to the states, as opposed to individuals, creates problems as soon as the use of the word "people" in other amendments within the Bill of Rights is analyzed.[117] The Fourth Amendment refers to "the right of the people to be secure in their persons" and it is "difficult to know how one might plausibly read the Fourth Amendment as other than a protection of individual rights."[118] The First Amendment refers to the right of the people to peaceably assemble,[119] and "it would approach the frivolous to read the assembly and petition clause as referring only to the right of state legisla-

111. *Pruess*, 13 Fed. Appx. at 88.
112. *Id.*
113. *Id.*
114. *See, e.g.*, U.S. v. Napier, 233 F.3d 394, 402 (6th Cir. 2000).
115. *Napier*, 233 F.3d at 402 (citations omitted).
116. *Id.* at 403.
117. Sanford Levinson, *The Embarrassing Second Amendment*, YALE L.J. 637, 645 (1989).
118. *Id.*
119. U.S. CONST. amend I.

tures to meet and pass a remonstrance directed to Congress or the President."[120]

An examination of the wording of the Tenth Amendment also support the conclusion that the Second Amendment applies to individuals as opposed to the states. The Tenth Amendment provides that rights not discussed in the Constitution are "reserved to the States respectively, or to the people."[121] The Second Amendment uses the word "people" as opposed to the word "states" when discussing who has the right to bear arms; viewing the Second Amendment as conveying a right only in the states, and not in individuals, necessitates that the word "people" as used in the Second Amendment refer to the states.[122] This leads to a problem of construction when considering the Tenth Amendment. If the word "people" really means "states," the Tenth Amendment would not declare that rights are reserved to the states or to the people.[123] The drafters of the Constitution suggest that the words have different meanings; otherwise, the Tenth Amendment would not reserve to both the people and the states the rights not enumerated in the other amendments. Therefore, if these words have different meanings in the Tenth Amendment, it seems odd that one word would be used to mean the opposite in the Second Amendment.

Further evidence that the word "people" does not refer to the states in the Second Amendment is taken from the decision in *United States v. Verdugo-Urquidez*.[124] This case involved the issue of whether the Fourth Amendment protected citizens of Mexico while in Mexico.[125] In holding that it did not, the Supreme Court engaged in an analysis of what the phrase "the people" meant when used in the constitution. The Court stated that:

> The people seems to have been a term of art employed in select parts of the Constitution. The preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of

120. Levinson, *supra* note 117 at 645.

121. U.S. CONST. amend X.

122. Levinson, *supra* note 117, at 645.

123. Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 449 (2001).

124. David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court has Said About the Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99, 176 (1999).

125. *Id.* at 176.

> the people to keep and bear arms," and the Ninth and Tenth Amendment provide that certain rights and powers are retained by and reserved to "the people" . . . . While this textual exegesis is by no means conclusive, it suggest that "the People" protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community.[126]

Logically speaking, "if 'the people' whose right to arms is protected by the Second Amendment are the American people, then 'the right of the people' in the Second Amendment does not mean 'the right of the states.'"[127] As a result, an interpretation of the Second Amendment as conveying a right only to the states is erroneous and not based on the text of the Constitution or proper Constitutional interpretation.

In addition to the text of the Constitution, the ideals on which our country was founded clearly demonstrate that the Second Amendment must convey an individual right. The Tenth Amendment's use of the phrase "the people" demonstrates that "the people" are a distinct political entity, separate from either state or national government.[128] This proposition is further supported by the fact that, during the ratification of the Constitution, Alexander Hamilton stated:

> [T]he necessity of laying the foundation of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the *consent of the people*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.[129]

James Madison echoed these sentiments when he stated, "[t]he federal and [s]tate governments are in fact but different agents and trustees of the people."[130] These statements by two of the most revered founders of the United States, as to the meaning of "the

126. *Id.*
127. *Id.*
128. Chrisman, *supra* note 123, at 454.
129. *Id.* (emphasis added).
130. *Id.* at 455.

people" provide strong evidence that an interpretation of "the people" in the Second Amendment to mean "the states" is a perversion of Constitutional interpretation. As such, the Second Amendment should be read to convey to the individual citizens of the United States the right to possess firearms.

Although the Second Amendment should be viewed as conveying to individuals the right to possess firearms, this right, as with all other rights protected by the Constitution, is not absolute.[131] While the right to possess a firearm may be restricted, any restriction must be based on a compelling governmental interest, and the regulation must be the least restrictive alternative to check the activity to be prevented.[132] In support of restricting the possession of firearms, it could be argued that firearms increase crime, that the government has a compelling interest in regulating crime, and that restricting firearms possession is the least restrictive alternative in regulating such crime. Crime prevention is clearly a compelling interest. Restrictions on the possession of firearms are not, however, the least restrictive alternative. States are empowered with the authority to make criminal almost any activity believed to be contrary to the public good or civil order, such as theft or murder. This is a far less restrictive step than taking a right from the entire populace because laws can be passed prohibiting theft, murder, and other evils sought to be prevented by a state without pre-emptively depriving certain groups of people of a Constitutionally protected right. More importantly, it is not for the federal government to ensure the safety of the people by restricting the possession of firearms, regardless of whether this is the least restrictive alternative to prevent crime. The power to define what is criminal is a power reserved to the states.[133] The federal government should no longer restrict the possession of firearms because such restrictions are not the least restrictive alternative to achieve the governmental interest, and therefore, Congress should leave to the states the responsibility of deciding what is criminal.

131. 16A AM. JUR. 2D *Constitutional Law* § 385 (2003).

132. *Id.* at § 387.

133. REDLICH, *supra* note 35, at 52. The federal government may define crimes within the District of Columbia and other federal territories. *See id.* at 54.

IV. CONCLUSION

When the Commerce Clause is properly evaluated, it becomes clear that the possession of firearms within a state is not a proper use of this power. The clause was included in the Constitution to facilitate trade and, for 150 years thereafter, was limited to this purpose. It was only following President Roosevelt's attempt to alter the Court that the scope of the Commerce Clause was expanded beyond its original boundaries to a point where nearly any activity could be regulated under the guise of regulating commerce. Although *Lopez* made a partial return to a more traditional and reasonable understanding of the commerce power, the holding in that case still permits federal regulation into almost all areas of life by simply requiring that the thing to be regulated moved in interstate commerce at some point in time. This result gives to the federal government far more authority than is granted by the Constitution.

Also, the federal government should not be regulating the possession of firearms because the Second Amendment should be viewed as granting to individuals the right to possess firearms. Interpreting the Second Amendment as conveying a right to the states creates inconsistencies with other Constitutional Amendments in the Bill of Rights. Although the Second Amendment should be viewed as conveying an individual right, this right is subject to restriction. It is not, however, within the jurisdiction of the federal government to restrict the possession of firearms. That responsibility is left to the states under their police power.

Federal courts have not adopted the above analysis, ruling instead that the Commerce Clause permits the regulation of the possession of firearms, and that the Second Amendment does not convey an individual right to possess firearms. In a society such as ours that faces threats of violence from domestic criminals and foreign terrorists, it is both socially and politically popular to restrict access to firearms. But social or political expedience is no reason to ignore the clear meaning of the Constitution. The political branches of the federal government will sometimes attempt to enact legislation without properly analyzing the constitutionality of the proposed laws. It is the responsibility of federal courts to make reasoned decisions regarding whether a federal act is constitutional to ensure that the rights of the people are protected. Future courts addressing the issue of whether Congress may regulate firearms possession because the firearm in question had moved in interstate commerce should hold that when the firearm

is received within a state, that firearm is no longer in interstate commerce and thereafter should not be subject to federal regulation under the Commerce Clause, but rather, the firearm at issue should be subject only to the police power of the state. These courts should further hold that the Second Amendment provides individuals with the right to possess firearms, and that the government may not intrude upon this right absent a showing that such intrusion meets a compelling governmental interest and is the least restrictive alternative. The regulation of crime is a power reserved to the states, and the federal government, therefore, has no compelling interest in regulating firearms possession. Because the states may regulate the violent crime sought to be prevented, courts should hold that regulating firearms possession is not the least restrictive alternative to achieve the compelling interest of preventing crime.

Samuel J. Toney IV