

FIREARM SOUND MODERATORS: ISSUES OF CRIMINALIZATION AND THE SECOND AMENDMENT

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INTRODUCTION

“Exposure to noise greater than 140 dB [decibels] can permanently damage hearing,” according to Dr. Michael Stewart, Professor of Audiology at Central Michigan University. “Almost all firearms create noise that is over the 140-dB level.”¹ However, “studies have shown that only about half of shooters wear hearing protection all the time when target practicing. Hunters are even less likely to wear hearing protection because they say they cannot hear approaching game or other noises.”²

“A single shot from a large caliber firearm, experienced at close range, may permanently damage your hearing in an instant,” writes Dr. Brian J. Fligor of Harvard Medical School.³ That means that most hunters likely suffer from such damage. He adds: “Loud explosions (that peak for a few milliseconds at levels greater than 130–140 dB) may cause immediate hearing loss (this is called ‘acoustic trauma’).”⁴ While recommending hearing protection devices, he also advises to “try to reduce noise at the source,” such as by “replacing mufflers” and

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¹ Michael Stewart, *Recreational Firearm Noise Exposure*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION, <http://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/> (last visited Oct. 20, 2015) (alteration in original) (“A small .22-caliber rifle can produce noise around 140 dB, while big-bore rifles and pistols can produce sound over 175 dB.”).

² *Id.*

³ Brian J. Fligor, *Prevention of Hearing Loss from Noise Exposure*, BETTER HEARING INSTITUTE 3 (2011), <http://clienthiadev.devcloud.acquia-sites.com/sites/default/files/BHI-noiseGuide.pdf>.

⁴ *Id.* at 6.

avoiding “ineffective mufflers” on tools and yard equipment.⁵ For firearms, reducing noise at the source would mean using sound moderators, otherwise known as silencers or suppressors.

Many shooters and hunters grew up using no ear protection. At some point they tried plugging cotton in the ear and found that it did nothing.⁶ Disposable earplugs came next, then earmuffs, and then earplugs molded to fit an individual’s ear.⁷ The National Institute for Occupational Safety and Health recommends that “hunters and shooters use double hearing protection every time a weapon is fired. Double protection involves wearing both earplugs and earmuffs.”⁸ But even the use of a single device makes it hard for a hunter to hear wildlife, and may inhibit one’s ability to hear range commands, which can cause accidents. That said, some recommend use of light ear protection even if noise suppressors are used.⁹

It might be speculated that most of America’s gun owners—there are an estimated eighty-nine firearms out of every one-hundred residents¹⁰—have some hearing damage, but no reliable figures exist. However, at the top of the list of service-connected disabilities of all military veterans appears “tinnitus,” or ringing in the ear (1,121,709 vets), and hearing loss (854,855), followed by post-traumatic stress disorder (648,992) and various other physical disabilities. Total recipients of disability payments amount to 4,120,238, for annual payments of \$54.92 billion.¹¹ While obviously not all cases of tinnitus and hearing loss are attributable to gunfire, by definition, that cause figures high in military service.

⁵ *Id.* at 7.

⁶ *They’re Your Ears: Protect Them: Hearing Loss Caused by Farm Noise is Preventable*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 2007), <http://www.cdc.gov/niosh/docs/2007-175/pdfs/2007-175.pdf>.

⁷ John Franks, *Why Choose Custom-Moulded Over Disposable Earplugs?*, INDUSTRIAL SAFETY & HYGIENE NEWS 5 (Aug. 2012), <http://www.ishn.com/ext/resources/Resources/white-papers/Why-choose-Custom-over-Disposable-Earplugs-FINAL-0912-copy.pdf?1409239043>.

⁸ William J. Murphy et al., *Firearms and Hearing Protection*, 3 HEARING REV. 36 (Mar. 6, 2007), <http://www.hearingreview.com/2007/03/firearms-and-hearing-protection>. (“Earplugs were able to reduce the peak SPL by 10-30 dB and standard earmuffs yielded 20-38 dB of peak reduction.”).

⁹ Ilkka Kyttälä & Rauno Pääkkönen, *Suppressors and Shooting Range Structures*, SUPPRESSOR PROJECT § 15 (1995), <http://www.guns.connect.fi/rs/suppress.html>.

¹⁰ Aaron Karp, *Estimating Civilian Owned Firearms*, 9 SMALL ARMS SURVEY RESEARCH NOTES 2 tbl.1 (Sept. 2011), http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-9.pdf.

¹¹ *Compensation: Service-Connected Disability or Death Benefits*, U.S. DEP’T OF VETERANS AFF. 5 (Aug. 17, 2014), http://www.benefits.va.gov/REPORTS/abr/ABR_FY_2013_Compensation_07172014.pdf.

Some of the most advanced studies on the effects of gunfire and other military activities on hearing have been conducted in relation to soldiers in the Finnish Defence Force. Attenuation of noise was found deficient because, among other reasons, earplugs do not always fit properly in ear canals; further, earplugs and earmuffs deteriorate communication between personnel and can thus increase the risk of accidents.¹²

Devices to reduce noise at its source are ubiquitous in modern society. But imagine if you had to register with the government, obtain permission of law enforcement, submit fingerprints, and pay a \$200 tax in order to have a muffler on your automobile or lawn mower.¹³ You have to do exactly that to obtain a device to muffle the noise from your firearm, and if you fail to do so, you can be imprisoned for ten years.¹⁴ There appears to be a perception that only a gangster would want to reduce such noise. Myth or reality?

Despite the legal restrictions, almost 800,000 silencers are registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) as of 2015.¹⁵ It is lawful to possess noise suppressors in forty-one states, and to use them for hunting in thirty-seven states.¹⁶ That indicates a broad recognition of legitimate uses of suppressors not only to protect one’s hearing, but also for such purposes as reduction of loud noise that may disturb others¹⁷ or spook game.¹⁸

The following analyzes the extensive restrictions on suppressors

¹² R. Paakkonen & K. Lehtomaki, *Protection Efficiency of Hearing Protectors Against Military Noise from Handheld Weapons and Vehicles*, 7 NOISE & HEALTH 11 (2005), <http://www.noiseandhealth.org/article.asp?issn=1463-1741;year=2005;volume=7;issue=26;spage=11;epage=20;aulast=Paakkonen>.

¹³ 26 U.S.C. §§ 5811–12 (2012).

¹⁴ *See id.* §§ 5845(a), 5871.

¹⁵ BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICAL UPDATE 2015, U.S. DEP’T JUSTICE 15 (2015), <https://www.atf.gov/file/89561/download>.

¹⁶ *Benefits of Using Suppressors for Hunting and Shooting Sports*, NATIONAL SHOOTING SPORTS FOUNDATION (2015), <http://www.nssf.org/factsheets/PDF/Suppressors.pdf>.

¹⁷ A Finnish study on use of suppressors at rifle ranges showed that “[a]ll rifle suppressors reduced the shooter’s exposure from the original 160 ± 3 decibels to below the EU risk limit 140 dB,” and that “[i]f noise level decreases by 6 dB, distance to the neighbor can be halved.” KYTTÄLÄ & PÄÄKKÖNEN, *supra* note 9, §§ 1a, 13.

¹⁸ “The situations where a group of hunted animals react by fleeing to the sound of a firearm being discharged is so universal to be axiomatic.” Martin MacCarthy et al., *An Investigation into the Use of Sound Moderators on Firearms for Game & Feral Management in New South Wales*, SHOOTERS & FISHERS PARTY 43 (July 2011), <http://www.shootersandfishers.org.au/files/6/533938269/sound-moderator-report-july-2011.pdf>.

set forth in the federal firearm laws, which include one set of restrictions that make it difficult for anyone to possess one, and a separate set of restrictions that prohibit possession by felons and other untrustworthy persons and punish criminal misuse thereof. It then sets forth a lengthy historical and legislative narrative showing how suppressors came to be restricted, albeit without evidence of criminal misuse. Next, this article summarizes certain data and precedents that shed light on whether suppressors are actually used in crime to any significant extent. Following that is a discussion of whether suppressors might be protected to some extent by the Second Amendment, which guarantees the right to keep and bear “arms.” That includes reference to the laws of European countries that do not reflect a need for stringent provisions. It concludes with a call for dialogue on whether the time has come to reevaluate how suppressors are regulated.

I. FEDERAL RESTRICTIONS ON FIREARM SILENCERS AND MUFFLERS

A. *Definitions*

A noise suppressor is defined as a “firearm” under Title I of the Gun Control Act (“GCA”) and is thus subject to all provisions applicable to firearms. 18 U.S.C. § 921(a)(3) provides in part: “The term ‘firearm’ means (A) any weapon . . . which will . . . expel a projectile by the action of an explosive; . . . (C) any firearm muffler or firearm silencer . . .” Section 921(a)(24) provides the following further definition:

The terms “firearm silencer” and “firearm muffler” mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

The above definitions are only for regulatory purposes. In ordinary language, a noise suppressor is not a firearm. “[A]lthough silencers are defined as ‘firearms’ . . . they are not actual weapons. They cannot be fired or discharge projectiles.”¹⁹ Moreover, the term “silencer” is a misnomer, in that—despite movie fantasies—a noise suppressor reduces decibels, but does not actually “silence” the discharge of a firearm. Noise may be muffled or diminished, and maybe by only a few decibels at that, but it can still be heard.²⁰

¹⁹ *United States v. Ritsema*, 31 F.3d 559, 562 (7th Cir. 1994).

²⁰ 1 ALAN C. PAULSON, *SILENCER HISTORY AND PERFORMANCE* 67, 69–70 (1996).

While the definition includes “any device for silencing, muffling, or diminishing the report of a portable firearm,” it does not include a device that incidentally has the effect of a silencer, nor does it include various firearm features that muffle or diminish the report of a firearm.²¹ Certain muzzle attachments are devices that may incidentally decrease noise but are not intended “for” that purpose,²² and noise may also be reduced merely by lengthening a firearm barrel²³ or by using a subsonic or lower powered cartridge (e.g., a .22 cal. rimfire round in place of a .45 cal. round).

The National Firearms Act (“NFA”) defines “firearm” to include certain narrow categories of guns, but also includes “any silencer (as defined in section 921 of Title 18, United States Code). . . .”²⁴ Other items defined as “firearm[s]” in the NFA include machineguns, shotguns with barrels under eighteen inches, and destructive devices, such as bombs and artillery.²⁵ Classifying a device that simply reduces harmful noise with major weapons of war could be viewed as bizarre, especially in light of GCA restrictions on suppressors, discussed below.

B. GCA Restrictions Applicable to Noise Suppressors

1. Provisions Applicable to Criminal Misuse and Prohibited Persons

A major focus of the GCA is to punish severely the criminal possession or misuse of firearms. Using or carrying a firearm during and in relation to, or possession in furtherance of, a “crime of violence” or “drug trafficking crime” punishable in a federal court²⁶ subjects a person to five years imprisonment, and if the firearm “is equipped with a firearm silencer or firearm muffler,” the person must be sentenced to *not less than thirty years* imprisonment.²⁷ For a second conviction for such use of a silencer, “the person shall . . . be sentenced to *imprisonment for life*.”²⁸ Conspiracy to commit the above subjects a person to

²¹ See 18 U.S.C. § 921(a)(24) (2012).

²² See *infra* notes 159–62 and accompanying text.

²³ Brandon Louis Clark, *Effect of Barrel Length on the Muzzle Velocity and Report from a Mosin-Nagant 7.62x54R Rifle*, UNIV. OF SOUTH FLA. (2011), <http://honors.usf.edu/documents/thesis/u82488180.pdf> (“[T]he report and muzzle blast increas[e] as the barrel length decreases.”).

²⁴ 26 U.S.C. § 5845(a)(7) (2012).

²⁵ *Id.* §§ 5845(a)(1), (6), (8), 5845(f).

²⁶ 18 U.S.C. §§ 924(c)(1)(A), (c)(2)–(3) (2012). The states are free to punish similar acts under state laws regardless of whether they are punishable under federal law.

²⁷ *Id.* §§ 924(c)(1)(A), (B)(ii) (emphasis added).

²⁸ *Id.* § 924(c)(1)(A), (C)(ii) (emphasis added).

imprisonment “for any term of years or life.”²⁹

Further, the GCA prohibits transfer or sale of a “firearm” (again, including a muffler or silencer) to, and prohibits possession of a firearm by, certain categories of persons who are considered untrustworthy. They include: convicted felons, fugitives, unlawful drug users and addicts, persons who were ever committed to a mental institution, illegal aliens, persons subject to domestic restraining orders, and persons convicted of misdemeanor crimes of domestic violence.³⁰ Violation is punishable by ten years imprisonment.³¹

2. Background Checks and Provisions Applicable to Law-Abiding Persons

Because noise suppressors are “firearms” under the GCA, they are subject to all of the GCA requirements regulating firearms. Manufacturers and dealers must be licensed by ATF, and engaging in the business without a license is punishable with five years imprisonment.³² Licensees must keep records of receipt and transfer of firearms, and their records, inventory, and premises are subject to inspection by ATF.³³ Like other firearms, silencers must be marked with a serial number,³⁴ and thus may be traced by ATF in any bona fide criminal investigation.³⁵

A dealer with federal firearms license (“FFL”) may transfer a firearm to a non-licensee only after a check under the National Instant Criminal Background Check System (“NICS”), and failure to do so is punishable by imprisonment for one year.³⁶ There is an exception for a transfer that has been approved under the NFA,³⁷ which also requires a background check. Thus, if suppressors were not subject to the NFA, transferees would undergo NICS checks. NICS checks rely on databases that identify prohibited persons and are conducted by the FBI or

²⁹ *Id.* § 924(o).

³⁰ *Id.* § 922(d)(1)–(9), (g)(1)–(9).

³¹ *Id.* § 924(a)(2).

³² 18 U.S.C. §§ 922(a)(1)(A)–(B), 924(a)(1)(C) (2012); *see also* Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Apply for a License: How to Become a Federal Firearms Licensee*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, www.atf.gov/firearms/apply-license (last visited Nov. 21, 2015).

³³ 18 U.S.C. § 923(a), (g) (2012).

³⁴ *Id.* at § 923(i). Besides the serial number, an importer or manufacturer must place the following further information on the firearm: model, caliber or gauge, and the name, city and state of the importer or manufacturer. 27 C.F.R. § 478.92(a)(1)(i), (ii)(A)–(E) (2014).

³⁵ 18 U.S.C. § 923(g)(1)(B)(iii), (g)(1)(D)(7) (2012).

³⁶ *Id.* §§ 922(t)(1)(A), 924(a)(5).

³⁷ *Id.* § 922(t)(3)(B).

state authorities.³⁸ As noted, a firearm, including a silencer, may not be transferred to a convicted felon or any of the other disqualified persons listed above.

One may transfer and receive a firearm only within one's state of residence and only in compliance with state law. Violation is punishable by imprisonment for five years.³⁹ Thus, a suppressor may be bought or sold only if consistent with state law.

Numerous other restrictions on firearms are set forth in the GCA and related ATF regulations,⁴⁰ and they all apply as well to silencers. Thus, the GCA includes a comprehensive array of restrictions to keep firearms out of the hands of prohibited persons.

C. NFA Restrictions Applicable to Noise Suppressors

By being defined as a "firearm" in the NFA, a suppressor is subject to the same strict requirements involving registration, taxation, and approval by the government that apply to machine guns and artillery.⁴¹ NFA firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Attorney General (who acts through ATF).⁴² The making and transfer of an NFA firearm requires payment of a \$200 tax, submission of fingerprints and other information, and approval by ATF.⁴³

To approve an application to make or transfer an NFA firearm, ATF regulations require applicants to obtain a certificate by local or state law enforcement, without which it will be denied.⁴⁴ However, they are not federal employees, and thus "these officials have the discretion to execute or not execute the required certifications."⁴⁵ It takes ATF six months to process an ATF Form 4 "Application for Tax Paid Transfer and Registration," which is required to transfer a silencer or other NFA firearm.⁴⁶

It is unlawful to transfer, receive, or possess a firearm in violation of any of the NFA provisions (the quintessential violation being "to

³⁸ 28 C.F.R. § 25.1 (2014).

³⁹ 18 U.S.C. §§ 922(a)(3), (5), (b)(2)–(3), 924(a)(1) (2012).

⁴⁰ 27 C.F.R. § 478.1–.171 (2014).

⁴¹ 26 U.S.C. § 5845(a) (2012) (defining "firearm").

⁴² *Id.* § 5841(a).

⁴³ *Id.* §§ 5811(a), 5812(a) ("transferring" firearms), 5821(a), 5822 ("making" firearms).

⁴⁴ 27 C.F.R. §§ 479.63 ("making" firearms), 479.85 ("transferring" firearms) (2014).

⁴⁵ T.D. ATF-270, 53 Fed. Reg. 10480, 10488 (Mar. 31, 1988).

⁴⁶ Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Enforcement Programs and Services Processing Times*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/file/11831/download> (last updated Dec. 31, 2014).

receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . .”).⁴⁷ Violation subjects a person to a fine of \$10,000 and ten years imprisonment.⁴⁸

The NFA is Chapter 53 of the Internal Revenue Code, and not surprisingly violation thereof involves paperwork and taxes applicable to all persons, rather than to possession or use of firearms in violent crimes. “Possession of unregistered silencers is a ‘victimless crime,’” and indeed, “the silencer alone cannot cause injury, nor does the device itself look like a weapon . . .”⁴⁹ This raises the issue of what would be the effects of removing suppressors from the NFA.

D. Effects of Removing Suppressors from the National Firearms Act

Thinking outside the current paradigm, the National Firearms Act could be amended by deleting the term “silencer” from its definitions of “firearms.”⁵⁰ The effect would be that a silencer would no longer be subject to the NFA’s registration and taxation provisions.

That would leave suppressors still defined as “firearms” under the Gun Control Act and thus subject to all of its provisions, including manufacturer markings so they can be traced, licenses for dealers, recordkeeping and inventory subject to ATF inspection, background checks on purchasers, prohibition on possession by felons and other disqualified persons, and enhanced incarceration for use in drug trafficking and violent crime.

Removal of suppressors from the NFA would have no effect on the laws of the nine States that prohibit them. The GCA prohibits a licensee from transferring a firearm to a person in a State where the purchase or possession thereof would violate State or local law.⁵¹ Thus, suppressors would remain unlawful in the States that prohibit them.

The first step in consideration of why suppressors might be removed from the NFA involves a historical analysis of how they got there in the first place. Get ready for a rendition of the insightful truism: “Laws are like sausages, it is better not to see them being made.”

⁴⁷ 26 U.S.C. § 5861(d) (2012).

⁴⁸ *Id.* § 5871.

⁴⁹ *United States v. Ritsema*, 31 F.3d 559, 565–66 (7th Cir. 1994).

⁵⁰ Specifically, 26 U.S.C. § 5845(a), which defines “firearm,” could be amended by deleting “(7) any silencer (as defined in section 921 of Title 18, United States Code),” and renumbering the current “(8)” to “(7)”.

⁵¹ 18 U.S.C. § 922(b)(2) (2012).

II. THE TORTUROUS HISTORY OF HOW NOISE SUPPRESSORS CAME TO BE RESTRICTED

A review of the historical background explains how mere noise suppressors came, paradoxically, to be placed in the National Firearms Act of 1934 in the same category as machine guns and short-barreled shotguns. Astonishingly, no facts or data were ever set forth in the legislative record suggesting that suppressors were a crime problem. The legislative history also demonstrates how, independently of the NFA, wholly separate restrictions focusing on keeping suppressors out of the hands of prohibited persons and punishing criminal misuse developed in the Federal Firearms Act of 1938, the Gun Control Act of 1968, and the Firearm Owners' Protection Act of 1986. NFA restrictions became arguably superfluous upon enactment of these provisions.

A. *Innocent Origins: Invention and Early Use of Suppressors*

"The Maxim Silencer was developed to meet my personal desire to enjoy target practice without creating a disturbance," wrote Hiram Percy Maxim, inventor of the first successful firearm noise suppressor. "I have always loved to shoot, but I never thoroughly enjoyed it when I knew that the noise was annoying other people. It occurred to me one day that there was no need for the noise. Why not do away with it and shoot quietly?"⁵²

Maxim was a genius who designed some of the first gasoline and electric automobiles.⁵³ "The silencer grew out of Hiram's efforts to improve the gasoline automobile, which in the early years of the century made a fearful racket."⁵⁴ Maxim described the simplicity with which he conceived of how to decrease the noise in the discharge of a firearm:

One morning after my bath, I noticed in the bath tub the miniature whirl pool that forms over the drain hole when the plug is pulled and the water starts to run out. There was the familiar little hole down in the center of the whirl and it started me thinking that here was an exactly similar case to my powder gas and bullet problem. Here was water in a bath tub, the drain plug being pulled out, and yet the water was able to run out, but slowly because it was whirling.

Why would not the powder gases act the same way as the water,

⁵² Hiram Percy Maxim, *Foreword* to HIRAM PERCY MAXIM, EXPERIENCES WITH THE MAXIM SILENCER 2 (1915), <http://www.silencerresearch.com/maximletters.pdf>.

⁵³ See HIRAM PERCY MAXIM, HORSELESS-CARRIAGE DAYS (Dover Pubs. 1962) (1936).

⁵⁴ STEPHEN B. GODDARD, COLONEL ALBERT POPE AND HIS AMERICAN DREAM MACHINES: THE LIFE AND TIMES OF A BICYCLE TYCOON TURNED AUTOMOTIVE PIONEER 227 (2000).

if they were whirled? . . .

I immediately made a little “whirling tube” which would catch the powder gases as they burst from the muzzle of one of my rifles and whirl it around vigorously. In the center I provided a hole for the bullet to pass through but considerably larger than the bullet so it would not touch. The gases had no escape except through this central hole. Being central they could not possibly get out until they had slowed down. This of course meant that they must come out gradually and in consequence, noiselessly. . . .

This was the birth of the Maxim Silencer.⁵⁵

In his 1908 patent application, Maxim described a device mounted on “an ordinary sporting rifle” in which “the energy of the powder gases is dissipated in rotary or whirling movement of the gases before they pass into the atmosphere,” thereby reducing noise.⁵⁶ Maxim called his device a “silencer,” although it did not actually silence a gun. “Reduces noise and recoil and eliminates flash,” declared one of his advertisements, adding: “Ask any hardware or sporting goods dealer to show you one”⁵⁷ A .22 suppressor could be had for \$5.00.⁵⁸ “Makes target practice and small gun shooting a fascinating pastime for the whole family,” declared another ad.⁵⁹

Maxim published a brochure with the front cover showing two finely-dressed ladies with suppressor-equipped rifles and consisting of “letters from sportsmen in all parts of the country.”⁶⁰ A hunter thought the device was “a very good thing from the humane standpoint and also for saving the game,” for if the first shot only wounded a deer, the noise would not frighten it away, and a second shot could be fired to dispatch the animal.⁶¹ A member of a “Noise-less Trap Shooting Club” described how use of the device with low-caliber shot cartridges “enables

⁵⁵ MAXIM, EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 52, at 2–3.

⁵⁶ U.S. Patent No. 958,935 col. 1 l. 11–14, col. 2 l. 62 (filed Nov. 30, 1908).

⁵⁷ Hardrada55, *Silencer Winchester 1903*, PHOTOBUCKET, <http://i65.photobucket.com/albums/h224/Hardrada55/Maxim%20Silencer/LotImg35393.jpg> (last visited Dec. 20, 2015).

⁵⁸ Hardrada55, *Maxim Silencers*, PHOTOBUCKET, <http://i65.photobucket.com/albums/h224/Hardrada55/Maxim%20Silencer/shooting-without-noise-article-pg-2.jpg> (last visited Dec. 20, 2015); Brochure, *Maxim Silencer: It Will Pay To Know About It*, FORGOTTENWEAPONS.COM 5, <http://www.forgottenweapons.com/wp-content/uploads/Maxim%20silencer/Maxim%20Silencer%20brochure.pdf> (last visited Dec. 20, 2015).

⁵⁹ POPULAR SCIENCE MONTHLY, April 1920, at 128 (advertisement for Maxim Silencer). Still another: “Train to be a marksman. . . . Shoot without disturbing anyone. Get up a club and have fun all the season. . . . Girls like it when there’s no nerve-ripping report. . . . No nervous clutching—no bruising of shoulder.” POPULAR SCIENCE MONTHLY, Oct. 1917, at 146.

⁶⁰ MAXIM, EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 52, at 1, 3.

⁶¹ *Id.* at 11.

us to enjoy trap shooting on the front lawn without disturbance or danger.”⁶² The owner of a suppressed Featherweight Savage .303 rifle wrote that it could “be shot mostly by a slightly built lady who is enthusiastic over the idea of being able to kill big game without having her shoulder battered to the various colors of the rainbow by her high power arm.”⁶³

Maxim’s suppressor had not been on the market long before crank-extraordinaire William T. Hornaday published his *Our Vanishing Wildlife* (1913), which railed against both improved firearms and ethnic groups such as Italians and blacks.⁶⁴ Hornaday saw catastrophe looming in the use of more accurate rifles and better binoculars, regretting also that “in Wyoming the Maxim silencer is now being used.”⁶⁵ But he first trained his wrath on disfavored ethnic groups. Because “all members of the lower classes of southern Europe are a dangerous menace to our wild life,” he proposed a law to “[p]rohibit the use of firearms in hunting by any naturalized alien from southern Europe until after a 10-years’ residence in America.”⁶⁶ He denounced the blacks and “poor white trash” of the South for hunting doves and other birds for food, claiming “[n]o white man calling himself a sportsman ever indulges in such low pastimes”⁶⁷ and harkened to the days “when the negroes were too poor to own guns”⁶⁸

But “[t]he time came when . . . single breech-loading guns went down to five dollars apiece. The negro had money now, and the merchants . . . sold him the guns, a gun for every black idler, man and boy,

⁶² *Id.* at 13.

⁶³ *Id.* at 14. “It will double the pleasure of your shooting and your advantage in hunting and target practice,” wrote another enthusiast. “Once you have enjoyed the experience of shooting quietly, you will never be satisfied with the old-fashioned noisy report.” *Id.* at 20. Still another opined:

Small game can be shot around camp without frightening away big game which may be in the neighborhood. Target practice can be enjoyed even at home with reduced velocity ammunition without the slightest disturbance being created. Marksmanship is improved because of the stopping of the report noise and reducing the recoil which stops the tendency to flinch, almost unavoidable when shooting a high power rifle.

Id. at 23.

⁶⁴ WILLIAM TEMPLE HORNADAY, *OUR VANISHING WILDLIFE: ITS EXTERMINATION AND PRESERVATION* 60 (Charles Scribner’s Sons 1913).

⁶⁵ *Id.* at 60.

⁶⁶ *Id.* at 100. “The Italians are spreading, spreading, spreading. If you are without them to-day, to-morrow they will be around you. Meet them at the threshold with drastic laws, thoroughly enforced” *Id.* at 102.

⁶⁷ *Id.* at 106.

⁶⁸ *Id.* at 110.

in all the South.”⁶⁹ The solution, as proposed in Alabama, was “a resident license law taxing every gun not less than five dollars a year,” a “gun tax which alone could have shut out three dollar guns and saved the remnant of the game.”⁷⁰ Guns could be banned by registering and taxing them out of existence.

Hornaday proceeded to rate the “degree of deadliness” in guns beginning with “Single-shot muzzle loader” and moving up to “Repeating rifle, with silencer,” and after that to “‘Pump’ shot-gun (6 shots)” and then “Automatic or ‘autoloading’ shot-guns, 5 shots,” at the top.⁷¹ He denounced as unsportsmanlike five-shot pump shotguns and self-loading shotguns, which he wrongly called “machine guns,” averring that “[t]he machine guns and ‘silencers’ are grossly unfair”⁷² He declared: “The use of automatic and pump shotguns, and silencers, should immediately be prohibited.”⁷³

Hornaday gave no explanation of why silencers should have been banned. A review of Hornaday’s book blamed “rapid transportation, improved fire-arms, smokeless powder, the ‘Maxim silencer,’ the ‘pump gun,’ and like abominations” for the depletion of game birds and mammals.⁷⁴ It seems that modern technology was the great evil.

Meanwhile, to promote conservation and wildlife management, game regulators would focus on seasons, bag limits, and limiting the number of shots a gun would hold, not on banning the use of pump and self-loading guns. The Public Trust Doctrine, under which wildlife and natural resources must be promoted and preserved, was being implemented in game laws.⁷⁵ Early conservation efforts had no greater supporter than Teddy Roosevelt, who stood up for “unborn generations,” averring: “The movement for the conservation of wildlife and the larger movement for the conservation of all our natural resources are essentially democratic in spirit, purpose, and method.”⁷⁶

Roosevelt saw no evil in suppressors. An avid hunter and gun collector, Roosevelt had a Maxim suppressor on his 1894 Winchester lever-action rifle for culling varmints at his residence of Sagamore Hill

⁶⁹ HORNADAY, *supra* note 64, at 110.

⁷⁰ *Id.* at 113.

⁷¹ *Id.* at 145.

⁷² *Id.* at 146.

⁷³ *Id.* at 287.

⁷⁴ *A Plea For The Preservation Of Our Wildlife*, 54 THE DIAL 509, 509 (June 16, 1913) (reviewing WILLIAM T. HORNADY, *OUR VANISHING WILDLIFE* (1913)).

⁷⁵ The Wildlife Society et al., *The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada*, 10 TECHNICAL REVIEW 1, 12–15 (Sept. 2010), <http://www.emwh.org/pdf/conservation/public%20trust%20doctrine.pdf>.

⁷⁶ *Id.* at 2 (quoting Theodore Roosevelt).

on Long Island.⁷⁷ That was not the only one. “In 1909, for his trip to Africa, Roosevelt ordered a M1903 Springfield [rifle] fitted with a Maxim silencer”⁷⁸

After all, the Maxim device was just one of several types of suppressors that reduced hearing loss and noise pollution caused by modern technology. In a 1932 tribute, *TIME* magazine had this to say:

While mental hygienists, efficiency experts and city officials have been bewailing the maddening effects of city noise, Hiram Percy Maxim has been manufacturing noise mufflers at Hartford, Conn. Last week he announced that his Maxim Silencer Co. . . . will—besides continuing to make silencers for guns, motor exhausts, safety valves, air releases, in fact every kind of pipe which emits a gas—offer a consulting service in noise abatement. Chief abater will be “Dr. Shush,” the Maxim trademark character “Dr. Shush” is really Hiram Percy Maxim, noise’s bogeyman.⁷⁹

But the brief golden age of noise suppressors for firearms would not last. “The public and the press mistakenly assumed that the silencer would be a tool for evil and that criminals would attach it to their pistols,” writes historian Stephen B. Goddard. “It proved to be fodder for demagogues and in many states and countries was prohibited.”⁸⁰ While the innovation for that one product was killed, the principle was extended to “industrial silencers, which were utilized for gas and diesel engines, air compressors, and to suppress industrial noise. More widely significant was the adaptation of the silencing principle to auto mufflers, safety valves, air compressors, and blowers.”⁸¹ The company continues in existence today: “Maxim Silencers, Inc., located in Houston, Texas, manufactures a complete line of noise control, waste recovery and emission control equipment under the Maxim trade

⁷⁷ Max Slowik, *Teddy Roosevelt’s Suppressed 1894 Winchester*, GUNS.COM (May 18, 2012), <http://www.guns.com/2012/05/18/nra-national-firearms-museum-theodore-roosevelt-collection-suppressed-winchester-model-1894/>.

⁷⁸ LEROY THOMPSON, *THE M1903 SPRINGFIELD RIFLE 71* (Martin Pegler ed. 2013).

⁷⁹ *Science: Noise’s Bogeyman*, *TIME* (Jan. 4, 1932), <http://content.time.com/time/subscriber/article/0,33009,742801,00.html>. Maxim’s genius in the field has been summarized more recently as follows:

His work on silencing devices for motor vehicle exhaust systems brought him recognition as a scientist – and prominence in another field, acoustics and sound abatement. In 1908, he patented a unique weapon silencer (called the Maxim silencer), a practical application of his research. He went on to develop silencers for diesel and gasoline engines, air compressors, air conditioning, and other applications which are still utilized today.

Michael Marinaro, *A Diversified Mind: Hiram Percy Maxim*, CONNECTICUTHISTORY.ORG, <http://connecticuthistory.org/hiram-percy-maxim/> (last visited Oct. 19, 2015).

⁸⁰ GODDARD, *supra* note 54.

⁸¹ *Id.*

name.”⁸²

No doubt some criminals made limited use of suppressors, just as they used firearms and automobiles on an infinitely wider basis to perpetuate their misdeeds. Yet a popular book on the history of the gun in America uncovered nothing more than three 1920s news articles stating that Chicago police found that some lawbreakers had ordered Maxim catalogues and that New York hoodlums developed an interest in the devices.⁸³ It has also been said that suppressors were used by hungry poachers during the Depression to obtain food.⁸⁴

The predominant use of Maxim’s invention was undoubtedly by law-abiding citizens. That would not stop a new breed of Luddites from virtually banning the device without much thought in the sausage-making legislative process.

B. How Suppressors Ended Up in the National Firearms Act of 1934 but Pistols and Revolvers Did Not

The earliest attempts to restrict firearms at the federal level were aimed at handguns. In 1924, Senator John K. Shields (a Democrat from Tennessee) introduced a bill to prohibit importation and restrict interstate commerce of pistols.⁸⁵ He supported the bill in part with a report claiming that “we, the dominant race,” must suppress “the carrying by colored people of a concealed deadly weapon, most often a pistol.”⁸⁶ It continued: “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.”⁸⁷

A more modest enactment did pass in 1927 providing that “pistols, revolvers, and other firearms capable of being concealed on the person are hereby declared to be nonmailable”⁸⁸ Representative Miller, the author of the bill, stated that it did not apply to the “shotgun, the

⁸² MAXIM SILENCERS, INC., http://www.maximsilencers.com/about_us.html (last visited Oct. 19, 2015) (“Maxim offers silencers and mufflers designed to meet the most demanding applications and most strenuous requirements for engine or turbine exhaust noise control, silencing of high pressure vent application, economical recovery of waste heat, and effective control of exhaust emissions.”).

⁸³ LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 202 (1975).

⁸⁴ See J. DAVID TRUBY, *THE QUIET KILLERS* 18 (1992) (“I knew a few Depression era people who owed a lot of poached meals to Hiram Maxim.”).

⁸⁵ See 65 CONG. REC. 3945 (1924). Shields had played a major role in killing an anti-lynching bill in 1922. NAACP, *The Dyer Anti-Lynching Bill*, THIRTEENTH ANNUAL REPORT FOR THE YEAR 1922, 17, 24 (1923).

⁸⁶ 65 CONG. REC. 3946 (1924).

⁸⁷ *Id.*

⁸⁸ Act of Feb. 7, 1927, ch. 75, Pub. L. No. 69-583, 44 Stat. 1059.

rifle, or any firearm used in hunting or by the sportsman.”⁸⁹ Representative McKeown asked: “Is there anything in this bill that will prevent the citizens of Oklahoma from buying sawed-off shotguns to defend themselves against these bank-robbing bandits?” To which Representative Blanton replied: “That may come next. Sometimes a revolver is more necessary than a sawed-off shotgun.”⁹⁰

A hearing was held in 1930 on several bills which were modeled from alcohol Prohibition legislation. The bills severely restricted interstate commerce in pistols, revolvers, machine guns, and “shotguns, or rifles which have had their barrels sawed off or shortened” (without specifying a length), and allowed states to prohibit entry thereof within their borders.⁹¹ Silencers were not mentioned.

Besides gangsters, reference was made to “a danger of . . . the communists acquiring machine guns, . . . and using them whenever it suits their revolutionary plans.”⁹² Rep. Hamilton Fish, Jr., a New York Republican, suggested that Congress had a “right to stretch the constitutional provisions . . . even if it were aimed solely against the communists,” to which Rep. George Huddleson, an Alabama Democrat, replied: “You stretch the Constitution this way and then somebody else stretches it the other way—what is the use of a constitution, anyhow?”⁹³ The bills died.

The National Firearms Act (“NFA”) of 1934⁹⁴ was the first federal law of significance that restricted firearms. For items under its narrow definitions of the term “firearm,” registration was required, and a tax of \$200 was imposed for making and transfer thereof.

The initial NFA bill, H.R. 9066, would have defined “firearm” to mean “a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun.”⁹⁵ A muffler or silencer for a firearm *not* capable of being concealed on the person,

⁸⁹ 66 CONG. REC. 727 (1924).

⁹⁰ *Id.* at 729. Blanton argued that the bill would not “stop a single thug or a single bootlegger or a single murderer from carrying firearms unlawfully,” expressed Second Amendment concerns, and hoped that “every woman in America will learn how to use a revolver.” *Id.* at 727–28.

⁹¹ *Firearms: Hearing on H.R. 2569, H.R. 3665, H.R. 6606, H.R. 6607, H.R. 8633, and H.R. 11325 Before a Subcommittee of the H. Comm. on Interstate & Foreign Commerce*, 71st Cong. 1–3, 7 (1930).

⁹² *Id.* at 14 (statement of Rep. John E. Nelson).

⁹³ *Id.* at 17 (statement of Hon. Hamilton Fish, Jr.).

⁹⁴ National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2012)).

⁹⁵ *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 1 (1934) [hereinafter *National Firearms Act Hearings*].

such as a rifle or shotgun, was not included.

Attorney General Homer Cummings was the first witness in the hearings before the House Committee on Ways and Means, and he assured members that the bill would not affect “the ordinary shotgun or rifle.”⁹⁶ But revolvers, pistols, “sawed-off” shotguns, and machine guns must be taken from “roving criminals” like John Dillinger.⁹⁷

Apparently to set a limit on what can be considered a “firearm capable of being concealed on the person,” Rep. Harold Knutson, a Minnesota Republican, suggested adding a rifle with a barrel under eighteen inches, so as not to “make it impossible for our people to keep arms that would permit them to hunt deer.”⁹⁸ No one suggested that rifles with short barrels were a crime problem.

While much crime was committed with handguns, Rep. Claude A. Fuller of Arkansas pointed to “resentment on behalf of all law-abiding people to be regulated too much, especially about pistols.”⁹⁹ In response to his suggestion to remove pistols and revolvers from the bill and make “as strong a law as possible for sawed-off shotguns and machine guns,” Attorney General Cummings warned against any such “half-way measures.”¹⁰⁰ Chairman Robert L. Doughton of North Carolina asked why rifles and shotguns did not suffice for self-defense, and James A. Frear of Wisconsin thought that “the average person who carries a revolver” lived in “places that Dillinger and men of his type are found.”¹⁰¹

In the extensive hearings up to this point, not one word was said about criminal misuse of mufflers or silencers for concealable weapons. In response to the opposition to including pistols and revolvers in the bill, a draft substitute bill was put in the record that would have defined “firearm” as “a pistol or revolver of more than .22 caliber rim fire, a shotgun or rifle having a barrel less than 18 inches in length, or any other firearm capable of being concealed on the person, a firearm muffler or firearm silencer, or a machine gun.”¹⁰² This extended coverage from mufflers or silencers for concealable weapons, to any firearm muffler or silencer, including for rifles and shotguns.

Assistant Attorney General Joseph B. Keenan explained that .22 caliber rimfire pistols could be removed because they were used for

⁹⁶ *Id.* at 5 (statement of Homer Cummings, Attorney General of the United States).

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 13.

⁹⁹ *Id.* at 21–22.

¹⁰⁰ *Id.* at 22.

¹⁰¹ *National Firearms Act Hearings*, *supra* note 95, at 48.

¹⁰² *Id.* at 83, 88.

target practice and were not as formidable as other firearms.¹⁰³ But all other pistols must be restricted. In raids against gangsters, “we usually find the machine gun, but we always find a half dozen or 8 or 10 Colt automatics or some easily concealable firearm.”¹⁰⁴ The Chairman joked that “[t]he wooden pistol seems to have been used with great effect”¹⁰⁵—a reference to Dillinger’s escape from jail with a fake pistol a couple of months earlier.¹⁰⁶

In further discussion, Rep. Fuller suggested that a man who carried “a sawed-off shotgun or machine gun, or a silencer” would do so “for an unlawful purpose.”¹⁰⁷ That was the only vague reference in the entire hearings to a silencer being possessed for an unlawful purpose. Again, criminal use of pistols, revolvers, and machine guns dominated the hearings.¹⁰⁸

Maj. Gen. Milton A. Reckord, Executive Vice President of the National Rifle Association, testified in support of bills to punish criminals who possessed or used any kind of firearm, but added that the NRA would not oppose the pending bill if three words were deleted: “pistols and revolvers.”¹⁰⁹

On behalf of the Justice Department, Keenan pushed back hard, pointing out that criminals had been apprehended with pistols.¹¹⁰ Reckord rejoined that “it is going to be another Volstead Act” (the Prohibition law), as citizens would not register pistols and revolvers and “you are going to legislate 15 million sportsmen into criminals”¹¹¹ Charles V. Imlay, a member of the National Conference of Commissioners on Uniform State Laws, warned not to repeat “the same unhappy condition that you had under the Volstead Act, where liquors were contraband, and where any transfer of the liquor necessitates either a violation of the law or a very elaborate system of espionage and control.”¹¹²

The hearings closed without a single reference to any incident of

¹⁰³ *Id.* at 90 (statement of Joseph B. Keenan, Assistant Attorney General of the United States).

¹⁰⁴ *Id.* at 100.

¹⁰⁵ *Id.* at 101.

¹⁰⁶ See Chad Love, *Dillinger’s Fake Pistol Sells For \$20K*, FIELD AND STREAM: FIELD NOTES (May 11, 2010), <http://www.fieldandstream.com/blogs/guns/2010/05/dillingers-fake-pistol-sells-20k>. Dillinger escaped on March 3, 1934. *Id.*

¹⁰⁷ *National Firearms Act Hearings*, *supra* note 95, at 111.

¹⁰⁸ *Id. passim*.

¹⁰⁹ *Id.* at 115.

¹¹⁰ *Id.* at 117–18.

¹¹¹ *Id.* at 123.

¹¹² *Id.* at 141.

the criminal misuse of a muffler or silencer, and the only reference to one in a negative light being Rep. Fuller's offhand inclusion of them with firearms being carried for an unlawful purpose.¹¹³ The hearing record amounted to 166 pages. The handwriting was on the wall: more was said about criminal misuse of pistols and revolvers than any other weapon, but too many people possessed them such that they could not be subjected to strict regulation without creating another unworkable Prohibition. Machine guns and "sawed-off" shotguns, with were repeatedly condemned as criminal tools, and mufflers and silencers, which were not and which were virtually unmentioned, could be restricted because they did not have large constituencies.

Attorney General Cummings explained that the constitutional basis of the bill was the taxing power. Congress had no inherent police power to deal with local crime, but it had the power to tax and to require registration in order to administer the tax.¹¹⁴ The transfer tax of \$200 was decided on because that was the average cost of a machine gun, and a 100% tax would thereby be imposed.¹¹⁵ If that was considered prohibitive, its comparison with the average price of a suppressor at \$5 or so would have been off the charts. In 1934, \$200 was equivalent to over \$3,500 today,¹¹⁶ and the average annual family income in this period was \$1,524.¹¹⁷

The Second Amendment was raised by Rep. David J. Lewis of Maryland, who "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." Cummings responded that "a statute absolutely forbidding any human being to have a machine gun" might involve a constitutional question, but it was proper to tax machine guns and to require a license showing payment of the tax.¹¹⁸

Assistant Attorney General Keenan repeatedly averred that Congress had no power to ban ownership of machine guns.¹¹⁹ Nor could it prohibit the manufacture or sale of pistols.¹²⁰ Rep. Fred M. Vinson of Kentucky asked: "It is because of that lack of power that you appear in

¹¹³ *National Firearms Act Hearings*, *supra* note 95, at 111.

¹¹⁴ *Id.* at 6–8, 28, 86–87, 102 (remarks of Keenan).

¹¹⁵ *Id.* at 12.

¹¹⁶ U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (last visited Nov. 21, 2015).

¹¹⁷ Bureau of Labor Statistics, *100 Years of U.S. Consumer Spending: Data for the Nation, New York City, and Boston* 1, 20 tbl.11 (2006), <http://www.bls.gov/opub/uscs/1934-36.pdf>.

¹¹⁸ *National Firearms Act Hearings*, *supra* note 95, at 19.

¹¹⁹ *Id.* at 101–02.

¹²⁰ *Id.*

support of the bill to do something indirectly through the taxing power which you cannot do directly under the police power?" Keenan responded that this was approved by the Supreme Court decisions on the Harrison Anti-Narcotics Act.¹²¹

Senate hearings were held on several firearm bills, one of which would have restricted, *inter alia*, "any other firearm capable of being concealed on the person; a firearm muffler or firearm silencer"¹²² Karl T. Frederick, President of the National Rifle Association, testified that "the term 'muffler or silencer' should be followed by the word 'therefor', because, in its general sense, the term 'muffler or silencer' is too broad."¹²³ Other than that, nothing substantive about silencers was mentioned in the Senate hearings.

H.B. 9741, the bill that would pass, dropped the inclusion of pistols and revolvers as "firearms." The House Ways and Means Committee report on the bill, which the Senate Finance Committee report repeated verbatim, made reference to depriving the gangster of the machine gun, averring that "limiting the bill to the taxing of sawed-off guns and machine guns is sufficient," and that it was unnecessary "to include pistols and revolvers and sporting arms."¹²⁴ No mention was made of silencers or the other firearms that were included. The constitutional basis of the NFA was explained 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 firearms 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.¹²⁵

In the scant debate on the House floor, one member stated that "the primary purpose of the bill is to stop gangsters from getting hold of machine guns."¹²⁶ There was no Senate debate of substance.¹²⁷ Again, not one word was uttered about any need to restrict noise suppressors.

¹²¹ *Id.* at 101; see *Nigro v. United States*, 276 U.S. 332 (1928) (upholding law under tax power).

¹²² *To Regulate Commerce in Firearms: Hearings on S. 885, S. 2258, and S. 3680 Before a S. Comm. on Commerce*, 73d Cong. 5 (1934).

¹²³ *Id.* at 89 (statement of Karl T. Frederick, President, National Rifle Association of America).

¹²⁴ H.R. REP. NO. 1780, 73d Cong., 2d Sess. 1 (1934); see also S. REP. NO. 1444, 73rd Cong., 2d Sess. 1 (1934).

¹²⁵ H.R. REP. NO. 1780, at 2. The two commerce provisions restricted import and carrying an unregistered firearm in interstate commerce. See National Firearms Act, ch. 757, 48 Stat. 1236, 1239 (1934).

¹²⁶ 78 CONG. REC. 11400 (daily ed. June 13, 1934) (statement of Congressman Connery).

¹²⁷ See *id.* at 11400–12555.

As passed, the NFA including the following definition:

The term “firearm” means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.¹²⁸

Thus, without any discussion of the need to restrict noise suppressors of any kind, the original bill’s restrictions on suppressors for concealable firearms only were expanded to include all silencers, including those for rifles and shotguns. While few may have recognized it, gun owners were destined to continue suffering from hearing loss.

C. The Supreme Court Rejects Any Presumption that Inclusion of a Firearm in the NFA Implied that it has an “Evil” Character

In the 1937 case of *Sonzinsky v. United States*, the Supreme Court upheld the provision of the NFA imposing “a \$200 annual license tax on dealers in firearms.”¹²⁹ Relying on the Tenth Amendment, the defendant argued “that the present [NFA] 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.”¹³⁰ The Court found the NFA on its face to be a revenue measure and nothing more, explaining:

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. . . .¹³¹

In other words, the NFA 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

¹²⁸ National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2012)).

¹²⁹ *Sonzinsky v. United States*, 300 U.S. 506, 511 (1937).

¹³⁰ *Id.* at 512.

¹³¹ *Id.* at 513.

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.¹³²

Based on the above, it would seem improper to suggest that the inclusion of noise suppressors as taxable articles in the NFA represented a judgment of Congress that they were somehow “evil” or without appropriate uses in society. *Sonzinsky* involved the annual tax of \$200 on dealers, and the Court thus had no occasion to comment on the \$200 making and transfer taxes for items defined as “firearms,” which could perhaps have raised issues of proportionality.¹³³ As noted above, before the NFA, one could buy a suppressor for \$5. At any rate, *Sonzinsky* remains an established precedent followed by the Court in upholding pure revenue measures concerning areas Congress could not necessarily otherwise regulate.¹³⁴

The NFA was back before the Court when it decided *United States v. Miller* in 1939, a poorly prepared challenge under the Second Amendment.¹³⁵ The indictment alleged an unregistered shotgun having a barrel less than eighteen inches in length that was transported in interstate commerce.¹³⁶ The district court dismissed the indictment as

¹³² *Id.* at 513–14.

¹³³ *Id.* at 511.

¹³⁴ See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596, 2599–600 (2012) (upholding “Obamacare” under the tax power, not the Commerce Clause). As the Court stated in that case:

Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. . . . But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

Id. at 2600. See also *id.* at 2599 (quoting Dep’t. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 779 (1994) (invalidating a tax on illegal drugs and noting that “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”)).

¹³⁵ *United States v. Miller*, 307 U.S. 174 (1939). Counsel for defendants did not even file a brief or attend oral argument. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J. L. & LIBERTY 48, 65–68 (2008).

¹³⁶ *United States v. Miller*, 307 U.S. at 175.

facially violative of the Second Amendment, but the Supreme Court reinstated the indictment based on “the absence of any evidence tending to show that possession or use” of such shotgun “has some reasonable relationship to the preservation or efficiency of a well regulated militia,” and thus “we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”¹³⁷ In other words, “it is not within judicial notice” that the shotgun “is any part of the ordinary military equipment or that its use could contribute to the common defense.”¹³⁸

The above implied that the NFA registration and taxation provisions may be violative of the Second Amendment if the type of firearm is a common military arm. Because the indictment had been dismissed, there was no evidence in the record on the issue, about which judicial notice could not be taken. The Court did not ask whether the defendants were in a militia. However, it noted that the militia originally included “all males physically capable of acting in concert for the common defense,” and that they “were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”¹³⁹

It is noteworthy that the Court recognized that “arms” included not only firearms, but also the related items and accessories that made them usable, including ammunition, bayonets, and accouterments.¹⁴⁰ While noise suppressors of the Maxim type had not been invented at the time of the founding, they might have readily fit into the same model had the NFA not intervened.

Miller was remanded for further proceedings,¹⁴¹ but that did not result in the submission in the district court of any evidence that the shotgun in question had militia uses or was in common use such as would render the NFA restrictions violative of the Second Amendment. That was because defendant Miller had been killed, and his co-defendant Layton pled guilty to the charge.¹⁴²

Under the *Miller* test, one might imagine that militia utility and common use of a shotgun with a barrel under eighteen inches might have been arguably demonstrated by reference to the possible use thereof of double barrel shotguns during the Civil War and of pump trench guns in the Great War.¹⁴³ As for common lawful use, recall that

¹³⁷ *Id.* at 177–78.

¹³⁸ *Id.* at 178.

¹³⁹ *Id.* at 179.

¹⁴⁰ *Id.* at 180–81.

¹⁴¹ *Id.* at 183.

¹⁴² Frye, *supra* note 135, at 68–69.

¹⁴³ *Id.* at 77–78.

some proponents of banning handguns had preached the virtues of using short-barreled shotguns for home defense.

Had a suppressor been involved, the technology was more recent, and its suppression by the NFA rendered it far less in common use than it may have become. Suppressors were initially conceived for sporting use, but were shown to have military use for similar reasons, such as protecting soldiers from harmful noise.¹⁴⁴

Suppressors received scant or no attention in post-NFA case law, suggesting that they were not in wide use by criminals. The NFA had not defined the relevant terms, but the Treasury Department, which administered the NFA, promulgated the following definition:

The term “muffler” or “silencer” includes any device for silencing or diminishing the report of any portable weapon, such as a rifle, carbine, pistol, revolver, machine gun, submachine gun, shotgun, fowling piece, or other device from which a shot, bullet, or projectile may be discharged by an explosive, and is not limited to mufflers or silencers for “firearms” as defined.¹⁴⁵

In referring to a device “for” silencing or diminishing a gun’s report, an intent requirement was recognized, in that ordinary features of a gun such as barrel length could increase or decrease its report. Treasury recognized this in a Revenue Ruling opining that permanently attaching “a sleeve-type muzzle brake to the muzzle end of a short barreled rifle” to lengthen the barrel would remove the rifle from being an NFA firearm.¹⁴⁶ Depending on its design, a muzzle brake might increase or decrease noise, but its purpose is to reduce recoil.¹⁴⁷

D. From the Federal Firearms Act of 1938 to the Gun Control Act of 1968

Four years after passage of the NFA, Congress enacted the Federal Firearms Act (“FFA”) of 1938, which regulated interstate commerce in firearms and required licenses for manufacturers and dealers. It defined “firearm” to include “any weapon . . . which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler

¹⁴⁴ MAXIM, EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 52, at 16–19.

¹⁴⁵ Regulations Dealing with Taxes Relating to Machine Guns and Certain Other Firearms, 6 Fed. Reg. 4935 (Sept. 30, 1941).

¹⁴⁶ Rev. Rul. 55-570, 1955-2 C.B. 481 (1955), 1955 WL 10164. That remains ATF’s position today: “The ATF procedure for measuring barrel length is to measure from the closed bolt (or breech-face) to the furthest end of the barrel or permanently attached muzzle device.” U.S. DEP’T OF JUSTICE, ATF, NATIONAL FIREARMS ACT HANDBOOK 6 (2009), <https://www.atf.gov/firearms/national-firearms-act-handbook>.

¹⁴⁷ *See* 132 CONG. REC. H1757-01 (1986) (remarks by Rep. Volkmer).

or firearm silencer”¹⁴⁸ Unlawful acts included the receipt of a firearm by a person convicted of a crime of violence or by a fugitive.¹⁴⁹ The scant legislative history included nothing about criminal use of suppressors.¹⁵⁰

These things stood until the turbulent 1960s brought gun-control matters to a head. But among other factors pushing toward a comprehensive gun control law was the invalidation of certain registration requirements of the NFA by the Supreme Court in *Haynes v. United States* (1968). *Haynes* held that requiring registration and then sharing the information with authorities in States where the registered firearms were unlawful violated the privilege against self-incrimination.¹⁵¹ The Court commented: “We do not doubt . . . that this Court must give deference to Congress’ taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution’s other commands.”¹⁵²

What became the Gun Control Act (“GCA”) of 1968¹⁵³ was preceded by several years of hearings, committee reports, and lengthy floor debates. References to the criminal misuse of silencers may as well have been written in invisible ink. Retention of silencers in the NFA in particular was not based on any crime data or substantive discussion, but was simply copied from the 1934 law. Virtually the sole reference to silencers in the 105-page Senate report was to its definition as a firearm, and it said: “This paragraph is existing law.”¹⁵⁴

Title I of the GCA expanded the 1938 FFA to regulate commerce in firearms far more extensively than before, including increased regulation of the firearms industry and expansion of the categories of prohibited persons. It broadened the definition of “firearm” in various respects, but retained “any firearm muffler or firearm silencer” as part of the definition.¹⁵⁵ Those definitions remain intact today.¹⁵⁶ The NFA was reenacted as Title II of the GCA, and it defined “firearm” in part as “a muffler or silencer for any firearm whether or not such firearm is

¹⁴⁸ Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938).

¹⁴⁹ *Id.* at 1251.

¹⁵⁰ See S. REP. NO. 82, 75th Cong., 1st Sess. (1937).

¹⁵¹ *Haynes v. United States*, 390 U.S. 85, 100 (1968).

¹⁵² *Id.* at 98.

¹⁵³ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).

¹⁵⁴ S. REP. NO. 1501, 90th Cong., 2d Sess. 45 (1968).

¹⁵⁵ § 101, 82 Stat. at 1213.

¹⁵⁶ See 18 U.S.C. § 921(a)(3)(C) (2012).

included within this definition”¹⁵⁷

Congress declared that the purpose of the GCA was “to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence,” adding:

[I]t 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, trapshooting, 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, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.¹⁵⁸

While that was easier said than done, the post-GCA judicial decisions on suppressors were concerned more with technical questions involving victimless crimes than with criminal misuse. Two devices a defendant built for an undercover ATF agent which caused only a “slight reduction in the sound level” sufficed to convict for untaxed and unregistered firearms.¹⁵⁹ However, the court cautioned against an overly broad approach:

An example would be a barrel extension or a device to reduce the kick of a weapon which incidentally reduces the noise level. We feel these legitimate attachments would not be covered by the definition of a silencer, in and of themselves, because they do have as one of their primary functions the silencing or reducing of noise. Any such reduction is merely incidental to a legitimate purpose and unavoidable.¹⁶⁰

Because a silencer lacked a “combination of parts” definition as did certain other firearms, in *United States v. Luce*, an argument was made that an unassembled silencer was not included. A jury instruction was upheld stating that unassembled parts requiring “only a brief and a minimal effort” to assemble a silencer was included.¹⁶¹ The only crime

¹⁵⁷ § 921 (a)(3)(C), 82 Stat. at 1214.

¹⁵⁸ § 101, 82 Stat. at 1213–14.

¹⁵⁹ *United States v. Schrum*, 346 F. Supp. 537, 537–38 (E.D. Va. 1972).

¹⁶⁰ *Id.* at 540. Similarly, *United States v. Hurd* upheld a jury instruction accommodating the interpretation “that the primary purpose of the devices was to stabilize the barrel, reduce recoil and eliminate the flash caused by firing,” because if “noise reduction was an incidental function of the devices, the court’s instruction clearly required them to find that the devices were not silencers because noise reduction would not have been a primary function.” *United States v. Hurd*, 642 F.2d 1179, 1182 (9th Cir. 1981).

¹⁶¹ *United States v. Luce*, 726 F.2d 47, 48 (1st Cir. 1984). *Accord*, *United States v. Endicott*, 803 F.2d 506, 509 (9th Cir. 1986).

was lack of registration, not a violent act.¹⁶²

E. Why Would Any Sportsman Want a Silencer? Debates on the Firearm Owners' Protection Act of 1986

Perceived ATF abuses under the Gun Control Act culminated in passage of the Firearms Owners' Protection Act ("FOPA") of 1986.¹⁶³ The Senate passed S. 49 in 1985, and it included no new provisions on suppressors.¹⁶⁴ The House leadership refused to allow H.R. 945, the equivalent bill sponsored by Rep. Harold Volkmer (Democrat of Missouri), to come to a vote until it was finally released by means of a discharge petition.

To head off the broader FOPA bill, the House Judiciary Committee reported H.R. 4332, which imposed new restrictions. The very first provision of the bill would have defined "silencer" or "muffler" as "any device for silencing, muffling, or diminishing the report of a portable firearm, including any part or combination of parts designed or redesigned and intended for such use with a firearm."¹⁶⁵ It would have made it "unlawful for any person to transfer or possess a silencer," except those under governmental authority and those lawfully possessed before the effective date.¹⁶⁶

The committee report stated that the bill "[b]ans the future sale of silencers and silencers kits,"¹⁶⁷ and that its proposed definition "will help to control the sale of incomplete silencer kits that now circumvent the prohibition on selling complete kits."¹⁶⁸ It claimed that silencers were "used in assassinations and contract murders," but provided no data or instances.¹⁶⁹

House debate in 1986 pitted H.R. 4332, known as the "Hughes bill" (after Rep. Bill Hughes, Democrat, of N.J.), against the Volkmer substitute. In his opening remarks, Volkmer pointed out that "my leg-

¹⁶² *Luce*, 726 F.2d. at 47.

¹⁶³ Pub. L. No. 99-308, 100 Stat. 449 (codified at 18 U.S.C. §§ 921-929 (2012)).

¹⁶⁴ 131 CONG. REC. S9175 (daily ed. July 9, 1985).

¹⁶⁵ H.R. REP. NO. 99-495, at 49 (1986). This is sometimes referred to as the report on FOPA, when it was actually for the bill that FOPA would defeat. The true FOPA report was S. REP. NO. 98-583, 98th Cong., 2d Sess. (1984). See *Nat'l Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990) ("S. Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub. L. No. 99-308.").

¹⁶⁶ H.R. REP. NO. 99-495, app. at 49.

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.* at 21.

¹⁶⁹ *Id.* at 4.

isolation includes stiff mandatory sentences for the use of firearms, including machinguns and silencers, in relation to violent or drug trafficking crimes”¹⁷⁰ Rep. Smith of Florida favored the H.R. 4332 approach to “prohibit the transfer and possession of silencers not otherwise lawfully possessed. Silencers have absolutely no legitimate sporting purpose.”¹⁷¹

While that mantra would be repeated over and over, Rep. Dan Lungren of California actually suggested one sporting purpose, although it did not concern the hearing loss of hunters:

I frankly, for the life of me, cannot understand the arguments of anybody that it serves a legitimate sportsman interest to use a silencer. Maybe when you shoot one grouse, you do not want the other grouse to get up and walk away because they hear the noise. Maybe you have some concern about other deer running around when you fire a weapon with a silencer at a particular deer that is in front of you.¹⁷²

That was exactly the reason one hunter gave in support of the Maxim suppressor before passage of the NFA. He thought the device was “a very good thing from the humane standpoint and also for saving the game,” for if the first shot only wounded a deer, the noise would not frighten it away, and a second shot could be fired to dispatch the animal.¹⁷³

While numerous other issues predominated in the ensuing debates,¹⁷⁴ the approaches to suppressors could not have been more stark. The Hughes bill would simply have banned any silencer not lawfully possessed (i.e., registered) before the date of enactment.¹⁷⁵ Tellingly, the ban included no element of any nexus with interstate or foreign commerce, which was the jurisdictional hook applicable to all provisions of Title I of the Gun Control Act, even to possession by felons.¹⁷⁶ The Volkmer bill, by contrast, would have increased the mandatory minimum penalty of five years for use of a firearm in a federal crime of violence or drug trafficking crime to ten years “if the firearm is a machinegun or is equipped with a firearm silencer or firearm muffler”¹⁷⁷

Hughes sparked debate on the issue by asking “what sporting

¹⁷⁰ 132 CONG. REC. H1652 (daily ed. Apr. 9, 1986).

¹⁷¹ *Id.* at H1657.

¹⁷² *Id.* at H1662.

¹⁷³ MAXIM, EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 52, at 11.

¹⁷⁴ See generally David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1987) (providing a comprehensive analysis).

¹⁷⁵ 132 CONG. REC. H1672, 1682 (daily ed. Apr. 9, 1986).

¹⁷⁶ See, e.g., 18 U.S.C. § 922(g)(1) (2012).

¹⁷⁷ 132 CONG. REC. H1677 (daily ed. Apr. 9, 1986) (amending 18 U.S.C. § 924(c)).

value silencers have? . . . The silencer is a contract murder weapon. We find it increasingly in parts of our country in the hands of drug traffickers and organized crime figures.”¹⁷⁸ He cited no instances. Volkmer asked if he knew “what you have to go through to get a registration for a silencer? . . . You have to have a full background check, and you have to have fingerprints and identification.”¹⁷⁹ Hughes agreed, but asked if he was “opposed to banning silencers?”¹⁸⁰

Volkmer rejoined that by banning silencers, “you are not going to stop one crime, because not one crime that has ever been committed in the United States with a silencer has been committed with a registered one, not one. I have the statement of the BATF [Bureau of Alcohol, Tobacco and Firearms]”¹⁸¹ Hughes did not respond to that, but turned to “do-it-yourself kits at home to build your silencers,” asserting that “you can read in publications today all kinds of silencer kits. Who in the world would be opposed to banning silencer kits?”¹⁸²

Rep. Mario Biaggi, a N.Y. Democrat, asked “how would they [BATF] know” if a crime was committed with a silencer.¹⁸³ Regarding whether a registered silencer had ever been used in a crime, Rep. Lungren said that “I, frankly, do not care whether that is true or not. I still ask, what legitimate sports interest is served by selling silencers?”¹⁸⁴ Rep. Morrison of Connecticut heard no reason “why it would be that silencers need to be legalized,”¹⁸⁵ and Rep. Torricelli of New Jersey saw no “legitimate reason” to have a silencer in one’s home.¹⁸⁶

The Hughes bill would have defined a firearm silencer or muffler as “any device for silencing, muffling, or diminishing the report of a portable firearm, including any part or combination of parts designed or redesigned and intended for such use with a firearm.”¹⁸⁷ The definition in the Volkmer bill evolved somewhat during the proceedings, and ended up being the one that would pass:

The terms “firearm silencer” and “firearm muffler” mean any device for silencing, muffling, or diminishing the report of a portable firearm,

¹⁷⁸ *Id.* at H1684.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See* 132 CONG. REC. H1688 (daily ed. Apr. 9, 1986) (statement of Rep. Biaggi). Because registered silencers were the issue, BATF would have known if it had been traced.

¹⁸⁴ *Id.* at H1689 (statement of Rep. Lungren).

¹⁸⁵ *Id.* at H1695 (statement of Rep. Morrison). Note that silencers were already legal.

¹⁸⁶ *Id.* at H1696 (statement of Rep. Torricelli).

¹⁸⁷ *See id.* at H1672.

including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.¹⁸⁸

The above third clause distinguished the two alternatives—Hughes would have included a part “intended” for use, while Volkmer required that a part be “intended *only*” for use. Under the latter, a dual-use part would not be included.

When the big vote came, the Volkmer substitute—which then became H.R. 4227—handily won out over the Hughes bill.¹⁸⁹ A colloquy then ensued to clarify the definition of a silencer. Noting the reference to “any device for silencing,” Rep. Larry Craig of Idaho asked whether “this term is designed to change the current interpretation. For example, according to BATF, the current law does not include conventional chokes, muzzle breaks [*sic*], flash hidens, and compensators that are not designed or altered to be silencers, even though these devices may quash sound in addition to their other lawful purposes.” Volkmer responded:

My substitute, as modified by the McCollum amendment, does not change existing law. No conventional choke, muzzle breaks, flash hidens, or compensators will fit within the definition of silencer in the substitute because they are not “devices for silencing * * *.” Each of these devices has a common sporting purpose totally apart from muffling sound. If someone modified these legitimate devices however for the purpose of silencing, then the modified device would be a silencer.¹⁹⁰

The debates over suppressors were striking more for what was not said instead of what was said. Supporters of a prohibition on suppressors argued that they lacked sporting purposes, and none were suggested other than Lungren’s statement that a first shot would scare the game away. It never occurred to anyone to raise the subject of endemic hearing loss of hunters and target shooters. Hughes asserted criminal misuse of suppressors, but gave no data or instances. Volkmer supporters were content to rely on the total lack of misuse of registered silencers, and to support criminal misuse with enhanced penalties.

In conclusion, the Firearms Owner’s Protection Act (“FOPA”) adopted a three-prong definition of silencer, which it also incorporated

¹⁸⁸ 132 CONG. REC. H1754 (daily ed. Apr. 10, 1986). *See also* 132 CONG. REC. H1675 (daily ed. Apr. 9, 1986) (as proposed); *id.* at H1700 (amendment offered by Rep. McCollum of Florida).

¹⁸⁹ 132 CONG. REC. H1752 (daily ed. Apr. 10, 1986) (committee of whole); *see id.* at H1753 (Volkmer substitute became “H.R. 4332, as passed by the House.”); *id.* at H1757 (“A similar House bill (H.R. 4332) [the Hughes bill] was laid on the table.”).

¹⁹⁰ *Id.* at H1757.

into the National Firearms Act.¹⁹¹ Those provisions remain current.¹⁹² FOPA also provided an enhanced penalty of ten years imprisonment for using a firearm equipped with a silencer in a federal crime of violence or drug trafficking crime, or twenty years for a second offense.¹⁹³ In 1988, this was increased to thirty years for a first offense and life imprisonment for a second offense.¹⁹⁴

Finally, as a matter of context and interpretation of FOPA's provisions, the findings of Congress are worth consideration:

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, trapshooting, 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.”¹⁹⁵

¹⁹¹ FOPA, Pub. L. No. 99-308, §§ 101, 109, 100 Stat. 449, 451 (1986) (codified at 18 U.S.C. §§ 921–929 (2012)).

¹⁹² See 18 U.S.C. § 921(a)(24) (2012); 26 U.S.C. § 5845(a)(7) (2012).

¹⁹³ FOPA, § 104, 100 Stat. at 457.

¹⁹⁴ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6460, 102 Stat. 4181 (1988).

¹⁹⁵ FOPA, § 1(b), 100 Stat. at 449. See *Thompson/Center Arms Co. v United States*, 924 F.2d 1041, 1048 (Fed. Cir. 1991) (“This admonition . . . requires us to decline the government’s invitation to expand the definition of ‘rifle’ to encompass the Contender pistol and carbine conversion kit. The government admits that both pistol and carbine are intended and primarily used for the legitimate purposes of hunting and target shooting.”).

F. An Overview of Restrictions

What is striking about silencers being subjected to NFA restrictions in 1934, and retained there in the enactments of the GCA in 1968 and FOIPA in 1986, is that no actual data or information was ever presented as to the use of silencers for either lawful or criminal purposes. When first proposed to be included in an initial NFA bill, only mufflers or silencers for concealable weapons would have been restricted. Pistols and revolvers—the predominant types of concealable weapons—were removed from a substitute bill, which was expanded to include mufflers or silencers for all firearms, including non-concealable rifles and shotguns. No one suggested why.

When mufflers and silencers were included along with all ordinary firearms in the Federal Firearms Act of 1938, it was not suggested that they be removed from the NFA. Nor did it occur to Congress in the GCA and FOIPA revisions to remove noise suppressors from the same NFA categories as machineguns and bombs. Legislators appear to have been oblivious to whether significant criminal misuse existed, as well as to the lawful sporting and other uses, protection against hearing loss, and reduction of noise pollution.

III. CRIMINAL MISUSE OF SOUND MODERATORS?

In asking whether criminalizing the possession of suppressors could be upheld under Congress's power to regulate activities that substantially affect interstate commerce, the Eighth Circuit reviewed all of the committee reports for the 1934, 1968, and 1986 legislation, concluding "that Congress made no legislative findings, either explicit or implicit, from which we may reliably conclude that the intrastate possession of silencers imposes 'substantial burdens,' . . . on interstate commerce."¹⁹⁶ The court upheld the NFA under the taxing power, not the commerce power.¹⁹⁷

A federal district court noted that "it is difficult to determine what exactly Congress was concerned about in deciding to regulate silencers at the federal level."¹⁹⁸ An Ohio court added that "despite public and media misimpressions, the use of suppressors in gun crimes generally and in homicides specifically is extremely infrequent . . ."¹⁹⁹ Both re-

¹⁹⁶ *United States v. Hall*, 171 F.3d 1133, 1140 (8th Cir. 1999) (citing *United States v. Lopez*, 514 U.S. 549, 562 (1995)).

¹⁹⁷ *Id.* at 1142.

¹⁹⁸ *Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 23 (D.C. Cir. 2014).

¹⁹⁹ *State v. Langlois*, 2 N.E.3d 936, 957 (Ohio Ct. App. 2013).

lied on the only pertinent study: Paul A. Clark's "Criminal Use of Firearm Silencers," published in the *Western Criminology Review*.²⁰⁰

Clark's review of the federal and state court data found that "there only appear to be about 30 federal prosecutions involving silencers each year, and it is very unlikely that there are more than 200 state and federal prosecutions per year involving silencers."²⁰¹ Clark examined all federal cases using the word "silencer" from 1995 through 2005 in Lexis and Westlaw. He found 136 cases of convictions for possession, eight enhanced sentences, two plea-bargained to lesser charges, seven in which the evidence was suppressed, seven not resulting in charges, and seven acquittals.²⁰² Clark concluded that "more than 80 percent of federal silencer charges are for non-violent, victimless crimes."²⁰³ For the ten-year period, only four federal cases were reported of a silencer being used in a murder.²⁰⁴

Using the same methodology but limiting the study to 2000–2004, Clark found only eighteen silencer cases in California state courts out of some 25,000 criminal cases. Only four or five defendants actually used a silencer in a crime, and nine of the eighteen were possessory offenses. Three or four silencers were used in homicides out of the 1,700 reported prosecutions for homicide for the five-year period.²⁰⁵

Clark concludes, quite simply: "The data indicates that use of silenced firearms in crime is a rare occurrence, and is a minor problem."²⁰⁶

Two judicial opinions on suppressors are noteworthy in illustrating the enigma of overcriminalization. *United States v. Crooker* involved "a device designed to muffle the sound of an airgun," which is not a "firearm," but which could be adapted for use on a firearm.²⁰⁷ When testing the silencer, an ATF agent was able to attach it to the testing pistol by threading an "adapter" that it supplied to both the barrel and the silencer.²⁰⁸ The court noted that "the statute by its terms requires something more than a potential for adaptation and knowledge

²⁰⁰ See *Innovator Enters., Inc.*, 28 F. Supp. 3d at 23; *Langlois*, 2 N.E.3d at 957; Paul A. Clark, *Criminal Use of Firearm Silencers*, 8 WESTERN CRIMINOLOGY REV. 44 (2007).

²⁰¹ Clark, *supra* note 200, at 47–48.

²⁰² *Id.* at 50.

²⁰³ *Id.* at 51.

²⁰⁴ *Id.*

²⁰⁵ Clark, *supra* note 200, at 53.

²⁰⁶ *Id.* at 44.

²⁰⁷ *United States v. Crooker*, 608 F.3d 94, 95 (1st Cir. 2010). (describing the device as "a cylinder made of black metal with a hole running through it, threading that allowed attachment to the muzzle of the airgun and baffles inside.")

²⁰⁸ *Id.* at 96.

of it. The statute does not refer either to capability or adaptation; it speaks of a device ‘for’ silencing or muffling. The ordinary connotation of the word is one of purpose.”²⁰⁹

No evidence existed that “either Crooker or the maker of the air-gun silencer intended that it be used to silence a firearm;” noting the statute’s further phrases “intended for use” and “intended only for use,” the court “view[ed] all three tests as gradations of purpose made more rigorous as the statute extends from a self-sufficient device to a collection of parts to a single part.”²¹⁰ Intent to use, not objective capability of use or knowledge of such capability, was critical, for otherwise the definition “could also extend to a soda bottle or even a potato. The peculiar problem of silencers is that many objects, including relatively innocent ones, have some capacity to muffle the sound of a shot.”²¹¹ Thus, “the range of physical objects that *can* muffle a firearm is so large and of so many alternative uses that some filtering restriction is needed to prevent overbreadth and possibly vagueness.”²¹²

Defendant Crooker was incarcerated until the above decision. The U.S. Court of Federal Claims awarded him \$172,465.75 for having served 1,259 days imprisonment for an unjust conviction.²¹³

The second opinion did not have a happy ending. The Tenth Circuit, in *United States v. Webb* (1995), found no reason for a downward sentencing departure where, among other factors, the defendant made two suppressors from “[o]ld toilet paper tubes and stuffing from some old stuffed animals.”²¹⁴ It did not matter that it may have been “unrealistic to expect defendant to stamp an identification number on a toilet paper roll used as the exterior covering of the silencer,” or that “Congress intended the Firearms Act to punish criminality qualitatively different from defendant’s behavior;” it was improper to sentence the defendant to probation when the Sentencing Guidelines range from

²⁰⁹ *Id.* at 97.

²¹⁰ *Id.*

²¹¹ *Id.* See Reply Brief of Defendant-Appellant Michael Crooker, *United States v. Crooker*, No. 07-1964 (1st Cir. Feb. 3, 2009) 2009 WL 6841493, at *19–21 (citing cases in which a potato, pillow, motorcycle muffler, and a plastic bottle were used as silencers; e.g., *United States v. Williams*, 547 F.3d 1187, 1194 (9th Cir. 2008) (potato)). A potato can be used as a silencer by simply hollowing out one end, inserting the gun barrel into the hole, and firing. See *Dorch v. Smith*, No. Civ.01-CV-71206-DT, 2002 WL 32598987, at *1–3 (E.D. Mich. 2002).

²¹² *Crooker*, 608 F.3d at 98. ATF has opined that a permanently-affixed silencer for a paintball gun is not a “firearm silencer” because “the device is not one for diminishing the report of a portable firearm.” ATF Ruling 2005-4, ATF, <https://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-2005-4.pdf>.

²¹³ *Crooker v. United States*, 119 Fed. Cl. 641, 658 (2014).

²¹⁴ *United States v. Webb*, 49 F.3d 636, 639 (10th Cir. 1995) (internal quotations omitted).

twenty-seven to thirty-three months imprisonment.²¹⁵ The court made no reference or discussion about the defendant's intent to use the tubes for an unlawful purpose.

Typical criminal cases involve whether an item is a firearm silencer or some other device, such as a muzzle brake,²¹⁶ compensator,²¹⁷ or flash suppressor.²¹⁸ A district court in a civil case held that ATF acted arbitrarily, capriciously, and contrary to law in classifying an item claimed to be a muzzle brake as a silencer.²¹⁹ Since "firearm silencer" is defined in a criminal statute, whether the case is civil or criminal, no deference to agency opinion is warranted, and any ambiguity must be construed in accord with the rule of lenity.²²⁰

Such cases as the above suggest that the NFA restrictions involving technical, paperwork violations, without any criminal purpose but with stringent felony penalties, are misplaced. That is particularly the

²¹⁵ *Id.* at 637, 640.

²¹⁶ "A muzzle brake is a device attached to the muzzle (exit end) of a gun barrel to reduce perceived recoil and barrel 'bounce' that occurs when the gun is fired." *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 288 n.1 (5th Cir. 2004). "Muzzle brake. Device at the muzzle end usually integral with the barrel that uses the emerging gas behind a projectile to reduce recoil." MICHAEL E. BUSSARD & STANTON L. WORMLEY, JR., *NRA FIREARMS SOURCEBOOK* 439 (John Zent ed., 2006). "Recoil" means: "The rearward movement of a firearm resulting from firing a cartridge or shotshell. Sometimes informally called 'kick.'" *Id.* at 450. The term "muzzle jump" means: "The generally upward motion of the muzzle of a firearm which occurs upon firing." *Id.* at 439.

²¹⁷ "Compensator: A device attached to the muzzle end of the barrel that utilizes propelling gases to reduce recoil. Also, see *muzzle brake*." BUSSARD & WORMLEY, *supra* note 216, at 418. *See United States v. Syverson*, 90 F.3d 227, 232 (7th Cir. 1996) (item "would not have done much, if anything, to reduce the recoil of a firearm," but it "did reduce the report of a pistol, albeit slightly").

²¹⁸ "Flash suppressor: A muzzle attachment designed to reduce muzzle flash (also called 'flash hider')." BUSSARD & WORMLEY, *supra* note 216, at 426. *See United States v. Klebig*, 600 F.3d 700, 719 (7th Cir. 2009) (issue of whether the defendant "intended to use the oil filter that was taped to the barrel of a long gun as a silencer rather than as a flash suppressor").

²¹⁹ *Innovator Enters., Inc. v. Jones*, 28 F. Supp. 3d 14, 25, 30 (D.C. Cir. 2014) (stating in response to ATF's claim that a device was a silencer because it had three out of eight physical characteristics consistent with those on silencers: "A mouse is not an 'elephant' solely because it has three characteristics that are common to known elephants: a tail, gray skin, and four legs.").

²²⁰ *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (pistol, shoulder stock, and long barrel held not to be a rifle with barrel under 16 inches); *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference"); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) (rejecting "one construction" of a criminal statute for the agency "and another for the Department of Justice"); *F. J. Vollmer Co., v. Higgins*, 23 F.3d 448, 452 (D.C. Cir. 1994) (rifle held not to be machinegun).

case given the GCA's ban on possession by prohibited persons and enhanced penalties for use of a suppressor in a federal crime of violence or drug trafficking offense.²²¹

IV. DOES THE SECOND AMENDMENT PROTECT POSSESSION AND USE OF SUPPRESSORS?

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." In ordinary linguistic usage, a noise suppressor is a device that, like a scope, bipod, or magazine, enhances the utility of an "arm," and indeed it is defined as a "firearm" in the GCA. There does not appear ever to have been any discussion of whether the Second Amendment might protect the possession and use of suppressors. What basis might exist in support of such protection?

The Supreme Court's 2008 decision in *District of Columbia v. Heller* suggests that the Second Amendment should be read to provide some protection for noise suppressors. The Court interpreted the term "arms" to mean the same now as in 18th-century dictionaries, to include "weapons of offence, or armour of defence"—specifically mentioning "bows and arrows," the quintessential quiet weapon of the day.²²² Bows and arrows had that advantage over firearms for hunting, a purpose for which, along with militia and self-defense, Americans at the founding "valued the ancient right."²²³

Maxim's device need not have been invented by the time of the founding: "Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. . . . [T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."²²⁴ Even so, it is noteworthy that air rifles, which are far quieter than firearms, were being made in the 18th century. Meriwether Lewis carried a Girandoni repeating air rifle in the Lewis and Clark expedition of 1803–1806.²²⁵

²²¹ See *supra* Part II. E.–F.

²²² *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

²²³ *Id.* at 599.

²²⁴ *Id.* at 582.

²²⁵ See Robert D. Beeman, *New Evidence on the Lewis and Clark Air Rifle—an "Assault Rifle" of 1803*, THE BEEMAN'S PRIVATE WEBSITE, <http://www.beemans.net/lewis-assault-rifle.htm> (last visited Oct. 21, 2015). "The weapon's advantages included a high rate of fire, no smoke, relatively low recoil, and less noise than a musket." Mike Markowitz, *The Girandoni Air Rifle*, DEFENSEMEDIANETWORK (May 14, 2013), <http://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/>.

Regarding the arms protected by the Second Amendment, *Heller* interpreted the reference in *Miller* to “ordinary military equipment” consistent with its further reference to arms “of the kind in common use” that militiamen would supply themselves.²²⁶ *Heller* thus “read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”²²⁷

The common-use test presents a quandary for noise suppressors, in that passage of the NFA in 1934 inhibited the common use of the product by Americans on Depression-era budgets. However, *Heller* does not imply that mere listing in the NFA in itself would cause an arm to lose Second Amendment protection. It goes on to say that the common-use test “is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”²²⁸ That referred to the carrying of certain arms in a manner that terrified the people, such as by creating an affray.²²⁹ That is made even clearer by *Heller*’s further references to military weapons that would be unusual in civilian society:

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. . . . It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no

²²⁶ *Heller*, 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179). *Heller*, explained:

Read in isolation, *Miller*’s phrase ‘part of ordinary military equipment’ could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939.

Id.

²²⁷ *Id.* at 625. That statement is dictum, as short-barreled shotguns were not before the Court in *Heller*. *Id.* Recall that some advocates of banning handguns had offered “sawed-off” shotguns as the better alternative for home defense. See *supra* notes 87, 90 and accompanying text. Had the *Miller* remand resulted in fact-finding instead of a guilty plea, defendant Layton would have been entitled to attempt to show both military utility and common use. See *Heller*, 554 U.S. at 625; *United States v. Miller*, 307 U.S. 174, 178, 183 (1939).

²²⁸ *Heller*, 554 U.S. at 627.

²²⁹ *Id.* *Heller* cites, *inter alia*, 4 WILLIAM BLACKSTONE, COMMENTARIES 149 (1769) (“The offense of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land”); *O’Neill v. State*, 16 Ala. 65, 67 (1849) (“if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows”). The offense thus involved “going armed” with such weapons to terrify others, not merely possessing them.

amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.²³⁰

A mere noise suppressor does not even come close to being in the same class as the above military weapons. By itself, it is not even a weapon. Attached to a firearm, it protects the hearing of the user, reduces noise that may be bothersome to others, and has advantages in hunting. Like any firearm, it may have military applications as well, but has inherent benefits in civilian life.

Explaining why it is not “permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed,” *Heller* analyzes the utility of the handgun for self-defense: it is easy to store and to be accessible, it cannot be easily wrestled away by an attacker, it requires little upper-body strength to lift and aim, and it can be held in one hand while the other hand dials the police.²³¹ Legitimate advantages could also be listed for a suppressor, whether used for sporting purposes or for self-defense—reduction of noise, recoil, and muzzle rise immediately come to mind.

A basis for severe restrictions on suppressors could not be found in the suggestion that any feature of a firearm that decreases the sound of its report has no Second Amendment protection. Could Congress ban firearms with longer barrels because they make less noise, and require shorter barrels because they are louder? Could low velocity .22 caliber rimfire ammunition be prohibited because it is far quieter than, say, .30.06 caliber ammunition? How about a ban on a .30-30 suppressed rifle, which has a report louder than a .22 rifle that is not suppressed? Sloganeering about gangsters aside, no principled argument has been advanced as to why a firearm loses Second Amendment protection once it is fitted with a suppressor.

Heller rejected Justice Breyer’s “judge-empowering ‘interest-balancing inquiry[.]’” which would have upheld the handgun ban based on the extent of violence committed with handguns: “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”²³² “[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table,” including “the absolute prohibition of handguns held and

²³⁰ *Heller*, 554 U.S. at 627–28. The “prefatory clause” refers to the Second Amendment’s declaration about a well regulated militia. *Id.* at 595.

²³¹ *Id.* at 629.

²³² *Id.* at 634.

used for self-defense in the home.”²³³

In dissent, Justice Breyer relied on extensive legislative findings, including a committee report that presented “statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns.”²³⁴ He added: “Handguns are involved in a majority of firearm deaths and injuries in the United States.”²³⁵ It is noteworthy that similar concerns regarding firearm deaths were discussed at length in Congress in support of handgun restrictions in the NFA in 1934²³⁶ and in support of general firearm restrictions in the GCA in 1968,²³⁷ but minimal data has been presented about criminal misuse of suppressors. A ban on suppressors would not be supported under Breyer’s “interest-balancing inquiry.”

Breyer also criticized the majority ruling that the Second Amendment protects arms that are “typically possessed by law-abiding citizens for lawful purposes.”²³⁸ He suggested that, if Congress and the States repealed restrictions on machineguns and they became popular for self-defense, the Court would have to find that the Second Amendment protects machineguns.²³⁹ “In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit.”²⁴⁰ This far-fetched example overlooks, of course, that no such repeal is conceivable, and that handguns have been lawfully possessed by Americans since colonial times.

Still, Breyer’s argument counsels against an inflexible rule under which an arm is interpreted to have no Second Amendment protection on the sole basis that restrictions have existed for some period of time. NFA restrictions on certain items are not based on any precedent from the founding period and have not been supported by actual crime data. Once handguns were removed from the NFA bill in 1934, it made little sense to include certain other concealable firearms under the NFA. For instance, pistols with smooth bores are in the NFA’s “any other weapon” category, while pistols with rifled bores are not.²⁴¹

²³³ *Id.* at 636.

²³⁴ *Id.* at 695 (Breyer, J., dissenting).

²³⁵ *Id.* at 697.

²³⁶ *National Firearms Act: Hearing on H.R. 9066 Before H. Comm. On Ways & Means, 73d Cong. 94 (1934).*

²³⁷ *E.g.*, S. REP. NO. 90-1501, at 22 (1968) (“In 1967, 7,700 citizens were murdered by gunmen in the United States.”).

²³⁸ *Heller*, 554 U.S. at 720.

²³⁹ *Id.* at 720–21.

²⁴⁰ *Id.* at 721.

²⁴¹ 26 U.S.C. § 5845(e) (2012). Similarly, while neither short-rifled arms (handguns) nor long-rifled arms (rifles with barrels at least 16 inches in length) are NFA firearms, medium-

Are noise suppressors “typically possessed by law-abiding citizens for lawful purposes?”²⁴² Despite the onerous NFA restrictions, 792,282 silencers were registered with ATF as of 2015.²⁴³ But for their inclusion in the NFA in 1934, they would be possessed in far greater numbers. Constitutional rights are not defined by what the legislature restricts or does not restrict. Some arms may be constitutionally protected if they *would have been* “typically possessed by law-abiding citizens for lawful purposes” *but for* restrictive legislation.²⁴⁴ Possession and use of a firearm that does not injure or ruin one’s hearing is an obvious candidate for such analysis.

In *McDonald v. City of Chicago* (2010), the Supreme Court held that the Second Amendment is incorporated into the Fourteenth Amendment and is thus applicable to the States, thereby invalidating Chicago’s handgun ban.²⁴⁵ Rejecting the argument that “the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety,” the Court noted: “All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.”²⁴⁶ Concurring, Justice Scalia noted that incorporation of rights through the due process clause of the Fourteenth Amendment cannot be restricted to “only rights that have *zero* harmful effect on *anyone*. Otherwise even the First Amendment is out.”²⁴⁷

Again dissenting, Justice Breyer asked: “What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons?”²⁴⁸ His further query could be applied to the NFA: “When do registration requirements become severe to the point that they amount to an unconstitutional ban?”²⁴⁹ While Justice Breyer would have deferred to the legislature,²⁵⁰ these are legitimate questions applicable to suppressors. Can a firearm with reduced noise facilitate self-defense? Of course. Do the NFA registration requirements amount to a ban?

rifled arms (rifles with barrels under 16 inches) are. 26 U.S.C. § 5845(a)(3) (2012).

²⁴² *Heller*, 554 U.S. at 625.

²⁴³ BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICAL UPDATE 2015, U.S. DEP’T JUSTICE 15 (2015), <https://www.atf.gov/file/89561/download>.

²⁴⁴ *Heller*, 554 U.S. at 625.

²⁴⁵ *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

²⁴⁶ *Id.* at 782–83.

²⁴⁷ *Id.* at 799 (Scalia, J., concurring).

²⁴⁸ *Id.* at 923 (Breyer, J., dissenting).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

For the majority of the population, yes; for an increasing minority, no.

“No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what *other* countries do,” Justice Scalia quipped in his *McDonald* concurrence.²⁵¹ Writing for the Court, Justice Alito rejected the assumption that “because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.”²⁵²

In his dissenting opinion, Justice Stevens wrote:

the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation.²⁵³

That “the United States is an international outlier in the permissiveness of its approach to guns” compared to such countries as England, Canada, and Japan, “suggest[s] that this Court may not need to assume responsibility for making our laws still more permissive.”²⁵⁴

While the above discussion strayed from the meaning of the Second and Fourteenth Amendments, it would be instructive to look at the laws of some European countries, which might be suggested as superior models for the United States, on what are generally called “noise moderators” in those nations.²⁵⁵ In some European nations, suppressors are far more readily available than the laws in the United States would allow.

The United Kingdom poses an instructive example, for it has no equivalent of the Second Amendment. As the Home Office states: “Gun ownership is a privilege, not a right. Firearms control in the UK is among the toughest in the world”²⁵⁶ Acquisition of a firearm requires a firearm certificate from local police which may be issued for “good reason,” including work, sport, or leisure.²⁵⁷ But once a person is qualified to have a firearm, it’s a cinch to obtain a suppressor:

Sound moderators are subject to certificate control as “items designed

²⁵¹ *McDonald*, 561 U.S. at 800 (Scalia, J., concurring).

²⁵² *Id.* at 781.

²⁵³ *Id.* at 895 (Stevens, J., dissenting).

²⁵⁴ *Id.* at 896.

²⁵⁵ See *infra* APPENDIX for a summary of such models.

²⁵⁶ *Home Office, Guide on Firearms Licensing Law*, GOV.UK at 5 (Mar. 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417199/Guidance_on_Firearms_Licensing_Law_v13.pdf.

²⁵⁷ *Id.* at 5–6.

to reduce the noise or flash of a firearm”. Sound moderators are often used for shooting game, deer, or vermin. In the case of the latter, they might facilitate more effective pest control. They are appropriate for reducing hearing damage to the shooter, or to reduce noise nuisance, for example, for deer control in urban parks, or close to residential properties, or to reduce recoil of the rifle. “Good reason” to possess a rifle for shooting game, vermin or deer should normally imply “good reason” to possess a sound moderator.²⁵⁸

However, “an integral sound moderator, that is one that is part of the firearm, does not require separate authorisation.”²⁵⁹ Finally, the Home Office adds: “Some target shooting events where fire and movement is conducted on field firing ranges may require the use of sound moderators, for example, where hearing protection may impede the shooter and where voice commands need to be heard or given by the shooter for safety and continuity.”²⁶⁰

Widely advertised on the internet for sale in the U.K., a .22 suppressor sells for just £44.10, and a set of spare baffles to repair a suppressor may be ordered online for £7.23.²⁶¹ Try doing that in the United States, and one would face ten years imprisonment under the NFA.²⁶²

In Finland, sound moderators were unregulated until 2011.²⁶³ Today, a suppressor is defined as a firearm part, purchase of which requires the buyer to show a firearm ownership permit to the seller.²⁶⁴

Also not traditionally regulated in France, currently one need only provide a copy of one’s gun permit, or gun declaration and hunting license, when sending a gun to be fitted with a suppressor, and the gunsmith can do the work and send it back to the owner.²⁶⁵

In Ireland, an authorization to possess a silencer may be granted to the holder of a firearm certificate.²⁶⁶ Mail your gun with a copy of

²⁵⁸ *Id.* at 119.

²⁵⁹ *Id.* at 120.

²⁶⁰ *Id.* at 120.

²⁶¹ T.W. CHAMBERS & CO., <https://www.gunspares.co.uk/products/23987/Airgun-Silencers/> (last visited Oct. 24, 2015).

²⁶² 26 U.S.C. § 5871 (2012).

²⁶³ See, e.g., DAN BAUM, GUN GUYS: A ROAD TRIP 45 (2013). Cf. Ampuma-aselaki [Firearms Act] Jan. 9, 1998, as amended (Fin.) (firearm suppressors not specifically addressed), <https://www.finlex.fi/en/laki/kaannokset/1998/en19980001.pdf>.

²⁶⁴ See Ampuma-aselaki [Firearms Act] Sept. 1, 1998, as amended, Feb. 11, 2011, c. 1 § 3, <https://www.finlex.fi/fi/laki/ajantasa/1998/19980001#L1P12>.

²⁶⁵ See, e.g., Moderateurs De Son Ou “Silencieux” [Moderators or It’s “Silent”], ATELIER SAINT ETIENNE-TOULOUSE, <http://www.ateliersaintetienne31.fr/moderateurs-de-son-ou-silencieux.html> (last visited Oct. 23, 2015).

²⁶⁶ Firearms and Offensive Weapons Act 1990 (Republic of Ireland), Part II, § 7(1), <http://www.irishstatutebook.ie/eli/1990/act/12/enacted/en/html> (last updated Oct. 31, 2012).

the firearm authorization to a store such as the Sportsden, and it will install the suppressor and send it back “free next day delivery” if the order is over 100 Euro.²⁶⁷

In Norway, a suppressor may be ordered under such terms as the following: “When purchasing mufflers the customer must show ID and firearms license just like the purchase of ammunition. Fax copy or scanned documents are also accepted.”²⁶⁸

Again, while the laws of other countries are irrelevant to the meaning of the U.S. Constitution, the liberal approach to sound moderators in several European nations suggest that the United States has over-criminalized them. There is no record of widespread use of suppressors in crime in Europe, but that could be said for the United States as well.

CONCLUSION: A CALL FOR DIALOGUE

Noise suppressors have clear public health benefits and should be removed from the onerous registration and taxation provisions of the National Firearms Act. More than sufficient regulation would be continued under the Gun Control Act, including prohibitions on possession and misuse by criminals and other prohibited persons, and regulatory requirements for lawful commerce together with the same background checks that are required for actual firearms.

Suppressors for modern devices from firearms to automobiles were invented to reduce noises that harm or annoy both users and persons in the vicinities of such use. Firearm suppressors were subjected to the provisions of the National Firearms Act in 1934 without evidence of significant criminal misuse, and the restrictions were extended without further thought when the NFA was revised in the Gun Control Act of 1968. However, the GCA prohibited felons from possession of suppressors, and the Firearms Owners’ Protection Act of 1986 severely punished criminal misuse of suppressors. Even though criminal misuse is markedly low, those provisions are more than adequate.

Suppressors are accessory parts to firearms that make the discharge thereof safer for the health of the users and less of a nuisance to the community. As such, persuasive reasons exist to consider suppressors as having protection under the Second Amendment, in that they enhance the ability of the people to exercise their right to keep and bear arms in a manner that does not damage their hearing or annoy others.

²⁶⁷ Terms and Conditions, SPORTSDEN.IE, <http://www.sportsden.ie/tandc> (last visited Oct. 25, 2015).

²⁶⁸ See, e.g., ARTEMIS AS, <http://artemisas.mamutweb.com/Shop/List/Lyddemper/19/1> (follow “Terms for the purchase of weapons” hyperlink) (last visited Oct. 25, 2015).

The more liberal approach to suppressor ownership in Europe suggests that it is not the crime problem it is perceived to be in the United States.

At the very least, a scholarly dialogue on the subject is overdue. The criminal law should not be based on legislative sausage-making that had no basis to begin with and that thrives only in the fantasies of gangster films. If criminalization based on paperwork violations applicable to the general public is supposedly the only deterrent to a criminal onslaught, let the proponents come forward with facts and data. If a design feature for a firearm that enhances the ability to exercise one's right to keep and bear arms without injuring one's hearing is *not* protected by the Second Amendment, a serious basis must be articulated for that position.

The *Heller* Court concluded that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field”²⁶⁹ This would be a good opportunity to begin a dialogue on whether suppressors that reduce harmful noise on firearms may have some protection under the Second Amendment. And regardless of the possible outcome of that issue, it would also be timely to consider whether the NFA restrictions serve any beneficial purpose in view of the GCA provisions aimed at criminals and criminal misuse.

²⁶⁹ District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

APPENDIX: SELECTED EUROPEAN LAWS ON SOUND MODERATORS

The sources of the following include secondary summaries, actual texts of laws that could be located, advertisements by suppressor vendors in the selected countries, and other internet sources. While this author takes responsibility for any inaccuracies, it is hoped that others will dig deeper and provide further clarification for all aspects of the subject.

DENMARK

A firearm and a suppressor may be possessed under license or authorization.²⁷⁰ As of 2014, use of suppressors for hunting is lawful.²⁷¹

FINLAND

In Finland, sound moderators were unregulated until 2011.²⁷² Today, a suppressor is defined as a firearm part, purchase of which requires the buyer to show a firearm ownership permit to the seller.²⁷³

FRANCE

Sound moderators, as they are called in France, are widely available, with prices as low as twenty-five Euros for a basic .22 model.²⁷⁴ Transfer and possession were traditionally unrestricted. To comply with an EU directive, suppressors became subject to regulation in 2013.²⁷⁵ A moderator is considered to be part of the gun and thus is subject to the same regulations as the gun on which it is installed. A handgun, semiauto rifle over 7.65 mm, and some shotguns require an authorization, so one merely provides a copy of that document and an ID when sending in a gun to be fitted with a moderator. For a double-

²⁷⁰ Consolidated Act no. 1316 [The Weapons and Explosives Act] Nov. 26, 2007, http://www.unodc.org/doc/enl/2010/Denmark_Weapons_and_Explosives_Act_R-10-44.pdf.

²⁷¹ See Consolidation Act no. 878, ch. 1, § 1 (June 26, 2010) <https://www.retsinformation.dk/Forms/R0710.aspx?id=162966>. (removing suppressor language); BAUM, *supra* note 263, at 45.

²⁷² See, e.g., BAUM, *supra* note 263, at 45. Cf. Ampuma-aselaki [Firearms Act], *supra* note 263.

²⁷³ See Ampuma-aselaki [Firearms Act], *supra* note 263.

²⁷⁴ See *Silencers in Europe: A Review*, ROGUESCI.ORG (May 11, 2008, 7:10 PM), <http://parazite.nn.fi/roguesci/index.php/t-6131.html>.

²⁷⁵ *New Gun Law in France: Decree Passed*, PROTEGOR (Aug. 4, 2013), <http://www.protegor.net/blog/2013/08/nouvelle-loi-sur-les-armes-en-france-le-decret-est-passe/>.

barrel hunting shotgun, one provides copies of one's shotgun declaration to the prefecture and hunting license.²⁷⁶

GERMANY

All firearms are registered, as are suppressors.²⁷⁷ Suppressors are allowed for hunting and may be required for professional hunters and certain others for hearing protection and noise pollution.²⁷⁸ Authorization to obtain suppressors varies.²⁷⁹

IRELAND

An authorization to possess a silencer may be granted to the holder of a firearm certificate.²⁸⁰ They are widely sold in gun shops, such as is exemplified in the following sample ad from Sportsden, "Ireland's Premier Outdoor Sports Store: The classic Parker-Hale .22 calibre sound moderator has been in continuous production for over 50 years and has not been bettered. Special Price €39.99. We offer free next day delivery on all orders over €100."²⁸¹

ITALY

A suppressor is defined as a firearm part and is subject to the same regulations as apply to a barrel, slide, and other parts.²⁸² It is lawful to possess and to use except for hunting.²⁸³

NORWAY

Suppressors may be freely transferred and possessed if the person has a gun license. A wide selection may be ordered online under such terms as the following: "When purchasing mufflers the customer must show ID and firearms license just like the purchase of ammunition. Fax

²⁷⁶ See, e.g., *Moderateurs De Son Ou "Silencieux"* [Moderators or It's "Silent"], *supra* note 265.

²⁷⁷ Cf. WaffG [Weapons Act], Oct. 11, 2002, FEDERAL LAW GAZETTE at 3970 2003 I, as amended, Annex. 1, p.1 (Ger.).

²⁷⁸ See, e.g., *Weapons Legislation*, ROEDALE PRECISION, <http://wp.roedale.de/en/hauptmenue/schiesslaermminderung/faqs/gesetzeslage-waffenrecht/> (last visited Oct. 25, 2015).

²⁷⁹ *Id.* See also MARTIN R. MASON, AR PLATFORM FIREARMS & CALIBERS 311 (First Strike 2015).

²⁸⁰ See Firearms and Offensive Weapons Act 1990 (Republic of Ireland), *supra* note 266.

²⁸¹ *Parker-Hale .22 Calibre Sound Moderator*, SPORTSDEN.IE, <http://www.sportsden.ie/parker-hale-22-calibre-sound-moderator.html> (last visited Oct. 25, 2015).

²⁸² Decreto Legislativo 26 ottobre 2010 [Legislative Decree No. 204 October 26, 2010], n.204, O.J. Dec. 10, 2010, n. 288 (It.), <http://www.earmi.it/diritto/leggi/Decreto%20legislativo%202010.htm>.

²⁸³ MASON, *supra* note 279.

copy or scanned documents are also accepted.”²⁸⁴

SWEDEN

Suppressors require a license and are lawful for hunting in specified calibers.²⁸⁵

UNITED KINGDOM

A summary by the Home Office explains that acquisition of a firearm requires a firearm certificate from local police which may be issued for “good reason,” including work, sport, or leisure.²⁸⁶ That also qualifies one to obtain a suppressor:

Sound moderators are subject to certificate control as “items designed to reduce the noise or flash of a firearm”. Sound moderators are often used for shooting game, deer, or vermin. In the case of the latter, they might facilitate more effective pest control. They are appropriate for reducing hearing damage to the shooter, or to reduce noise nuisance, for example, for deer control in urban parks, or close to residential properties, or to reduce recoil of the rifle. “Good reason” to possess a rifle for shooting game, vermin or deer should normally imply “good reason” to possess a sound moderator.²⁸⁷

However, “an integral sound moderator, that is one that is part of the firearm, does not require separate authorisation.”²⁸⁸ Finally, the Home Office added: “Some target shooting events where fire and movement is conducted on field firing ranges may require the use of sound moderators, for example, where hearing protection may impede the shooter and where voice commands need to be heard or given by the shooter for safety and continuity.”²⁸⁹

Sound moderators are widely advertised by gun and agricultural shops. A Parker Hale .22 moderator sells for just £29.75, and a set of spare baffles may be ordered online for £7.23.²⁹⁰

²⁸⁴ See, e.g., ARTEMIS AS, <http://artemis.mamutweb.com/Shop/List/Lyddemper/19/1> (follow “Terms for the purchase of weapons” hyperlink) (last visited Oct. 25, 2015).

²⁸⁵ MASON, *supra* note 279.

²⁸⁶ Home Office, *Guide on Firearms Licensing Law*, *supra* note 256, at 5–6.

²⁸⁷ *Id.* at 119.

²⁸⁸ *Id.* at 119–20 (citing the case of *Broome v. Walter* [1989] Crim LR 724).

²⁸⁹ *Id.* at 120.

²⁹⁰ Parker Hale Rimfire Sound Moderator, WILLIAM SHEARER <http://www.william-shearer.co.uk/index.php/shooting/sound-moderators/product/80-parker-hale-rimfire-sound-moderator-22rf> (last visited Dec. 26, 2015); *Airgun Silencers—Gun Accessories: Parker Hale Baffles*, T.W. CHAMBERS & CO., <https://www.gunspares.co.uk/products/23987/Airgun-Silencers/> (last visited Dec. 26, 2015).