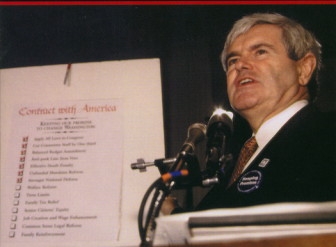


THE REPUBLICAN REVOLUTION 10 YEARS LATER

Smaller Government or Business as Usual?



Contract with America

KEEPING OUR PROMISE
TO CHANGE WASHINGTON

- Apply All Laws to Congress
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- Balanced Budget Amendment
- Anti-union Labor Free Vote
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- Stronger National Defense
- Welfare Reform
- Term Limits
- Family Tax Relief
- Senior Citizens' Equity
- Job Creation and Wage Enhancement
- Common Sense Legal Reform
- Family Reinforcement

EDITED BY CHRIS EDWARDS AND JOHN SAMPLES

15. A Smooth Transition: Crime, Federalism, and the GOP

Timothy Lynch

When the American electorate expressed its dissatisfaction with the status quo in 1994, congressional Republicans had not only a mandate to implement marginal changes in policy, but also a historic opportunity to make *fundamental and sweeping changes*. It is no overstatement to say that official Washington trembled as the Republicans vowed to restore the Constitution and clean up the mess that the Democrats had created.

In his first speech as majority leader in the Senate, Robert Dole declared, "If I have one goal for the 104th Congress, it is this: that we will dust off the tenth Amendment and restore it to its rightful place in our Constitution."¹ The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In criminal justice, almost all of the powers exercised by government had long been held by the states.

Now that 10 years have passed, one can draw some conclusions about the GOP stewardship of the national legislature. With respect to criminal justice policies, the Republicans not only squandered their mandate but now also preside over a burgeoning federal law enforcement bureaucracy. It is almost as if the Republicans have concluded that they can maintain the esteem of the electorate by acting like Democrats.

Instead of a revolution, the GOP has turned its back on the Tenth Amendment and embraced a big-government agenda. Thus, the historic takeover of Congress by Republicans resulted in a party transition but no change in the direction of key policies with respect to criminal justice matters.

Constitutional Federalism

Before delving into the policy decisions of the past 10 years, it is useful to begin with the first principles of American constitutional

law so that the legal and policy battles are put into context. The Constitution creates a federal government of limited powers. As James Madison noted in *Federalist* No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Most of the federal government's "delegated powers" are set forth in article I, section 8, of the Constitution. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

For 150 years the original constitutional understanding held firm. The federal law enforcement bureaucracy was minuscule. There were no federal prisons in the early days because only a handful of federal criminal laws were on the books. Instead of building prisons, federal officials opted to "rent" space in state facilities for the housing of federal convicts.²

The constitutional principle of federalism collapsed in 1937 when President Franklin D. Roosevelt threatened to pack the Supreme Court with new justices who would approve his New Deal measures. After the famous "switch in time that saved nine," the Supreme Court started to approve any federal law that simply "affected" interstate commerce. The constitutional principle of federalism that was embodied in the Tenth Amendment was trampled underfoot.³

The consequences of the New Deal precedents were not immediately apparent to most Americans, because changes came fairly slowly. With the New Deal precedents on the books, Congress began to criminalize economic regulations that had previously carried only civil fines. Notorious crime also started to prompt federal politicians to propose new federal laws to ostensibly "solve" problems. For example, after his pioneering flight across the Atlantic, Charles Lindbergh was famous. A few years later, when his child was kidnapped, the media went into a frenzy and put pressure on Congress to take action. A new law was enacted that made the crime of kidnapping a federal offense if the perpetrators "crossed state lines."⁴ Kidnaping, of course, was already a crime in every single state.

These trends accelerated over time and the result has been an explosion in the number of federal criminal laws, federal law enforcement personnel, federal searches, federal wiretaps, and federal prisoners. A 1998 report from the American Bar Association notes that

more than 40 percent of the federal criminal provisions enacted since the Civil War became law in just the past three decades.⁵ By the early 1990s, the federalization of crime was frequently in the headlines because Congress seemed incapable of declaring any crime, no matter how local in nature, beyond its reach. For example, when the *Washington Post* reported the story of a horrific carjacking in a Maryland suburb of the capital in 1992, Rep. Charles Schumer (D-N.Y.) introduced a federal carjacking bill the next day. A headline one day, a law the next day, and on it went.⁶

Federal judges complained that the federal court system was being swamped with ordinary criminal matters that had always been administered by state and local governments.⁷ For some perspective on the accelerating trends, consider that in 1958 taxpayers spent \$55 million on the federal court system. By 1992 taxpayers were spending \$2.3 billion on that system.⁸ And despite the budget growth, federal courts and prisons could not keep up with the influx of cases. The federal system was spiraling out of control.⁹

Republicans Fumble Historic Opportunity

Corrupted by their 40-year reign over the House of Representatives, the Democrats were blindsided by the wrath of voters in 1994. To be sure, Democrats had anticipated a difficult election because of the unpopularity of Bill and Hillary Clinton's costly health care plan, but they could not fathom a GOP-controlled House or a conservative Supreme Court that would take the Tenth Amendment seriously and invalidate federal laws as beyond the proper scope of federal power. Liberals dismissed such notions as simply fodder for right-wing fundraising letters. And yet, those remarkable developments happened and turned the Democratic world upside down.

Republicans have long complained about liberal judges who ignore the original understanding of the Constitution. Since the Republicans were successful in winning presidential elections, vacancies on the Supreme Court were greeted with the utmost seriousness. One by one, the liberal justices of the Warren era were replaced by conservative judges or legal scholars. By the fall of 1994, eight of the nine members of the Supreme Court had been appointed by Republican presidents.

Official Washington and the liberal legal academy decried the conservative direction of the Supreme Court in areas ranging from

affirmative action to criminal procedure and property rights. But few anticipated a landmark ruling on the constitutional principle of federalism. After all, the Supreme Court had not invoked the doctrine of enumerated powers to invalidate a federal law in decades. In the liberal view, as long as Congress did not trample a specific constitutional right—such as free speech or the right to a jury trial—lawmakers could pass a law on any subject whatsoever.

On November 8, 1994—the same day that voters were handing the Congress to the Republicans for the first time in 40 years—the Supreme Court heard arguments in a case that raised the most basic question about the power of Congress to legislate. The case involved a constitutional challenge to the Gun-Free School Zones Act, which was part of a 1990 crime bill passed by Congress. The Gun-Free School Zones Act essentially made it a federal crime for a person to possess a firearm within 1,000 feet of a school.

The case arose when Texas law enforcement authorities arrested Alfonso Lopez, a 12th-grade student, for bringing a handgun to his high school in San Antonio. Lopez's conduct was illegal under Texas law, but the state charges were dropped when federal officials intervened to indict Lopez under the Gun-Free School Zones Act in federal court. Lopez was tried before a federal judge and was convicted and sentenced to six months' imprisonment.

On appeal, Lopez's attorneys argued that the federal law was unconstitutional because the federal government did not have the authority to pass it. Federal prosecutors acknowledged that the Constitution created a federal government of delegated and enumerated powers, but they maintained that the Gun-Free School Zones Act could be enacted pursuant to Congress's power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." Lawyers for the federal government defended the constitutionality of the law by arguing as follows: possession of a gun in a school zone (a) might lead to violent crime, which (b) might threaten the learning process, which (c) might ultimately produce less productive citizens, which (d) might, cumulatively, impair the national economy and interstate commerce.

In the spring of 1995, the Supreme Court announced its landmark ruling that the federal prohibition on guns in schools exceeded the powers of Congress. Chief Justice William Rehnquist explained the Court's decision:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . To 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. . . . And to do that would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local. This we are unwilling to do.¹⁰

At long last, the Supreme Court had reaffirmed the basic idea that Congress could not use the commerce power as a pretext to enact any law that Congress considered desirable.

It is almost impossible to overstate the historical significance of this moment for proponents of limited, constitutional government. For the first time in 60 years, the Supreme Court had invoked the doctrine of enumerated powers to invalidate a federal law.¹¹ The Tenth Amendment was suddenly revived. And, for the first time in 40 years, the national legislature was controlled by a political party that claimed an affinity for limited, constitutional government.

With the *Lopez* ruling on the books, the GOP was perfectly positioned to downsize the bloated and expensive federal government. Years and years of groundwork had been done in order to arrive at this juncture. The time was finally right to abolish unconstitutional federal agencies and repeal unconstitutional laws.

President Clinton tried to feign his allegiance to the then-prevailing sentiment when he declared the "era of big government is over." Rhetoric aside, Clinton would stand and fight. When the Supreme Court announced its decision in the *Lopez* case, Clinton immediately ordered his attorney general, Janet Reno, to find a way to circumvent the ruling.¹² The Democrats and liberal legal academics were determined to find a way to roll back this new legal precedent, which called into question the constitutional legitimacy of much of modern Washington, D.C.¹³ But what could Clinton do? The Supreme Court had just spoken and Congress was controlled by the Republicans.

With the benefit of hindsight, it is now painfully obvious that while the Republicans dithered, Clinton went to work. First, he had his Democratic allies introduce a slightly revised Gun-Free School

Zones Act in both the Senate and the House. Because any member of Congress can introduce a bill about anything, this action meant little. What is inexplicable, however, is how the Republican leadership could have allowed these measures to be put on a fast track for serious consideration by both chambers. Committees *controlled by the GOP* held hearings on these measures and moved them along. A few months later, Clinton demanded that his school zone bill be included in a year-end appropriation measure. The Republicans capitulated and, in a remarkable act of defiance, Clinton signed a slightly revised Gun-Free School Zones Act into law on September 30, 1996.¹⁴ Not only had the Republicans failed to build upon the historic *Lopez* precedent by repealing laws and abolishing agencies, the feckless Republican leaders could not even manage to keep a single federal criminal law off of the books!

Republican leaders tried to deflect criticism by saying that they had to deal with a hostile liberal media and a big-government advocate like Clinton in the White House—so there was only so much that could be done.¹⁵ To assuage their longtime supporters, the GOP leadership would say: “Just wait until the Republican Party captures the White House! That’s when our limited government agenda will really get under way!”

That claim was put to the test when George W. Bush won the 2000 presidential election. The results are in: not only have matters not improved, the situation has worsened.¹⁶ President Bush appointed Sen. John Ashcroft to be his attorney general. Before the terrorist attacks of September 11, 2001, the centerpiece crime-fighting program of the Ashcroft Justice Department was an initiative called Project Safe Neighborhoods. The thrust of that initiative is to divert firearms offenses from state court, where they would ordinarily be prosecuted, to federal court, where harsher prison sentences would be meted out. A related program is called Project Sentry, which Ashcroft has called a “vital federal-state project” dedicated to prosecuting in federal court gun crimes in schools.

Thus, instead of working with the Supreme Court to build a vibrant Tenth Amendment jurisprudence, Republicans are *actively undermining* the Court. As the Cato Institute’s Senior Editor Gene Healy has noted, “A more brazen affront to the Rehnquist Court’s landmark ruling in *Lopez*—striking down the Gun-Free School Zones Act—could hardly be imagined.”¹⁷ Because the GOP Congress

approves the funding of Project Safe Neighborhoods and Project Sentry, it is no less culpable than President Bush and Attorney General Ashcroft.

Embracing Big Government

The sad tale of how the GOP is now taking *pride* in vigorously enforcing the one federal law that was invalidated by the Rehnquist Court is a microcosm of the party’s stewardship of criminal justice matters generally. House GOP members who focus on military affairs or budget matters often look to Henry Hyde (R-Ill.) for leadership on criminal justice matters because he has been the ranking member of the House Judiciary Committee for many years. Hyde has supported the federalization of whatever the crime-of-the-month happens to be—from carjacking, to wife beating, to church arson, to partial-birth abortion.

The story has been the same in the Senate. Despite Robert Dole’s goal of “dusting off the Tenth Amendment,” GOP Senators typically defer to Orrin Hatch, the chairman of the Senate Judiciary Committee. He too has sought to federalize more crimes, not less. Senator Hatch has supported the Violence against Women Act, the Church Arson Prevention Act, the Partial-Birth Abortion Prevention Act, and the Hate Crimes Prevention Act. Hatch went so far as to sponsor the anti-paparazzi bill that was proposed after the highly publicized car crash that killed Princess Diana.¹⁸

The Federal Bureau of Investigation was rocked by scandal after scandal throughout the 1990s, but Senator Hatch kept reassuring his colleagues that there was no need to worry because Director Louis Freeh was “the best FBI Director I’ve seen in my whole 23 years in the Senate.”¹⁹ Freeh ultimately resigned when the first federal execution in 38 years had to be postponed because the bureau failed to fulfill its legal obligation to turn over evidence to the trial court.²⁰ To its credit, the GOP-controlled House held extensive hearings into the Waco scandal in 1995. The House committee produced a good report, but it failed to bring accountability to federal agents who broke the law and did not enact any systemic reforms.²¹

Despite GOP rhetoric about downsizing government, the federal law enforcement bureaucracy has been steadily expanding.²² Consider these statistics:

- The Department of Justice budget grew from \$11.2 billion in 1994 to \$30.1 billion by 2003.²³
- The number of federal law enforcement agents grew from 69,000 in 1994 to 94,000 by 2003.²⁴
- The number of federal criminal laws grew from about 3,000 in 1994 to 4,000 by 2004.²⁵
- The federal prison population doubled from 89,500 in 1994 to 177,500 by 2004.²⁶
- The annual number of federal wiretaps continues to climb. Even before the recent increases related to the war on terrorism, the federal government conducted more wiretaps than all of the state courts combined, a new milestone.²⁷

The hard reality is that the federal government under the Republicans is on its way to establishing a national police force—a development that is utterly inconsistent with an “original understanding” of the Constitution.²⁸ It is impossible to tell whether the trend will be arrested at some point in the future, but it is clear that between 1994 and 2004, the GOP embraced big-government law enforcement policies.

Notes

1. Quoted in W. John Moore, “Pleading the 10th,” *National Journal*, July 29, 1995.
2. Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), pp. 269–70.
3. Roger Pilon, “Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles,” *Notre Dame Law Review* 68 (1993): 507.
4. Friedman, p. 266.
5. American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (Washington: American Bar Association, 1998), p. 7.
6. Liz Spayd, “Tragedy Spurs Call for Tougher Car Theft Laws,” *Washington Post*, September 11, 1992.
7. See Stanley Harris, “Crippling the Courts,” *Washington Post*, October 16, 1991; Maryanne Trump Barry, “Don’t Make a Federal Case of It,” *New York Times*, March 11, 1994; D. Brooks Smith, “Congressional Encroachment on the Federal Judiciary,” *Federalist Paper*, January 1994.
8. See Nancy E. Roman, “Rehnquist Blames Congress for Clogged Courts,” *Washington Times*, September 16, 1992.
9. See Naftali Bendavid, “How Much More Can Courts, Prisons Take?” *Legal Times*, June 7, 1993.
10. *United States v. Lopez*, 514 U.S. 549, 552, 567 (1995).
11. See Roger Pilon, “It’s Not about Guns: The Court’s Lopez Decision Is Really about Limits on Government,” *Washington Post*, May 21, 1995.

12. See Todd S. Purdum, “Clinton Seeks Way of Avoiding Ruling on School Gun Ban,” *New York Times*, April 30, 1995.
13. See George F. Will, “Rethinking 1937,” *Newsweek*, May 15, 1995.
14. Public Law 104-208, 104th Cong., 2nd sess. See also “Senate Votes Federal Gun-Free School Zones,” *Human Events*, November 1, 1996, pp. 22–23.
15. See, for example, Chris Cox, “Can Washington Change?” *Reason*, August–September 1996.
16. See Steve Chapman, “The Late, Great States: Where Have All the Federalists Gone?” *Slate*, July 22, 2004.
17. Gene Healy, “There Goes the Neighborhood: The Bush-Ashcroft Plan to ‘Help’ Localities Fight Gun Crime,” Cato Institute Policy Analysis no. 440, May 28, 2002, p. 7.
18. See Todd S. Purdum, “Two Senators Propose Anti-Paparazzi Law,” *New York Times*, February 18, 1998. See also Orrin G. Hatch, “A Serious Federal Role Fighting Crime,” *Washington Times*, July 19, 1994.
19. Orrin Hatch, interview by Tony Snow and Mara Liasson, September 19, 1999, transcript, Fox News Sunday, September 19, 1999.
20. See Nancy Gibbs, “Missing Documents Surface, McVeigh’s Execution Is Delayed, and the FBI Is Left Scrambling to Explain Its Latest Fiasco,” *Time*, May 21, 2001.
21. See David B. Kopel and Paul H. Blackman, *No More Wacos* (Amherst, NY: Prometheus, 1997).
22. Jim McGee, “At the Justice Dept., Big Government Keeps Getting Bigger,” *Washington Post*, April 5, 1996.
23. Budget Staff, Justice Management Division, U.S. Department of Justice, “Budget Trend Data: From 1975 through the President’s 2003 Request to the Congress,” in total Department of Justice budget, Spring 2002.
24. Brian A. Reaves, “Federal Law Enforcement Officers, 1993,” *Bureau of Justice Statistics Bulletin*, December 1994. See also Brian A. Reaves and Lynn M. Baker, “Federal Law Enforcement Officers, 2002,” *Bureau of Justice Statistics Bulletin*, August 2003.
25. See John S. Baker Jr., *Measuring the Explosive Growth of Federal Crime Legislation* (Washington: Federalist Society, 2004).
26. Federal Bureau of Prisons, U.S. Department of Justice, “State of the Bureau: A Day in the Life of the Bureau of Prisons” (Washington: U.S. Department of Justice, 1993), Part 4, p. 63.
27. See Jim McGee, “Wiretapping Rises Sharply under Clinton,” *Washington Post*, July 7, 1996.
28. See Edwin Meese III, “The Dangerous Federalization of Crime,” *Wall Street Journal*, February 22, 1999. See also Edwin Meese III, “Big Brother on the Beat: The Expanding Federalization of Crime,” *Texas Review of Law and Politics* 1 (1997): 1; John S. Baker Jr., “Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?” *Rutgers Law Journal* 16 (1985): 495.