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NEWS

Nullifying gun laws

An old theory makes a strange comeback

By: Steve Chapman - September 18, 2013

The 21st century is the golden age of gun rights. All 50 states allow the carrying of concealed weapons. The once-toothless Second Amendment finally has real potency. Even after the Newtown, Conn., massacre, Congress rejected new restrictions on firearms. Monday's Washington Navy Yard shooting is not likely to change that.

For those who value this freedom and grasp the futility of most gun control measures, the future is bright. The democratic process has worked to advance good ideas and weed out bad ones. Judges have shown their openness to new evidence and cogent argument in interpreting the Constitution.

You might expect gun rights activists to feel a new appreciation for Congress and the federal courts. But no. The attitude of many is: We don't care about Congress and the federal courts because they have no authority over us.

In April, Kansas passed a law barring federal restrictions on guns made and kept in the state. This month, the governor of Missouri vetoed a law that would have invalidated federal gun laws and made it a crime to enforce them.

The idea of "nullification" is not new. It was endorsed by Thomas Jefferson and John C. Calhoun a couple of centuries ago. But it has unsavory connotations, having been a favorite of segregationists during the civil rights era.

The argument in favor of these measures is that the 10th Amendment reserves to the states or the people "the powers not delegated to the United States by the Constitution." According to the Tenth Amendment Center, which promotes nullification, "The states, as parties to the compact that created the Constitution and the federal government, have the power to judge for themselves whether a law is constitutional or not."

This claim may appear to conflict with the clause of the Constitution that says federal statutes "shall be the supreme law of the land" — "anything in the Constitution or laws of any state to the contrary notwithstanding." Nullifiers say that provision applies only to laws that are constitutional. And the only constitutional laws, in their view, are those a state accepts.

It's a line of thought that earns points for audacity. But it blithely disregards the opinions of the framers who saw federal supremacy as the foundation of the Constitution — which was intended to curb the power of the states under the Articles of Confederation.

It contradicts two centuries of jurisprudence based on the final authority of the U.S. Supreme Court to interpret the Constitution. As Chief Justice John Marshall wrote in an 1803 opinion, "It is emphatically the province and duty of the Judicial Department" — the courts — "to say what the law is." It ignores a minor matter known as the Civil War, which drastically altered the balance of power between the federal government and the states.

What has been established by history is that the states have the right to contest the exercise of power by those in Washington — but only within legitimate channels.

They can scream bloody murder against unwanted federal laws. They can refuse to let state and local police enforce them. They can decline federal funding that has strings attached. If the Supreme Court interprets the Constitution in an unwanted way, two-thirds of the states can call a convention to approve amendments, which can be ratified by three-quarters of the states.

What they can't do is pretend to be exempt from the national government. This point is not in dispute even among experts who see Washington as far too powerful. Robert Levy, Cato Institute chairman, who led the lawsuit that yielded the Supreme Court's 2008 decision establishing an individual right to own guns, writes that "states cannot impede federal enforcement of a federal law merely because the state deems it unconstitutional."

Georgetown University law professor Randy Barnett, who argued the unconstitutionality of Obamacare before the Supreme Court, shares that view. "Under the supremacy clause, states cannot override valid federal laws," he told me.

He proposes a constitutional "repeal amendment" allowing a majority of states representing a majority of the U.S. population to override federal laws and regulations — which would be superfluous if states could simply ignore them.

Today, the essential freedoms of gun owners are highly secure, protected by elected leaders as well as the judiciary. So it's hard to see why their purported champions feel impelled to radically upend our system of government. Better to take yes for an answer.