Introduction

Albert J. Rosenthal
SYMPOSIUM
FEDERAL GUN CONTROL AND
THE BRADY ACT

INTRODUCTION

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Do not let the narrow title of this Symposium deceive you. The Editors of the Journal have, wisely, encouraged the participants to explore related matters that put the subject into perspective and add greatly to the value of this enterprise.

Analysis of the merits and shortcomings of one federal gun control statute will not answer all questions about the possibilities of federal gun control generally. The latter, in turn, will not dispose of problems of gun control at the state and local level, nor does a focus on gun control alone give adequate attention to the causes of and possible remedies for the high level of violence in the United States. Finally, even violence is closely linked, in a tangled web of causes and effects, with so much else that is worrisome in our society—substandard education; the weakening of the family; drugs;

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race prejudice; growing poverty and the erosion of hope; the housing shortage; and much more. Quite properly therefore, the contributors to this Symposium have tried to give us insights into much of the context so necessary to a fuller understanding of our core inquiry—whether and how government should deal with guns.¹

Although legal analysis should be informed by ideas and knowledge emanating from other disciplines, the principal focus for a law journal is naturally the law. As constitutional arguments have often been in the forefront of debates about gun control, it is not surprising that they are emphasized in legal discussions of the subject. But with respect to the feasibility of gun control legislation, the Constitution is not the problem.

A tempting argument for opponents of gun control is based on the Second Amendment, which reads:

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.

But the courts have repeatedly held that the right of the people to bear arms must be interpreted in light of the stated purpose of the Second Amendment, namely the preservation of state militias, and that the Amendment therefore does not confer rights upon individuals.² "Militia" was the term for what we now call the "Na-


The leading Supreme Court case on the subject is not entirely clear. The Court rejected a Second Amendment challenge to an indictment for transporting in interstate commerce a sawed-off shotgun that had not been registered and for which a required tax had not been paid, stating: "In the absence of any evidence tending to show that possession or use of [such a weapon] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." United States v. Miller, 307 U.S. 174, 178 (1939). Although this decision does not clearly dispose of the question of a weapon kept for purely personal purposes but potentially useful for a militia, it has been generally assumed in more recent cases that the Second Amendment confers no rights on individuals. E.g., Lewis v. United States, 445 U.S. 55, 65 n.8 (1980); United States v. Swinton, 521 F.2d 1255, 1259 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1956); Sarah Brady, Working for a
tional Guard"—reserves organized and activated under state authority, but also subject to call into the service of the federal government in cases of riots and invasion.\(^3\)

During a period of over fifty years, at least six federal statutes regulating guns have been enacted, with few constitutional challenges and no invalidations on Second Amendment grounds. Since the Second Amendment has not been "incorporated," through the Fourteenth Amendment, to apply to the states,\(^4\) challenges to state laws regulating guns have usually been based on somewhat similar provisions in state constitutions, and have also been generally rejected.

Even if the Second Amendment were interpreted as conferring upon individuals some right to bear arms, there is no reason to suppose that it would be held to be an absolute barrier to all limitations.\(^5\) Even freedom of speech and of the press are not completely insulated by the First Amendment from government regulation; consider for example, obscenity, fraud, copyright infringement, and, especially relevant here, the right to publish troop movements in time of war or to shout "fire" in a crowded theater.\(^6\) A fortiori, the uncertain commands of the Second Amendment could scarcely protect gun possession where the relationship of guns to potential loss of life is so much more direct.

Assuming, therefore, that the Second Amendment interposes no barrier, federal statutes must still fall within an enumerated power of Congress. It might be tempting to cite the Preamble to the Constitution; one of the six purposes stated as reasons for es-

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\(^{3}\) See U.S. CONST. art. I, § 8, cl. 15 (stating power of Congress to call forth militia); U.S. CONST. art. II, § 2, cl. 1 (stating that President is Commander in Chief of militia when it is called into actual service of United States).

\(^{4}\) See Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding that Second Amendment "has no... effect" other "than to restrict the powers of the National government"). This case was decided before the Supreme Court began extending to the states any of the restrictions on the federal government contained in the Bill of Rights. Even more recently, however, there has been no indication that the Second Amendment might be applied to the states. See Fox & Shah, supra note 2, at 132-33 and cases cited therein.

\(^{5}\) See Fox & Shah, supra note 2, at 128-30 (developing this analysis).

\(^{6}\) See Near v. Minnesota, 283 U.S. 697, 716 (1931); Schenck v. United States, 249 U.S. 47, 52 (1919).
stablishing the Constitution was "to insure domestic Tranquility," and guns are certainly a threat to tranquility. But the Preamble has long been held not to be a source of additional powers in the Federal Government, although it may be relevant in the interpretation of powers conferred elsewhere in the Constitution.

The specific power of Congress most frequently invoked is the power to regulate interstate commerce. The relationships among guns, organized crime, the level of violence, and interstate commerce, are sufficiently demonstrable to sustain regulation of the purchase, sale, transportation, possession, or use of guns.

Although the Supreme Court has repeatedly declared that it will uphold a federal statute on the basis of the commerce power only if there is a showing of substantial effect upon interstate or foreign commerce, the Court has not found a lack of such effect in any case since 1936. Both Congress and the executive branch agencies have been casual in recent years about explaining such links in statutes or regulations or even drafting recitals asserting them, and the Court may eventually decide to insist on such evidence, at least in borderline situations.

There is a case now pending before the Supreme Court that involves gun control, and that might provoke such a response. The Gun Free School Zones Act, forbidding the bringing of weapons into or near schools, was invalidated by lower courts in United States v. Lopez, where in the absence of any showing by Congress the courts refused to conclude that there was a sufficient link to interstate commerce or a factual basis for invoking any other federal power.

Whether or not Lopez will be the case in which the Supreme Court may tighten the requirements, it should be simple for Congress to insert appropriate recitals in all gun control statutes where the connections to commerce are not obvious, and to develop persuasive legislative history, factual data, etc., to provide the necessary predicate to establish the relationship.

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7 See Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).
8 See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 280 (1981); see also id. at 307-13 (Rehnquist, J., concurring) and cases cited therein.
10 2 F.3d 1342, 1360-68 (5th Cir. 1993), cert. granted, 128 L. Ed. 2d 189 (1994).
11 See Ronald A. Giller, Note, Federal Gun Control in the United States: Revival of the Tenth Amendment, 10 St. John's J. Legal Comment. 151, 155-57 (1994) (discussing these and similar cases).
There is also a long history of the use of the federal taxing power as an alternative basis for regulation. From Alexander Hamilton's protective tariff, designed to protect the new nation's "infant industries" from competition of foreign imports, down to the present time, the taxing power has repeatedly been used for regulatory as well as revenue purposes, and even those taxes intended primarily for the purpose of forcing products or practices out of the market have been generally upheld. Moreover, Congress has in the past used the taxing power to attempt to regulate the possession and transfer of guns, modeling legislation on laws that employed the taxing power to control narcotics. The fact that neither drugs nor guns have been extirpated does not necessarily demonstrate the inappropriateness of the taxing power but merely the inherent difficulty of enforcing laws intended to get rid of either.

If gun control legislation is sustainable by the commerce power, or the taxing power, may it nevertheless be invalidated by the Tenth Amendment? Several lower federal courts have stricken a temporary provision of the Brady law, requiring the chief law enforcement officer in each locality to conduct searches of police records across the nation in order to determine whether intended purchasers of handguns have been convicted of felonies, or have a history of mental illness or other disqualifying qualities. This requirement is to remain in effect only until such time as a computerized national records system has been established and is accessible. These lower courts have held this provision to be an unconstitutional invasion of the autonomy of state governments, because of the burdensome duties imposed by the federal government upon state or local officials. For authority, these courts relied on New York v. United States, in which portions of a federal statute that imposed upon state officials duties and responsibili-

12 Compare Cunningham, supra note 2, at 67 with Wayne H. Wink, Jr., Note, Biting the Bullet: Two Proposals to Stem the Tide of Gun Violence, 10 St. John's J. Legal Comment. 235, 244-45 (1994).
14 See Cunningham, supra note 6, at 75-76; Richard E. Gardiner & Stephen P. Halbrook, NRA and Law Enforcement Opposition to the Brady Act: From Congress to the District Courts, 10 St. John's J. Legal Comment. 13, 24 (1994); Giller, supra note 11, at 172-74; Timothy Jones & Janine Tyne, Printz v. United States: An Assault Upon the Brady Act or a Tenth Amendment Fortification?, 10 St. John's J. Legal Comment. 179, 182 (1994); Murtha & Smith, supra note 1, at 216 n.77; and cases cited therein.
ties pertaining to the storage of low-level nuclear waste were invalidated by the Supreme Court as intruding on the autonomy of the state in violation of the Tenth Amendment.\textsuperscript{16}

Whether or not these lower court decisions will stand, they relate only to an interim provision of one statute and constitute no threat to the constitutionality of gun control legislation generally.\textsuperscript{17} Although the opinions legitimately invoke what is, under current Supreme Court doctrine, a plausible application of the Tenth Amendment, there is some confusion as to the relevance of the Tenth Amendment to other aspects of gun control that are quite different.\textsuperscript{18} Some of the confusion springs from careless statements in opinions of the Supreme Court itself.

The trouble started with \textit{Hammer v. Dagenhart},\textsuperscript{19} in which the Supreme Court held unconstitutional a federal statute forbidding the transportation in interstate commerce of the products of the labor of children working for private employers. The majority opinion asserted that the statute was doubly invalid, because it imposed a regulation not warranted by the commerce power and \textit{also} because it violated the Tenth Amendment.\textsuperscript{20} It seemed to many observers that analytically this case presented only one question, not two. If the statute was authorized by the commerce power, it was not a "power not delegated," and the Tenth Amendment was inapplicable. In \textit{United States v. Darby},\textsuperscript{21} which overruled \textit{Hammer v. Dagenhart}, in upholding the Fair Labor Standards Act's prohibition of the shipment in interstate commerce of the products of underpaid labor, a unanimous Court characterized the Tenth Amendment as stating "but a truism that all is retained which has not been surrendered."\textsuperscript{22}

\begin{itemize}
  \item\textsuperscript{16} \textit{Id.} at 2428-29. More specifically, the Court invalidated imposing upon the states a choice of either accepting ownership of all waste generated within their borders and assuming the liabilities that would spring from that, or regulating pursuant to Congress's directions. \textit{Id.}
  \item\textsuperscript{17} See Gardiner & Halbrook, \textit{supra} note 14, at 14. Even the National Rifle Association is not opposed in principle to the permanent provisions of the Brady law, establishing a quickly accessible national repository of information relevant to the possible disqualification of persons seeking permission to buy guns. \textit{Id.} at 15.
  \item\textsuperscript{18} See generally Giller, \textit{supra} note 11, at 153-62; Jones & Tyne, \textit{supra} note 14, at 181.
  \item\textsuperscript{19} 247 U.S. 251 (1918).
  \item\textsuperscript{20} \textit{Id.} at 276. "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend." \textit{Id.}
  \item\textsuperscript{21} 312 U.S. 100 (1941).
  \item\textsuperscript{22} \textit{Id.} at 124.
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The next steps were a series of challenges to amendments to the Fair Labor Standards Act that extended coverage of minimum wage and maximum hour regulation to state and local government employees. It was conceded that the wages and hours of these employees were as closely related to interstate commerce as were those of their counterparts in the private sector; these regulations were attacked, however, on the ground that they were too intrusive upon the right of the states to make their own decisions concerning the work of their employees.

The Supreme Court has gone back and forth on this question, and there may be more swings of the pendulum ahead. In Maryland v. Wirtz, the Court upheld the application of the Fair Labor Standards Act to state government employees. In National League of Cities v. Usery, Maryland v. Wirtz was specifically overruled and that aspect of the statute held unconstitutional. Confusion was revived, however, by the Court's express declaration that its decision was based on the Tenth Amendment. An intrusion on the state that falls within the enumerated powers does not seem to be covered by the language or supported by the history of the Tenth Amendment; it might have been clearer if the Court had stated simply that the statute clashed with the manifest intention of the Framers to preserve the states as effective, autonomous, governmental entities. By calling it a Tenth Amendment violation, the Court was giving that amendment a new application, clearly in conflict with its characterization in United States v. Darby.

Nine years later, in Garcia v. San Antonio Metropolitan Transit Authority, the Court expressly overruled National League of Cities in turn, holding that the intrusion did not sufficiently interfere with the functioning of the states to be invalid. But the Court continued to call the issue one of the Tenth Amendment. Since both Justices Rehnquist and O'Connor, dissenting, warned that they hoped to reassemble a majority of Justices to bring National

25 See id. at 842-56.
26 See supra note 21 and accompanying text.
28 Id. at 536.
League of Cities back to life, still another swing of the pendulum may be coming.

Wirtz, National League of Cities, and Garcia all involved a statute governing conduct affecting interstate commerce, regulating both private and state governmental employment. New York v. United States, however, was quite different. At issue in that case was a directive to the state alone, ordering it to enact laws or assume responsibilities, not on the basis of the judgment of the state's own officials, but pursuant to an order from the federal government. The Court made clear that it was not reexamining Garcia. It referred again to the Tenth Amendment, but this time tried to clarify the nature of the Court's reliance on it.

Thus, the only aspect of existing or proposed gun control legislation likely to give rise to serious Tenth Amendment problems is the interim provision of the Brady law. Assuming that adverse lower court decisions are affirmed, Congress again has a remedy within reach. As pointed out in New York v. United States, the Court has repeatedly upheld the practice of Congress to induce or even coerce states to do its bidding by conditioning grants of funds to the states upon their compliance. For example, in South Dakota v. Dole, Congress had conditioned states' eligibility for certain highway funds upon their enactment of laws prescribing twenty-one as the minimum age for consumption of alcoholic beverages. The Court assumed, arguendo, that Congress could not

29 See id. at 580. It is probably mere coincidence that the two Justices who wanted to bring National League of Cities back from its ashes came from Phoenix.


31 Id. at 2420.

32 Id.

33 Id. at 2418-19. "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." Id. at 2419; see also Gardiner & Halbrook, supra note 14, at 31-33; Giller, supra note 11, at 160-62; Jones & Tyne, supra note 14, at 187-92.


35 112 S. Ct. at 2426-27; see also Giller, supra note 11, at 156; Jones & Tyne, supra note 14, at 199-201 n.144.

directly order the states to do this, but upheld the statute on the basis of the power of Congress to condition its spending. Assuming, therefore, that the obstacles to effective gun control laws are not constitutionally imposed, large areas of disagreement as to policy nevertheless remain. In particular, what kinds of guns should be controlled, what kinds of controls should be placed upon them, by what agencies of government, and what may we reasonably expect to be accomplished?

If we are serious about intending, through gun control, to contribute substantially to the reduction of violence, the mere prohibition of sales to felons, the insane, and a few other suspect categories, is not likely to be sufficient. Too many killings, especially those committed by younger offenders, are done by those who have had no previous conviction or other reason to be barred from buying guns. This might argue for an additional requirement of a showing of compelling need for the buyer to qualify for a license, obtainable only upon submission of proof of unusual circumstances in which possession of a gun may be vital. However, even such a rule may not necessarily be effective, as witness the experience of the State of New York with a similar standard since early in this century.

What kinds of guns should be banned? The old New York statute forbade concealed weapons—apparently meaning pistols and sawed-off shotguns, but not hunting rifles. Gun control opponents may be worried about a “foot in the door,” and the NRA probably includes in its membership not only hunters but also those who use pistols for target practice or as collectors’ items. Further, there are some who believe that possession of a handgun

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37 There were provisions in the Twenty-first Amendment, which repealed prohibition, that were intended to preserve local option as to the regulation of alcoholic beverages. Although a persuasive case might otherwise have been made that Congressional regulation of the drinking age could be sustained under the Commerce Clause (because, inter alia, of the effect of drunken driving on the use of interstate highways), it is possible that this power might have been defeated by an expansionist construction of the extent of local control preserved.

38 Dole, 483 U.S. at 208-09.

39 For a fuller discussion of these questions, see Fox & Shah, supra note 2, at passim.

40 See Cunningham, supra note 2, at 61-64; Murtha & Smith, supra note 1, at 216. But see Brady, supra note 2, at 80-81 (1994) (setting forth statistics on accomplishments of Brady law).

41 N.Y. Penal Law §§ 1897, 1898 (Consol. 1909); see also People ex. rel. Darling v. Warden, 154 A.D. 413, 139 N.Y.S. 277 (1st Dep't 1913); People v. Grass, 79 Misc. 457, 141 N.Y.S. 204 (Nassau County Ct. 1913).

42 N.Y. Penal Law §§ 1897, 1898 (Consol. 1909).
increases the safety of the possessors and those close to them rather than jeopardizing it, and it has even been argued that if more and more people had weapons, there would be less and less criminal activity. As for assault weapons, there may be problems of definition, but the inappropriateness of their use by sportsmen, as distinguished from gangsters or maniacs, must be embarrassing to lobbyists who are trying to obtain the repeal of the assault weapon ban in the Violent Crime Control and Law Enforcement Act of 1994.

The failure of almost a century of gun control laws in New York and in some other states has sometimes been ascribed to the ease of movement of guns across state lines. Federal laws criminalizing such interstate commerce have not seemed to be of much help. Nationwide restrictions on possession might prove to be more effective, but there is not much reason for confidence that they would provide anything approaching a complete solution.

Which brings us back to where we came in. Senator Bill Bradley points out the array of interrelated factors that contribute to the high level of violence in today's society, and suggests a program to start to deal with them. This approach, of which denial of access to guns is one of a number of components, seems to offer more hope than gun control alone. Two of the student notes also emphasize the need to learn more about the causes of violence and the ways to cope with it.

Wayne Wink analyzes and expands on some proposals of Senator Daniel Patrick Moynihan, including concentrating less on guns and more on ammunition (especially recently developed, more destructive types of ammunition), and imposing prohibitive taxes on the production of at least some kinds of guns and ammunition. Mr. Wink also discusses changing products liability law to impose financial responsibility upon the manufacturers for gun-caused injury or death.

Lynn Murtha and Suzanne Smith emphasize the need to understand and seek to ameliorate the factors that give rise to violence.

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45 See Fox & Shah, supra note 2, at 136-37; Wink, supra note 12, at 235-36.
46 See Bradley, supra note 1, at 47-54; see also Murtha & Smith, supra note 1, at 230-33.
47 See Wink, supra note 12, at 236-41.
48 See id. at 251-60; see also Brady, supra note 2, at 84.
and the relatively minor attention accorded them by the government. In particular, they point out that although Congress has provided some funding for further investigation of the causes of and possible remedies for gun-inflicted violence, the amount of money authorized for these purposes is dwarfed by that to be spent for apprehension and punishment.49

The extent of our ignorance about the causes and cures for this unprecedented crisis in our society is deplorable. Furthermore, history suggests that the building of more and more prisons and the broadening application of the death penalty will probably accomplish little for our protection and less for our enlightenment.

The Articles and Notes in this Symposium attack these problems from a variety of starting points and offer a wide range of insights. Let us hope that they will prove to be a significant step toward a better understanding of the existing problems, and ultimately toward the development of successful solutions for the future.

49 See Murtha & Smith, supra note 1, at 225-33.