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## A Gun Activist Takes Aim at U.S. Regulatory Power

By JESS BRAVIN

MISSOULA, Mont.—With a homemade .22-caliber rifle he calls the Montana Buckaroo, Gary Marbut dreams of taking down the federal regulatory state.



Montana passed a law that tries to exempt the state from federal gun regulation. But the law is now before the courts, in a test of states' rights. WSJ's Jess Bravin reports.



Jess Bravin/The Wall Street Journal

Gary Marbut with gear for making shooting-range targets.

He's not planning to fire his gun. Instead, he wants to sell it, free from federal laws requiring him to record transactions, pay license fees and open his business to government inspectors.

For years, Mr. Marbut argued that a wide range of federal laws, not just gun regulations, should be invalid because they were based on an erroneous interpretation of Congress's constitutional power to regulate interstate commerce. In his corner were a handful of conservative lawyers and academics. Now, with the rise of the tea-party movement, the self-employed shooting-range supplier finds himself leading a movement.

Eight states have adopted his Firearms Freedom Act, which Mr. Marbut conceived as a vehicle to undermine federal authority over commerce.

Ten state attorneys general, dozens of elected officials and an array of conservative groups are backing the legal challenge he engineered to get his constitutional theory before the Supreme Court. A federal appeals court in San Francisco is now considering his case.

Mr. Marbut isn't basing his pro-gun effort on the Second Amendment, the one that talks about a right to bear arms, but on the 10th, which discusses the limits of federal power.

"This is really about states' rights and federal power rather than gun control," Mr. Marbut says. There is "an emerging awareness by the people of America that the federal government has gone too far," he maintains, "and it's dependent on a really weird interpretation."

He is talking about the 1942 Supreme Court case of *Wickard v. Filburn*, which looms for him the way the *Dred Scott* decision denying rights to blacks did to antebellum abolitionists.

The narrow question in 1942 was whether the federal government could regulate wheat a farmer grew for use on his own farm. But the constitutional issue concerned how far



Jess Bravin/The Wall Street Journal

Gary Marbut leading a rifle competition. The Montana activist stages the contests to raise funds for his political-action committee.

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Utah Attorney General Mark Shurtleff, who filed a brief representing 10 states in support of Mr. Marbut's case, says it will be tough to get the Wickard decision overturned outright.

But he believes today's Supreme Court could be persuaded to narrow Congress's commerce-regulation authority.

In recent years, the court's conservative majority has overturned precedents to strike down laws restricting handguns and regulating corporate political spending.

"Clearly, since Wickard, the federal government has gone way beyond" its authority, Mr. Shurtleff says. "We would like to see that rolled back."

Mr. Marbut wants the court to declare that the Wickard case "was wrongly decided, and the whole trail of cases that rely on it were wrongly decided."

Mark Meckler, national coordinator of the Tea Party Patriots, says Mr. Marbut has engineered "a wonderful legal approach to doing" what he considers "the fundamental issue of our time...putting government back in the box."

Mr. Marbut says he doesn't belong to a tea-party group, though "I get along with them, philosophically."

The Montana Firearms Freedom Act, which he drafted and pushed through his state's legislature, declares that guns made in Montana, stamped "Made in Montana" and staying in-state aren't subject to federal regulations.

After the state enacted it, he announced plans to manufacture the Buckaroo, a miniature rifle that is based on an 1899 Winchester model and intended for children between ages five and 10. Orders, at \$200 apiece, poured in. Some came from lawmakers.

"I have four grandkids on the ground, two more on the way, and my youngest gets married on June 12th, so I expect results from him by mid-winter," Republican State Rep. Krayton Kerns told Mr. Marbut by email last year. "Put me down for seven with the option to purchase more."

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Congress's authority to oversee interstate commerce stretched.

The court ruled Congress could regulate almost any activity that might interfere with national policy. That set the legal basis for a panoply of federal laws.

The principle underpins the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Controlled Substances Act, the Endangered Species Act, the Consumer Product Safety Act and the Americans with Disabilities Act.

Congress drew on its commerce power to pass the Civil Rights Act of 1964, which outlawed segregated hotels, restaurants and theaters because these could serve "interstate travelers" or sell food that crossed state lines.

The ruling is also at the center of a challenge to part of last year's health-care overhaul, requiring most Americans to carry insurance. In June, a federal appeals court in Cincinnati cited the Wickard case in upholding that. Several other suits against the act are pending.

The federal Bureau of Alcohol, Tobacco, Firearms and Explosives was less enthusiastic. It wrote to Mr. Marbut saying: "Federal law supersedes the [Montana Firearms Freedom] Act, and all provisions of the Gun Control Act and the National

**"The Story of Wickard v. Filburn" by Jim Chen**

**"Arming States Rights" by Barak Orbach et al.**

Firearms Act" remain in force.

Mr. Marbut went to court. The "Constitution confers no power on Congress to regulate the special rights and activities contemplated by the MFFA," his petition argued, while the

Ninth and 10th Amendments assign "all regulatory authority of all such activities within Montana's political borders" to "the sole discretion of the State of Montana."

The Wickard case involved a challenge to a 1938 law that sought to keep farmers from going bankrupt. It said if the size of a year's wheat crop was projected to exceed the norm by 35%, the Agriculture Department could prop prices by setting a cap on wheat acreage. A farmer who ignored it had to surrender his excess production or pay a penalty.

Ohio farmer Roscoe Filburn, who had planted double his allotted 11.1 acres, preferred to do neither. Saying he planned to use the excess wheat himself, he argued that it fell beyond federal regulation by never entering the stream of commerce.

The Supreme Court disagreed, in a unanimous opinion by Justice Robert Jackson.

He invoked an 1824 case in which Chief Justice John Marshall said federal interstate-commerce power doesn't stop at state boundaries but reaches any activity that "may affect other States." Thus, even local, noncommercial activity "may still...be reached by Congress if it exerts a substantial economic effect on interstate commerce," he wrote.

The idea was that every bushel Mr. Filburn grew was one less he needed to buy, reducing demand; if every farmer did the same, the price pressure would be "far from trivial," the court said.

Coming at the end of a string of similar rulings, the decision wasn't controversial at the time, says Jackson scholar John Barrett, a law professor at St. John's University in New York. It was seen as reflecting the framers intent to create a powerful federal government.

In drafting the Constitution, "there really was an interest in creation of a national market and an empowering of the government to oversee a national market," he says.

Some conservatives never accepted the reasoning; a 1988 Reagan Justice Department document said it stretched "the power of Congress to regulate pursuant to the Commerce Clause to the breaking point."

A 2005 suit contended the commerce power shouldn't permit federal authorities to prosecute someone for growing marijuana if his state's law let him do so for personal medical use. Invoking the Wickard reasoning, the Supreme Court held otherwise, 6-3.

Until Mr. Marbut, few imagined overturning it. He quotes science-fiction author Robert A. Heinlein: "When it's time to railroad, people start railroading."

He might seem an unlikely candidate to lead a constitutional counterrevolution. Mr. Marbut, 65, lives alone outside Missoula, in a solar-powered geodesic dome he built from a kit, on the remnant of a cattle ranch his family once owned. He started college but didn't finish. After Army service, he knocked around Alaska before coming home to devote himself to guns, his passion.

After a dispute with others in the state's National Rifle Association affiliate in the late 1980s, Mr. Marbut set up his own lobbying organization, the Montana Shooting Sports Association.

He teaches gun-safety classes, has self-published a book on Montana gun laws and manufactures targets for sale to shooting ranges. The NRA didn't respond to requests for comment.

Though he lost a bid for the Montana Legislature, he became the state's pre-eminent firearms advocate because

of his singular focus. He organizes shooting matches to raise money for pro-gun politicians. He writes legislation for the lawmakers he helps elect. Montana lawmakers have enacted dozens of his bills, most of which relax gun regulations.

But Montana couldn't alter federal law. That led Mr. Marbut to the source of congressional authority over guns in the state, the Wickard case.

He concluded the Supreme Court had twisted the words of the commerce clause, which grants Congress authority to "regulate Commerce with foreign Nations, and among the several States."

Last year, in an essay that incorrectly attributed Justice Jackson's opinion to Justice Owen Roberts, he wrote: "It's time for the [Chief Justice John] Roberts of 2010 to trump the squishy [Owen] Roberts of 1942."

He conceived of the Firearms Freedom Act as a way to get it reconsidered. He says he focused on the commerce clause, rather than Second Amendment theories popular with firearms enthusiasts, to prompt a broad ruling that would rein in federal power.

The bill failed twice but passed in 2009, after Republicans won statehouse majorities. The Legislature's nonpartisan legal adviser said it would probably be found unconstitutional.

Gov. Brian Schweitzer, a Democrat, signed it anyway. "It's a gun bill, but it's another way of demonstrating the sovereignty of the state of Montana," the governor said at the time.

State Rep. Robyn Driscoll, a Democrat who got a grade of F from Mr. Marbut's political-action committee, called the bill "absolutely appalling," saying legislators "would not support funding for education or women's clinics or anything like that, but they'll pass this blatantly unconstitutional bill and pay for the Supreme Court fight."

Infusing the dry concept of commercial regulatory authority with the emotional issue of gun rights was political "genius," says Barak Orbach, a University of Arizona law professor who has studied Mr. Marbut's impact on lawmaking.

On his website, Mr. Marbut posted a seven-step plan for attacking the federal commerce power, centering on passage of Firearms Freedom Acts. Enthusiasts got them introduced in more than 20 states. Nine legislatures passed them. Only one governor vetoed the bill, Democrat Brad Henry of Oklahoma.

Arizona Gov. Jan Brewer, a Republican, signed, even as she vetoed a similar measure applying to light bulbs. "Both bills invite lawsuits that would restore our Founding Fathers' vision of a limited federal government based on the 10th Amendment," said her veto message, but "the Firearms Freedom Act is the more immediate and practical vehicle for achieving the objective."

Following a strategy pioneered by Thurgood Marshall and the civil-rights movement, Mr. Marbut rounded up allies to file friend-of-the-court briefs. In addition to gun groups, conservative advocacy organizations such as the Goldwater Institute filed briefs backing the court challenge.

Mr. Marbut took an even more restrictive view of federal commerce power than did farmer Filburn. Where the farmer claimed his wheat was beyond congressional regulation because he didn't seek to market it, Mr. Marbut says Congress lacks authority over products even when they're sold, if not sold over state lines.

As he predicted, he lost the first round in federal court. Federal District Judge Donald Molloy wrote that the Montana legislature was free "to riddle the statutory code with 'political statements'" but not to invent its own constitutional law.

Mr. Marbut expects to fall short at the appeals court, as well. If he gets to the Supreme Court and loses there, he is readying a Plan B. He calls it "Sheriffs First," a bill that would authorize Montana sheriffs to arrest federal lawmen who enter their counties without permission.

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