The Volokh Conspiracy: The Federal Government's "Police Power" and the Takings Clause: Part II

Josh Blackman

April 7, 2020

Part I in this series rejected the notion that the federal government has an inherent "police power" to seize property without providing just compensation. There may be such an inherent authority with respect to policing matters at the border. But such this would not extend to domestic matters.

Part II will now explore the most likely source of Congress's authority to prohibit the possession of certain items within the homeland: the Commerce Clause and the Necessary and Proper Clause.

Let's start with first principles. The Commerce Clause provides "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Under modern caselaw, the word "regulate" is an all-encompassing term that embraces every conceivable aspect of government activity. But it isn't clear that, as an original matter, the power to "regulate" include the power to "prohibit."

Champion v. Ames (1903) is the leading precedent on point. The Lottery Case, as it is known, established the principle that Congress's power to "regulate" interstate commerce include the power to "prohibit" that commerce. Justice John Marshall Harlan wrote the majority opinion. Randy and I discuss the case in An Introduction to Constitutional Law:

> Justice Harlan concluded that [the power to "regulate" commerce give Congress the power to prohibit commerce]. By way of analogy, he observed that states have the police power to prohibit the intrastate sale of lottery tickets. If the states have that power, he asked, "why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?" In short, just as a state has a police power over intrastate commerce — which includes the power to prohibit such commerce — Congress also has a police power over interstate commerce. To this day, Champion v. Ames is cited for the principle that the power to "regulate" commerce includes the power to prohibit some forms of commerce.

Harlan suggests that the Commerce Clause, read in conjunction with the Necessary and Proper Clause, vests Congress with plenary authority that is akin to the state's police power.

Justice Kennedy articulated this principle in his Lopez concurrence:

> In another line of cases, the Court addressed Congress' efforts to impede local activities it considered undesirable by prohibiting the interstate movement of some essential element. In the Lottery Case, (1903), the Court rejected the argument that Congress lacked power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit.

Under modern doctrine, if Congress has the power to regulate "x," then it also has the power to prohibit "x." And this prohibition would not effect a taking; no compensation is required.

Let's use Lopez to illustrate this principle. In 1990, Congress enacted the Gun-Free School Zones Act (GFSZA). This law made it a federal crime "for any individual knowingly to possess a firearm" within 1,000 feet of a school zone. The law did not purport to regulate any commercial activity. Additionally, the government did not need to show that the firearm had traveled in interstate commerce — the so-called jurisdictional hook.

The Supreme Court declared this statute unconstitutional. The GFSZA, Chief Justice Rehnquist wrote, "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Nor is the federal law "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." For this reason, the Act "cannot . . . be sustained under [the] cases upholding regulations of [intrastate economic] activities . . . which viewed in the aggregate, substantially affects interstate commerce."

The GFSZA was declared unconstitutional, and Alfonso Lopez's conviction was overturned. Going forward, could the government seize a gun that was carried near a school zone? The answer is no, at least under the 1990 statute. Such a seizure could not be supported by the federal government's "police power." Stated more precisely, that action is beyond the scope of Congress's enumerated powers. If a federal agent seized Lopez's gun, it would amount to a taking, and just compensation must be provided.

In September 1994, six months before Lopez was decided, Congress enacted a new version of the Gun-Free School Zones Act that included a jurisdictional hook. Now, to be convicted of violating this law, the government had to prove that the firearm in question "has moved in or otherwise affects interstate commerce." As amended, the law remains in force. If a federal agents seizes a gun, under the authority of the new GFSZA, there would be no taking. The action would be within Congress's enumerated powers, or what some courts may refer to as the federal government's "police power." No compensation would be required.

This post should be relatively non-controversial. In Part III, I will extend this analysis to the bump stock cases.

JOSH BLACKMAN is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the President of the Harlan Institute. Follow him @JoshMBlackman.