

FIREARM REGULATION

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Kidnaping, racketeering and gangsterism, which reached a climax of publicity in the last twelve months with such front page cases as the Urschel kidnaping, the income tax evasion trial of the New Jersey racketeer and beer baron, "Waxey" Gordon, and the final victory of law enforcement agents over the Touhy and Dillinger gangs, have greatly stimulated the interest of the American public in criminal law and law enforcement. Efforts of the present Administration to improve criminal practice and procedure and to secure federal legislation to aid in the suppression of crimes of violence have also been a cause of this awakening interest, as well as a partial result of it.

Among these bills sponsored by the Attorney General of the United States, Homer S. Cummings, none has received more general attention and bitter criticism than the bill proposing to regulate the manufacture, importation, and disposition of certain types of firearms. The purpose of this article is to discuss briefly the various forms of firearm regulation in this country and abroad, proposed federal and state legislation, and the constitutionality thereof.

FORMS OF FIREARM LEGISLATION

Regulating the Carrying of Weapons

The earliest antecedent of firearm regulation among English-speaking people was the development of the English common law which held it a crime against the public peace to ride or go about with dangerous or unusual weapons. This common law principle was later enacted into statute in 1328 by the Statute of Northampton.¹ Among the first enactments of many of our states were provisions concerning weapons, which modified or enlarged upon this early English law. For example, the Criminal Code of the Province of Massachusetts, adopted in 1692-3,² provided that justices of the peace could arrest any person riding or going about armed offensively, could commit him to prison until sureties were found for the peace, and could forfeit

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¹ 2 Ed. III, c. 3 (1328). See Knight' Case, 3 Mod. 117, 87 Eng. Repr. 75 (1686).

² C. 18, §6.

his armor and weapons. This law was reenacted, except for the forfeiture provision, in 1795, after Massachusetts became a state.³

These early statutes either made it unlawful to carry certain weapons such as pistols, dirks, and bowie knives, exempting certain classes of persons, such as peace officers, and exempting certain places, as the owner's premises or place of business; or provided that it was unlawful to carry weapons "concealed"; or prohibited certain persons, such as minors, from carrying weapons; or prohibited the carriage of weapons in certain places. Most of these statutes were soon challenged as unconstitutional, but almost invariably they were upheld.⁴ The first volume of Alabama Supreme Court Reports recorded the case of *State v. Reid*,⁵ decided at Montgomery in 1840. The Alabama statute prohibiting the carrying of any species of concealed firearms about the person was upheld in this case. In 1831, shortly after Indiana became a state, a statute similar to that of Alabama was enacted, which, when questioned, was upheld by the Indiana Supreme Court.⁶ In 1839 the Arkansas Supreme Court upheld the local firearm statute which made it a misdemeanor to wear a pistol, dirk or other concealed weapon except on a journey.⁷ This form of firearm regulation is contained in the Uniform Firearms Act and in many present state statutes.

Regulating the Sale or Disposal of Firearms

Regulations governing the disposition of firearms and regulating dealers therein appear in numerous state statutes and have been incorporated in the Uniform Firearms Act.⁸ These provisions are extremely varied. Such legislation may include a prohibition upon the sale to certain persons, such as minors, drug addicts, and criminals; a prohibition upon advertising firearms for sale; provisions for keeping records of all sales; provisions for formal application for firearms, identifying prospective purchasers, and prohibiting delivery until notification to the police or until the elapse of a period of time; or a prohibition upon sales by pawnbrokers. The principal weakness in this type of law is that there is nothing to prevent a criminal from obtaining a gun in a nearby state which has no similar restrictive regulation. Only through legislation national in scope can there be effected a uniform and successful regulation of dealers and manufacturers in firearms and of the disposal of such weapons.

Requiring License to Purchase or Possess

The first instance of state regulation of the purchase and possession of firearms is found in the controversial Sullivan Law in New York, enacted in 1889.⁹ Since then,

³ 2 MASS. LAWS 1780-1800, 653.

⁴ The constitutionality of legislative regulation of firearms is discussed hereafter.

⁵ 1 Ala. 612 (1840).

⁶ *State v. Mitchell*, 3 Blackf. 229 (Ind., 1833).

⁷ *State v. Buzzard*, 4 Ark. 18 (1839). See also *Nunn v. State*, 1 Ga. 243 (1846), upholding the Georgia Firearms Act of 1837, GA. LAWS 1837, p. 90, in so far as it dealt with the carrying of concealed weapons.

⁸ 9 UN. LAWS ANN. (Supp. 1933) 39.

⁹ N. Y. LAWS 1889, c. 140, §§1, 2; N. Y. CONS. LAWS (Cahill, 1930) c. 41, §1897.

Massachusetts, West Virginia, Michigan, New Jersey, and Missouri have adopted somewhat similar legislation.¹⁰ The objection raised to this type of regulation is the usual objection raised against all firearm legislation, namely, that it burdens the law-abiding citizen and does not keep the pistol out of the hands of the criminal, who will not obey the law but who will steal, bootleg, or, himself, make the gun. But proponents of this form of firearm control do not deny this. In fact, one benefit to be derived from this type of firearm legislation is that it provides a basis for easily convicting gun-carrying gangsters when witnesses have been intimidated or when there is not sufficient evidence to prove guilt beyond a reasonable doubt for a major offense. Proving that a gunman possessed a gun without a license is a simple matter compared with proving that he participated in a bank robbery. It is a type of "public enemy" statute, simple in operation. For example, in 1933, 1,003 persons were arrested and temporarily detained for carrying concealed weapons in violation of the New York Sullivan Law. One hundred fifty-four of these persons are now serving prison sentences, many of them notorious gangsters, such as Morris Grossman, alias Irving Bitz, Harry Kagel, and Stanley Tomasetta.

This form of legislation is also attacked because it provides for identification of the purchaser and, consequently, generally provides for fingerprinting, since this is the best method of identification. Although the hostile reaction to fingerprinting is gradually disappearing, this method of identification is still bitterly opposed even by some law-abiding citizens.

This and other technical requirements of the Sullivan Law and similar legislation are annoying to those who have carried firearms for years without harm to anyone. It is seriously and heatedly questioned whether the New York law does not infringe more than is justified upon personal liberty, considering the civil benefits derived. It cannot be denied, however, that the percentage of homicides and suicides by firearms is considerably less where rigid firearm laws are enforced, as in England, Holland, and even New York State, than where there are few or no regulatory provisions.¹¹

Increasing Penalties for Use or Possession of Weapons by Criminals.

Most of the states have enacted statutes making specially punishable an assault with a "deadly weapon," with a "dangerous weapon" or with a "pistol or revolver." The mere pointing of a gun at another, within shooting distance, is regarded as an assault at common law, whether the gun is loaded or not.

Moreover, the laws of many states provide an additional penalty in the case of one who commits a crime of violence when armed. The recent Federal Bank Robbery Act¹² has such a provision. The Uniform Firearms Act,¹³ provides an

¹⁰ See Imlay, *Uniform Firearms Act Reaffirmed* (1930) 16 A. B. A. J. 799, and *The Uniform Firearms Act* (1926) 12 A. B. A. J. 767; Chamberlain, *Legislatures and the Pistol Problem* (1925) 11 A. B. A. J. 596.

¹¹ See Remarks on Firearm Control by Frederick L. Hoffman, consulting statistician for the Prudential Life Insurance Company, Hearings before Subcommittee of Committee on Commerce (Senate) on S. 885, S. 2258, and S. 3680, 73rd Cong., 2nd Sess., May 28, 1934, at p. 32.

¹² 48 STAT. 783 (1934), 12 U. S. C. A. (Supp. 1934) §588b (b).

¹³ See note 8, *supra*.

additional penalty if a person commits or attempts to commit a crime of violence when armed with a pistol or revolver. A few recent state statutes, as in California,¹⁴ deny the privilege of probation to one who has been convicted of an offense while armed.

FIREARM LEGISLATION IN GREAT BRITAIN AND EUROPE

The British Firearms Act¹⁵ not only is more rigorous and burdensome upon the inhabitants of Great Britain than any proposed federal regulation could be upon the American people, but, considering all its provisions, it is more drastic than any present state legislation, including New York's Sullivan Law.

The British Act is based on regulating the sale, as well as the use and possession, of every kind of firearm except antiques and of the ammunition therefor. Only those individuals can obtain firearm certificates who are approved by the local chief of police, with certain exceptions such as law enforcement officials, and certain classes of persons are prohibited from obtaining any weapons. The certificate, which also limits the quantity of ammunition that can be purchased for each gun, must be kept on the person while carrying the gun. Otherwise the firearm or ammunition may be seized and detained. The certificate fee is approximately \$25.00. The certificate is good for but three years and is revocable. There is an additional hunting license fee.

Dealers are rigidly supervised and must make reports of all sales of weapons or ammunition within forty-eight hours. Such sales can only be made to identified certificate holders and must be pursuant to instructions in the certificate. Pawnbrokers cannot deal in firearms, and all manufacturers and repairmen are supervised.

Practically all the European countries have some form of firearm regulation, ranging from Amsterdam's complete ban on concealed weapons to the Swiss national provision making it obligatory upon every able-bodied adult male to possess and know how to use a military rifle. Most of the Swiss cantons have restrictions on pistols and revolvers, however, and these weapons are rarely seen in Switzerland.

THE UNIFORM FIREARMS ACT

After the World War the growing current of public opinion against the right of individuals to possess or carry freely revolvers and pistols became more assertive. An effort was made in a number of states to adopt the rigid provisions of the Sullivan Law in New York, which is the severest anti-firearm legislation in the United States. As the result the United States Revolver Association endeavored to draft legislation of a less drastic nature to be urged as uniform legislation throughout the states, in order to forestall laws which might seriously interfere with the privileges of pistol shooting and hunting.

This proposed uniform firearm law, which adopted various provisions from existing state firearm laws, was called to the attention of the National Conference of

¹⁴ CAL. LAWS 1933, c. 814.

¹⁵ 10 & 11 GEO. V, c. 43 (1920).

Commissioners on Uniform State Laws in 1923. The substance of these provisions was enacted in the California,¹⁶ North Dakota,¹⁷ and New Hampshire Firearms Acts¹⁸ of that year. In 1925 the first draft of the proposed "Uniform Act to Regulate the Sale and Possession of Firearms" was discussed at the Conference, and, after numerous changes, was adopted by the Conference in 1926.¹⁹ This proposed act at once was severely criticized as not being sufficiently drastic. These criticisms were principally made by law enforcement officers. The National Crime Commission received so many protests that it organized a committee to study and propose uniform firearm legislation. The resulting uniform act was considerably more drastic than the act proposed by the Conference. As the result both the Conference and the American Bar Association reconsidered the previous act. For four years there were frequent meetings between committees of the National Crime Commission and the Conference, and eventually the present Uniform Act was presented. This proposed law is summarized as follows:²⁰

1. The carrying of a "pistol," defined as any firearm with a barrel less than twelve inches in length, in a vehicle or concealed on the person is forbidden to all except law enforcement officers and certain others, except upon the issuance of a license. (No license is required, therefore, for the purchase or possession of a pistol so long as it is not carried beyond the limits of the owner's abode or place of business.)

2. A crime of violence committed by one armed with a "pistol" carries a penalty in addition to that prescribed for the crime, and the fact that one charged with a crime of violence is armed and has no license is *prima facie* evidence of his intention to commit such a crime.

3. The delivery of "pistols" is forbidden to certain classes of persons, such as drug addicts, habitual drunkards and minors under eighteen, if there is reasonable cause to believe that the applicant is in one of the designated classes; and possession is prohibited to any person convicted of a crime of violence.

4. The sale of "pistols" is regulated by licensing the dealer. The sale may be made only after forty-eight hours have elapsed from the time the purchaser makes application for the firearm, and such application must contain certain information identifying the applicant and the weapon to be sold. A copy of this application must be sent by the dealer to local police authorities. Moreover, the purchaser must be personally known to the seller.

5. The pawning of pistols is forbidden.

6. A penalty is imposed for altering or removing the identifying marks of the

¹⁶ CAL. LAWS 1923, c. 339; CAL. GEN. LAWS (Deering, 1931) Act 1970.

¹⁷ N. D. LAWS 1923, c. 266; N. D. COMP. LAWS ANN. (Supp. 1925) c. 54 A, §9803.

¹⁸ N. H. LAWS 1923, c. 118; N. H. PUB. LAWS (1926) c. 149.

¹⁹ NAT. CONF. COMM. UN. STATE LAWS, HANDBOOK AND PROCEEDINGS, 1925, 294, 316; *ibid.*, 1926, 571, 575.

²⁰ See Inlay, *supra* note 10; Hearings before Committee on Ways & Means (House of Representatives) on National Firearms Bill, May 14-15, 1934, at pp. 102, 127.

firearm, and the possession of a weapon from which the identifying marks have been removed is *prima facie* evidence that the possessor removed such marks.

This Act with minor changes was adopted for the District of Columbia by the Congress in 1932,²¹ and by the State of Pennsylvania in 1931.²²

THE UNIFORM MACHINE GUN ACT

The growth of armed gangsterism has resulted in the use of more deadly weapons by criminals. The automatic pistol replaced the revolver, and now the submachine gun, a partly concealable gun shooting automatically 20 to 100 of the ordinary 45 caliber Colt cartridges at one time, has become the favorite weapon of gangsters.

Recently, there have been enacted in some states laws against the purchase, possession, or carriage of such machine guns. In 1932, a Uniform Machine Gun Act²³ was presented by the Conference of Commissioners on Uniform State Laws. Therein, the possession or use of a machine gun of any kind for offensive purpose is declared to be a crime. Such possession or use is presumed if the gun is found on premises not owned or rented for legitimate use by the possessor or user of the gun; if the gun is in possession of, or used by, either an unnaturalized foreigner or a person previously convicted of a crime of violence; if the machine gun is of the kind most commonly used by criminals and has not been registered as provided in the Act; or if shells adapted to use in that particular weapon are found in the immediate vicinity thereof.

There is also a provision concerning registration of machine guns by the manufacturer thereof, and a provision for an additional penalty if a machine gun is possessed or used in the perpetration or attempted perpetration of a crime of violence. In view of the new National Firearms Act,²⁴ discussed hereafter, the need for such legislation is greatly lessened.

THE NATIONAL FIREARMS ACT

While there has been some effort to obtain federal legislation restricting the promiscuous sale or transportation of certain firearms, with the exception of the innocuous measure prohibiting shipping revolvers through the mails (I have before me a catalogue advertising \$6.95 revolvers which "must be shipped by express"), no such legislation has been effectively sponsored for passage until the memorable 73rd session of Congress which has just terminated.

A number of bills regulating the manufacture, disposal, or transportation of small firearms were introduced in this session. Some of these bills regulated transportation of small firearms or ammunition by exercising the federal power over interstate commerce. Other bills were based on the federal taxing power. S. 2840,²⁵ a bill to pro-

²¹ 47 STAT. 650 (1932). This act includes many provisions not contained in the Uniform Act. See 9 UN. LAWS ANN. (Supp. 1933) 38.

²² PA. LAWS 1931, No. 158.

²³ 9 UN. LAWS ANN. (Supp. 1933) 63.

²⁴ Act of June 26, 1934, Pub. No. 474, 73rd Cong. 2nd Sess.

²⁵ Introduced by Senator Ashurst of Arizona on Feb. 21, 1934, 78 CONG. REC. 3026.

vide for the taxation of manufacturers, importers and dealers in small firearms and machine guns, required the registration of pawnbrokers and other dealers in used firearms, as well as of manufacturers and importers. By reason of the tax imposed, proponents of this bill expected that most, if not all, pawnbrokers, who have been the principal legitimate source of supply of dangerous weapons to the criminal element, would cease to handle such weapons. It was also expected that this provision would furnish some assurance of the reliability of such manufacturers, importers, and dealers.

S. 2844,²⁶ a bill to tax the sale or other disposal of firearms and machine guns by importers, manufacturers and others, and to restrain the importation thereof, provided for a stamp tax on the disposal of every small firearm and machine gun, and for the positive identification of each recipient of such weapon, and otherwise regulated importation, disposal and transportation thereof.

These bills eventually were combined into one bill, entitled "A bill to provide for the taxation of manufacturers, importers and dealers in small firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrain importation and regulate transportation thereof." This consolidated bill, with minor changes, was presented in the House by Congressman Sumners, as H. R. 9066, and was referred to the Committee on Ways and Means, where public hearings were had. Considerable opposition developed from certain rifle associations which sought, with eventual success, to have pistols and revolvers eliminated from the bill. There was also some opposition, on the part of manufacturers, to the amount of the tax suggested. The bill, as eventually reported, was practically the same as was discussed by the Committee, except that pistols and revolvers were omitted. It was hurriedly passed in this form at the last moment before Congress adjourned.²⁷

It was believed that a bill based upon the taxing power of the federal government and analogous to the Harrison Anti-Narcotic Act²⁸ would be preferable to one based on the interstate commerce power, for the following reasons: First, it would be a source of revenue. Secondly, it would permit the federal government to exert some control over ownership of small firearms as well as over the interstate shipment thereof. Under the revenue measure, after a period of time it would be possible to ascertain by proper credentials the identity of the possessor of every small firearm and machine gun and his lawful right to such possession, and a means of speedy punishment for unlawfully possessing such weapons would be thereby provided. Finally, this act, being patterned closely after the Harrison Act, would have the advantage of numerous appellate and Supreme Court decisions²⁹ to sustain its constitutionality.

It was not expected that this proposed legislation would keep all revolvers, sawed-

²⁶ See note 25, *supra*.

²⁷ *Supra* note 24.

²⁸ 38 STAT. 785 (1914), 26 U. S. C. A. §§211, 691-708.

²⁹ The Harrison Anti-Narcotic Act was held constitutional in *U. S. v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214 (1919), discussed *infra*, p. 408.

off shotguns, and machine guns out of the hands of criminals. It was believed, however, that law-abiding citizens would respect its provisions, and that the criminal element would violate it, thus laying a foundation for forfeiture of their weapons, and for their imprisonment for violating its provisions. Because of the omission of revolvers and pistols from the bill, the Act is now a mere skeleton, applying only to machine guns, "sawed-off" shotguns and rifles, and firearm silencers.

The first section of this Act defines the terms used therein. The term "firearms" is defined to include only the weapons above mentioned.

The second section incorporates, in substance, S. 2840, providing for the annual registration and taxation of importers, manufacturers, dealers and pawnbrokers in such firearms.

Section 3 imposes a tax on the transfer of such firearms, such tax to be represented by appropriate revenue stamps. Section 4 provides that no such firearm shall be disposed of except in pursuance of an order from the person seeking to obtain the firearm, on a form drafted by the Commissioner of Internal Revenue, such order to identify the purchaser by fingerprints, and otherwise. If the order is accepted, the person disposing of the firearm must set forth in it the mark identifying the weapon, affix proper revenue stamps to it, and return it to the applicant, forwarding a copy to the Commissioner of Internal Revenue. Every subsequent transferor must transfer his stamp-affixed order with the gun. The transfer of firearms from manufacturer or dealer to other dealers is exempt from this section. Section 6 makes it unlawful to receive or possess any firearm disposed of in violation of Sections 3 or 4.

Section 5 provides for registering all such firearms with the local collector of internal revenue within sixty days after the Act goes into effect. The object of this provision is to determine whether a person who is arrested with a machine gun in his possession owned it when the Act went into effect. If he did not, a tax should have been paid on the subsequent transfer and he should have a stamp-affixed order form in his possession. Generally gangsters steal the arms found in their possession, so this provision will aid enforcement officers to find out at once whether the possessor rightfully possesses the weapon.

Section 7 provides that any such firearm disposed of in violation of the proposed act shall be subject to seizure and forfeiture.

Section 8 requires every manufacturer and importer of any such firearm to identify it by placing thereon a number or other identification mark approved by the Commissioner of Internal Revenue. A further provision penalizes those who remove this number or identifying mark, and mere possession of such a weapon with the mark obliterated raises a presumption of unlawful possession.

Section 9 provides that importers, manufacturers, and dealers must keep such books and records and render such returns concerning transactions in these weapons as shall be required by regulations of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

Section 10 limits the importation of these firearms to such as are unique or of a type not obtainable in the United States, and the purpose of such importation must be lawful. Such firearms may be imported pursuant to such regulations as the Secretary of the Treasury may prescribe. This section makes it unlawful (a) fraudulently or knowingly to import any such firearm in violation of the provisions of the act, or (b) to assist in so doing knowing the same to have been imported contrary to law, or (c) to receive, conceal, or in any manner facilitate transportation, concealment or sale of any such firearm after being imported, knowing the same to have been imported contrary to law. Possession of such an imported firearm is deemed sufficient evidence to authorize conviction, unless such possession is explained to the satisfaction of the jury. This section is similar to certain provisions in the Act of February 9, 1909, c. 100, as amended,³⁰ which regulates the importation of narcotic drugs. The provisions of that Act were upheld in *Yee Hem v. United States*.³¹

Section 11 makes it unlawful for any person who has neither registered his firearm, nor paid a transfer tax on it, to send, ship, carry or deliver it in interstate commerce.

Section 12 requires the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all needful rules and regulations to carry the Act into effect.

Section 13 provides that the Act shall not apply to the disposal of such firearms to the United States Government or other political units, or to any peace officer as shall be designated by regulations of the Commissioner of Internal Revenue. Moreover, antiques and similar unserviceable weapons are exempted.

Section 14 imposes a penalty of not more than \$2,000 fine or imprisonment for not more than five years, or both, upon any person failing to comply with the requirements of the Act.

Section 15 provides that existing taxes on firearms shall not apply to firearms which are included in its scope.

Section 16 provides that if any provision of the Act is held invalid, the remainder of the Act shall not be effected thereby. In the light of such United States Supreme Court decisions as *Nigro v. United States*³² and *United States v. Doremus*,³³ upholding the constitutionality of the Harrison Anti-Narcotic Act as a valid revenue measure, there cannot be much doubt that the National Firearms Act also is a valid revenue measure. In the latter case the Supreme Court held that the power conferred by the Constitution to levy excise taxes uniformly throughout the United States is to be exercised at the discretion of Congress; that, while Congress may not exert authority which is wholly reserved to the states, where the provisions of the law enacted have some reasonable relation to the revenue power, the fact that they have been impelled by a motive, or may accomplish a purpose, other than the raising of

³⁰ 35 STAT. 614 (1909); 21 U. S. C. A. §§173, 174.

³¹ 268 U. S. 178, 45 Sup. Ct. 470 (1925).

³² 276 U. S. 332, 48 Sup. Ct. 388 (1928).

³³ *Supra* note 29.

revenue cannot invalidate them; nor can the fact that they affect the conduct of business which is subject to regulation by the state police power. It is believed that the individual provisions of this Act which, so far as possible, follow like provisions of the Harrison Act, similarly would be upheld, if they should be tested in the Supreme Court.³⁴

Section 17 provides that the Act shall take effect thirty days after its enactment and entitles it "The National Firearms Act."

It will be observed that this federal firearm legislation follows the principles of the Uniform State Firearm Act in that sales are regulated through licensing the dealer, the pawnshop business in firearms is controlled, the obliteration of identifying marks is discouraged, and governmental agencies and antique weapons are exempted from the provisions. In addition, control over importation and manufacture is secured, and registration of weapons covered by the Act is provided for—results which could not be attained effectively by individual state legislation.

FIREARM LEGISLATION AND THE CONSTITUTIONAL RIGHT TO "BEAR ARMS"

Neither the National Firearms Act, nor any of the state statutes with respect to firearms, infringe, in the least, upon the constitutional provisions which guarantee to the people the right to keep and bear arms. The Second Amendment to the United States Constitution, from which most of the similar state constitutional provisions have been copied, provides that

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.

History and Purpose of Provision

The right to keep and bear arms, whether collectively or individually, was not a right guaranteed by the common law. As has been seen, as early as 1328 a statute in England³⁵ provided that no man should

go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere upon pain, . . .

At the same time landed proprietors were required to maintain in readiness at their own expense certain arms and equipment for military service when required by the government. These landed proprietors, with their retainers, constituted the militia of the kingdom. When James II succeeded to the throne he increased the body of soldiers which acted as the guardian of the throne into a regular army for military service. Finally, after Monmouth's rebellion, he began to disarm Protestant subjects. Then occurred the Great Rebellion, and James was forced to abdicate the throne. As the result of this rebellion the Declaration of Rights was presented to the reigning

³⁴ That the statute is not violative of the Second Amendment to the United States Constitution is the thesis of the succeeding section.

³⁵ Statute of Northampton, *supra* note 1.

Prince of Orange, who yielded assent to its provisions. Parliament then confirmed this Declaration in the Bill of Rights. One of the provisions was the following guarantee:

That the subjects which are Protestant may have arms for their defense suitable to their condition, and as allowed by law.³⁶

In the American colonies the situation was similar to that in England in the 14th century. The male citizens were enrolled for military service and were required by law to maintain specified arms and equipment. Moreover, there was as much grievance amongst the colonists because the king had established troops in the colonies under the direct command of royal officers as there had been over the quartering of Catholic soldiers by James II amongst the rebellious people of Great Britain. Hence, when the colonies had rebelled against Great Britain, there was incorporated in the new Bill of Rights—the first ten amendments to the Constitution—a provision very similar to the above provision of the original Bill of Rights, namely, the Second Amendment quoted above.

It is quite evident from the history of this provision that its purpose was to preserve the state and to aid in the enforcement of law. It assured the people that a powerful executive could not organize a strong army and, by disarming the citizenry, place them at his mercy, as the Stuarts had attempted to do in England. This is further indicated by the specific language of this Amendment.³⁷

Moreover, it is evident that the first ten Amendments to the Constitution, and especially the Second Amendment, were not intended to set forth any novel principles of government but only to assure the retention of the principles established by the original Bill of Rights with recognized exceptions, including the power of the state to regulate the promiscuous carrying of deadly weapons. Our Supreme Court has clearly stated this in the case of *Robertson v. Baldwin*:³⁸

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; . . . Nor does the provision that an accused person shall be confronted with the witnesses against him

³⁶ See opinion of Justice Lumpkin in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260 (1911); Emery, *The Constitutional Right to Keep and Bear Arms* (1915) 28 HARV. L. REV. 473, 474.

³⁷ Emery, *supra* note 36, at 477; McKenna, *The Right to Keep and Bear Arms* (1928) 12 MARQUETTE L. REV. 138, 139.

³⁸ 165 U. S. 275, 281, 17 Sup. Ct. 326, 329 (1897).

prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.³⁹

Judicial Construction of the Second Amendment

(a) Interpretation of the words, "the people."

As used in the Constitution, the term "the people" connotes the citizens in a collective sovereign sense. In the *Civil Rights Cases*,⁴⁰ the court quotes from the *Dred Scott* decision as follows:

The judgment of the court was that the words "people of the United States" and "citizens" meant the same thing, both describing "the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;" that "they are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty;" . . .

The word "people" means only the collective body, and individual rights are not protected by the constitutional clause.⁴¹

It will be noted that persons are designated by four different terms in the Constitution: "the people"; "person" (and "persons"); "citizen" (and "citizens"); "subject" (and "subjects").

The expression "the people" is on each occasion used to denote people in a collective sense, as "We *the people* of the United States . . ." (the Preamble); "the right of *the people* to be secure in their *persons*, houses, papers, . . ." (Fourth Amendment).

When the drafters of the Constitution desired to refer to the individual or to individual rights, privileges, or immunities, they never referred to "the people" but referred to "persons," as "the Electors shall . . . make a list of all the Persons voted for . . ." (Article II, Section 1); "no person shall be held to answer for a capital or otherwise infamous crime, except on a presentment or indictment of a Grand Jury, . . ." (Fifth Amendment). Where the substance required such specification, reference was made to "citizens" or "subjects."⁴²

It is worthy of note that in the Fourth Amendment to the Constitution both terms are used.

The right of *the people* to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized.

(b) Interpretation of the words, "bear arms."

The expression "to bear arms" should be distinguished from "to carry weapons."

³⁹ To the same effect are the following: *Hill v. State*, 53 Ga. 472 (1874); *City of Salina v. Blaksley*, 72 Kans. 230, 83 Pac. 619 (1905); *Emery*, *supra* note 36, at 476; *McKenna*, *supra* note 37, at 139.

⁴⁰ 109 U. S. 3, 31, 3 Sup. Ct. 18, 36 (1883).

⁴¹ See also *City of Salina v. Blaksley*, *supra* note 39; *Emery*, *supra* note 36, at 476-477; *McKenna*, *supra* note 37, at 145.

⁴² As in U. S. CONST. Art. III, §2: "The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The former originally referred to the arming of an organized group with weapons of warfare, such as swords, muskets, and artillery. The latter expression has been used to denote weapons generally concealable on the person, such as blackjacks, bowie knives, pistols, and such other weapons as are commonly employed in brawls or by criminals.

The very words, "bear arms," had then and now have, a technical meaning. The "arms bearing" part of a people, were its men fit for service on the field of battle. That country was "armed" that had an army ready for fight. The call "to arms," was a call to put on the habiliments of *battle*, and I greatly doubt if in any good author of those days, a use of the word arms when applied to a people, can be found, which includes pocket-pistols, dirks, sword-canes, toothpicks, Bowie-knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society, can encourage or secure the existence of a militia, and especially of a well regulated militia, I am not able to divine.⁴³

(c) Interpretation of: "A well regulated Militia, being necessary to the security of a free State, . . ."

The purpose of the Second Amendment is set forth in this phrase. The right of the people to bear arms is protected by the Constitution because a well-regulated militia is necessary for the security of the state. The entire provision must be read in the light of this expression, and no regulation or restriction of firearms or weapons is in conflict with this Amendment unless it substantially impedes the maintenance of a militia sufficiently well-equipped to assure the safety of the state.

Upon its very front, as we have said, the object of the clause is declared to be to secure to the state a well regulated militia. Has this declaration *no* significance? Is the clause to be interpreted without reference to it? On the contrary, by the well settled rules for the interpretation of laws, as well as by the dictates of common sense, the object and intent of the law is the prime key to its meaning. A well regulated militia may fairly mean—"the arms-bearing population of the state, organized under the law, in possession of weapons for defending the state, and accustomed to their use." The constitution declares that as such a militia is necessary to the existence of a free state, the right of the people to keep and bear arms shall not be infringed. . . . If the general right to carry and to use them exist; if they may at pleasure be borne and used in the fields, and in the woods, on the highways and byways, at home and abroad, the whole declared purpose of the provision is fulfilled. The right to keep and to bear arms *so that* the state may be secured in the existence of a well regulated militia, is fully attained.⁴⁴

Types of Valid Firearm Legislation

In England, as stated above, the Protestant people have been guaranteed the right to "bear arms," but this has never been regarded as inconsistent with restriction, and even prohibition, upon the individual in the obtaining or carrying of certain weapons, where such legislation has been necessary as a police measure. The present British Firearms Act⁴⁵ is much more drastic than any similar legislation in this country.

⁴³ Hill v. State, *supra* note 39, at 474. See Robertson v. Baldwin, *supra* note 38; English v. State, 35 Tex. 475 (1872); Strickland v. State, *supra* note 36.

⁴⁴ Hill v. State, *supra* note 39, at 475.

⁴⁵ *Supra* note 15.

So, also, in those states of the United States which have a constitutional provision similar to the Second Amendment to the Federal Constitution, it is recognized that, in the proper exercise of the police power, the carrying of weapons by the individual may be regulated, restricted, and even prohibited by statute.⁴⁶ Such regulation, restriction, or prohibition applies

(1) to the carrying of certain types of weapons, such as concealed weapons or weapons habitually carried by criminals to terrorize the community;⁴⁷

(2) to the carrying of weapons in certain public places and peaceable assemblies, such as churches, courts of justice, street parades;⁴⁸

(3) to the carrying of weapons by certain individuals, such as boys or persons of dissolute habits.⁴⁹

Federal Firearm Regulation

The National Firearms Act is more restricted in scope than the regulations listed above since it provides only for the taxation of manufacturers, importers and dealers in certain small firearms and machine guns, for the taxation of the sale or other disposal of such weapons, and for the restriction of importation thereof. It includes only sawed-off shotguns, firearm silencers, and machine guns, although the next session of Congress may extend it to include pistols and revolvers. There is no restriction upon the possession and use of such weapons, the only regulation, in so far as the individual is concerned, being the provision to identify the present owner of each such weapon, and subsequent purchasers and transferees. In its operation, the Act will not deny, nor seriously restrict, the right of the individual to carry weapons; *a fortiori* it will not deny to the people the right to keep and bear arms.

The propriety of reasonable regulations of the individual by the federal government in conjunction with its power to levy and collect taxes has been pointed out earlier in this paper.⁵⁰ To the extent that the regulation imposed by the proposed measure restricts the obtaining of certain weapons, the decisions and comments previously set forth concerning the right of the states to enact regulatory provisions in connection with the possession and carrying of firearms, irrespective of state constitutional provisions concerning the bearing of arms, are applicable. So, also, are the well-recognized exceptions of the common law to the original provision in the Bill of Rights, which first guaranteed the right to bear arms.

⁴⁶ It is settled that the Second Amendment, similar to the other provisions of the first ten Amendments, affects only action by the federal government, and is not a restriction upon the states. *U. S. v. Cruickshank*, 92 U. S. 542, 553 (1875). See FREDERICK, PISTOL REGULATION (1931) 25.

⁴⁷ *Strickland v. State*, *supra* note 36, and cases cited therein; *Darling v. Warden of the City Prison*, 29 N. Y. Crim. Rep. 66, 139 N. Y. Supp. 277 (1913).

⁴⁸ *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580 (1886); *Hill v. State*, *supra* note 39; *McKenna*, *supra* note 37, at 138.

⁴⁹ *Darling v. Warden of the City Prison*, *supra* note 47; *Emery*, *supra* note 36, at 476.

⁵⁰ P. 408, *supra*.

CONCLUSIONS

The following conclusions are warranted from this discussion:

1. The guarantee contained in both the federal and state constitutions of the right to bear arms is not infringed either by existing or proposed legislation regulating use, possession, or disposal of small firearms.
2. Certain types of firearm legislation, such as regulation of importation, manufacture or sale of firearms, or registration thereof, can be successful only if national in scope. Federal legislation is restricted, however, because of the limited powers delegated to the federal government by the Constitution.
3. There is a certain field where state regulation is necessary, as where direct exercise of the police power is required. An example is legislation increasing the penalty for committing a crime of violence while armed, or prohibiting certain persons to carry weapons.
4. Immediate and studious consideration should be given to the advisability of applying the provisions of the National Firearms Act to pistols and revolvers, or
5. The Uniform Firearms Act should be reconsidered with a view to omitting provisions which would be duplicated by federal legislation, and to improving its effectiveness, if this is possible, in the light of experience in those states where its provisions have been in effect.