

CONSTITUTIONAL LIMITATIONS ON FIREARMS REGULATION

The constitutional debate over firearms regulation is centered on the requirements of the fifth and second amendments to the United States Constitution. In discussing the questions that will confront any federal regulatory scheme, this note examines recent fifth amendment decisions and explores the origins of the second amendment, which has been infrequently interpreted. It is concluded that while artfully drawn legislation could avoid the fifth amendment objections posed by Haynes v. United States, the impact of the second amendment is uncertain because of the historical and decisional ambiguity surrounding that provision.

The National Firearms Act of 1934¹ and the Gun Control Act

¹ Ch. 757, 48 Stat. 1236 (1934) (formerly codified as 26 U.S.C. §§ 5801-62 (1964)). Prior to its amendment in 1968 section 5811 of the Firearms Act placed a burdensome \$200 tax on the transfer of certain designated weapons, such as fully automatic firearms and sawed-off shotguns and rifles, and a similar \$200 tax on the making of such weapons by anyone other than manufacturers was imposed by former section 5821. Exceptions for "making taxes" were made in former section 5821(b)(2) if such a tax had previously been paid on the weapon to be made, and if the weapon was made for, or transferred to, a peace officer, the United States Government, a State, Territory, District of Columbia, or any political subdivision thereof, both the "making" and "transfer" taxes were waived by former section 5821(b)(3). In order to enforce this tax, persons possessing such weapons had to register them with the Secretary of the Treasury under former section 5841. Exceptions were made for those firearms in compliance with the applicable provisions of the Act. *Id.* In the case of the "making" tax, former section 5821(e) required the registrant to file a "notice of intent to make" with the Secretary before he could lawfully commence construction of the firearm. Importation of firearms, as defined by the Act, into the United States, was forbidden, unless permission was granted by the Secretary or his delegate, under former section 5845. In order to receive such permission, the importer had to show that his purpose was lawful and that the firearm was unique. *Id.* Possession of any firearm in violation of the Act was unlawful, as was failure to register the defined firearm, under former section 5851.

Responding to an adverse holding by the Supreme Court in *Haynes v. United States*, 390 U.S. 85 (1968), with respect to the registration requirements of the Act, Congress completely revised the statute, Pub. L. No. 90-618, § 201 (1968 U.S. CODE CONG. & AD. NEWS 1413-24), amending 26 U.S.C. §§ 5801-5862, eliminating exceptions to the registration requirements, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1415-16) (26 U.S.C. § 5841), and exempting from the transfer tax only transfers to federal, state and local governments and their political subdivisions, and to registered manufacturers, dealers and importers. *Id.* (1968 U.S. CODE CONG. & AD. NEWS at 1420-21) (26 U.S.C. §§ 5851-53). The amended statute further provides that the information obtained through compliance with the requirements of

of 1968² presently comprise the major federal gun control legislation. The Firearms Act is specifically directed at eliminating the unlawful use of certain weapons such as machine guns and

the Act cannot be used either directly or indirectly as evidence against the registrant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." *Id.* (1968 U.S. CODE CONG. & AD. NEWS at 1419-20) (26 U.S.C. § 5848). In addition, importations are further restricted, the "lawful and unique" standard being abandoned. Under regulations by the Secretary of the Treasury, firearms, as defined, may now be imported only for the purposes of scientific study or research, testing by a registered manufacturer, use as a sample by a registered dealer or importer, or use by a federal, state or local government. *Id.* (1968 U.S. CODE CONG. & AD. NEWS at 1417) (26 U.S.C. § 5844). The amended Act also defines "destructive devices," such as mines, grenades, and other explosives, for the purpose of identification and regulation by the Secretary. *Id.* (1968 U.S. CODE CONG. & AD. NEWS at 1418) (26 U.S.C. § 5845(f)). Finally, the penalties for violation of the Act are increased: fines have been raised from a maximum of \$2,000 and/or five years' imprisonment to \$10,000 and/or 10 years' imprisonment. *Id.* (1968 U.S. CODE CONG. & AD. NEWS at 1422) (26 U.S.C. § 5871).

² Gun Control Act of 1968, Pub. L. No. 90-618, §§ 101-302 (1968 U.S. CODE CONG. & AD. NEWS 1397-1424). This Act amended Title IV of the Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, 18 U.S.C.A. §§ 921-28 (Supp. 1968), which had repealed the Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250.

Requiring licenses for manufacturers, dealers and importers who desire to engage in the interstate movement of firearms, Pub. L. No. 90-618, §§ 101-302 (1968 U.S. CODE CONG. & AD. NEWS 1397, 1406-09) (18 U.S.C.A. § 923), the Gun Control Act prohibits interstate sales or shipments to or reception by persons other than licensed manufacturers, dealers or importers, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1404-05) (18 U.S.C.A. §§ 922(d), (f) & (h)). Certain exemptions are listed, such as sales or shipments to watchmen, law officers, or others listed in 18 U.S.C. § 1715 (1964), Pub. L. No. 90-618, §§ 101-302 (1968 U.S. CODE CONG. & AD. NEWS at 1401) (18 U.S.C.A. § 922(a)(2)(B)); shipments to lawful owners by licensed manufacturers, dealers or importers who had received the firearms from said owners; and shipments by owners to licensees for repairs or customizing, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1400-01) (18 U.S.C.A. § 922(a)(2)(A)). Individuals are forbidden to carry into their state of residency firearms purchased in another state, except for sporting rifles and shotguns obtained in a state contiguous with the home state of the purchaser, where the laws of the latter allow such importation, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1401) (18 U.S.C.A. § 922(a)(3)). Exemption from the restrictions are: guns received through bequest or intestate succession, *id.*; firearms acquired prior to the effective date of the Act, *id.*; and firearms shipped to lawfully recognized sporting or shooting clubs, and federal, state and local governments and their subdivisions, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1402-03) (18 U.S.C.A. § 922(b)(3)). The seller may not knowingly, or with reasonable cause to believe, make sales of rifles and shotguns to: minors under 18 and of any other firearm to minors under 21, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1402) (18 U.S.C.A. § 922(b)(1)); convicts or criminally accused persons, fugitives from the law, drug addicts, and mental or former mental patients, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1404) (18 U.S.C.A. § 922(d)); and persons to whom purchase or possession is forbidden by the law of the place of sale or delivery, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1402) (18 U.S.C.A. § 922(b)(2)). Inversely, interstate shipments or receptions by such persons are also prohibited, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1405) (18 U.S.C.A. § 922(h)).

sawed-off shotguns,³ whereas the 1968 Gun Control Act is more comprehensive in its restrictions on mail order and interstate traffic in handguns, rifles and shotguns.⁴ Despite the rather extensive

Private, intrastate transactions, such as the gift of a pistol by a father to his son, would not, *per se*, violate federal law. Unless otherwise prohibited by the Act, a licensee may sell to a lawful customer, without a personal appearance by the latter, upon a submission by the purchaser of a sworn statement stating that the transferee is not prohibited from purchasing the firearm, and setting forth the name of the local law enforcement official to whom the weapon will be delivered, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1403-04) (18 U.S.C.A. § 922(c)). Notice to carriers of firearms shipments are required, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1404-05) (18 U.S.C.A. § 922(e)), and any carrier who knowingly, or with reasonable cause to believe, transports firearms which contravene the prohibitions of the statute, is in violation thereof, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1405) (18 U.S.C.A. § 922(f)). The Act also imposes heavy licensing fees, including \$1,000 per year for manufacturers, dealers and importers of destructive devices or ammunition therefor (handguns are included, but sporting rifles and shotguns are not), *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1406-07) (18 U.S.C.A. § 923(a)). If destructive devices or their ammunition are not involved, the fee is only \$50 per year for firearms manufacturers and importers, \$10 per year for ammunition manufacturers, \$25 per year for pawnbrokers, and \$10 per year for dealers in such firearms who are not pawnbrokers. *Id.* Collectors of antique firearms seeking licenses must pay \$10 per year, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1407) (18 U.S.C.A. § 923(b)). A license must be granted if the applicant is over 21, is not prohibited from transporting, shipping or receiving such firearms, has not willfully failed to disclose any required information, and has premises in the state from which he conducts his business, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1407) (18 U.S.C.A. § 923(d)(1)). The Secretary is required to act upon the application within 45 days, and if he fails to do so, the applicant may bring an action compelling the Secretary to act, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1407) (18 U.S.C.A. § 923(d)(2)). Reasons for a denial must be specified, and notice and an opportunity for a hearing are required prior to revocation of a license, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1408) (18 U.S.C.A. § 923(f)(1)). Judicial review in a United States district court is also provided for, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1408) (18 U.S.C.A. § 923(f)(3)). Licensees are required to keep records of their transactions, and serial numbers are to be used to identify the firearms so involved, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1408-09) (18 U.S.C.A. §§ 923(g) & (i)).

The penalties for violation of any provision of the Act are severe, with \$5,000 and/or 5 years' imprisonment as the maximum, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1409) (18 U.S.C.A. § 924(a)). Persons who ship, transport or receive firearms in interstate commerce with intent to commit an offense punishable by at least one year's imprisonment face fines ranging to \$10,000, and 10 years' incarceration, as do persons using firearms while committing felonies, *id.* (1968 U.S. CODE CONG. & AD. NEWS at 1409) (18 U.S.C.A. §§ 924(b) & (c)).

Finally, the Act is not intended to pre-empt state law, except where there is an irreconcilable conflict, nor is it intended to modify or affect the National Firearms Act of 1934, or 18 U.S.C. § 1715 (1964), relating to non-mailable firearms, Pub. L. No. 90-618, §§ 101-302 (1968 U.S. CODE CONG. & AD. NEWS at 1412) (18 U.S.C.A. §§ 927 & 928).

³ See note 1 *supra*.

⁴ See note 2 *supra*.

regulation of firearms under these and other less comprehensive federal statutes,⁵ three-quarters of the American people apparently

⁵ 18 U.S.C. § 1715 (1964). Firearms as Nonmailable; regulation. "Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any postmaster, letter carrier, or other person in the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postmaster General shall prescribe, for use in connection with their official duty, to officers of the Army, Navy, Air Force, Coast Guard, Marine Corps, or Organized Reserve Corps; to officers of the National Guard or Militia of a State, Territory, or District; to officers of the United States or of a State, Territory, or District whose official duty is to serve warrants of arrest or commitments; to employees of the Postal Service; to officers and employees of enforcement agencies of the United States; and to watchmen engaged in guarding the property of the United States, a State, Territory, or District. Such articles also may be conveyed in the mails to manufacturers of firearms or bona fide dealers therein in customary trade shipments, including such articles for repairs or replacement of parts, from one to the other, under such regulations as the Postmaster General shall prescribe.

"Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than \$1,000 or imprisoned not more than two years, or both."

49 U.S.C. § 1472(1) (1964). Carrying weapons aboard aircraft. "Except for law enforcement officers of any municipal or State government, or the Federal Government, who are authorized or required to carry arms, and except for such other persons as may be so authorized under regulations issued by the Administrator, whoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon, or whoever attempts to board such an aircraft while having on or about his person a concealed deadly or dangerous weapon, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

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Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, *formerly* 15 U.S.C. §§ 901-10 (1964), which was repealed by Title IV of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C.A. § 921-28, was designed to regulate the interstate and foreign commerce of all firearms. Interstate shipment or reception by any person other than a licensed manufacturer, importer or dealer, was forbidden. Unfortunately, the "dealer's fee" of \$1 was so ridiculously low that any person wishing to receive firearms in compliance with the federal law simply applied for a license. The Federal Firearms Act of 1938, generally, had been ineffective in obtaining its purpose. *See Hearings on S. Res. 340 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 77 (1968) [hereinafter cited as *Delinquency Hearings*] (remarks of Att'y Gen. Ramsey Clark); Note, *Firearms: Problems of Control*, 80 HARV. L. REV. 1328, 1331 (1967); Comment, *Federal Regulation of Firearms Sales*, 31 U. CHI. L. REV. 780, 787 (1964). *But see* Note, *Firearms Regulations*, 17 W. RES. L. REV. 569, 572-73 (1965).

desire additional federal legislation restricting private possession and ownership of firearms.⁶

Proponents of more restrictive gun laws believe that increased measures are necessary to stem the rising rate of homicides which involve firearms,⁷ while opponents argue strenuously that additional legislation is not the solution, and, indeed, may be unconstitutional.⁸ The constitutional arguments of the latter group are usually based on the second amendment, which provides that "the right to keep and bear arms shall not be infringed." Moreover, firearms statutes which would require registration or filing of specific information with the federal or state authorities may transgress the fifth amendment privilege against self-incrimination.⁹

The power of Congress to regulate firearms under the taxing and commerce clause is clear.¹⁰ The Supreme Court has upheld the taxing provisions of the National Firearms Act¹¹ as a legitimate exercise of the congressional power to tax.¹² Similarly, the lower

⁶ A Harris Poll, taken April 22, 1968 revealed that 71% of all Americans favored strict control over the sale of firearms, in response to the question: "Do you favor or oppose Federal laws which would control the sales of guns, such as making all persons register all gun purchases no matter where they buy them?" Twenty-three percent opposed such regulation. Among firearms owners, the poll was 65% in favor, and 31% opposed. Quoted in the REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, S. REP. NO., 1097, 90th Cong., 2d Sess. 198-99 (1968).

⁷ See generally C. BAKAL, THE RIGHT TO BEAR ARMS (Paperback Library ed. 1968) [hereinafter cited as BAKAL]; *Delinquency Hearings* 56-88, 593-612, 615-58 (remarks of Att'y Gen. Ramsey Clark).

⁸ The National Rifle Association of America (NRA) is the anti-legislation leader. General views of the NRA may be found in practically every issue of *The Rifleman*, the organization's official publication. See also NRA, *The Gun Law Problem* (1968). For more detailed arguments held by the officers of the NRA, see *Delinquency Hearings* 192-207, 395-451 (remarks of NRA Exec. Vice President Franklin L. Orth and President Harold W. Glassen). See also Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 Wm. & MARY L. REV. 381 (1960); Olds, *The Second Amendment and the Right to Keep and Bear Arms*, 46 MICH. S.B.J. 15 (Oct. 1967); Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554 (1965).

⁹ See notes 18-52 *infra* and accompanying text.

¹⁰ See, e.g., *Haynes v. United States*, 390 U.S. 85, 98 (1968); *United States v. Miller*, 307 U.S. 174 (1939); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942).

¹¹ See note 1 *supra*.

¹² See, e.g., *Haynes v. United States*, 390 U.S. 85, 98 (1968); *United States v. Miller*, 307 U.S. 174 (1939); *accord*, *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935). In *Haynes*, the registration requirement of the National Firearms Act, 26 U.S.C. § 5841 (1964) was successfully attacked on fifth amendment grounds. However, the Supreme Court

federal courts have sanctioned firearms legislation enacted under the commerce clause,¹³ and recent Supreme Court decisions have reaffirmed congressional power to enact a broad range of regulatory legislation under this constitutional provision.¹⁴ Furthermore, the "necessary and proper" clause of the Constitution augments the commerce clause, empowering Congress

indicated that if immunity from specified prosecutions arising out of admissions of violations through registration were granted by the Act, registration might validly be required. See notes 18-52 *infra* and accompanying text.

¹³ The Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, passed under the Commerce Clause, was upheld as a valid exercise of the powers of the Federal Government in two Circuit Court cases. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261 (2d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943).

¹⁴ Recent cases state that virtually any intrastate activity affecting interstate commerce may be federally regulated. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *White v. United States*, 395 F.2d 5 (1st Cir.), *cert. denied*, 393 U.S. 928 (1968). See also *Wickard v. Filburn*, 317 U.S. 111 (1942); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). In *Heart of Atlanta and McClung*, Title II of the Civil Rights Act of 1964, prohibiting, *inter alia*, racial discrimination in public accommodations establishments, was attacked as unconstitutional on the ground that such legislation exceeded the granted powers of Congress. In both cases the Act was upheld as a valid exercise of the commerce power. The Court said: "It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . . . the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). In *Wickard v. Filburn*, 317 U.S. 111 (1942), a farmer sought to enjoin the enforcement of a section of the Agricultural Adjustment Act of 1938 which levied a penalty on excessive crops. He claimed the Act was unconstitutional as applied to him since all the crops he raised were used on his farm, and thus had no relation to interstate commerce, or, if it had some effect, it was indirect only, and not subject to regulation. The Court, rejecting this claim, noted the broad and sweeping power of Congress under the Commerce Clause, and observed that "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125.

While the argument has not yet been made in any case, it would appear that courts would have no difficulty in finding that firearms transported in intrastate commerce do have a substantial effect on interstate commerce, if only because they are used to commit crimes against travellers, thus causing economic loss or discouraging interstate travel. Furthermore, legislation affecting purely local transactions, such as a national permit-to-purchase and possess, would probably find justification under the "necessary and proper" clause, on the grounds that without such a requirement there could be no effective enforcement of the ban on non-resident firearms sales.

to pass laws implementing existing legislation in areas over which it has regulatory powers.¹⁵

The interstate sale, shipment or transportation of firearms seemingly comes directly under the commerce clause authority. Supposing that a valid congressional purpose to curtail circumvention of local laws through non-resident gun sales can be posited, then under the commerce and "necessary and proper" clauses Congress can validly enact laws to effectuate this purpose, including regulation of wholly intrastate transactions.¹⁶ Thus, the real question is not whether Congress may regulate the transfer and possession of firearms, but rather, how far such legislation may constitutionally extend.¹⁷

GUN CONTROL AND THE FIFTH AMENDMENT

In *Haynes v. United States*,¹⁸ the Supreme Court dealt the first serious reversal to the National Firearms Act of 1934, and explicitly delineated one of the constitutional limitations on gun control legislation. As one of three closely related decisions¹⁹

¹⁵ See cases cited note 14 *supra*.

¹⁶ See, e.g., *Wickard v. Filburn*, 317 U.S. (1942), discussed note 14 *supra*. In the landmark case of *United States v. Darby*, 312 U.S. 100 (1941), which upheld the provisions of the Fair Labor Act of 1936 regulating wages and hours of employees engaged in the production of goods involved in interstate commerce, the Court said, "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." 312 U.S. at 118.

¹⁷ Whether or not there is any need for gun control legislation is also a matter of debate. Avid firearms enthusiasts, such as the NRA and ardent firearms legislation advocates, such as Sen. Thomas Dodd and author Carl Bakal, each employ statistics to establish the need or lack of need for stringent firearms regulations. The NRA publishes a report on firearms accidents and crimes which shows that firearms accidents accounted for 1.3 deaths per 100,000 population in 1966, while automobiles killed 27.1 persons per 100,000, and that the firearms homicide rate from 1930 to 1966 declined from 5.7 per 100,000 to 2.9. N.R.A., *Statistics on Firearms in Accidents and Crime* 1, 9 (no date), Bakal, on the other hand, points out that some 800,000 civilian Americans have died by firearms since 1900, and that now some 20,000, including suicides, suffer this fate yearly. BAKAL, *supra* note 7, at 1. In this book, Bakal emphasizes the reckless attitude of Americans toward firearms. For assorted articles denying the necessity for gun control legislation, see generally Hays, *supra* note 8; Olds, *supra* note 8; Sprecher, *supra* note 8, at 665.

¹⁸ 390 U.S. 85 (1968).

¹⁹ The two related opinions handed down with *Haynes* were *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). In *Marchetti*,

reaffirming the vitality of the fifth amendment privilege against self-incrimination,²⁰ *Haynes* held that the privilege provided a complete defense to a charge that the defendant failed to register his possession of a designated firearm as required by the 1934 statute.²¹

Under the former section 5841 of the National Firearms Act,²² registration of various weapons was required.²³ Possession of a firearm which violated *any* provision of the Act including registration was declared unlawful.²⁴ In effect, failure to register possession of a firearm, even though such possession was in violation of the Act, was a separate offense. The conflict with the privilege against self-incrimination was manifest, since one who complied with the registration requirements and registered an illegal weapon testified to a violation of the Act for which he was subject

defendant was convicted of conspiring to evade payment of the occupational tax on gamblers imposed by 26 U.S.C. § 4411 (1964), and for failing to comply with 26 U.S.C. § 4412 (1964), which required those liable for the tax to register with the Internal Revenue Service. Payment of the tax did not exempt the registrant from prosecution under state or federal anti-wagering laws, *id.* § 4422, and federal officials are required to provide state or federal prosecutors with lists of those paying the tax, *id.* § 6107. Defendant appealed on the ground that the statutes in question violated his fifth amendment privilege against self-incrimination. The Supreme Court agreed with the defendant, overruling *United States v. Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955), which had upheld similar convictions. Reversing the defendant's conviction, the Court held that a person may not be compelled by law, upon pain of penalty, to furnish a government with information which would furnish *any* governmental authority with a "link in the chain of evidence" which could be used to convict him. 390 U.S. at 48, 54. Similarly, in *Grosso*, defendant's conviction for failure to pay the required excise tax on gambling under 26 U.S.C. §§ 4401 & 4411 (1964), and 18 U.S.C. § 371 (1964), was also reversed.

²⁰ The privilege against self-incrimination, as guaranteed by the fifth amendment, reads, "nor shall [any person] be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

²¹ 390 U.S. at 100.

²² Section 5841 was amended after *Haynes* to correct the constitutional defects. *Compare* Pub. L. No. 90-618, § 201 (1968 U.S. CODE CONG. & AD. NEWS 1413, 1415-16) with 26 U.S.C. § 5841 (1964), under which *Haynes* was prosecuted.

²³ A transferee was exempted from registering those firearms which had been made or transferred in compliance with the provisions of the Act. Former section 5848(1) defined "firearm" for the purpose of the Act as: "a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition."

²⁴ Ch. 757, §§ 6, 10(b), 48 Stat. 1236, 1238, 1239 (1934).

to criminal prosecution.²⁵ The Government, said the Court, could not subject a defendant to a choice of either registering and thereby admitting possession of an unlawful weapon, or not registering and risking a conviction under section 5851 for possession of a weapon violating the registration requirement of section 5841, and any other provision with which the firearm failed to comply.

Rejected also was the Government's argument that the Court should uphold the conviction under section 5841 by "imposing restrictions upon the use by state and federal authorities of information obtained as a consequence of the registration requirement."²⁶ The flaw in this suggested judicial legislation was that it contravened the legislative intent to have the information gathered under the registration statute passed on to state and federal prosecutory authorities as commanded by 26 U.S.C. section 6107.²⁷ Nevertheless, the Court refused to hold the provisions unconstitutional on their face, on the ground that there were situations in which possession of an unregistered weapon would not violate section 5851.²⁸

The Court made it equally clear that the *Shapiro* doctrine, which removes "required records" from the protection of the fifth amendment, was inapplicable in this instance. *Shapiro v. United*

²⁵ "The object [of the fifth amendment] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself committed a crime." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

²⁶ "An internal statutory defect in the fifth amendment sense exists where the statutory scheme is so constructed that compliance with one section of the statute will compel the defendant to admit to a violation of a related section of the same act." 13 VILL. L. REV. 650, 654 n.34 (1968).

²⁷ "What the government cannot do is compel information under one statute which necessarily admits the violation of an unrelated criminal statute: this is the essence of self-incrimination." Comment, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L.J. 839, 847 (1967). See generally 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. ed. 1961); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193. One critic has suggested, however, that by its language, the fifth amendment was designed only to protect defendants at their own trial. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191, 195 (1930).

²⁸ 390 U.S. at 99.

²⁹ *Id.* at 99-100.

³⁰ The Government noted in its brief several instances in which registration would not lead to criminal prosecution: "In the case of a making, one person can make a firearm by modifying a weapon that is owned and possessed by another person. In such a case, the owner commits no crime in connection with the making, but if he wishes to continue to

*States*²⁹ held that records required to be kept by law fell outside the ambit of fifth amendment protection if such records had three characteristics: (1) the governmental purpose in requiring the records to be kept was regulatory; (2) the material recorded was of a nature which the registrant normally keeps; and (3) the records assumed a "public aspect,"³⁰ presumably by a legal requirement that they be normally available for inspection by certain or all members of the public.³¹ While it may be true that the essential purpose of the Government in *Haynes* was regulatory, and it is possible that manufacturers, dealers and importers normally keep records of their transactions, it is equally true that requiring such information to be recorded does not give the records a "public aspect." Furthermore, private transferees would not customarily record sales or gifts of firearms, nor would there be a "public aspect" to such transactions. Nevertheless the National Firearms Act sought to include such private transactions when they violated the Act, as well as "public" sales between merchants and customers. Thus, reasoned the Court, *Shapiro* did not apply here.

Relying heavily on the tests set forth in *Albertson v. Subversive Activities Control Board*,³² the majority noted that sections 5841 and 5851 were not aimed at the general public but rather were concerned with a "highly selective group inherently suspect of criminal activities" in "an area permeated with criminal statutes."³³ That the risk of prosecution for violation of the Act was materially increased by registration was clear to the Court, for

possess the weapon after its modification he must register under Section 5841. That registration can in no way incriminate him, but only serves to eliminate any possibility of criminal prosecution.

"[T]he filing obligation [under § 5814] is entirely the transferor's and not the transferee's. A transferee could in good faith provide the transferor with all the information required, but the transferor could fail to file, which would impose on the transferee a duty to register. If he did register, he could be convicted of no crime." Brief for the United States at 19-20, *Haynes v. United States*, 390 U.S. 85 (1968). However, the Government did admit that such situations were "uncommon." *Id.* at 20. Presumably also, registration would not incriminate a person who found a lost or abandoned firearm which had been in violation of the Act. *Cf. Haynes v. United States*, 390 U.S. 85, 96 n.10 (1968).

²⁹ 335 U.S. 1 (1948).

³⁰ *Shapiro v. United States*, 335 U.S. 1, 34 (1948); see also 6 DUQUESNE L. REV. 291, 297 (1968).

³¹ *Shapiro v. United States*, 335 U.S. 1, 33-34 n.42 (1948).

³² 382 U.S. 70 (1965). See note 36 *infra*.

³³ *Haynes v. United States*, 390 U.S. 85, 98-99 (1968).

they observed:

The registration requirement is . . . directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecution under sections 5851 and 5861.³⁴

This defect, coupled with the "non-public aspect" of records of firearms transactions, and the provisions of section 6107 which required the federal government to give any information acquired through registration to state officials, led the Court to conclude:

[A] proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under section 5841 or for possession of an unregistered firearm under section 5851.³⁵

The *Haynes* Court did not believe that its decision would preclude effective regulation or taxation of firearms, but nevertheless demonstrated that close judicial scrutiny would be given to any registration statutes aimed at a "highly selective group inherently suspect of criminal activity" and concerned with "an area permeated with criminal statutes."³⁶ Where registration might form a "link in the chain of evidence" used for conviction of the registrant for a related crime, the fifth amendment provides a

³⁴ *Id.* at 96.

³⁵ *Id.* at 100.

³⁶ 390 U.S. at 98-99. Registration requirements have only recently encountered difficulties under the self-incrimination clause of the fifth amendment. *See, e.g.,* *Leary v. United States*, 395 U.S. 6 (1969) (marijuana); *Haynes v. United States*, 390 U.S. 85 (1968) (firearms); *Marchetti v. United States*, 390 U.S. 39 (1968) (gamblers); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) (Communists); *cf. United States v. Minor*, 398 F.2d 511, 512-13 (2d Cir. 1968) (narcotics).

Prior to *Albertson*, in which a statute requiring Communists to register with the Subversive Activities Control Board was voided on the grounds that it violated the privilege against self-incrimination, no registration statute had been held unconstitutional. *See United States v. Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955) (registration requirement for gamblers valid); *United States v. Eramdjian*, 155 F. Supp. 914 (S.D. Cal. 1957) (narcotics registration statute valid).

In distinguishing *United States v. Sullivan*, 274 U.S. 259 (1927), in which the Court affirmed a conviction for failure to file an income tax statement despite the fact that the filing would reveal illegally gained income, the *Albertson* Court said, "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where

complete defense.³⁷ Thus, federal registration requirements in statutes dealing with Communists,³⁸ narcotics³⁹ and gambling,⁴⁰ designed to gather information which might be used in criminal prosecutions against registrants, have been declared in violation of the privilege against self-incrimination.⁴¹ However, where

response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." 382 U.S. at 79. The tests of "aimed at a highly selective group inherently suspect of criminal activity" and "an inquiry in an area permeated with criminal statutes" are heavily relied upon by courts today, and have apparently been adopted as the standard in self-incrimination cases. See *Haynes v. United States*, 390 U.S. 85, 98-99 (1968); *Marchetti v. United States*, 390 U.S. 39, 47 (1968); *United States v. Minor*, 398 F.2d 511, 512 (2d Cir. 1968).

Despite the adoption of this standard, it would appear from the language of the fifth amendment, and the interpretation rendered in *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), that the protection afforded should be available other than only when the information required is more than merely incidental in establishing guilt of some crime. What in the language of the privilege suggests that "merely incidental" information is not protected? Perhaps the answer lies in the "balancing test." Where the information required is necessary to the proper functioning of society or government, the fact that it may later provide a "link in the chain of evidence" is not sufficient to warrant constitutional protection against divulgence. Examples would be the use of marriage licenses to convict a bigamist, income tax returns to convict a tax-evader, and an automobile registration to convict a hit-and-run motorist.

³⁷ See, e.g., *Leary v. United States*, 395 U.S. 6 (1969); *Haynes v. United States*, 390 U.S. 85 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Counselman v. Hitchcock*, 142 U.S. 547 (1892). *Cf. Galvan v. Superior Court*, 452 P.2d 930, 76 Cal. Rptr. 642 (1969) (upholding local registration ordinance since defendant not member of class for whom registration would present substantial hazard of self-incrimination).

³⁸ Subversive Activities Control Act of 1950, 50 U.S.C. § 786(d)(4) (1964).

³⁹ 26 U.S.C. §§ 4701-76 (1964).

⁴⁰ 26 U.S.C. §§ 4401, 4411, 4412 (1964).

⁴¹ The registration requirement provisions of the Subversive Activities Control Act of 1950, §§ 7(d)(4), 8(a) & (c) and 13 (a), 50 U.S.C. §§ 786(d)(4), 787(a) & (c), 792(a) (1964) were declared unconstitutional as violative of the privilege against self-incrimination in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965). In upholding the conviction of a seller who failed to comply with 26 U.S.C. § 4705(a), which forbids the sale of narcotics to anyone without an order form issued by the Secretary of the Treasury, the Second Circuit rejected defendant's claim that the requirement violated the self-incrimination clause of the fifth amendment. *United States v. Minor*, 398 F.2d 511 (2d Cir. 1968). Defendant claimed that as the provision required the purchaser, in effect, to register, such information would tend to incriminate the buyer. Thus the requirement, under *Haynes v. United States*, 390 U.S. 85 (1968), *Marchetti v. United States*, 390 U.S. 39 (1968), and *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), was unconstitutional. The court tersely stated: "Even if we were to assume *arguendo* that the registration and tax provisions infringe upon the purchaser's Fifth Amendment rights . . . it hardly follows that a seller . . . is immune from prosecution for selling to a person who failed to provide the form. . . . [A] seller cannot benefit from the privilege allegedly available to the buyer. . . . [I]t is clear that

registration requirements are "neutral" on their face and aimed at the general public, no violation of the fifth amendment results. There cannot be a fifth amendment objection simply because registration *might* lead to conviction for a crime neither committed nor contemplated at the time of registration. Accordingly, an income tax statement must be filed regardless of the fact that some of the requested information might lead to a conviction for illegal traffic in liquor,⁴² and an automobile has to be registered regardless of the fact that the state may use this evidence to trace, arrest and convict a hit-and-run motorist.⁴³

When the *Albertson* tests of "suspect group," "area permeated by criminal statutes" and "link in the chain of evidence" are applied to firearms registration statutes, the result is not so clear as when those tests are applied to the Communists registration statutes, for which they were promulgated.⁴⁴ If the government places a transfer or manufacturing tax on all firearms, the purpose of registration would be to enforce payment, a function similar to that secured by income tax returns and automobile registration. No "select group inherently suspect of criminal activity" would be the subject of the statute, and a crucial element of the *Albertson* objection would be avoided. Because the legislation would apply essentially to a "non-criminal" group, firearms registration would

standing under the Fifth Amendment is not freely negotiable nor transferable." 398 F.2d at 513. The language of the court indicates that the registration requirement as regards the purchaser may, indeed, be unconstitutional. 26 U.S.C. §§ 4401, 4411, 4412 (1964), requiring registration under and payment of an excise and occupational tax on gambling, were declared unconstitutional as violative of the privilege against self-incrimination in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968).

⁴² *United States v. Sullivan*, 274 U.S. 259 (1927) (must file income tax return despite revelation of illegal sources of income). A registrant may, however, invoke the privilege as to specific questions asked in the form. *Id.* at 263.

⁴³ This use of automobile registrations has apparently never been challenged, and it is doubtful that any court would sustain a fifth amendment argument in such a case.

⁴⁴ Unlike gambling, narcotics possession and Communist affiliation, firearms possession is not as clearly an indication of the commission or intent to commit a crime. However, in terms of the purpose and lethal nature of a firearm, especially a handgun, registration of a firearm is more likely to lead to the discovery of a crime already committed than is an income tax return or automobile registration. The effectiveness of firearms registration has been questioned seriously, however. See *Delinquency Hearings* 192-207, 395-451 (remarks of Mr. Franklin L. Orth & Mr. Harold W. Glassen); Krug, *Does Firearms Registration Work?* (National Shooting Sports Foundation, Inc. 1968). But see *Delinquency Hearings* 83-88 (remarks of Att'y Gen. Ramsey Clark); Geisel, Roll & Wettick, *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*, 1969 DUKE L.J. 647.

be more analogous to automobile than to Communist registration. As such, it is probable that courts will disregard the fact that registration may supply the state with information leading to the conviction of a registrant for a crime committed with the registered weapon. On the other hand, possession and ownership of firearms might meet the *Albertson* criterion of an "area permeated with criminal statutes." Since crimes by firearms are so frequent, courts may deem this fact sufficient to hold that any attempted firearms registration scheme would violate the fifth amendment.

Finally, the problem of the interaction of the fifth amendment with federal firearms registration is further complicated by restrictive state legislation. While federal laws do not as yet prohibit ownership of any class of weapons, many states impose restrictions on the weapons which may be privately owned,⁴⁵ and forbid certain persons from owning or possessing any weapons.⁴⁶ Under *Haynes* a defendant could not be convicted of failure to register his firearm and pay the federal tax on it if possession is a violation of state law.⁴⁷ However, under *Murphy v. Waterfront Commission*⁴⁸ immunity from state prosecution for illegal possession might be granted by the federal statute, in which case the defendant could be prosecuted for non-registration and non-payment. Obviously, immunity will not support laws designed to keep firearms out of the hands of persons the state feels should not possess them.⁴⁹ Nevertheless, law enforcement can reap a benefit

⁴⁵ Machine guns are prohibited by many states; see, e.g., CONN. GEN. STAT. ANN. § 53-202 (1960); IOWA CODE § 696.1 (1950); N.J. STAT. ANN. tit. 2A, § 151-50 (1953).

⁴⁶ Many states forbid sale to, purchase by and possession by such classes as ex-felons, drug addicts and habitual drunks. See, e.g., ALA. CODE tit. 14, §§ 174, 178 (1959) (pistols); CAL. PENAL CODE §§ 12021, 12025 (West 1956) (concealed weapons); CONN. GEN. STAT. ANN. § 29-29 (1960); HAWAII REV. LAWS § 7 (1955); ILL. ANN. STAT. ch. 38, § 24-3 (Smith-Hurd Supp. 1969); N.Y. PENAL LAW § 265.05(6) (McKinney 1967).

⁴⁷ 390 U.S. 85 (1968).

⁴⁸ 378 U.S. 52 (1964).

⁴⁹ *Id.* Petitioners, subpoenaed to testify before the Waterfront Commission of New York Harbor concerning a work stoppage, were granted immunity from state prosecution in New York and New Jersey for any matter arising out of their testimony. They still refused to answer, on the ground that they were still subject to federal prosecution, and hence came within the protection of the fifth amendment. Held in contempt by the New Jersey court, petitioners appealed to the Supreme Court. The Supreme Court, reversing the contempt conviction, nevertheless ordered the witnesses to answer on the grounds that the immunity granted was complete and extended to possible prosecution under both state and federal law. Noting that "the constitutional privilege against self-incrimination protects a state witness

from a general firearms registration law with an immunity clause by providing alternative criminal charges against those owning a federally unregistered firearm, in violation of state possession laws. Although immunity from state prosecution must be granted if failure to register is charged, it would be possible to forego the federal complaint and have local authorities file charges for illegal possession. Furthermore, where firearms crimes are committed by registered weapons, ownership can be traced in a manner similar to that used for locating the owner of an automobile, thereby assisting law enforcement.⁵⁰ Unfortunately, the value of federal gun registration alone is minimal.⁵¹ Because a federal registration law, by itself, arguably affords protection to those who violate state and local gun possession laws,⁵² more is needed to ensure enforcement of local controls. But what more can be achieved depends upon the limitations of the second amendment.⁵³

GUN CONTROL AND THE SECOND AMENDMENT

The relatively few Supreme Court interpretations of the second amendment seem to establish two propositions: (1) the second amendment limits only the federal government; and (2) the second amendment is a "collective" guarantee, designed to ensure the

against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law," *id.* at 77-78, the Court held "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." *Id.* at 79.

⁵⁰ See BAKAL, *supra* note 7, at 97; Comment, *Federal Regulation of Firearms Sales*, 31 U. CHI. L. REV. 780, 785 n.27, 789 (1964); *Delinquency Hearings* 84, 619 (remarks of Att'y Gen. Ramsey Clark).

In a study of homicides committed in 1967 in Chicago, it was revealed that approximately 75% of the murders were committed by an acquaintance of the victim and that 57% of all homicides by weapons were committed with firearms. Presumably a large percentage of these were committed by persons with no previous criminal record, and who, probably, would presently qualify for legal ownership of the firearm used to complete the crime. Zimring, *Is Gun Control Likely to Reduce Violent Killings?* 35 U. CHI. L. REV. 721, 722, 726 n.8 (1968). See also Note, *Firearms: Problems of Control*, 80 HARV. L. REV. 1328, 1345 (1967).

⁵¹ See *Delinquency Hearings*, *supra* note 5, at 193-95 (remarks of Franklin L. Orth).

⁵² See note 49 *supra* and accompanying text.

⁵³ "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." U.S. CONST. amend. II.

preservation of a well-regulated militia, necessary to the security of a free state. Although there is ample linguistic justification for these views, the text of the amendment lends itself equally well to other, conflicting interpretations.

By holding that the second amendment applies only to the federal government,⁵⁴ courts imply that the provision must be a "states rights" guarantee.⁵⁵ That is, the "free state" with whose security the amendment is concerned, must be each individual member of the Union, rather than the "nation-state." Under this reading, the clause guarantees that the federal government will not be permitted to interfere with the internal mobilization of each state for its own security. But then, of what meaning is Article IV, section 4 of the United States Constitution? "The United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." If it is the duty of the Federal Government to protect the states, what is the need for a constitutional amendment prohibiting the federal power from denying a state the opportunity to form its own militia? Perhaps an answer lies in the fear of the original states that the national government would envelop them.⁵⁶ Viewed in this light it would

⁵⁴ See, e.g., *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *Galvan v. Superior Court*, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *People v. Seale*, 78 Cal. Rptr. 811, 815-16 (Ct. App. 1969).

⁵⁵ See, e.g., *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *Hill v. State*, 53 Ga. 472, 473 (1874).

⁵⁶ See 1 ANNALS OF CONG. 749-52 (1789); THE FEDERALIST Nos. 25, 29 (A. Hamilton). As was pointed out in THE FEDERALIST No. 25, at 159 (J. Cooke ed. 1961): "Reasons have been already given to induce a supposition that the State Governments will too naturally be prone to a rivalry with that of the Union, the foundation of which will be the love of power If . . . the ambition of the members should be stimulated by the separate and independent possession of military forces, it would afford too strong a temptation, and too great facility to them to make enterprises upon, and finally to subvert the constitutional authority of the Union. On the other hand, the liberty of the people would be less safe in this state of things, than in that which left the national forces in the hands of the national government." Though preferring a national force, on balance, THE FEDERALIST supported the idea of a National Militia, led by state officers, a plan embodied in Article I, § 8 of the Constitution. *Id.*, No. 29. As "Publius" stated, "There is something so far fetched and so extravagant in the idea of danger to liberty from the militia. . . ." *Id.*, No. 29, at 185.

Of course, THE FEDERALIST was written to support passage of the Constitution itself, not the later Bill of Rights, but the comments and observations with respect to the militia are pertinent to a discussion of the second amendment, reflecting substantively the fears of contemporary America.

appear that Article IV, section 4 and the second amendment, given its present interpretation, mesh very well indeed. The Constitution mandates the duty of the Federal Government to protect its members from the external foe and internal rebel but insures that the states shall have an unassailable right to protect themselves against encroachment by the central authority. However, Article IV, section 4 is not the only constitutional provision which may be read in conjunction with the second amendment.

Article I, section 8, clauses 15 and 16 cloak Congress with power to provide for the organizing, arming, disciplining and calling forth of the militia,⁵⁷ trained by the states in such manner as Congress prescribes.⁵⁸ Presumably, these are the troops to be dispatched to quell disorders and repel invasions contemplated in Article IV, section 4. In light of this portion of the Constitution, the second amendment may be seen as protecting another interest, wholly separate from any state interest in avoiding military takeover by the federal government—the right of the Federal Government to have at its disposal a militia, the right of whose members “to keep and bear arms” may not be infringed by state governments.⁵⁹ While this interpretation has never been directly espoused by any court, dictum by the United States Supreme Court in *Presser v. Illinois*⁶⁰ indicates that such a view is not wholly frivolous.

The Illinois statute which was challenged in *Presser* required irregulars who sought to form an organized militia or military

⁵⁷ For the meaning of the word “militia,” see notes 87-93 *infra* and accompanying text.

⁵⁸ Article I, § 8, cls. 15 & 16 provide that Congress shall have power: “[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions:

“[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

⁵⁹ *Cf.* *United States v. Cruikshank*, 92 U.S. 542 (1875). Defendants were indicted under § 6 of the Enforcement Act of 1870 for conspiring, *inter alia*, to prevent two Negroes from bearing arms. The Court, affirming an order for arrest of judgment on the grounds that the Act was beyond the power of Congress, observed of the second amendment, “This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to . . . the powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police . . .” *Id.* at 553.

⁶⁰ 116 U.S. 252 (1886).

units to obtain a license from the governor if they wished to meet or drill within the state. Presser, in defiance of the law, led some 400 rifle-bearing members of a German nationalist group down the streets of Chicago, without having procured the requisite license. Arrested, convicted and fined \$10, Presser appealed on the ground, *inter alia*, that the statute violated the second amendment. While admitting that the second amendment was a prohibition on the Federal Government, and not on the states, Presser claimed that the statute interfered with his right to keep and bear arms on behalf of a national purpose, in violation of the Constitution.⁶¹ The question of his personal right to keep and bear arms was not argued by the defendant.⁶²

⁶¹ *Id.* at 257-60 (argument for plaintiff-in-error).

⁶² *Id.* at 258 (argument for plaintiff-in-error). The plaintiff-in-error indicated that he was not contending for second amendment protection of an individual right by this statement: "Whether a State may not prohibit its citizens from keeping or bearing arms for other than militia purpose is a question which need not be considered, as the Illinois statute is aimed against the organizing, arming and drilling of bodies of men as militia, except as they belong to the Illinois National Guard. . . ." *Id.*

If it is true that the second amendment is unconcerned with individual rights and is, instead, focused on the protection of a "governmental" right, a rather interesting "standing" question arises: why should a court entertain a private party's argument that *his* right to keep and bear arms is protected by the second amendment? If the second amendment is designed to shield the states from encroachment by the federal government, only the states may invoke its protection. *Cf. Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 143-44 (1939). Similarly, if the second amendment is deemed to protect the federal government's right to access to trained troops, then it alone may call upon that amendment in attacking a law interfering with that right. In either event, an individual has no standing to raise a second amendment defense, since it is not his legal right, but that of a political entity, which is allegedly being violated. This problem apparently was recognized by the defendant in *Presser*, who urged not that his individual right was violated, but that the state law in question infringed upon the federal government's right to have a militiaman keep and bear arms. The Court, however, was unable to find a basis for a contention that he was suing on behalf of the federal government. Other cases dealing with second amendment claims such as *United States v. Miller*, 307 U.S. 174 (1939), and *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), have dealt with the "individual right" argument on the merits, concluding that the second amendment was not a guardian of an individual's right to keep and bear arms, but have never even suggested that a question of standing existed. The paradox is readily apparent: If the second amendment protects a "governmental right," then an individual claim or defense based on the second amendment should be dismissed for want of standing, without a discussion of the merits. If, however, the individual does have standing to raise a second amendment argument on his own behalf, then it would appear that the right protected is, indeed, individual, and present decisional law is erroneous. While there is no ready explanation for the existence of this paradox, it would appear that the opinions of the courts have, in effect, determined the standing issue indirectly and against the individual claim.

The Supreme Court affirmed Presser's conviction on the grounds that the second amendment does not apply to the States. The Court noted that the statute "which only forbids bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law," did not infringe upon the right to keep and bear arms.⁶³ However, as to Presser's argument that the statute denied the right of the people to keep and bear arms for the purpose of organizing as a militia, and thus denied the United States Government a source for its military, the Court observed:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the *States cannot*, even laying the constitutional provision in question out of view, *prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security*, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.⁶⁴

Thus, while the Court held the second amendment not applicable to the states, it nonetheless recognized that there were limits beyond

Nevertheless, by not explicitly deciding the standing issue, courts have left open the possibility that an "individual right" argument, if persuasive in a specific suit, might prevail to the limited extent of the facts of that case.

⁶³ 116 U.S. at 264-65.

⁶⁴ *Id.* at 265-66 (emphasis added). But this is a most unsatisfactory analysis, because such a statute could "have this effect." If a state does not train a militia, does not allow those without licenses the right to organize and train privately, and refuses to issue any such licenses, a "well regulated militia" is *effectively* denied, despite the possibility that the citizens could parade and drill without weapons, and practice the use of arms individually. Perhaps the Court sought to avoid granting constitutional sanction to roving bands of armed private armies.

One commentator has suggested that even in today's world, the trained and armed private citizen, as part of the universal "private militia," apparently, forms a vital part of the national security. "With the urgent need for civil defense and particularly if the 'stand-by home guard' is ever incorporated into the national army, is it not important that as wide a base of the citizenry as possible be armed and somewhat trained? Armed and trained citizens may not prevent an atomic attack, but they can preserve internal order after one." Sprecher, *supra* note 8, at 667. The Supreme Court, in *United States v. Miller*, 307 U.S. 174 (1939), noted that the framers of the amendment viewed the militia as "comprised [of] all males physically capable of acting in concert for the common defense." *Id.* at 179.

which a state could not constitutionally go. Unfortunately, the Court did not state specifically the basis of the limitation upon the states. Presumably, this limitation results from Article I, section 8, clause 16 of the Constitution, which provides for the availability of volunteer troops from each state for service to the national government.⁶⁵

Despite the reluctance of the courts to hold the second amendment applicable to the states, there appears to be a valid argument to the contrary. The argument finds support in the construction of the first amendment, which states that "*Congress shall make no law.*" The second amendment simply provides that the right protected "shall not be infringed," without specifying against whom the prohibition applies. Arguably, then, no one may infringe the right to keep and bear arms. Courts, however, in their interpretation of the amendment, have added "by Congress,"⁶⁶ without substantial explanation for this limitation, other than that the first ten amendments to the United States Constitution are restrictions upon the federal authority and not upon the states.⁶⁷ With the piecemeal incorporation of the Bill of Rights into the due process clause of the fourteenth amendment,⁶⁸ this explanation is no longer acceptable, and if the second amendment is to be limited only to a prohibition on the federal government, a new rationale must be found.

The second often recited principle regarding the second amendment is that the guarantee extends to the collective right of the people to be secure in their establishment of a well regulated militia, rather than to the individual's right to keep and bear arms.⁶⁹ Indeed, there is nothing to suggest that it was designed to

⁶⁵ See note 58 *supra*.

⁶⁶ *E.g.*, *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Ex parte Rameriz*, 193 Cal. 633, 651, 226 P. 914, 921 (1924); *People v. Seale*, 78 Cal. Rptr. 811, 816 (Ct. App. 1969).

⁶⁷ See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942); *State v. Kerner*, 181 N.C. 574, 575, 107 S.E. 222, 223 (1921).

⁶⁸ Various provisions in the Bill of Rights have been "incorporated" into the fourteenth amendment, and hence have been held applicable to the states, over the past decade. See, *e.g.*, *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment assistance of counsel); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment).

⁶⁹ See, *e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd*

protect this individual "right,"⁷⁰ and it is of some interest to note that at least one state constitution seeking to preserve the individual right expressly declares that the citizens of the state have the "right to keep and bear arms in defense of themselves and the State."⁷¹ Nevertheless, one early state court opinion⁷² provides an argument

on other grounds, 319 U.S. 463 (1943); *United States v. Adams*, 11 F. Supp. 216, 219 (S.D. Fla. 1935); *Hill v. State*, 53 Ga. 472, 474 (1874) (dicta); cf. *Salina v. Blaksley*, 72 Kan. 230, 231-32, 83 P. 619, 620 (1905) (state constitutional provision). *But cf.* *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (state constitutional provision), discussed note 70 *infra*.

⁷⁰ See 1 ANNALS OF CONG. 749-52 (1789); Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROB. 400, 410-12 (1934). Some isolated state cases have, however, held that the second amendment does protect the individual right to keep and bear arms. In *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), the defendant, convicted of carrying a concealed sword, in violation of a state statute, appealed on the ground that the law violated the Kentucky Constitution, Article 10, § 23, which stated that: "[T]he right of the citizens to bear arms in defense of themselves and the state, shall not be questioned." Without citing any authority for the proposition, the Supreme Court of Kentucky said that the right of the individual to keep and bear arms existed prior to the constitutional guarantee. *Id.* at 92. After making an unconvincing distinction between "prohibition," which was invalid, and "regulation," which was valid, the court stated: "[I]t is the right to bear arms in defense of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Id.* at 91-92. The conviction was duly reversed. Within a few years this decision was rendered ineffectual by an amendment of the constitution, in which the words "shall not be questioned" were stricken, and the phrase "subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons" was added. KY. CONST. § 1, cl. 7.

Only two other decisions adopted a restricted view of the power of the legislature to regulate firearms. In *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921), the North Carolina Supreme Court, declaring a state statute forbidding the carrying of unconcealed weapons off one's property without a permit to be in violation of a state constitutional provision similar to the amended Kentucky constitution, stated, "This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons but no further." *Id.* at 575, 107 S.E. at 223.

In *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902), the Idaho Supreme Court struck down a statute prohibiting the carrying of a loaded weapon within the city limits. Noting that the Idaho constitution permitted the regulating of the bearing of arms, the court held that the legislature might "regulate the exercise of this right, but may not prohibit it." *Id.* at 599, 70 P. at 609.

This fuzzy distinction with respect to the prohibition or regulation of the bearing of arms has not been accepted in other jurisdictions, and it appears settled now that the state has the power to prohibit the carrying of concealed weapons, or require a permit for this activity. See, e.g., *People ex rel. Darling v. Warden*, 154 App. Div. 413, 139 N.Y.S. 277 (1913) (prohibition of possession of concealable weapon held valid); *Ex parte Thomas*, 21 Okla. 770, 97 P. 260 (1908) (prohibition of carrying of concealed weapons held valid). All 50 states now either forbid the carrying of a concealed handgun, or require a permit to do so.

⁷¹ KY. CONST. § 1, cl. 7 (emphasis added). See note 70 *supra*.

⁷² *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

by analogy that the second amendment of the Federal Constitution was directed to the individual right, and recent critics of gun control legislation also adhere to this position.⁷³ In view of the "conflicting" interpretations of this aspect of the second amendment, it is worthwhile to examine the basis for each argument.

Historically, it appears that the "right" of men to keep and bear arms centered on the belief that an armed, trained citizenry, denominated a "militia," was the best method of preserving the autonomy of the state and the freedom of its inhabitants. Both Plato⁷⁴ and Aristotle⁷⁵ agreed that an equipped militia, well versed in the arts of war, comprised of the able-bodied members of the community, was preferable to a standing army which might be employed by a despotic government to subvert the freedom of the people. Familiarity with the use of weapons was essential to a militia and this could best be achieved through the private ownership of the weapons employed by the potential soldiers. Nevertheless, it was recognized early that the untrammelled bearing of arms was a danger to the public, subject to governmental regulation. The Statute made at Northampton, of 1328,⁷⁶ prohibited individuals from riding armed at night, or attending fairs, markets, courts or churches while armed. In this manner the principle was established that, while individuals might keep arms, the bearing of weapons could be regulated with respect to time and place.

⁷³ See generally Hays, *supra* note 8; Olds, *supra* note 8; Sprecher, *supra* note 8. The viewpoint of the National Rifle Association can be gleaned from any of their literature. See, for example, NRA, *Standing Firm* (no date); NRA, *The Gun Law Problem* (1968); NRA, *The Truth About Guns* (1967); NRA, "Be It Enacted" *May Mean Goodbye Guns* (1968) reprinted, *Delinquency Hearings* 414-19.

⁷⁴ PLATO'S DIALOGUES, *Laws* viii: 829 (B. Jowett Trans. 1892).

⁷⁵ In his TREATISE ON GOVERNMENT, Aristotle advised that "as a city is composed of persons of different ages, some young and some old, the fathers should teach their sons, while they were very young, a light and easy exercise; [and] when they are grown up, they should be perfect in every warlike exercise." ARISTOTLE'S POLITICS, Book VI, ch. vii, (Ellis Trans. 1912).

⁷⁶ The Statute made at Northampton, 2 Edw. III, c. 3, 1328 (1 Dawson's Stats. 257, 258 (1963)), is often cited as authority for the proposition that the right to keep and bear arms was not a fundamental common law right, since it was subject to governmental regulation. Issued as a public safety measure, the law forbade persons to "go nor ride armed by night or by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." See, e.g., BAKAL, *supra* note 7, at 295-304; Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 474 (1915); Haight, *The Right to Keep and Bear Arms*, 2 BILL OF RIGHTS REV. 31, 31-35 (1941).

The value of arms to the individual for his own protection was recognized by the English Bill of Rights, section 7, which provided, "That the subjects which are protestants, may have arms for their defence suitable to their condition, and as allowed by law."⁷⁷ Since the right protected was extended by the government and only to certain subjects, "suitable to their condition and as allowed by law," it is difficult to perceive how this right to keep and bear arms could be characterized in 1682 as "absolute."⁷⁸

Whether the framers of the American Bill of Rights intended to guarantee the individual's right to keep and bear arms for any purpose or solely for the protection of "the people" is unclear.⁷⁹ Most analysts favor the latter view.⁸⁰ Keenly aware of the value of

⁷⁷ 1 Wm. & M., sess. 2, c. 2, § 7 (1688) (4 Halsbury's Stats. 152 2d ed. 1948).

⁷⁸ An early, influential state case, *Aymette v. State*, 21 Tenn. 152, 2 Humph. 154 (1840), pointed out that section 7 of the English Bill of Rights was adopted for the protection of a single group—the Protestants—in response to their complaint of disarmament by their political and religious enemies, the Catholics. The guarantee was for the public—not private—defense of their rights against governmental infringement. The court observed, "No private defence was contemplated, or would have availed anything. If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says that 'subjects which are Protestants may have arms for their defence, suitable to their condition, as allowed by law,' it does not mean for private defence, but, being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered among them contrary to law." *Id.* at 155, 2 Humph. at 157. One critic apparently has interpreted this collective right to defend just rights against governmental tyranny as an absolute right to revolt, and derivatively, as an absolute right of the individual to keep and bear arms in order to revolt. Hays, *supra* note 8. This view does not appear to have widespread acceptance.

⁷⁹ James Madison, addressing the first session of Congress, in June, 1789, suggested as one amendment to the Constitution, "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONG. 434 (1789). The fact that the clause was altered to emphasize the "militia-preservation" purpose of the guarantee tends to indicate the intent of the framers. However, Elbridge Gerry, during the debate in Congress pointed out that the government in power could use the "religiously scrupulous" clause to disarm a part of the people, and thus take over power absolutely. *Id.* at 749. Subsequent debate led to the deletion of the phrase, *id.* at 751, which might produce a reading more indicative of a personal right to arms possession for defense of self or a particular group, rather than of "the people" collectively. However, this argument seems tenuous in light of the framers' desire to maintain a militia rather than a standing army, which indicates that no thought of an individual right to keep and bear arms was entertained. Indeed, the ANNALS contain no mention of such an individual right. See also Feller & Gotting, *The Second Amendment: A Second Look*, 61 NW. U.L. REV. 46, 61-62 (1966).

⁸⁰ See authority cited in note 69 *supra*. See also BAKAL, *supra* note 7, at 296-304; Emery,

an armed citizenry in overthrowing foreign rule, and faced with a body of jealous political entities seeking to unite under a central government stronger than the ineffectual Confederation, the drafters of the Constitution saw the militia as a source of defense in times of war, and as a means of minimizing fears of the states from attack by each other and by the central government.⁸¹ Therefore, to allay the people's fears of the state governments, and the states' fears of the possible tyranny of the central government, and to provide a means of national protection, the second amendment was proposed and ratified.⁸² There does not appear to have been any mention of a desire to protect constitutionally the individual right to armed self-protection.

Historical fact, however, reveals another relevant aspect of the status of weapons at the time the Constitution was adopted. Firearms, notably muskets, were vital tools for many Americans. They were used as a means of defense, sport and hunting. Without meat markets, police forces and other modern services, firearms were crucial to the existence of the frontiersman. Presumably, frontier Americans could safely assume they had a right to their longguns, for without them, they could not survive. But this fact does not mean that the right to own a firearm became a common law right after 1792, since the explicit constitutional provisions dealing with the right to keep and bear arms implicitly denied that the right was individual.

Textually, two phrases of the second amendment are important in determining whether it guarantees an individual rather than a collective right to keep and bear arms. The first is "the people" and the second is "bear arms."⁸³ As one critic observed:

When the drafters of the Constitution desired to refer to the individual or to individual rights, privileges, or immunities, they never referred to "the people" but referred to "persons"⁸⁴

The significance of this phrase, when viewed in this light, becomes readily apparent when read in conjunction with "bear arms."

supra note 76, at 476-77; Feller & Gotting, *supra* note 79, at 53-62, 69; Haight, *supra* note 76, at 31-34. *But see* Hays, *supra* note 8; Olds, *supra* note 8; Sprecher, *supra* note 8.

⁸¹ See note 56 *supra*.

⁸² Unfortunately, there is virtually no discussion of the second amendment in the legislative history of the Bill of Rights. See note 70 *supra* and accompanying text.

⁸³ See Brabner-Smith, *supra* note 70, at 411-12.

⁸⁴ *Id.* at 411.

“Bearing arms” connotes a military endeavor, rather than the individual carrying of a weapon.⁸⁵ The position that the second amendment refers only to the collective right of the people to take up weapons in behalf of the common defense receives added support from the introductory clause—“A well-regulated Militia, being necessary to the security of a free State.” Thus, the text of the amendment does not appear to support the view that the individual right to keep and bear arms is constitutionally protected.

From the foregoing discussion it may be concluded that the right to which the second amendment refers is the collective right of the people of a state, acting in their capacity as members of the militia. While courts refuse to extend the limitations of the amendment to the states, it appears, nevertheless, that there is a limit upon regulation of arms beyond which a state may not go.⁸⁶ However, until a court finds that a state regulation interferes with federal access to a well-regulated militia, it is unlikely that the second amendment will be held applicable to the states. If then, the right protected by the second amendment is so narrow, what is the permissive scope of federal firearms legislation?

Though the question has been rarely litigated,⁸⁷ the definition of the word “militia” is crucial to the issue of the scope and limitation of the second amendment. If, in fact, the purpose of the second amendment was to provide the citizenry with a means of keeping state governments in check, then the “militia” would appear to be an extra-governmental body, privately organized and trained. If, on the other hand, the militia was intended to supply soldiers to defend the nation against attack by invaders, or to protect the state against encroachment by the federal government, then the word might describe a preference for a body of state-organized and trained volunteers, rather than a professional standing army.⁸⁸ In theory, these two functions are incompatible.

⁸⁵ *Hill v. State*, 53 Ga. 472, 474 (1874).

⁸⁶ See *Presser v. Illinois*, 116 U.S. 252 (1886), discussed notes 60-68 *supra* and accompanying text.

⁸⁷ *Presser* seems to be the only Supreme Court case dealing directly with the question of the definition of the word “militia.”

⁸⁸ It appears that the latter function was intended. See *THE FEDERALIST* No. 29, at 181 (J. Cooke ed. 1961) (A. Hamilton): “The power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy.”

While the private body is designed to prevent encroachment upon the people by the state government, it does not appear that it would qualify for the purposes of a militia as contemplated either in Article I, section 8⁸⁹ or Article IV, section 4.⁹⁰ On the other hand, it is equally clear that state-controlled troops, while effective against possible tyranny from the central government, and useful in defending the nation against a common foe, would probably not be very reliable in defense of the people against state-encroachment, as the militia would be a unit of that government. As seen in *Presser v. Illinois*,⁹¹ the Supreme Court has defined the militia as a governmentally-controlled body, rather than a privately organized army, and this is the definition which is generally accepted today.⁹² If, however, the militia referred to in the second amendment is a governmentally organized and trained body of troops, to what extent may legislation impair the *private* keeping and bearing of arms?

It is readily apparent from the foregoing analysis of the second amendment that if the amendment were designed to protect the states from federal encroachment, Congress might prohibit private ownership of firearms, provided that the state were permitted to furnish the arms necessary for equipping a well-regulated militia. Thus, "the people" in their collective sense would still maintain the right to keep and bear arms, though the individual right to do so, which has never been constitutionally protected, would be denied. If, on the other hand, the amendment were designed to insure the availability of a militia to the federal government, then any constitutional difficulty which might arise under Article IV, section 4,⁹³ could be avoided by a congressional act requiring the states to maintain an armory to provide able-bodied citizens with those arms

"[D]esirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority." *Id.* See also *United States v. Miller*, 307 U.S. 174, 178-82 (1939). The NRA, in its literature, takes the position that there is really a bifurcated meaning of the word "militia." "Anti-gun spokesmen claim 'militia' means only the National Guard and like organizations. They could hardly be more wrong. The nation has 2 kinds of militia, organized and *unorganized*. The latter consists of virtually *all able-bodied males*." NRA, *The Truth About Guns* 6 (1967) (emphasis in original).

⁸⁹ See note 58 *supra*.

⁹⁰ See page 788 *supra* for the text of this provision.

⁹¹ 116 U.S. 252 (1886).

⁹² Cf. Sprecher, *supra* note 8, at 668.

⁹³ See notes 54-60 *supra* and accompanying text.

the federal government deems necessary to preserve a militia. Neither the courts nor the governments, however, have stated that the second amendment could be construed so narrowly.

Concluding then that the second amendment guarantees a collective right to keep and bear arms in order to preserve a militia, a final question arises as to the types of arms included within the protection of the provision.

With the exception of a Kentucky case of 1822, *Bliss v. Commonwealth*,⁹⁴ holding that the right to keep and bear arms, as guaranteed in the state constitution, was an absolute individual right which could in no manner be infringed, courts are in agreement that the second amendment protects the collective right of the people to keep and bear *such arms as are necessary to preserve a well-regulated militia*.⁹⁵ While there is no unanimity, most courts would include rifles, shotguns and other conventional longguns.⁹⁶ Pistols, revolvers and handguns have been explicitly denied protection from regulation by some courts,⁹⁷ while given constitutional protection by others.⁹⁸ The difficulty in determining the status of handguns, which are of deep concern to most present day gun control advocates,⁹⁹ can probably be traced to the

⁹⁴ 12 Ky. (2 Litt.) 90 (1822). See note 70 *supra*.

⁹⁵ The Supreme Court of Kansas observed that "The provisions in section 4 of the bill of rights [of Kansas] that 'the people have the right to bear arms for their defense and security' refers to the people as a collective body. . . . It deals exclusively with the military; individual rights are not considered in this section." *Salina v. Blaksley*, 72 Kan. 230, 231-32, 83 P. 619, 620 (1905). The Third Circuit, in *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943), and a Florida federal district court, in *United States v. Adams*, 11 F. Supp. 216, 219 (S.D. Fla. 1935), drew similar conclusions regarding the second amendment. But the argument has been made that the individual right to keep and bear arms extends to an active member of the organized militia. The difficulty, of course, with this position, is the varied definitions of the words "militia" and "organized."

⁹⁶ See, e.g., *United States v. Miller*, 307 U.S. 174 (1939); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *cf. Parmon v. Lemmon*, 244 P. 227 (Kan. 1926) (on rehearing); *Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905); *Aymette v. State*, 21 Tenn. 152, 2 Humph. 154 (1840).

⁹⁷ See, e.g., *People ex rel. Darling v. Warden*, 154 App. Div. 413, 139 N.Y.S. 277 (1913); *Ex parte Thomas*, 21 Okla. 770, 97 P. 260 (1908) (state constitutional provision).

⁹⁸ See *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921); *In re Brickley*, 8 Idaho 597, 70 P. 609 (1902). See also *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (limited by constitutional amendment, see note 70 *supra*).

⁹⁹ See generally BAKAL, *supra* note 7; *Delinquency Hearings*, *supra* note 5; *Hearings on S. Res. 63 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 14 (1963).

unfortunate looseness of language in several federal court cases which attempted to describe the weapons subject to regulation.

The Supreme Court, affirming a conviction under the National Firearms Act of 1934, held that a federal statute prohibiting the transportation of an unregistered sawed-off shotgun in interstate commerce was not in violation of the second amendment.¹⁰⁰ Noting that the amendment was aimed at the preservation of a militia, the Court failed to find that the weapon involved in the case bore any "reasonable relationship to the preservation or efficiency of a well regulated militia," and was thus not within the ambit of constitutional protection.¹⁰¹ The Court did not further explain what it meant by "reasonable relationship." Certainly machine guns, recoilless rifles and mortars would prove quite useful for the efficiency of a military body, as would rifles, shotguns and handguns. This oversimplification was noted in a federal circuit court opinion¹⁰² three years later which pointed out that the view of the Supreme Court was outdated, since it had been recognized that the federal government could and had regulated such weapons as machine guns, customized longguns and the like. Refusing to formulate any general rule itself, the court advocated the use of an ad hoc approach to determine whether the weapon involved was such as might be deemed suitable for militia use.¹⁰³ Unfortunately, this court also failed to set down any more definite guidelines for the future.

¹⁰⁰ *United States v. Miller*, 307 U.S. 174 (1939).

¹⁰¹ *Id.* at 178. The Court observed, "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* A real difficulty with the "reasonable relationship" test, as the First Circuit, in *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), pointed out, is that certain weapons which have a recognized military value in the hands of an individual citizen, are, or should be, subject to regulation. This is especially true of the handgun. *See Ex parte Thomas*, 21 Okla. 770, 97 P. 260 (1908).

¹⁰² *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942). The court stated that in light of the fact that almost any lethal weapon had some military value, "to hold that the Second Amendment limits the federal government to regulations concerning only weapons which can be classed as antiques or curiosities,—almost any other might bear some reasonable relationship to the preservation or efficiency of a well-regulated militia unit of the present day,—is in effect to hold that the limitation of the Second Amendment is absolute. . . . It seems to us unlikely that the framers of the Amendment intended any such result." *Id.* at 922. *See also Sprecher, supra* note 8, at 665-66.

¹⁰³ *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942).

CONCLUSIONS

Haynes v. United States,¹⁰⁴ while invalidating the existing firearms registration scheme of Congress, suggested that a registration requirement, properly drawn, could avoid constitutional objections raised by the fifth amendment.¹⁰⁵ Review of the decisional interpretations of the second amendment reveals a clouded uncertainty as to both the object of the provision's protection and the subject of its limitations. While courts are certain that the second amendment protects the collective right of a "political" body—"the people"¹⁰⁶—there does not appear to be any concise authority determining the relationship of this right to considerations of federalism. It is possible either to view the second amendment as prohibiting the states from interfering with the right of the federal government to draw upon a well-trained militia or as prohibiting the federal government from obstructing similar activities by the states. Until this question is settled, the full extent of congressional power to regulate firearms cannot be determined. In spite of this doubt, however, the position that the second amendment applies only to weapons suitable for militia use¹⁰⁷ indicates that Congress has at least one guideline for determining the constitutional validity of various regulatory schemes.

¹⁰⁴ 390 U.S. 85 (1968).

¹⁰⁵ *Id.* at 96-101.

¹⁰⁶ See cases cited at note 69 *supra*.

¹⁰⁷ See notes 96-103 *supra* and accompanying text.

