Stephen P. Halbrook, "Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 *Tennessee Law Review* 597-641 (Spring 1995). http://www.stephenhalbrook.com/law_review_articles/congress.pdf

CONGRESS INTERPRETS THE SECOND AMENDMENT: DECLARATIONS BY A CO-EQUAL BRANCH ON THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

by

Stephen P. Halbrook*

---

* Ph.D., Florida State University, 1972; J.D., Georgetown University, 1978; Attorney at Law, Fairfax, Virginia, 1978-present; Assistant Professor of Philosophy, Tuskegee Institute, Howard University, George Mason University, 1972-1981. Author of A Right to Bear Arms: State and

Federal Bills of Rights and Constitutional Guarantees (Greenwood Press 1989) and That Every Man Be Armed: The Evolution of a Constitutional Right (University of New Mexico Press 1984; reprinted by the Independent Institute, 1991). The author thanks Richard E. Gardiner and David Kopel for their comments on this manuscript.

©1994 by Stephen P. Halbrook. All rights reserved.

I. INTRODUCTION: CONGRESS RECOGNIZES AND REAFFIRMS THE SECOND AMENDMENT RIGHT OF INDIVIDUALS TO KEEP AND BEAR ARMS

The Bill of Rights, including the Second Amendment liberty of individuals to keep and bear firearms, originated in the United States Congress in 1789 before being ratified by the States.[1] On three occasions since then--in 1866, 1941, and 1986--Congress enacted statutes to reaffirm this guarantee of personal freedom and to adopt specific safeguards to enforce it.

These statutory declarations by Congress have been the subject of little or no judicial or scholarly comment.[2] This study analyzes the legislative movement to register firearms in the 1930s, and the swinging of the pendulum in the opposite direction in the 1941 legislation, which was a

---

[1] This author has analyzed the background to Congress' action in Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 DAYTON L.REV. 91 (1989) and The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment, 26 VALPARAISO UNIV.L.REV. 131 (1991).

The growing academic discussion includes S. Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637 (1989); A. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1162-73 (1991); and R. Cottrol and R. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 GEORGETOWN L.J. 309 (Dec. 1991).

[2] The significance of the 1866 declaration to the intent of the Fourteenth Amendment is recognized in A. Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1245 n.228 (1992) and M. Curtis, NO STATE SHALL ABRIDGE 104 (1986), and is the subject of a major study being prepared by this author. The 1941 and 1986 declarations are not the subject of any scholarly studies. On the 1986 statutory provisions, see D. Hardy, The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 CUMBERLAND L.REV., No. 3, 585 (1986-87).

reaction against the growth of police states worldwide. This study also analyzes the 1986 declaration, and considers whether the judiciary should defer to expansive interpretations of constitutional rights by the legislative branch.

In 1789, Representative James Madison introduced what became the Bill of Rights, stating that the amendments "relate first to private rights."[3] The leading popular analysis, which Madison endorsed, of what became the Second Amendment explained that "civil rulers . . . may attempt to tyrannize," and thus "the people are confirmed . . . in their right to keep and bear their private arms."[4]

As proposed by Congress and ratified by the States, the Second Amendment provides: "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." As with any other constitutional amendment, two thirds of the Congress passed the Second Amendment.

When the slaves were freed as a result of the Civil War, the Southern States reenacted the slave codes which made it illegal for blacks to exercise basic civil rights, including the purchase, ownership, and carrying of firearms. Congress responded by passing the Freedmen's Bureau Act of 1866, which provided:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.[5]

Since it passed as a veto override, the Act was approved by over two-thirds of Congress. The

---

[3] 12 MADISON, PAPERS 193-94 (1979).

[4] Id. at 239-40, 257; [T. Coxe], Federal Gazette, June 18, 1789, at 2, col. 1.

[5] 14 Statutes at Large 176-77 (July 16, 1866).

same two-thirds of Congress adopted the Fourteenth Amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Senator Jacob Howard, when introducing the amendment, explained that its purpose was to protect "personal rights" such as "the right to keep and bear arms" from State infringement.[6]

In 1941, just before Pearl Harbor, Congress authorized the President to requisition property from the private sector on payment of fair compensation. The Property Requisition Act included the following:

> Nothing contained in this Act shall be construed--
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[7]

The reason for the above was explained by the House Committee on Military Affairs as follows:

> In view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. . . . There is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.[8]

---

[6] CONG.GLOBE, 39th Cong., 1st Sess., 2765 (May 23, 1866).

[7] P.L. 274, 77th Cong., 1st Sess., Ch. 445, 55 Stat., pt. 1, 742 (Oct. 16, 1941).

[8] Rept. No. 1120 [to accompany S. 1579], House Committee on Military Affairs, 77th Cong., 1st Sess., at 2 (Aug. 4, 1941).

The fourth and most recent time Congress passed a constitutional amendment or legislation in support of the right to keep and bear arms was in 1986. The Firearms Owners' Protection Act of 1986 provides:

> CONGRESSIONAL FINDINGS--The Congress finds that--
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."[9]

This study focuses on the constitutional debate in the twentieth century concerning firearms leading to the adoption of the Property Requisition Act of 1941. This debate ensued in two phases. In the first, members of Congress seized upon its power to tax in order to require the registration of a narrow class of firearms, such as machineguns, in the National Firearms Act of 1934. It was

[9] §1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

recognized that Congress has no power to prohibit firearms, but can, through the exercise of an enumerated power, regulate firearms.

In the second phase of this debate, members of Congress began to react strongly against proposals to register a wide class of ordinary firearms. This reaction was strongly influenced by the rise of the totalitarian police states in Nazi Germany and Stalinist Russia. By the time of the 1941 legislation, Congress was ready to declare a moratorium on registration and to reaffirm the right of individuals to keep and bear arms.

This study also includes an analysis of the declaration about the Second Amendment in the Firearms Owners' Protection Act of 1986, and a critique concerning whether the judiciary should defer to a broad Congressional declaration concerning the meaning of a Bill of Rights guarantee. It concludes that such an expansive declaration, since it is made by the popular branch elected by the people, is entitled to great weight.

II. REGISTRATION, THE POWER TO TAX, AND THE NATIONAL FIREARMS ACT OF 1934

Proposals to require registration of or to prohibit firearms were from the beginning of the twentieth century laced with the rhetoric of Prohibition, Negrophobia, and anti-Communism. Long before the first gun-control debate in Congress, in 1909 an editor of Virginia's law review commented:

> It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime, and we believe the criminal statistics will bear us out in this statement. There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register . . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights. In that "lawless" state of

> Texas, "toting" guns is altogether forbidden, and we all know that the section of the Byrd law forbidding drinking on railroad trains is so far a dead letter, that it would hardly prevent this aforesaid son of Ham from consuming most of the quart even on the cars in this state.[10]

Registration and a prohibitive tax were passed in Virginia in 1926,[11] although it was declared unconstitutional.[12] Meanwhile, Senator John K. Shields, a Tennessee Democrat, introduced a bill in the United States Congress to prohibit the shipment of pistols through the mails and by common carrier in interstate commerce.[13] Shields inserted into the record a report which supported his bill based on the following:

> Can not we, the dominant race, upon whom depends the enforcement of the law, so enforce the law that we will prevent the colored people from preying upon each other? . . .
>
> Here we have laid bare the principal cause for the high murder rate in Memphis--the carrying by colored people of a concealed deadly weapon, most often a pistol. . . .
>
> . . . It is unspeakable that there is public sentiment among the whites that negroes should not be disturbed in their carrying of concealed weapons. . . .
>
> Neither do we need pistols for the protection of our homes. If we need a firearm to repel a burglar, a sawed-off shotgun with its load of buckshot is far more deadly and surer than the pistol.[14]

That last comment highlights the somewhat arbitrary nature of which guns were considered evil, for the short-barreled shotgun would come under the preview of the National Firearms Act of

---

[10] Comment, Carrying Concealed Weapons, 15 VIRGINIA LAW REGISTER 391-92 (1909).

[11] Acts of Assembly (Va.) 285-87 (1926).

[12] Commonwealth v. O'Neal, 13 VIRGINIA LAW REGISTER 746 (Hustings Ct.-Roanoke, 1928).

[13] 65 CONG.REC. 3945 (Mar. 11, 1924).

[14] Id. at 3946.

1934. In any event, the Shields proposal also adopted the rhetoric of Prohibition. The same report was aghast at the following argument: "Still others say it can not be expected that the law against homicide will be rigidly enforced as long as public opinion is opposed to the rigid enforcement of the laws against gambling, 'pistol toting,' 'bootlegging' and the various other laws which our people violate with impunity."[15]

The debate on the bill included rhetoric about armed bootleggers and advocacy of a constitutional amendment with the language of the Eighteenth Amendment applied to concealed weapons.[16] Such a proposal, and the basis of the bill in the constitutional power to establish post offices, exhibited a consciousness that Congress had no inherent power to regulate firearms. Opponents of the bill relied on the Second Amendment right to keep firearms in the home, and the fact that many rural persons could not obtain firearms other than through the mail. One opponent was ridiculed for suggesting that the Second Amendment protected the right of women to use arms for self defense.[17] The bill, which made pistols nonmailable, became law.[18]

Violence caused by Prohibition coupled with fear or paranoia about Communism created the impetus for more comprehensive gun control. Hearings were held in 1930 concerning bills to restrict interstate commerce in pistols, revolvers, and machineguns. This culminated in passage of the National Firearms Act ("NFA") of 1934, which was passed on the basis of the revenue power. The NFA severely restricted, through a system of taxation and registration, machineguns and short-

---

[15] Id.

[16] 66 CONG.REC. 732 (Dec. 17, 1924).

[17] Id. at 728.

[18] Currently codified as 18 U.S.C. §1715.

barreled shotguns and rifles. The Federal Firearms Act of 1938 regulated commerce in all firearms. It was generally recognized throughout this process, though somewhat grudgingly, that Congress had no power to prohibit possession of any firearms because of the Second Amendment, and because Congress' powers were limited to such objects as taxation and regulation of interstate commerce.

A hearing was held in 1930 on several bills which were modeled on alcohol prohibition legislation and which severely restricted interstate commerce in pistols, revolvers, and machineguns, and allowed states to prohibit entry thereof within their borders.[19] Subcommittee Chairman and Representative John E. Nelson (Republican of Maine), referring to Prohibition-spawned gang violence, explained:

> I know of no way to stop their securing these machine guns without absolutely restricting the sale of them or prohibiting interstate transportation.
>
> There is also a danger of certain groups within this country, such as the communists acquiring machine guns, and establishing secret arsenals of them in certain cities, wherever they want, and using them whenever it suits their revolutionary plans. It has happened and is happening all the time in foreign countries; for instance, in Germany, storehouses of machines guns have been recently found, belonging to the German communists.[20]

In fact, the German Communists adopted the strategy that "arms are normally acquired in the course of the insurrection itself."[21] However, alarmist assertions about Communism made grist for

---

[19] Firearms: Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess., 1-3, 7 (1930).

[20] Id. at 14.

[21] A. NEUBERG, ARMED INSURRECTION 195, 269 (1970), reprint of Der bewaffnete Aufstand (1928). As in the Hamburg Uprising of 1923, the Communists planned to seize most of their firearms, including machineguns, from the police. Id. at 89-103.

many a mill, not the least of which was German National Socialism.[22] Indeed, England was partly disarmed after the British cabinet secretly determined in 1919 that the working class threatened a "Red Revolution."[23]

Representative Hamilton Fish, Jr., a New York Republican, explained that his bill would restrict only machineguns, not handguns:

> The possession of pistols would involve the right of private American citizens to arm themselves in self-defense, in certain cases.
>
> I claim that this bill is entirely separate from those other bills referring to pistols and other small arms. I do not want to deprive American citizens of any of their rights of self-defense. This is intended simply to help protect American citizens from underworld criminals who are organized in big groups.[24]

Representative George Huddleson, an Alabama Democrat, was quick to object that the federal government has no constitutional function in regard to the preservation of public order:

> That is reserved expressly to the States and is not granted the Federal Government by our national charter. The Federal Government has nothing to do under the Constitution with the preservation of public order. To pass this bill is to pass a bill for an unconstitutional purpose, under the guise of regulating interstate commerce.[25]

The following exchange ensued:

> Mr. Fish. I admit that where you have 48 States, and the safety of all the people is involved, that you have a right to stretch the constitutional provisions to a considerable degree. But I for one am strongly in favor of it, even if it were aimed solely against the communists.

---

[22] Hitler's Mein Kampf (1924) made effective use of the anti-Communist theme to show the need for strong governmental power.

[23] D. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 74 (1992).

[24] Firearms, supra note 17, at 15.

[25] Id. at 16.

> Mr. Huddleston. You stretch the Constitution this way and then somebody else stretches it the other way--what is the use of a constitution, anyhow?[26]

Obviously, red-baiting as a method to avoid constitutional restraints did not begin with Joe McCarthy in the 1950s.

Fish proceeded to argue that his bill was valid because "it is copied word for word from the prohibition law, which has been held constitutional by the Supreme Court."[27] Left unsaid was the fact that to make a prohibition on commerce in alcohol constitutional, it was deemed necessary to pass an explicit amendment.[28]

Pistols, revolvers, short-barreled rifles and shotguns, and machineguns would have all been prohibited from interstate commerce under the bill proposed by Representative Joe Crail, a California Republican.[29] Crail also appealed to counterrevolutionary themes:

> I was down in Cuba during the Spanish-American War . . . . The revolution had been going on there for 25 years. It was a great problem to establish peace and law and order, and our Government directing affairs down in Cuba issued a proclamation forbidding the use of rifles and deadly weapons and giving a bounty in gold, American money, to everybody that would bring in a firearm. The Cubans brought them in there by the thousand and thousands . . . .

---

[26] Id. at 17.

[27] Id. at 18.

[28] The Eighteenth Amendment, which was ratified in 1919 and repealed in 1933, provided:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

[29] Firearms, supra note 17, at 2, 28.

> . . . There was nothing that helped to regulate and make possible the peace of Cuba as did that one act upon the part of the Government of the Untied States, the absolute putting away of these firearms, putting them out of the reach of the people, and leaving the only firearms in the island those that were in the possession of the peace officers of the government.[30]

As Crail spoke, Cuba was suffering under the Machado dictatorship, one of several which ruled by corruption and terror. The disarming of the people set the stage for a succession of such tyrants along with American military intervention and economic domination.[31] America's "Manifest Destiny" was still being assumed in those days.

The 1930 bills died. The great debate over registration of types of firearms took place in hearings preceding passage of the National Firearms Act of 1934,[32] which requires registration of machineguns, short-barreled shotguns and rifles, and other selected firearms. Pistols and revolvers where included in the original bills, but were taken out as a compromise measure.

The constitutional basis of the National Firearms Act was extensively discussed in hearings before being enacted in 1934. The congressmen were acutely aware that they had no constitutional authority simply to prohibit possession of machineguns and other firearms. The initial bills replied on both the interstate commerce and revenue-raising powers, and as finally adopted the NFA was passed solely as a tax measure.

The leading spokesman for the bill was Homer S. Cummings, U.S. Attorney General, who

---

[30] Id. at 29.

[31] See G. PENDLE, A HISTORY OF LATIN AMERICA 172-75 (1971); M. RIERA, HISTORIAL OBRERO CUBANO 25-87 (Miami 1965) (on opposition to American domination and domestic dictatorship between 1898 and 1933, when dictator Batista took power).

[32] P.L. No. 474, 48 Stat. 1236 (June 26, 1934). The NFA as amended is codified at 26 U.S.C. §5801 et seq.

told the House Ways and Means Committee early in its hearings:

> Now we proceed in this bill generally under two powers--one, the taxing power and the other, the power to regulate interstate commerce. The advantages of using the taxing power with respect to the identification of the weapons and the sale, and so forth, are quite manifest. In the first place, there is already in existence a certain machinery for dealing with the collection of taxes of this kind, and these powers are being preserved in this particular act. In addition to that, it is revenue-producing. . . .
>
> . . . We have followed, where we could, the language of existing laws as to revenue terminology; and we have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act.[33]

Cummings noted that Congress had no power simply to prohibit firearms, a proposition to which Representative James A. Frear, a Wisconsin Republican, agreed. Cummings stated:

> We have no inherent police powers to go into certain localities and deal with local crime. It is only when we can reach those things under the interstate commerce provision, or under the use of the mails, or by the power of taxation, that we can act.[34]

The amount of the transfer tax was discussed, and $200.00 was suggested because that was the average cost of a machinegun and a 100-percent tax would thereby be imposed.[35] However, there was no constitutional power to require registration of existing machineguns, apparently because no relation to the revenue power existed:

> Mr. [James V.] McClintic [Democrat of Oklahoma]. . . . What in your opinion would be the constitutionality of a provision added to this bill which would require registration, on the part of those who now own the type or class of weapons that are included in this bill? . . .

---

[33] National Firearms Act: Hearings Before the Committee on Ways and Means, U.S. House of Representative, 73rd Cong., 2d Sess., 6 (1934).

[34] Id. at 8.

[35] Id. at 12.

Attorney General Cummings. I am afraid it would be unconstitutional.[36]

When Representative Harold Knutson, a Minnesota Republican, asked "why should we permit the manufacture, that is, permit the sale of the machine guns to any one outside of the several branches of the Government," Congressman Hatton W. Sumners, a Texas Democrat, suggested "that this is a revenue measure and you have to make it possible at least in theory for these things to move in order to get internal revenue?"[37] Cummings agreed: "That is the answer exactly."[38]

In perhaps the most significant discussion in the hearings, Congressman David J. Lewis, a Maryland Democrat, asked how the bill could be reconciled with the Second Amendment right to keep and bear arms:

> Mr. Lewis. . . . Lawyer though I am, I have never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the privilege to the legislature to take away the right to carry arms. Concealed-weapon laws, of course, are familiar in the various States; there is a legal theory upon which we prohibit the carrying of weapons--the smaller weapons.
>
> Attorney General Cummings. . . . Do you have any doubt as to the power of the Government to deal with machine guns as they are transported in interstate commerce?
>
> Mr. Lewis. I hope the courts will find no doubt on a subject like this, General; but I was curious to know how we escaped that provision in the Constitution.
>
> Attorney General Cummings. Oh, we do not attempt to escape it. We are dealing with another power, namely, the power of taxation, and of regulation under the interstate commerce clause. You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved. But when you say, "We will tax the machine gun," and when you say that "the absence of a license showing payment of the tax has been made indicates that a crime has been perpetrated" you are easily within the law.

---

[36] Id. at 13.

[37] Id. at 13-14.

[38] Id. at 14.

Mr. Lewis. In other words, it does not amount to prohibition, but allows of regulation.

Attorney General Cummings. That is the idea. We have studied that very carefully.[39]

Thus, Cummings conceded that Congress has no power to prohibit possession of machineguns for two reasons. First, the Second Amendment guarantees an individual right to possess arms; that right may be regulated but not prohibited. Second, even without the Bill of Rights provision, Congress has no authority to ban possession per se, but may regulate through its revenue and commerce powers.

Congressman Samuel B. Hill, a Washington Democrat, noted that the commerce power would be invoked to regulate sales of machineguns which are imported or shipped across state lines, but asked how intrastate sales could be regulated: "Now if the person receiving that gun, sells it to some other person within the same State as he is, does the interstate commerce character still obtain?"[40] Cummings replied: "Well we would get that person, if he is a criminal, under the taxing provision."[41]

The bill was changed in committee to delete the interstate commerce provisions and to require registration of existing firearms. Assistant Attorney General Joseph B. Keenan explained that "the bill as originally drafted exercised two powers, one under the taxation clause and the other under the commerce clause. Under the bill as now submitted, it follows the theory of taxation all the way through, and it contains this one affirmative change of extreme importance in that it calls

---

[39] Id. at 19.

[40] Id. at 24.

[41] Id.

for a registration of all firearms within a prescribed period."[42]

Keenan explained the constitutional basis of the registration requirement to Congressman Fred M. Vinson, a Kentucky Democrat, as follows:

> Mr. Vinson. As to those weapons now owned, is it not the taxation power which provides the basis for requiring the registration of the firearms now owned and possessed?
>
> Mr. Keenan. Yes. In executing or administering the taxation provision it is important to be able to identify arms to see which possessors have paid taxes and which firearms have been taxed and which have not.[43]

Even then, the constitutionality of registration was doubted, and no penalty was provided for failure to register.[44] The new provision was further explained as follows:

> Mr. Vinson. In fact, the entire interstate commerce basis is withdrawn from the bill?
>
> Mr. Keenan. The permit, as such. Of course, I have not come to that part yet, but it is made unlawful for anyone to transport any firearm described in this act in interstate commerce unless he has registered, as provided under the registration clause, the existing firearms, or unless he has complied with the provisions, that is, the fingerprinting, and so forth, relative to acquiring firearms after the passage of the act.
>
> Mr. Vinson. I think you stated originally that H.R. 9066, as introduced on April 11 of this year, had as its foundation taxation and interstate commerce, but that the interstate commerce feature had been withdrawn and that it was presented purely with the taxation feature.
>
> Mr. Keenan. I meant by that statement, that now you are not required to get a permit to bring a firearm from one State to another. You are required to register all existing arms, and you are required to observe all the formalities for the purchase of arms described in the act, after its passage.[45]

---

[42] Id. at 86.

[43] Id. at 87.

[44] Id.

[45] Id. at 93-94.

As Keenan reiterated, "The purpose of [registration] is to determine whether or not a gun in a certain instance was purchased before or after the passage of this act, to determine whether or not the tax has been properly paid upon it."[46] He conceded that no gangster would register a firearm.[47]

The issue of why Congress could not simply ban possession of machineguns was again raised, this time by Congressman Allen T. Treadway, a Massachusetts Republican:

> Mr. Treadway. What benefit is there in allowing machine guns to be legally recognized at all? Why not exclude them from manufacture?
>
> Mr. Keenan. We have not the power to do that under the Constitution of the United States. Can the Congressman suggest under what theory we could prohibit the manufacture of machine guns?
>
> Mr. Treadway. You could prohibit anybody from owning them.
>
> Mr. Keenan. I do not think we can prohibit anybody from owning them. I do not think that power resides in Congress.[48]

The original bill would have brought pistols and revolvers under the NFA in the same category as machineguns, but a compromise removed the former. Congressman Claude A. Fuller, an Arkansas Democrat, asked why pistols could not simply be banned:

> Mr. Fuller. What would you think of a law which prohibits the manufacture or sale of pistols to any person except the Government or an officer of the law?
>
> Mr. Keenan. I think that would be an excellent provision if the Congress had power to enact such legislation. . . . The way that can be attacked, naturally, is by some action of the State assemblies.
>
> Mr. Fuller. We could enact a law declaring it a felony to sell them.

---

[46] Id. at 94.

[47] Id.

[48] Id. at 100.

Mr. Keenan. I do not think that power resides in the Congress. The Federal Government has no police powers.

Mr. Fuller. It could require them to be registered and pay them full value and then destroy the weapons.

Mr. Keenan. I do not think that power resides in Congress.

Mr. Vinson. It is because of that lack of power that you appear in support of the bill to do something indirectly through the taxing power which you cannot do directly under the police power?

Mr. Keenan. I would rather answer that we are following the Harrison Act, and the opinions of the Supreme Court.[49]

By contrast, the states do have police powers. Assistant Attorney General Keenan recalled that "the State of Illinois through its legislature had refused to pass an act making it unlawful to possess machine guns without a permit. Even though they have the power, they do not do those things always."[50] Congress is unlike the British Parliament, which does "not have the same constitutional limitations and constitutional questions that we have. . . . [W]e are struggling with a difficult problem with limited powers of the Federal Government."[51]

Charles V. Imlay, of the National Conference of Commissioners on Uniform State Laws, testified extensively on the constitutional issues. Imlay stated: "I am not opposed to a form of Federal regulation that stops where the Mann Act stops, confining itself to interstate commerce, or which goes as far as some of the acts passed in the State prohibition history, which were in aid of the State, an act which would make it unlawful to transport weapons that would be in violation of

---

[49] Id. at 101-102.

[50] Id. at 119.

[51] Id. at 134.

State laws on the subject."[52]

In the following discussion with Representatives Allen T. Treadway and Daniel R. Reed, a New York Republican, Imlay explained why Congress could not prohibit manufacture of machineguns:

> Mr. IMLAY. I am in favor of State laws that forbid the manufacture of machine guns except for those few uses.
>
> Mr. TREADWAY. You cannot go so far as to say that we can sidestep the Constitution sufficiently to prevent their manufacture?
>
> Mr. IMLAY. I think not. I think you can pass a bill which says you cannot ship machine guns across State lines. That is as far as the Mann Act goes. . . .
>
> Mr. REED. . . . Do you know of any power other than the taxing power and the power to regulate interstate commerce by which we could prevent the manufacture of firearms?
>
> Mr. IMLAY. I know of no other power.[53]

The final point on the constitutionality of the bill to be discussed in the above hearing concerned the requirement that persons other than those liable to pay the tax can be required to register firearms. Keenan offered as an analogous precedent on the Harrison Narcotic Act the case of Nigro v. United States (1928).[54] Nigro considered the constitutionality of Section 2 of the Harrison Narcotic Act which required that morphine be sold only pursuant to an order on an Internal Revenue form. The Court recalled having upheld Section 1's requirement that narcotics be sold only with a tax stamp, because it thereby "did not absolutely prohibit buying or selling; that it produced a substantial revenue and contained nothing to indicate that by colorable use of taxation Congress

---

[52] Id. at 143.

[53] Id. at 150.

[54] Id. at 162, citing 276 U.S. 332.

was attempting to invade the reserved powers of the states."[55] Nigro held:

> In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid . . . . Everything in the construction of Section 2 must be regarded as directed toward the collection of the taxes imposed and Section 1 of the prevention of evasion by persons subject to the tax.[56]

Criminal penalties were imposed to secure evidence of the transaction in order that it may be taxed,[57] not to punish perceived evil in society. "Congress by merely calling an act a taxing act can not make it a legitimate exercise of taxing power under Section 8 of article 1 of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise."[58] The requirement of order forms was not "void as an infringement on state police power where these provisions are genuinely calculated to sustain the revenue features."[59]

The hearings in the Subcommittee of the Senate Committee on Commerce were briefer and contain little discussion of the constitutional basis of the bill. When Maryland Adjutant General M.A. Reckord stated that the bill sought to regulate firearms "under the subterfuge of a tax bill," Senator Royal S. Copeland, a New York Democrat, replied: "Is it a subterfuge for a department of the Government to find ways, under the Constitution, to regulate an evil?"[60] It was noted that a

---

[55] 276 U.S. at 339 (paraphrasing Alston v. United States, 274 U.S. 289, 294 [1927].)

[56] Id. at 342.

[57] Id. at 352.

[58] Id. at 353.

[59] Id. at 353-354.

[60] To Regulate Commerce in Firearms: Hearings Before a Subcommittee of the Committee on Commerce, U.S. Senate, 73rd Cong., 2d Sess. 16 (1934).

compromise in the House committee had removed pistols and revolvers from the bill.[61]

The House Ways and Means Committee report on the bill, which the Senate Finance Committee report repeats verbatim, explained its basis as follows:

> In general this bill follows the plan of the Harrison Anti-Narcotic Act and adopts the constitutional principle supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected. It also employs the interstate and foreign commerce power to regulate interstate shipment of fire-arms and to prohibit and regulate the shipment of fire-arms into the United States.[62]

The reports also explained: "Limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not necessary to go so far as to include pistols and revolvers and sporting arms."[63]

There was little floor debate on the bill, and no mention of its constitutional basis, other than that it was a tax measure. Congressman Robert L. Doughton, a Democrat from North Carolina, did mention that "it does not in any way interfere with the rights of the States."[64]

It was agreed that "machine guns, sawed-off shotguns, rifles," and not "the ordinary sporting rifle," would be subject to the NFA. [65] The bill was approved by those "interested in sport and

---

[61] Id. at 58.

[62] Rept. No. 1780, Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess. 2 (1934); Rept. No. 1444, Committee on Finance, U.S. Senate, 73rd Cong., 2d Sess. 1 (1934).

[63] Id. at 1.

[64] 78 CONG.REC., 78th Cong., 2d Sess., pt. 10, 11400 (June 13, 1934).

[65] Id. at 11400 (statements of Representatives Bertrand H. Snell, a New York Republican, and Robert Doughton).

sporting arms, from the standpoint of the use of those arms for ordinary purposes."[66]

The National Firearms Act was passed as part of the Internal Revenue Code. On its face, it included provisions for raising revenue, and did not purport to have other law enforcement purposes or to be a criminal penal code as such. Like with all tax measures, violators were subject to civil and penal liabilities.

The NFA began to be enforced vigorously upon enactment, but the initial results were not necessarily as expected. The following exchange had taken place in the House committee hearings:

> Mr. Hill: The law-abiding citizens probably might not register. What are you going to do if he does not register?
>
> Mr. Keenan: If the law-abiding citizen does not register and does not get into any kind of difficulty that would cause him to come to the notice of the police, there are not going to be snooping squads going around from house to house to see who does and who does not possess arms; this is a practical piece of legislation.[67]

The official magazine of the National Rifle Association quoted the above and had this to say about how the NFA, hot off the press, was enforced:

> Three days before this statement in regard to snooping squads was made by the Assistant Attorney General, a negro was machine-gunned to death in St. Louis. Just a little more than a month later, June 26th to be exact, President Roosevelt signed the Federal Machine Gun Bill. Less than a month after this, on July 14th, the first fatality resulted from a federal squad doing exactly what Mr. Keenan told the House Ways and Means Committee they need not worry about!
>
> Mrs. Desse Masterson, mother of four children, was shot and killed during the course of a raid by federal agents looking for the machinegun which had been used on May 12th in the assassination of the negro above mentioned. Neither Mrs. Masterson, her husband, nor anyone else in the apartment was involved or even accused of the original murder, of having a machine gun, or of any other federal crime. From the standpoint of the Assistant Attorney

---

[66] Id. at 12555 (June 18, 1934) (exchange between Representatives George W. Blanchard and Samuel B. Hill, a Washington Democrat).

[67] National Firearms Act, supra note 31 at 136.

> General, Mr. Keenan, who told the House Ways and Means Committee that they need not worry about honest people being bothered by federal agents, this is probably just an unfortunate accident similar to many unfortunate accidents of the same type which occurred during the efforts of federal agents to enforce the Prohibition Law.
>
> Fortunately, there are relatively few machine guns in use around the country, so that relatively few innocent citizens may be expected to be killed by federal agents looking for machine guns. Had the original desires of the Attorney General been carried out, however, and pistols and revolvers been included in this new Federal Firearms Law, the Masterson incident perhaps gives a hint as to what might have happened and as to just how far wrong Mr. Keenan was in telling the House Ways and Means Committee that the law-abiding citizen need not worry about "snooping squads going around from house to house to see who does and who does not possess arms."[68]

If this demonstrates the civilian casualties inherent in the enforcement of Prohibition-type laws, it also anticipates a more ominous problem of police violence which began to loom. In Europe, the growth of the police state proceeded in earnest. Adolph Hitler, who took power just a year before enactment of the National Firearms Act, would sign his own gun control act in 1938. By then, firearms registration schemes and countless other devices were being used systematically to deprive whole peoples of basic rights and, ultimately, of life itself.

The Supreme Court upheld the National Firearms Act in Sonzinsky v. United States (1937). The defendant insisted "that the present levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government."[69] The Tenth Amendment power of the states to regulate firearms in their criminal codes, he argued, was an exclusive power not delegated to the federal government.

The Court found the National Firearms Act on its face to be a revenue measure and nothing

---

[68] American Rifleman, August 1934, at 2.

[69] 300 U.S. 506, 512 (1937).

more. The Court noted:

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. . . . Nor is the subject of the tax described or treated as criminal by the taxing statute. . . . Here Section 2 contains no regulations other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure . . . .[70]

The Court upheld its validity precisely because the National Firearms Act was a revenue measure only and did not purport to exercise any general criminal power not delegated to Congress under the Constitution. Moreover, the Court refused to speculate into any reasons why Congress might have taxed certain firearms:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. . . .
>
> Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.[71]

In 1938, Congress passed the Federal Firearms Act,[72] which regulated interstate commerce in firearms and prohibited possession of firearms by felons where an interstate nexus could be demonstrated. This legislation, since it primarily regulated only interstate commerce in firearms by requiring licenses and recordkeeping by manufacturers and dealers, was far less controversial than the NFA.

---

[70] Id. at 513.

[71] Id. at 513-14.

[72] 52 Stat. 1250.

Since by its own terms the Federal Firearms Act concerned only interstate commerce, there was little discussion of its constitutionality. On the Senate floor, Senator William H. King, a Utah Democrat, stated to Senator Copeland, the chief sponsor:

> The Senator will bear in mind that we have a constitutional provision that right of the people to keep and bear arms shall not be infringed. I was wondering if this bill was not in contravention of the constitutional provision.[73]

Copeland denied the proposition, but the following exchange then ensued:

> Mr. McKellar [Democrat, Tennessee]: How does the Senator avoid the second amendment to the Constitution, which provides:
>
> > 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. . . .
>
> Mr. Copeland. Will not the Senator read it all together? The part relating to militia is important; the statement as to the militia is, of course, in the first part of the constitutional provision.
>
> Mr. McKellar. Yes; but, while it refers to the militia, the provision is all-inclusive and provides that the right of the people to keep and bear arms shall remain inviolate.[74]

The constitutional issue was not pursued further, apparently because the bill was a regulation of interstate commerce, and did not operate upon individual firearms owners, other than felons who received firearms in interstate commerce. The Senate committee report described the bill as follows:

> The bill under consideration . . . is designed to regulate the manufacture of and the shipment through interstate commerce of all firearms.
>
> . . . It is believed that the bill above referred to will go far in the direction we are seeking and will eliminate the gun from the crooks' hands, while interfering as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living

---

[73] 79 CONG.REC, 74th Cong., 1st Sess., 11973 (July 29, 1935).

[74] Id.

conditions unbearable in the past decade.[75]

While the law hardly eliminated the gun from the crooks' hands, anti-firearms proponents wanted far more stringent legislation.

Meanwhile, in United States v. Miller (1939),[76] the Supreme Court rendered an equivocal opinion concerning the status of the National Firearms Act under the Second Amendment. A district court found the National Firearms Act to be unconstitutional on its face as violative of the Second Amendment, and dismissed an indictment for transporting in interstate commerce a shotgun with a barrel less than eighteen inches without the required tax stamp.[77] The Supreme Court reversed based on the following:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. 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.[78]

Accordingly, the Court remanded the cause to the district court for further proceedings.[79] Consistent with the above, these proceedings would have entailed the taking of evidence about the nature of the shotgun. Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses, the Court did not consider whether the tax and related registration

---

[75] Report No. 82 [to accompany S. 3], Senate Committee on Commerce, 75th Cong., 1st Sess., 1-2 (1937).

[76] United States v. Miller, 307 U.S. 174 (1939).

[77] United States v. Miller, 26 F.Supp. 1002, 1003 (W.D. Ark. 1939).

[78] 307 U.S. at 178.

[79] Id. at 183.

requirements of the National Firearms Act violated the Second Amendment. The Court assumed that if the shotgun was a protected "arm" under the Second Amendment, the tax and registration requirements may have been unconstitutional, for otherwise the Court could have disposed of that issue without remanding the case.

Further, the Court apparently assumed that the Second Amendment protects all individuals, not just members of an organized force such as the National Guard. The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm "at this time" is "ordinary military equipment" or its use "could" potentially assist in the common defense. Had the Court assumed that the Second Amendment did not protect ordinary persons, it would not have remanded the case to determine the factual status of the arm.

The Court also discussed the meaning of the Second Amendment. Referring to the militia clause of the Constitution, the Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."[80] The Court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[81]

The philosophy behind the Second Amendment was well articulated in the commentaries of

---

[80] 307 U.S. at 178.

[81] Id. at 179.

Justice Joseph Story and Judge Thomas M. Cooley, which Miller approvingly cites.[82] Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[83] Miller's reference to Judge Cooley finds him stating:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed . . . .[84]

Thus, although Miller was somewhat equivocal, it provided little comfort to supporters of registration, for its apparent holding was that registration of military-type arms might be inconsistent

---

[82] 307 U.S. at 183 n.3.

[83] 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . ." J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

[84] T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further:

> The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as
> a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The right is General--It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

with the Second Amendment. Indeed, Miller represents the end of an era, for Congress would soon react to European police statism by reaffirming the Second Amendment and rejecting registration.

III. "TO IMPAIR OR INFRINGE IN ANY MANNER ON THE RIGHT OF ANY INDIVIDUAL TO KEEP AND BEAR ARMS": THE PROPERTY REQUISITION ACT OF 1941

Perhaps because crime dramatically decreased by the repeal of Prohibition, by 1940 gun-control proponents were advocating firearms registration as an aid in combatting subversion. However, the following article in the New York Times headlined "Citizen is Supported in Firearms Right" demonstrates that even the legal establishment opposed registration and did not panic from rhetoric about subversion:

> In the face of pleas for compulsory registration of firearms as a defense measure against fifth columnists, the National Conference of Commissioners on Uniform State Laws voted today, by a large majority, to exclude from its proposed Uniform Pistol Act a clause compelling householders to register their weapons.
>
> Professor S.B. Warner of the Harvard Law School read the proposed act, which he drafted for the firearms committee of the Interstate Commission on Crime during a two-year leave of absence from his teaching duties. The suggested law retains the traditional right of the American citizen to keep arms as a matter of protection.
>
> W.E. Stanley of Wichita, Kan., recommended that this right be abrogated in the interests of "national defense." The present system, he said, "gives any fifth columnist the right to make an arsenal out of his home."
>
> When Professor Warner acknowledged this was so Mr. Stanley added:
>
> "Then let's make every one register his weapons to aid us in combating subversive activities."
>
> To this Mr. Warner replied:
>
> "If such a measure is needed as a war measure, let the Federal Government pass it as

such. It is not in the province of States."[85]

Registration was advocated by Robert H. Jackson, the new Attorney General and ex-Solicitor General who argued the Miller case,[86] in his report to Congress. The Times reported that, in addition to wiretapping, "Mr. Jackson suggested adoption of an indeterminate sentence program for criminal cases in Federal courts, and a law for national registration of firearms now exempt from such listing."[87] The actual language of the proposal was as follows:

> I desire to recommend legislation to require registration of all firearms in the United States and a record of their transfers, accompanied by the imposition of a nominal tax on each transfer.
>
> Such a step would be of great importance in the interest of national defense, as it would hamper the possible accumulation of firearms on the part of subversive groups.
>
> It is also of outstanding importance in the enforcement of the criminal law. . . .
>
> A proposed bill drafted in this department embodying the foregoing recommendations is enclosed herewith. I recommend its enactment and hope that favorable action can be taken in respect to it at this session of the Congress.
>
> [The document contained this addendum.] The provisions of the National Firearms Act, which was a registration and tax law enacted as one of the Crime Laws of the 73rd Congress, apply only to certain types of weapons, including machine guns, submachine guns, sawed-off shot guns, sawed-off rifles and silencers.
>
> The Attorney General's recommendation would extend the registration and nominal tax provisions of the 1934 statute to all types of firearms.[88]

However, firearms registration was beginning to get a bad name. While some politicians in

---

[85] New York Times, September 5, 1940, at 17.

[86] Brief for the United States at 21.

[87] New York Times, January 4, 1941, at 7.

[88] Reprinted in New York Times, April 11, 1989.

the 1930s seemed infatuated with European statism,[89] the ugly side of government worship was beginning to be seen.

In 1928, Germany had enacted its Gesetz über Schusswaffen und Munition (Law on Firearms and Ammunition), which required firearms and ammunition acquisition permits and record keeping for all transactions.[90] This resulted in knowledge by the police of all firearms owners, which was used to advantage by the Nazis when they took power in 1933. The Nazi Waffengesetz (Weapons Law) of 1938, which was signed by Adoph Hitler, built upon the previous registration systems and strictly regulated handguns.[91] It provided in part:

> (1) Licenses to obtain or to carry firearms shall only be issued to persons whose reliability is not in doubt, and only after proving a need for them.
>
> (2) Issuance shall especially be denied to: . . .
>
> 3. gypsies, and to person wandering around like gypsies;
>
> 4. persons for whom police surveillance has been declared admissible, or upon whom the loss of civil rights has been imposed, for the duration of the police surveillance or the loss of civil rights;
>
> 5. persons who have been convicted of treason or high treason, or against whom facts are under consideration which justify the assumption that they are acting

---

[89] E.g., D. SCHMITZ, THE UNITED STATES AND FASCIST ITALY, 1922-1940 (1988) (American policy makers supported Mussolini's fascism in Italy.)

[90] Reichsgesetzblatt 1928, I, 143, reprinted and translated in JAY SIMKIN AND AARON ZELMAN, GUN CONTROL: GATEWAY TO TYRANNY 15 (Milwaukee, Wis.: Jews for the Preservation of Firearms Ownership, 1992).

[91] Reichsgesetzblatt 1938, I, 265, reprinted in id. at 53. Another English translation is in Federal Firearms Legislation, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 489 (1968).

in a manner inimical to the state . . . .[92]

Excluded from the license requirement were members of the armed forces, the police, and leaders of the Nazi party, the SS, and the SA.[93] Unpopular persons were to be disarmed:

> (1) In individual cases a person who has acted in an inimical manner toward the state, or it is to be feared that he will endanger the public security, may be prohibited to obtain, possess, and carry firearms and ammunition, as well as weapons for cutting or stabbing.
>
> (2) Weapons and ammunition which may be found in the possession of a person against whom the prohibition has been declared, shall be confiscated without compensation.[94]

Extensive implementing regulations were promulgated governing the manufacture, sale, and ownership of firearms.[95] One such regulation was the Verordnung gegen der Waffenbesitz der Juden (Regulations Against Jews' Possession of Weapons),[96] which was promulgated on November 11, 1938, the day after the anti-Jewish pogrom Kristallnacht (Night of the Broken Glass).[97] §1 of the regulation provided:

> Jews . . . are prohibited from acquiring, possessing, and carrying firearms and ammunition, as well as truncheons or stabbing weapons. Those now possessing weapons and ammunition are at once to turn them over to the local police authority.

The gun control law was enforced not just against Jews, but also against any politically

---

[92] Id. §15.

[93] Id. §§18, 19.

[94] Id. §23.

[95] For an eerie side-by-side comparison of the Nazi law and regulations and the federal Gun Control Act of 1968 and regulations, see SIMKIN AND ZELMAN, supra note 90, at 83-107.

[96] Reichsgesetblatt 1938, I, 1571.

[97] SIMKIN AND ZELMAN, supra note 90, at 8, 80-81.

suspect person. By having access to the names of firearms owners through the registration lists and hunting license records, the Nazis were aware of any potential resistance. And they did not just confiscate firearms: firearms owners disappeared in the night and were never heard of again.[98]

The fixation in Congress with registration and confiscation was based on events unfolding before the members' eyes in Europe. Countries falling to Nazi conquest had existing licensing and registration laws, some of which where enacted in the 1930s, which made it easier for the Nazis to enforce orders to surrender firearms under penalty of death. France forbade possession of war weapons, and required registration of commercial weapons other than hunting rifles and collection pieces.[99] Belgium required registration of defense weapons (pistols and revolvers) and war weapons, the latter of which could not be possessed for non governmental purposes; possession of hunting rifles carried no requirements.[100] Czechoslovakia required a permit and registration for possession and carrying of firearms.[101] Norway required a police permit and registration for possession and sale of a firearm.[102]

Nazi proclamations made in 1940 and 1941 in occupied counties required the surrender of private firearms. A decree in Luxemburg provided:

---

[98] Interview with Dr. David Th. Schiller, some of whose German Jewish ancestors successfully eluded the Nazis. Nuremberg, Germany, March 13, 1993.

[99] Legislative Reference Service, Library of Congress study dated July 5, 1968 (citing in part decret loi du 23 October 1935), in Federal Firearms Legislation, Hearing before the Subcommittee to Investigate Juvenile Delinquency, Senate Judiciary Committee, 90th Cong., 2d Sess., 482 (1968).

[100] Id. at 481 (citing in part law of Jan. 3, 1933).

[101] Id. at 482 (citing incorporation of 1918 Austro-Hungarian law).

[102] Id. at 482 (citing lov om innforsel of June 28, 1927).

> It shall be unlawful: . . . To possess arms unlawfully. . . . Violations shall be punishable by imprisonment, in serious cases by hard labor or death, in less serious cases by fine.[103]

In Czechoslovakia, it was declared that "the intentional illegal possession of firearms . . . is subject to martial law."[104] It is still generally remembered today, over fifty years later, that the first day the Nazis occupied Czechoslovakia, they put up posters in every town ordering the inhabitants to surrender all firearms, including hunting guns.[105] The penalty for disobedience was death. The Nazis were able to use local and central registration records of firearms owners and hunters to execute the decree. Lists of potential dissidents and other suspects were already prepared, and those persons disappeared immediately.[106]

The Nazi commander of Belgium and Netherlands proclaimed: "The surrender of weapons and other implements of war has been ordered by special proclamation. . . . Hunting guns are to be surrendered . . . ."[107] The Nazi head of Norway decreed: "All arms and munitions must be handed over. The right to possess arms is restricted" to licensed officials and persons with police permits.[108]

The Nazi decree concerning Poles and Jews provided in part:

> The death penalty or, in less serious cases, imprisonment shall be imposed on any Pole or Jew: . . .
>
> If he is in unlawful possession of firearms, . . . or if he has credible information that a Pole or a Jew is in unlawful possession of such objects, and fails to notify the authorities

---

[103] Id. at 487.

[104] Id.

[105] Interview by author with Milan Kubele, Uherský Brod, Czech Republic, March 16, 1994.

[106] Id.

[107] Id.

[108] Id.

forthwith.[109]

In 1994, on the occasion of the fiftieth anniversary of the liberation of France, the Army Museum in Paris exhibited partisan and other wartime items, including the Nazi Ordonnance concernant la détention d'armes et de radio-émetteurs dans les territoires occupés (Ordinance concerning the detention of arms and radio transmitters in the occupied territories). The text of the decree, which was issued by the German military commander, states:

> 1) All firearms and all sorts of munitions, hand grenades, explosives and other war materials will have to be turned over immediately.
>
> Delivery must take place within 24 hours to the closest "Kommandantur" [German police station] unless other arrangements have been made. Mayors will be held strictly responsible for the execution of this order. The [German] troop commandants may allow exceptions.
>
> 2) Anyone found in possession of firearms, munitions, hand grenades, or other war materials will be sentenced to death or forced labor or in lesser cases prison.
>
> 3) Anyone in possession of a radio or a radio transmitter has to turn it over to the closest German military authority.
>
> 4) All those who would disobey this order or would commit any act of violence in the occupied lands against the German army or against any of its troops will be condemned to death.[110]

While the Nazis made good on the threat to execute persons in possession of firearms, the gun control decree was not entirely successful. There are numerous pictures of civilians with

---

[109] Id. at 488.

[110] A photograph of the original was taken by the author while visiting the museum (also known as the Hotel National des Invalides) on August 22, 1994, during the fiftieth anniversary of the liberation of Paris.

revolvers, semiautomatic pistols, and rifles at the barricades during the liberation of Paris.[111]

The above firearms restrictions and Nazi policies were apparently widely known and published in the United States. In an editorial against domestic firearms registration, the magazine of the National Rifle Association referred to media reports about European developments as follows:

> From Berlin on January 6th the German official radio broadcast--"The German military commander for Belgium and Northern France announced yesterday that the population would be given a last opportunity to surrender firearms without penalty up to January 20th and after that date anyone found in possession of arms would be executed."
>
> So the Nazi invaders set a deadline similar to that announced months ago in Czecho-Slovakia, in Poland, in Norway, in Romania, in Yugo-Slavia, in Greece.
>
> How often have we read the familiar dispatches "Gestapo agents accompanied by Nazi troopers swooped down on shops and homes and confiscated all privately-owned firearms!"
>
> What an aid and comfort to the invaders and to their Fifth Column cohorts have been the convenient registration lists of privately owned firearms--lists readily available for the copying or stealing at the Town Hall in most European cities.
>
> What a constant worry and danger to the Hun and his Quislings have been the privately owned firearms in the homes of those few citizens who have "neglected" to register their guns![112]

Fear of tyranny was both real and reasonable in those dark days. Members of Congress were acutely aware of the legislative prohibitions on individual firearms possession in Nazi Germany and Communist Russia and the growth of the Gestapo and other police organizations which sought to monopolize possession of firearms.

---

[111] E.g., C. Touzé, Paris libéré, Paris Retrouvé 3 (1994); "Le Journal de la Liberation de la France," a special issue of L'Evenement du Jeudi, August 18-24, 1994, at 21, 25, 30.

[112] "The Nazi Deadline," American Rifleman, February 1942, at 7. Although this article appeared after the 1941 congressional debates analyzed infra, the types of events it described appear to have been well known in 1941.

In a letter reprinted in the Congressional Record, C.B. Lister, Secretary Treasurer of the National Rifle Association, told Representative Edwin Arthur Hall, a Republican of New York:

> May I take this opportunity to express the appreciation of the quarter of a million organized rifle and pistol target shooters of the United States for your outspoken support of their viewpoint in this matter [unwise antifirearms legislation]?
>
> I believe you will be interested to know that we have received information from a reliable, conservative source close to one of the groups which has been agitating for registration of all firearms, to the effect that an attempt may be made to include such a registration provision as a rider on one of the urgent deficiency appropriation bills which Congress is passing without too minute examination of details in connection with the national-defense program. Because such an attempt at new legislation in connection with an appropriation bill could be thrown out on a point of order if caught by any Member of the House, the thought occurs to me that an attempt might be made to incorporate such Federal registration of firearms in the pending tax bill.
>
> Fortunately, the House Ways and Means Committee has on several occasions in the past granted extensive hearings on such proposals and has rejected them. It is possible that Mr. Doughton's committee might for that reason refuse to consider a tax for the registration of firearms in connection with the new tax bill.[113]

In hearings before the House Committee on Military Affairs in July of 1941, Representative Paul Kilday, a Democrat from Texas, attempted to ask questions of Judge Robert P. Patterson, Under Secretary of War, concerning a bill to allow the President to requisition property from civilians and to establish necessary rules and regulations. Representative Dow W. Harter, Democrat of Ohio, quashed their being made part of the public record:

> Mr. Kilday. The reason I ask that is somebody made the boast they were going to get the other [firearms] legislation under this bill!
>
> Mr. Harter. Mr. Chairman, I move we go into executive session. (The committee thereupon went into executive session, as [sic] the conclusion of which an adjournment was

---

[113] CONG.REC., 77th Cong., 1st Sess., at A2072 (May 2, 1941).

taken subject to call of the chair.)[114]

In 1941, less than two months before Pearl Harbor, Congress enacted legislation to authorize the President to requisition broad categories of property with military uses from the private sector on payment of fair compensation, but reaffirmed and protected Second Amendment rights. Known as the Property Requisition Act, the legislation included the following provisions:

> That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. . . .
>
> Nothing contained in this Act shall be construed--
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms, or
>
> (3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business.[115]

As originally proposed in the Senate, S. 1579 did not have the three qualifications at the end.

---

[114] Hearings before the Committee on Military Affairs, House of Representatives, 77th Cong., 1st Sess., on S. 1579 To Authorize the President of the United States, July 31, 1941, at 18 (1941).

[115] P.L. 274, 77th Cong., 1st Sess., Ch. 445, 55 Stat., pt. 1, 742 (Oct. 16, 1941) (emphasis added).

The House Committee on Military Affairs added the provisions with the explanation as follows:

> It is not contemplated or even inferred that the President, or any executive board, agency, or officer, would trespass upon the right of the people in this respect. There appears to be no occasion for the requisition of firearms owned and maintained by the people for sport and recreation, nor is there any desire or intention on the part of the Congress or the President to impair or infringe the right of the people under section 2 of the Constitution of the United States, which reads, in part as follows: 'the right of the people to keep and bear arms shall not be infringed.' However, in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties, our committee deem it appropriate for the Congress to expressly state that the proposed legislation shall not be construed to impair or infringe the constitutional right of the people to bear arms. In so doing, it will be manifest that, although the Congress deems it expedient to grant certain extraordinary powers to the Executive in furtherance of the common defense during critical times, there is no disposition on the part of this Government to depart from the concepts and principles of personal rights and liberties expressed in our Constitution.[116]

When the matter was first debated on the House floor, Congressman Edwin Arthur Hall deplored and predicted legislation that would infringe on the Second Amendment:

> Before the advent of Hitler or Stalin, who took power from the German and Russian people, measures were thrust upon the free legislatures of those countries to deprive the people of the possession and use of firearms, so that they could not resist the encroachments of such diabolical and vitriolic state police organizations as the Gestapo, the Ogpu, and the Cheka. Just as sure as I am standing here today, you are going to see this measure followed by legislation, sponsored by the proponents of such encroachment upon the rights of the people, which will eventually deprive the people of their constitutional liberty which provides for the possession of firearms for the protection of their homes.
>
> I submit to you that it is a serious departure from constitutional government when we consider legislation of this type. I predict that within 6 months of this time there will be presented to this House a measure which will go a long way toward taking away forever the individual rights and liberties of citizens of this Nation by depriving the individual of the private ownership of firearms and the right to use weapons in the protection of his home, and thereby his country.[117]

Representative Walter G. Andrews, Republican of New York, responded that the bill was

---

[116] Rept. No. 1120 [to accompany S. 1579], House Committee on Military Affairs, 77th Cong., 1st Sess., at 2 (Aug. 4, 1941).

[117] 87 CONG.REC., 77th Cong., 1st Sess., 6778 (Aug. 5, 1941).

strongly advocated by Under Secretary of War Patterson, a former circuit judge of the New York Supreme Court and a Republican.[118]

The day after the above remarks, the Senate considered the House amendments. Senator Tom Connally, a Texas Democrat, described the House amendment as "safeguarding the right of individuals to possess arms."[119] Senator Albert B. Chandler, a Democrat of Kentucky, in order to give them careful consideration, moved to disagree with the House amendments.[120] Senator Chandler stated that "we have no reason to take the personal property of individuals which is kept solely for protection of their homes."[121] Delegates to a conference committee were appointed.[122]

The conference committee rendered a compromise report deleting the prohibition on registration, but retaining the declaration against infringing Second Amendment rights.[123] Defending this in the House, Representative A.J. May, a Kentucky Democrat and manager in the conference, noted the early opposition to the bill because it might allow the President to seize firearms or to require registration. May recalled the hearing in the Military Affairs Committee, of which he was chairman, as follows:

> Judge Patterson before the committee stated in answer to a question that the War Department had been considering regulations with respect to the requisitioning of personal property, that it had not yet occurred to them, as I remember it, that they might be called upon to register arms. If they were called upon to register arms, I do not think they would go out and say to

---

[118] Id.

[119] Id. at 6811 (Aug. 6, 1941).

[120] Id.

[121] Id.

[122] Id.

[123] Id. at 7097 (Aug. 13, 1941).

> every farmer in this country, to every workingman in this country, to every citizen, businessman, or whatever profession or calling he may have, that he must register the weapons he might have in his home, but to guard against that we undertook to give these brethren here concerned about their guns the proper kind of protection, and we did it in the language of the Constitution, or as nearly as we could, and I quote from the report:
>
> Nothing contained in this act shall be construed to impair or infringe in any manner the right of any individual to keep and bear arms.
>
> The Senate agreed to that.[124]

In an explanation of Second Amendment rights, Congressman May, stated: "the right to keep means that a man can keep a gun in his house and can carry it with him if he wants to; he can take it where he wants to, . . . and the right to bear arms means that he can go hunting . . . and that nobody has any right, so long as he bears the arms openly and unconcealed, to interfere with him."[125]

Representative Dewey Short, a Missouri Republican, attacked the deletion of the anti-registration provision. He made the observation that: "The method employed by the Communists in every country that has been overthrown has been to disarm the populace, take away their firearms with which to defend themselves, in order to overthrow the Government."[126] Representative Paul Kilday gave a detailed account of the background of the bill as follows:

> Now, I want to got to this constitutional question. It is really a substantial and valuable right that is involved. For a period of perhaps 15 years there has been an element in this country seeking to require the registration of all firearms. That bill has been offered in almost every Congress during that period of time. It has never been reported out of the Committee on the Judiciary, and we now have another one of those subterfuges of getting under the name of national defense something that they have not been able to get over a period of years.

---

[124] Id. at 7098.

[125] Id.

[126] Id. at 7100.

> I call attention to section 4 of this act, which provides that the President shall have the power to administer the provisions of the act, through any officer or agency that he may determine and to require such information as he may deem necessary in carrying out the provisions of the act. That gives the power to require the registration of every firearm in the United States because knowledge of the location and the owner would be the first information necessary for requisition.[127]

Kilday then explained why the repetition of constitutional language without further protections was a platitude:

> Such a registration of firearms has been sought, unsuccessfully, for years. Now that they have been unable to get that legislation, they bring it here under the form of national defense. We are in the ridiculous position of being asked to vote for an amendment which copies the language of the Constitution into an act of Congress. Are we going to be in that ridiculous position? If so, then we are going to have to copy the language of the Constitution into every bill that we pass. . . . At the proper time I propose to offer a motion to recommit the conference report to the conference committee, to the end that they may pass on this and incorporate my amendment which provided that the bill shall not be construed to give the Government the power to requisition a firearm possessed by an individual, nor to require the registration of it. That must be put in here in order to make the bill constitutional. Judge Patterson testified. His one example was that they might need shotguns, and he felt that if they need shotguns they should have the right to take them from anybody.[128]

This is an interesting comment on declaring a constitutional right in a statute. Such a declaration may be meaningless without procedural or other specific barriers to guarantee and enforce it. Kilday explained this point further as follows:

> I go further than that and say if they do not intend to require the registration of all firearms they would not object to this provision being in the bill. Judge Patterson said they had already made their plans to require registration. . . . Remember that registration of firearms is only the first step. It will be followed by other infringements of the right to keep and bear arms until finally the right is gone. It is no shallow pretext. The right to keep and bear arms is a substantial and valuable right to a free people, and it should be preserved.[129]

---

[127] Id. at 7100-7101.

[128] Id. at 7101.

[129] Id. at 7101.

Representative Lyle H. Boren, an Oklahoma Democrat, set forth further reasons to support Kilday and return the bill to conference, based on the experiences in the Communist and Nazi totalitarian societies:

> A careful reading of Trotsky's History of the Russian Revolution should convince anyone of the wisdom of our founding fathers in writing into the Constitution of the United States the provision that our right to bear arms as private citizens shall not be abridged. Although I never carried a gun in my life, never had one outside my home except on a hunting trip, I feel that the gun I own in my home is essential to maintaining the defense of my home against the aggression of lawlessness.[130]

Adding that under the bill "you could disarm the State militia,"[131] Boren continued with the civil libertarian dictum that tyranny must be resisted at home as well as abroad:

> I propose to defend it [our way of life] against the soldiers of a Hitler and against a government bureaucrat. All the invasions threatened against American democracy are not from without. I feel that the defense of democracy is on my doorstep and your doorstep as well as on the world's battlefields. . . . I rebel against the destruction of freedom in America under the guise of emergency.[132]

Representative John W. Patman, a Texas Democrat, also supported recommittal. He unabashedly stated that the ultimate purpose of the Second Amendment is to resist governmental tyranny. The Constitution made the President the head of the army, and an attempt at power seizure could be initially resisted by the State militias.[133] That was not fail safe, Patman continued:

> But there is a provision in the Constitution that the militia under certain conditions can be called into the national service. Then it was said, "Where will our protection be? The Executive then will have control of both the Army and the militia of the States." The answer was, "The people have a right to bear arms. The people have a right to keep arms; therefore,

---

[130] Id.

[131] Id.

[132] Id.

[133] Id. at 7102.

> if we should have some Executive who attempted to set himself up as dictator or king, the people can organize themselves together and, with the arms and ammunition they have, they can properly protect themselves." . . .
>
> . . . If we permit the people here in Washington to compel he people all over the Nation to turn in their arms, their ammunition, then the Chief Executive, whoever he is, gets control of the Army and the militia, how will the people be able to protect themselves?[134]

Patman also addressed the uselessness of redeclaring a constitutional right without explicit safeguards, such as a prohibition on registration, to prevent infringement of that right:

> They [the conferees] retained that part of the amendment which says that the right to keep and bear arms shall not be infringed. That part is meaningless. They might just as well have left it out. They cannot add to the Constitution. The Constitution guarantees to the people those rights which they have asserted in this bill.[135]

Representative Daniel A. Reed, a New York Republican, spoke next. His comments in support of recommittal recalled the passage of the National Firearms Act of 1934 as a firearms registration scheme passed under the power of Congress to tax:

> Since 1933 those in control of the Government, realizing that the power to tax is the power to destroy, have appeared before the Committee on Ways and Means with the proposal to tax firearms. While they narrowed it down to machineguns on the ground that it would prevent bandits from using firearms of a certain size, yet the thought was there of getting control of the private firearms of this country. I know that our chairman of the Ways and Means Committee and others on that committee were on the alert, sensed the danger, and accordingly went no further than partial taxation and regulation, but I think every member of the committee saw the purpose and the motive of the proposed tax.[136]

Representative John J. Sparkman, an Alabama Democrat, responded. In order to defeat totalitarianism, he was apparently wiling to adopt the totalitarian tenet that the person and all his possessions belong to the government:

---

[134] Id.

[135] Id.

[136] Id. at 7103.

> Now as to the firearms. The Constitution guarantees to every citizen the right to keep and bears arms. That guaranty is not disturbed. Do not think that the Government is going to go out and take the shotguns. Under Secretary Patterson never did make any serious contention to our committee that such a thing might be expected, but he did say that if, in order to defend our homes, our institutions, or ideals, our Government, and our way of life, it is necessary to take our shotguns, we ought to have the power to do it.
>
> I say that if in order to defend this country it is necessary to come into my home and take my shotgun, my pistol, my rifle, or anything else I have, I believe strongly enough in the defense of this country that I say you are welcome to do it.
>
> We have more than 2,000,000 rifles we are not using now. We do not need them. Why think of the impractical things, the almost impossible things? The Government does not want to get your shotguns or your rifles.[137]

The above statement was short-lived, because before long the War Department was taking back all rifles it had issued to the state militias.[138] However, before debate ended, Representative Robert E. Thomson, a Texas Democrat, urged against recommittal as follows:

> This is all a joke about taking a man's personal firearms like his shotgun and pistol. That is all a smoke screen to kill this bill. The Constitution protects every citizen in the right to own and bear arms. No personal rights are being violated. The War Department has no idea of doing anything ridiculous. It now has more than 2,000,000 rifles in storage.[139]

The motion to recommit then passed by a landslide, 154 to 24.[140] The subsequent conference report reflected agreement to include both the prohibition on registration and the declaration against impairment of the individual right to keep and bear arms.[141] The bill became law.

---

[137] Id.

[138] E.g., M. SCHLEGEL, VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR 129 (1949).

[139] 87 CONG.REC., 77th Cong., 1st Sess., 7164 (Aug. 13, 1941).

[140] Id.

[141] Rpt. No. 1214, Conference Report [to accompany S. 1579], 77th Cong., 1st Sess., at 2 (Sept. (continued...)

Senator Theodore G. Bilbo, a Democrat from Mississippi, introduced a total mobilization bill in the next session. It would have repealed the provision and allowed confiscation of all property, but it died in committee.[142]

So too were firearms registration and confiscation passé for the duration of the war. The British, who two decades before began disarming the commoners,[143] were begging for contributions of rifles, shotguns, pistols and revolvers from American civilians. "Send a gun to defend a British home," exhorted an advertisement in the magazine of the National Rifle Association.[144] As Britain rearmed its citizens, the Nazis decided what would be necessary when they occupied the island:

> Brauchitsch's instructions were headed "Orders Concerning the Organization and Function Of Military Government In England" and went into considerable detail. . . . Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours.[145]

Moreover, with all of the men and guns sent abroad to fight the war, America still needed defending from expected invasions on the East and West coasts and domestic sabotage and Fifth Column activity. Sportsmen and gun clubs responded by bringing their private arms and volunteering for the state protective forces.[146] The gun control debate was a dispensable luxury for

---

[141](...continued)
25, 1941).

[142] See 88 CONG.REC., 77th Cong., 2d Sess., 2785-2790 (Mar. 23, 1942).

[143] C. GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 45-70 (London 1972).

[144] American Rifleman, Nov. 1940.

[145] W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1027 (1959).

[146] E.g, REPORT OF THE [VIRGINIA] ADJUTANT GENERAL FOR 1945 at 23-24 (Richmond (continued...)

less desperate times.

IV. THE FIREARMS OWNERS' PROTECTION ACT OF 1986: SHOULD THE JUDICIARY DEFER TO A BROAD INTERPRETATION OF A CONSTITUTIONAL RIGHT BY CONGRESS?

In addition to 1789, 1866, and 1941, the fourth and most recent time Congress passed a constitutional amendment or legislation explicitly declaring support of the right to keep and bear arms was in 1986. The Firearms Owners' Protection Act of 1986 declares:

> CONGRESSIONAL FINDINGS--The Congress finds that--
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership

---

[146](...continued)
1946); U.S. HOME DEFENSE FORCES STUDY 58-59 (Office of Ass't Sec. of Defense 1981).

or use of firearms by law-abiding citizens for lawful purposes."[147]

The Gun Control Act of 1968, of course, had been the most comprehensive legislation on the subject to have passed, and its legislative history is beyond the scope of this study. Title I of the Act, which revised the Federal Firearms Act of 1938, was based on the interstate commerce power. Title II was based on the tax power and amended the National Firearms Act of 1934.[148] The Act carefully avoided any prohibition on possession of a firearm per se,[149] and included no registration requirements for ordinary rifles, pistols, and shotguns. As noted, its preamble eschewed any intent to burden law-abiding persons, although it included no explicit reference to the Second Amendment.

The finding in the Firearms Owners' Protection Act of 1986 that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution, Senate Judiciary Committee, 97th Cong., 2d Sess. (1982), which states:

> The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful

---

[147] §1(b), P.L. 99-308, 100 Stat. 449 (May 19, 1986).

[148] See analysis of bills by Fred B. Smith, General Counsel of the Treasury Department, in Federal Firearms Act: Hearings Before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Committee, U.S. Senate, 90th Cong., 1st Ses., 1086-88 (1967).

[149] Concerning a proposal to prohibit possession by a person under 21 years of age of an NFA firearm, Treasury Counsel Smith stated:

> It seems doubtful that the . . . provision can be justified under the taxing or commerce powers, or under any other power enumerated in the Constitution, for Federal enactment. Consequently, the Department questions the advisability of including in the bill a measure which could be construed as an usurpation of a (police) power reserved to the states by Article X of the United States Constitutional Amendments. Id. at 1089.

manner.[150]

In the substantive reforms of the Act, Congress implemented its recognition that the Second Amendment guarantees an individual right of persons to keep the arms regulated by the Gun Control Act, including rifles, shotguns and pistols. The Protection Act recognized "the rights of citizens to keep and bear arms under the second amendment to the United States Constitution" as a reason to deregulate substantially the purchase, sale and ownership of firearms.

In a chapter entitled "The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers," the above Senate subcommittee report also demonstrates that the Second Amendment was intended to be incorporated into the Fourteenth Amendment so as to limit state action.[151] As noted, the Firearms Owners' Protection Act states: "The Congress finds that (1) the rights of citizens--(A) to keep and bear arms under the second amendment to the United States Constitution . . . require additional legislation to correct existing firearms statutes. . . ."[152] Those "statutes" included state statutes which Congress could preempt under the supremacy clause and under the enforcement clause of the Fourteenth Amendment.

Among the Firearms Owners' Protection Act's measures to enforce the Second Amendment is 18 U.S.C. §926(a), which provides:

---

[150] Id. at 12. In addition, two other scholarly studies were inserted into the legislative record in support of Congress' finding during Senate debate. D. Caplan, Restoring the Balance: The Second Amendment Revisited, 5 FORDHAM URBAN L.J. 31 (1976), reprinted in 131 CONG.REC. S8692 (June 24, 1985); S. Halbrook, To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791, 10 N.KY.L.REV. 13 (1982), reprinted in 131 CONG.REC. S9105 (July 9, 1985).

[151] Id. at 68-82.

[152] §1, P.L. 99-308, 100 Stat. 449 (May 19, 1986).

> No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

This reflects Congress' traditional rejection of bills to require the registration of rifles, pistols, and shotguns. In passing the Gun Control Act of 1968, Congress rejected all registration proposals. To prevent the Bureau of Alcohol, Tobacco and Firearms from establishing a system of registration of firearms transactions and purchasers, the Congress has provided the following in every BATF appropriation act passed since 1978:

> Provided, That no funds appropriated herein shall be available for administrative expenses in connection with consolidating or centralizing within the Department of the Treasury the records of receipts and disposition of firearms maintained by Federal firearms licensees or for issuing or carrying out any provisions of the proposed rules of the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, on Firearms Regulations, as published in the Federal Register, volume 43, number 55, of March 21, 1978. . . .[153]

Passage in the 1986 Act of 18 U.S.C. §926A, which allows persons to transport firearms through states which prohibit firearms, reflects recognition by Congress that the Second Amendment protects the individual right to keep and bear arms, and that this is made applicable to the States through the Fourteenth Amendment. Senator Symms introduced this provision with the explanation: "The intent of this amendment . . . is to protect the second amendment rights of law-abiding citizens wishing to transport firearms through States which otherwise prohibit the possession of such weapons."[154] In the House, Congressman Robinson stated that "our citizens have a constitutional

---

[153] This prohibition on registration is found most recently in P.L. 102-393, 106 Stat. 1731 (Oct. 6, 1992).

[154] 131 CONG. REC. S9114 (July 9, 1985).

right to bear arms . . . and to travel interstate with those weapons."[155] Accordingly, the Firearms Owner's Protection Act was passed in part pursuant to Congress' power to enforce the Fourteenth Amendment against the states.

No federal court in a reported decision has ever mentioned Congress' declaration in the Property Requisition Act of 1941 about the individual right to keep and bear arms. Nor has any federal court ever referred to the similar Congressional statement in the Freedmen's Bureau Act of 1866. In order to uphold the first State ban in American history on various rifles, the Ninth Circuit refused to acknowledge that over two-thirds of the same Congress that adopted the Fourteenth Amendment found that the rights to "personal security" and "personal liberty" included "the constitutional right to bear arms."[156] This was apparently the first time Congress' 1866 finding about the Second Amendment has been presented to a court.

Circuit Judge Noonan of the Ninth Circuit referred to the congressional findings concerning the Second Amendment in the Firearms Owners' Protection Act of 1986 in United States v. Breier (9th Cir. 1987),[157] stating:

> Donald Douglas Brier is a hobbyist who has been turned into a criminal by the too vivid zeal of government agents and prosecutors. Like many other hobbyists--stamp

---

[155] 132 CONG.REC. H1695 (Apr. 9, 1986). "This section has been included to assure the right of an individual to travel in and between States with a rifle or shotgun . . . . This provision has been drawn very narrowly because it is preemption of the laws of the various States . . . . " H. Rep. No. 99-495, 4 U.S. Code Cong. & Admin. News 1986, 1327, 1355 (emphasis added.) As passed in the Act, the provision includes all firearms, including handguns.

[156] Fresno Rifle & Pistol Club v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992) (refusing to consider "remarks by various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights act of 1871.")

[157] 827 F.2d 1366. Judge Noonan was dissenting from the denial of a rehearing. The previous majority opinion made no reference to the Second Amendment. See 813 F.2d 212 (9th Cir. 1987).

> collectors for example--he swapped parts of his collection and sold and bought other parts. Admittedly guns are more dangerous than stamps, and Congress has seen fit to regulate gun dealers. But unlike stamps, guns are the subject of constitutional protection: "the right of the people to keep and bear arms shall not be infringed." United States Constitution, Amendment II. Congress has regulated guns, sensitive to the Second Amendment and to the difference between hobbyists and those making a living out of the gun business.[158]

Judge Noonan appealed to the congressional declaration as a method of interpretation to cause restrictions not to apply. The issue was whether Congress intended to apply retroactively its new narrow definition of "engaged in the business"--which triggers the requirement of a federal firearms license, absence of which is a felony. Judge Noonan wrote:

> The Act begins with two congressional findings. First, Congress finds that Second Amendment and other constitutional rights of citizens "require additional legislation to correct existing firearms statutes and enforcement policies" (emphasis supplied). Second, Congress finds that:
>
> . . . additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms. . . .[159]

Congress' finding assumes that the right of "the people" declared in the Second Amendment belongs to individuals, and that unnecessary burdens infringe on that right. The obvious purpose of referring to these findings is to show that, by giving an honest and expansive interpretation of a constitutional right, Congress thereby expresses an intent that other provisions of law be read in such a manner as not to interfere with that right. Judge Noonan wrote:

> After making these findings Congress went on to amend 18 U.S.C. §921 by inter alia defining the term "engaged in business." The definition sets out that to be a dealer one must have "the principal objective of livelihood and profit" from the trade.

---

[158] Id.

[159] Id. at 1366-67.

> Called upon to construe 18 U.S.C. §921 in the light of the Firearms Owner's Protection Act, a court should not hesitate to respond to the congressional concern of correcting existing enforcement policy, and a court should not fail to acknowledge the explicit declaration that Congress in this legislature is reaffirming the intent of the Gun Control Act of 1968. The 1986 amendment makes crystal-clear how the old statute should be read: the law was not meant to reach the hobbyist who is not making his living out of trading in guns.[160]

Thus, by deferring to Congress' declaration that every citizen has a right to keep and bear arms, Judge Noonan proceeds to interpret the statute in favor of an individual engaged in a few transactions in firearms, and against governmental restrictions. Implicit in this case is the inference that the right "to keep and bear arms" includes the right to trade firearms on an occasional basis without a license.

Courts occasionally appeal to the Constitution in order to decide whether a statute is consistent therewith. Perhaps more often, courts appeal to the rule that a statue should be construed so as to be consistent with the Constitution. Judge Noonan's analysis is of the latter sort, but with the added twist that the judiciary should defer to Congress' positive construction of a constitutional right in order to interpret Congress' intent in a given statute.

Should the judiciary defer to congressional declarations of constitutional rights in order to determine whether a statute is constitutional? The query is more easily answered in the affirmative in regard to state law. In determining whether a state statute prohibiting possession of firearms is consistent with the Fourteenth Amendment, a court should certainly consider Congress' declaration in the Freedmens' Bureau Act that no person should be denied "the constitutional right to bear arms." Even in the harder case of a federal prohibition on firearms, a court should consider Congress' statements in 1866, 1944, and 1986 and construe the Second Amendment broadly to recognize the

---

[160] Id. at 1367.

right of individuals to keep and bear arms.

In contrast with Judge Noonan's discussion, some judges have assiduously refrained from any acknowledgment of Congress' declaration that the Second Amendment protects the rights of citizens to have firearms. A Sixth Circuit case quotes floor speeches on the Firearms Owners' Protection Act which did not mention the Second Amendment, and then the court asserts that "there is no individual right to possess a firearm."[161] Similarly, an Eighth Circuit opinion refrained from any mention of Congress' 1986 declaration in arguing that the Second Amendment does not protect possession of a type of firearm unless the possessor demonstrated his nexus with a militia.[162]

---

[161] United States v. Cassidy, 899 F.2d 543, 549 n.12 (6th Cir. 1990). Commenting on this statement, United States v. Hammonds, 786 F.Supp. 650, 657 n.5 (E.D.Mich. 1992) notes:

> However, throughout the seven years that Congress dealt with the amendments to the Gun Control Act that are presently at issue, in enacting the 1986 amendments the Legislature approached this matter with clearly stated belief that there is a constitutionally protected individual "right" to possess firearms.
>
> In fact, Congress expressly so stated in the Federal Firearms Owners' Protection Act of 1986 . . . .

Quoting Congress' declaration, the court added:

> Although this expression is not, of course, dispositive of the issue of whether there is a Constitutional right, the fact that key legislators and the Act itself expressed the belief that such a "right" exists is reflective upon the context of the debate and consideration of this legislation, and, of course, Congressional intent. id.

[162] United States v. Hale, 978 F.2d 1016, 1018-20 (8th Cir. 1992). This case concerned the paradox in the Firearms Owners' Protection Act that it prohibited possession of machineguns. 18 U.S.C. §922(o). Concurring in Hale, Circuit Judge Beam more cautiously wrote:

> I also agree that Hale's possession of the particular weapons at issue in this case is not protected by the Second Amendment. I disagree, however, that Cases v. United States, 131
>
> (continued...)

The Eighth Circuit opinion even brushes aside[163] the following clear statement by the Supreme Court in 1990 in United States v. Verdugo-Urquidez that "the people" protected by the Second Amendment are individuals, not states:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[164]

Wholly aside from the Second Amendment, a last-minute floor amendment which became part of the Firearms Owner's Protection Act has given rise to a renewed jurisprudence concerning the enumerated powers of Congress. This equivocal provision of the Act was interpreted to ban possession of machineguns made after 1986, resulting in the refusal by the Department of the Treasury to register them under the National Firearms Act.[165] Under one line of cases, NFA

---

[162](...continued)
F.2d 916 (1st Cir. 1942); United States v. Warin, 530 F.2d 103 (6th Cir.1976); United States v. Oakes, 564 F.2d 384 (10th Cir.1977) and United States v. Nelson, 859 F.2d 1318 (8th Cir.1988) properly interpret the Constitution or the Supreme Court's holding in United States v. Miller, 307 U.S. 174 . . . (1939) insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes. Id. at 1021.

[163] 978 F.2d at 1020.

[164] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[165] Farmer v. Higgins, 907 F.2d 1041 (11th Cir. 1990) (construing 18 U.S.C. §922[o]).

registration requirements were ruled unconstitutional as applied to otherwise prohibited firearms for which BATF will not accept tax payments.[166] These cases rely in part on the explanations by the proponents of the NFA in 1934 that Congress has no enumerated power to prohibit possession of firearms, and could require registration of machineguns only to collect revenue. The Justice Department originally agreed with these cases.[167] Under another line of cases, the registration requirements could be sustained under the commerce power, although Congress passed them strictly under the tax power.[168]

Does Congress have power to prohibit mere possession of a firearm at a local school? The Ninth Circuit upheld the Gun Free School Zones Act of 1990 as a exercise of the interstate commerce power,[169]while the Fifth Circuit ruled the Act as beyond Congress' Article I, §8 powers

---

[166] United States v. Rock Island Armory, Inc., 773 F.Supp. 117 (C.D.Ill. 1991), appeal dismissed, 1991 U.S.App.Lexis 19505 (7th Cir. 1991); United States v. Dalton, 960 F.2d 121 (10th Cir. 1992). These cases have been approvingly cited in United States v. Parker, 960 F.2d 498, 500 (5th Cir. 1992); United States v. Ferguson, 788 F.Supp. 580, 581 (D.D.C. 1992); United States v. Aiken, 787 F.Supp. 106, 107-8 (D.Md. 1992, aff'd 974 F.2d 446, 448-50 (4th Cir. 1992); United States v. Kurt, 988 F.2d 73, 75-76 (9th Cir. 1993).

[167] "The United States agrees that the foregoing decisions [Dalton and Rock Island] are persuasive and should control the disposition of this appeal, and . . . [defendant's] conviction under 26 U.S.C. § 5861(d) should be vacated . . . ." Joint Motion for Remand, United States v. Kirk, No. 91-8418, granted (5th Cir. 1992). See Brief for the United States [on cert. petition], Staples v. United States, 92-1441 (Justice Department has instructed U.S. Attorneys not to prosecute under NFA because the government will not accept registration forms).

[168] United States v. Jones, 976 F.2d 176, 182-84 (4th Cir. 1992); United States v. Ross, 9 F.3d 1182, 1192-94 (7th Cir. 1993); United States v. Ardoin, 19 F.3d 177 (5th Cir. 1994) (2-1 opinion), petition for cert. pending.

[169] United States v. Edwards, 13 F.3d 291 (9th Cir. 1993).

and as unconstitutional under the Tenth Amendment.[170] The latter case did not involve the transportation of a firearm by a law-abiding citizen in a vehicle for lawful purposes on a public road within 1,000 feet of a school, which is also defined as within a school zone. The Court of Appeals noted of that situation:

> It is also conceivable that some applications of section 922(q) might raise Second Amendment concerns. Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here. For an argument that the Second Amendment should be taken seriously, see Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989).[171]

The Fifth Circuit also noted that in the Firearms Owners' Protection Act of 1986, Congress explicitly recognized "the rights of citizens . . . to keep and bear arms under the second amendment . . . ."[172] The Supreme Court has granted certiorari to review the Fifth Circuit's holding that the Act is unconstitutional.

Congress may expand but not contract constitutional rights recognized by the Supreme Court.[173] When Congress construes a Bill of Rights guarantee broadly, it reflects the interests of the people at large, who influence Congress through the rights of petition and suffrage and, in the final analysis, keeping and bearing arms.[174]

---

[170] United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993).

[171] Id. at 1364 n. 46.

[172] Id. at 1355.

[173] J. Nathanson, Congressional Power to Contradict the Supreme Court's Constitutional Decisions, 27 WM. & MARY L.REV. 331 (1986); Comment, When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? 141 UNIV.PA.L.REV. 1029 (1993).

[174] On the populist and structural core of the Second Amendment, See A. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1162-73 (1991); E. Scarry, War and the Social

(continued...)

St. George Tucker, who wrote the first major commentaries on the Bill of Rights, recognized the role of the people in respect to the enforcement of the Bill of Rights as follows: "A bill of rights may be considered, not only as intended to give law, and assign limits to a government about to be established, but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated . . . ."[175] Thus, when a Congressional declaration reflects the people's understanding of a constitutional right, a court should be loath to enforce its own narrow interpretation. In the United States, there is a firearm in half of all households, and every firearms owner believes that he or she is one of "the people" protected by the Second Amendment.[176]

Tucker adhered to the then-incipient view that the courts are duty bound to declare statutes contrary to the Constitution as void. Tucker elaborated as follows:

> If, for example, a law be passed by congress, prohibiting the free exercise of religion, according to the dictates, or persuasions of a man's own conscience; or abridging the freedom of speech, or of the press; or the right of the people to assemble peaceably, or to keep and bear arms; it would, in any of these cases, be the providence of the judiciary to pronounce

---

[174](...continued)
Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U.PA.L.REV. 1257 (1991).

[175] TUCKER, BLACKSTONE'S COMMENTARIES App. 308 (1803).

[176] The Hearst Corporation reported: "Half (50%) of the American population wrongly believe the Constitution gives every citizen the right to own a handgun." THE AMERICAN PUBLIC'S KNOWLEDGE OF THE U.S. CONSTITUTION: A HEARST REPORT 27 (1987) (emphasis added). If this statement reflects the political agenda of the power elite, which is known to be adverse to firearms ownership in the community, it also illustrates the point made by St. George Tucker: the Bill of Rights (including the Second Amendment) is written in a manner so as to be understood by commoners, who rightly believe that it means what it says. The percentage who Hearst claims "wrongly" believe that the Second Amendment protects the right of every citizen may well be higher than 50%. The existence of these persons nicely illustrates C. Wright Mills' point that America has not reached totalitarianism because "media markets are not entirely ascendant over primary publics." MILLS, THE POWER ELITE 304 (1956).

> whether any such act were constitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act. . . . The judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shaft of faction and violence.[177]

The above doctrine would be adopted by the U.S. Supreme Court in Marbury v. Madison in 1803.[178] However, the federal judiciary may be shy about protecting certain constitutional rights. The right of the people to keep and bear arms prevents a state monopoly of force and threatens absolute concentration of power in the hands of the few. Federal judges are appointed, not elected, and some courts have not bent over backwards to protect this right. It is noteworthy that some of the strongest precedents protecting the right to keep and bear arms under the state bills of rights were decided by elected judges.[179] Paradoxically, the broad interpretation of the Second Amendment in congressional enactments is a correct statement about the nature of the right to which courts should defer when considering the validity under the Constitution of specific enactments of Congress and the States.

In sum, Congress has reaffirmed and embellished the Second Amendment on three occasions. In the Freedmen's Bureau Act of 1866, Congress guaranteed to the freed slaves "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal liberty . . ., including the constitutional right to bear arms." Again, in the war-time Property Requisition Act of 1941, Congress prohibited any construction which would "require the registration of any firearm possessed

---

[177] Id. at 357.

[178] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[179] E.g., City of Princeton v. Buckner, 377 S.E.2d 139 (W.Va. 1988); State v. Kessler, 289 Ore. 359, 614 P.2d 94 (1980).

by any individual for his personal protection or sport" or would "infringe in any manner the right of any individual to keep and bear arms." Finally, in the Firearms Owners' Protection Act of 1986, Congress found that "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution" required legislation to correct the Gun Control Act and BATF enforcement policies, and enforced this with a prohibition on the registration of firearms owners.

These Congressional declarations are directed to the basic political units. A declaration of a constitutional right reflects a consensus and a form of self-discipline in the Congress itself. It is an assurance to the people at large that their rights are recognized and will be enforced, and functions to admonish and encourage the people to stand up for their rights through every constitutional means. It is a directive to the executive branch (1) to enforce the right against state, local, and private action (the Freedmen's Bureau Act and, and in regard to interstate travel, the Firearms Owners' Protection Act) or (2) not to infringe on the right through the promulgation of rules and regulations (the Property Requisition Act and the Firearms Owners' Protection Act).[180] Finally, a declaration is an emphatic statement by the popular branch to the appointed judiciary that the right to keep and bear arms is a fundamental, individual right and should be recognized as such, and that statutes regulating firearms should be narrowly construed against the government and in favor of the people.

Recognition of the constitutional right of individuals to keep and bear arms originated in 1789 in the United States Congress, which has explicitly reaffirmed this right in 1866, 1941, and 1986. At the same time, Congress has enforced this right by mandating that the government may not require the registration of firearms and firearms owners. As the republic enters its third century, it remains to be seen whether Congress will continue to protect this provision of the Bill of Rights, and

[180] These acts enforced this right against specific executive action by prohibiting registration.

whether the courts will defer to the popular branch's broad interpretations of constitutional rights.