St. John's Law Review

Volume 46
Issue 3 *Volume 46, March 1972, Number 3*

Article 12

December 2012

Gun Control (United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns)

St. John's Law Review

GUN CONTROL

All firearms are capable of taking human life. Nevertheless, it is true that firearms can provide a safe means of recreation as well as serve a legitimate "protection from danger/self-defense" function. However, this should not obscure the fact that guns, with their inherent death-producing potentiality, should be placed under the strictest of controls.[151] However, in the United States, where the preservation of hu-

---

tial And Congressional War-Making Powers, 50 B.U.L. REV. 78 (1970) (special issue). The note explores the traditional principles comprehended by the political question doctrine in the context of a hypothetical congressional statute condemning the President's actions and excusing servicemen from orders to Vietnam or Cambodia. The use of the statute reduces the issue to whether it is within the power of Congress to control the President's actions by a restrictive statute when, in the opinion of Congress, such actions have exceeded defensive measures.

151 Firearms unfortunately are not governed by the strictest of controls because of a general reluctance by legislatures to enact stricter gun control statutes, due in part to the constitutional problems involved in enforcing such laws. For example, the constitutional safeguards against self-incrimination have been expanded recently in three landmark decisions prohibiting self-incrimination by disclosure required by federal registration requirements. In Marchetti v. United States, 390 U.S. 36 (1968), a conviction against a professional gambler for willfull failure to register as such and pay the $50 wagering tax imposed by statute was reversed. The Court held that provisions requiring voluntary registration and admission of an illegal activity may not be used to impose criminal liability upon one who defends his failure to comply by utilizing a proper assertion of the privilege against self-incrimination. In Grosso v. United States, 390 U.S. 62 (1968), a conviction for failure to pay the wagering excise tax and gambler's occupational tax imposed by 26 U.S.C. §§ 4401 and 4411, (1970) and conspiracy to defraud the government by evading payment of these taxes was reversed. The Court recognized that the wagering tax provisions were directed almost exclusively against those suspected of criminal activity and as such were violative of the self-incrimination protections secured within the fifth amendment.

However, the basis for the most effective fifth amendment challenges to gun controls is contained in Hays v. United States, 390 U.S. 85 (1968), where the Court reversed a conviction for knowingly possessing an unregistered firearm specifically defined in the National Firearms Act, 26 U.S.C. §§ 5841, 5851 (1970). Because the act's requirements are applicable only to sawed-off rifles and shotguns, automatic weapons and silencers, petitioner contended that the act was obviously intended to apply to those weapons used by persons engaged in criminal activity. Petitioner moved to dismiss, asserting that his privilege against self-incrimination guaranteed by the fifth amendment was violated by the Act. The Court agreed, holding that a proper fifth amendment claim will provide a full defense to prosecutions for failure to register or for possession of an unregistered firearm. However, it should be noted that the Court in *Marchetti*, reiterated the recognized principle that taxes may be imposed upon unlawful activities. In addition, there may be those who own a federally unregistered firearm who, as a class, may be prohibited from possessing a firearm under state and/or local laws. *See, e.g.*, CONN. GEN. STAT. ANN. § 29-28, 33 (1971), N.J. STAT. ANN. § 2A: 151-9 (1969), N.Y. PENAL LAW § 265.05 (McKinney 1971), and PA. STAT. ANN. tit. 18, § 4628 (1970) where such classes as convicted felons, mental incompetents and minors are prohibited from owning firearms. However, these people may successfully argue that the Federal Gun Control Act, 18 U.S.C. § 921 *et seq.* (1970), itself provides a defense against state prosecution by invoking fifth amendment protection based on Murphy v. Waterfront Commission, 378 U.S. 52 (1964). There petitioners were convicted of contempt for refusing to answer questions posed by a New York Waterfront Commission, even though they had been granted immunity from state prosecution. The Court, per Justice Goldberg, overturned the "established rule" that the constitutional

man life theoretically occupies the highest of priorities, any attempt to strengthen existing gun control laws immediately triggers outcries from both sides of the issue which border on the extreme, add nothing to the dialogue which must occur before meaningful legislation can be enacted, and fail to make any headway in dealing with the problem of firearms' proliferation which is rapidly becoming firearms' pollution.[152] This dilemma is only aggravated, it seems, by the widespread feeling that any increase in the pervasiveness of gun controls is another step in the process of American emasculation, which can be traced to an intuitive belief that every citizen has an undeniable common-law right to own a deadly weapon, often referred to as one's "right to bear arms."[153] However, any American right to bear arms included in the Constitution[154] should be seen as having been written by men well aware of the

---

privilege against self-incrimination does not protect a witness in one jurisdiction against being compelled to give testimony which could convict him in another jurisdiction, and reversed on the grounds that petitioners' answers might have tended to incriminate them under federal law.

152 *But see Violence Symposium*, 14 N.Y.L.F. 694 (1968), for the kind of intelligent dialogue which must occur before meaningful solutions to the firearms proliferation problem can be found.

153 It appears that belief in such a "right" is quite old and not restricted to the West. In 124 B.C. the Imperial Chancellor Kung-Sun Hung petitioned the Chinese Emperor Han to take away the people's arms. In turning down the petition the Emperor stressed the right of the individual to bear arms for the common protection of society as well as the individual. *See* AMERICAN RIFLEMAN, Jan. 1959, at 14, *cited in* Hays, *The Right to Bear Arms: A study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 n.1 (1960) [hereinafter Hays]. In the West, these same concepts arose majestically in the Magna Carta of 1215 where it was provided that if the King did not follow the provisions of the charter, the barons could then exercise their right to correct the King by force. Thus the right of lawful revolution is said to have been born into the constitutional law of England, and this seems to mandate a corresponding right to bear arms to achieve this end. *See* Hays *supra*.

Arguments championing the existence of a right to bear arms draw their strength from two principal sources. First and fundamentally, they look to a right of personal and familial preservation and defense. *See generally* Emery, *The Constitutional Right To Keep and Bear Arms*, 28 HARV. L. REV. 473 (1914); McKenna, *The Right To Keep and Bear Arms*, 12 MARQ. L. REV. 138 (1927) [hereinafter McKenna]; Rohner, *The Right to Bear Arms, A Phenomenon of Constitutional History*, 16 CATH. U.L. REV. 53 (1966). Second, albeit more controversially, arms bearing can be defended on the basis of the right of "lawful revolution", *i.e.*, one's right to resort to force when law fails through the establishment of a "well-regulated militia composed of the body of the people" because this is "the natural and safe defense of a free state." Virginia Bill of Rights of 12 May 1776, *cited in* Hays' *supra*, at 391 n.34.

154 The second amendment reads: "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." Often cited by laymen as the protector of the citizen's right to own a weapon, the second amendment was long ago rendered impotent from the viewpoint of affording constitutional defenses to state and federal gun controls. See United v. Cruikshank, 92 U.S. 542 (1875), where the Court reversed the conviction of Louisiana whites under the Enforcement Act of 1870 for conspiracy to prevent blacks from bearing arms for lawful purposes and held that the right of the people to keep and bear arms is not a right granted by the Constitution.

necessary limitations on such a right, derived from the police power of the government and the common-law restrictions on weapons-bearing in public.[155] It seems logical then, that just as we would agree to the need for restricting widespread weapons-bearing in public in our urbanized society, we should also agree to the need for restricting gun ownership per se as the logical means for achieving that end. For example, no reason exists why a weapon should be available to the general public that by reasonable standards serves no legitimate sporting or security purpose. No responsible citizen presumably would question the need for some sort of gun ownership restriction, at least as applied to weapons of clearly ludicrous relationship to any sporting or security function.[156] It is within this context that the Second Circuit clearly

---

> Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it should not be infringed; but this . . . means no more than it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . .

Id. at 553. *Cruikshank* was adhered to in Presser v. Illinois, 116 U.S. 252, 265 (1885), where the Court went on to hold that "a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the National Government, and not upon that of states." But see Hays, *supra* note 153, at 405, where a most persuasive argument is advanced that these opinions are more the children of the Civil War and "Black Republican Reconstructionism" than jurisprudential essays in constitutional interpretation denying the existence of a fundamental right to bear arms.

In those instances where the American courts have dismissed the matter of the existence of a right to bear arms, they have said merely that the constitutions do not create the right, but only protect it. See McKenna, *supra* note 153, at 149. However, it appears that if and when this issue is finally raised for Supreme Court adjudication, it will be denied and any such right to own a weapon couched in one's right to bear arms will be defined as vesting within the power of society to create one along with those limitations it deems necessary. In fact, the death knell may have already sounded in 1924 in People v. Camperlingo, 69 Cal. App. 466, 473 231 P. 601, 604 (2d Dist. Ct. App. 1924), when the court said

> It is clear that, in the exercise of the police power of the state, that is, for the public safety or the public welfare generally, such right (to bear arms) may be either regulated or in proper cases, entirely destroyed.

However, the court seems to recognize that the right to bear arms nevertheless predates society's creation of the state and its police power.

155 To the extent that one searches the English experience for the source of a right to bear arms as an inviolate constitutional principle, one must realize that there nevertheless is a long established history of restrictions upon weapons bearing. For example, in 1328, during the reign of Edward III, the enactment by Parliament of the Statute of Northampton, I. STATUTES OF THE REALM 258 (1963), provided that none "except the King's servants" should "go nor ride armed by night nor by day . . . upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." Thus was established the statutory misdemeanor of going about armed, which along with the Common Law on England was adopted by the colonies. *See* R. PERKINS, CRIMINAL LAW 365 (1953).

156 *See, e.g.*, the National Firearms Act of 1934, 26 U.S.C. § 5801 *et seq.* (1970) which sought to control by prohibitive taxes the sale, importation and transfer of criminal-type weapons (machine guns etc.) used by the underworld during Prohibition. However, it has little contemporary significance in curtailing weapons proliferation. The Federal Firearms

established its intention to keep such ludicrous firearms out of circulation in its decision in *United States v. 16, 179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns.*[157]

In August 1969, an agent of the Alcohol Tax and Firearms division (ATF) of the Internal Revenue Service purchased a derringer-type .22 caliber starter gun from a third party who had purchased it from the appellant, Lee. The agent was able to convert the gun to fire live ammunition with the aid of an electric drill in less than ten minutes. Another ATF agent was able to convert an identical gun purchased from the same source to fire live ammunition in the same way in five or six minutes. As a result of these two purchases, officers of ATF seized a total of 16,179 Molso starter guns at Lee's place of business. Lee was not a licensed dealer in firearms under the federal act[158] which provides that firearms imported contrary to the statute, *i.e.*, by an unlicensed dealer, are subject to confiscation.[159] Thereafter, Lee commenced an action to enjoin such confiscation, and the government brought an action to enforce the order. Upon stipulation of the parties, the cases were consolidated. The issue thus joined was whether the starter guns confiscated by the government were firearms within the meaning of the statute. During the trial, the government demonstrated with the help of

---

Act of 1938, ch. 850, § 9, 52 Stat. 1252, on the other hand, specifically prohibited licensed dealers from knowingly selling weapons to felons or those indicted for a felony and from knowingly dealing in stolen weapons. However, while the act appeared to be readily applicable to current problems, it proved to be completely ineffective because scienter, or reasonable cause to believe that the purchaser was a member of the prohibited group, had to be proven. Yet, while such laws have made the practice of carrying a violin-cased "Thompson," now only a late movie cliché, they clearly have not attacked the dual source of modern weapons pollution, *i.e.*, the widespread availability in many states of cheap mail-order war surplus weapons and cheap small caliber handguns, and the impotence of federal law to curb their continued manufacture and sale. For example, while the Federal Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* (1968), note 158 *infra*, prohibits the importation of such cheap revolvers, the law has been rendered ineffective in preventing the proliferation of these "Saturday night specials" because it still allows parts for these guns to be imported for domestic assembly and sale. See N.Y. Times Editorial, Aug. 23, 1971, at 28. See generally, Sherril, *The Saturday Night Special and Other Hardware*, N.Y. Times, Oct. 10, 1971, § 6 (Magazine), at 15.

157 443 F.2d 463 (2d Cir. 1971) *cert. denied*, 40 U.S.L.W. 3264 (Dec. 7, 1971).

158 Federal Gun Control Act, 18 U.S.C. § 921 (1970). This statute, also known as the Gun Control Act of 1968, was enacted June 19, 1968 and became effective 180 days later. The Gun Control Act of 1968 replaced the Federal Firearms Act of 1938, ch. 850, Texas, 153 U.S. 535 (1894), where the common law concept of restricting weapons-bearing traffic in firearms, the effect of which spilled into the individual states so that they were also unable to control this traffic within their own borders through the exercise of their police power. See note 156 *supra*. The fact that the United States had become a dumping ground for cast-off military weapons that had no supporting purpose and were easily available by mail order was painfully brought to light by the assassination of President Kennedy. Unfortunately, it took such a catalyst to force the nation to review its inadequate gun controls.

159 Federal Gun Control Act, 18 U.S.C. § 924(d) (1970).

ATF firearms experts that the guns were readily convertible to fire live ammunition with the use of an electric drill in three to eight minutes. The government then contrasted this evidence with three other sample Molso starter guns which the ATF had examined and approved as not being firearms and demonstrated the differences between them to the extent that this evidence was sufficient to sustain the government's action of confiscation and forfeiture.[160]

On appeal Lee contended that the phrase "may readily be converted" as contained in the statute[161] is unconstitutionally vague and that even though this is a civil action, the government must prove the presence of scienter. The Second Circuit, per Judge Lumbard, summarily rejected these contentions, upholding the constitutionality of the statute and denying the contention that scienter is a necessary element of the statute. The court held that

> as the proper purpose of the statute is to keep such potentially dangerous weapons out of the hands of unlicensed dealers, we can see no reason for requiring scienter or for reading into the statute what is not there.[162]

It is clear now that federal law is transgressed if an unlicensed individual imports or deals in firearms (or starter guns and the like if they are "readily convertible") whether or not he does so wilfully and/or intentionally.[163]

---

160 United States v. 16,179 Molso Ital. 22 Caliber Winlee Derringer Convertible Starter Guns, 314 F. Supp. 179 (E.D. N.Y. 1970).

161 As used in the chapter, the term "firearms" means "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." Federal Gun Control Act, 18 U.S.C. § 921(3)(A) (1970).

162 United States v. 16,179 Moslo Ital. .22 Caliber Winlee Derringer Convertible Starter Guns, 443 F.2d 463, 446 (2d Cir. 1971).

163 The basis for congressional regulation of firearms is articulated in United States v. Miller, 307 U.S. 174 (1939). Defendant was charged with the interstate transportation of a sawed-off shotgun in violation of the National Firearms Act. In rejecting the contention that the act was violative of the second amendment, the Court said that the second amendment must be interpreted and applied with the view that its obvious purpose was to assure the continuation and render possible the effectiveness of a well-regulated militia. Once this tenet was established, the Court went on to hold that absent any "evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length . . . had some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 179. Similarly, the constitutionality of all state firearms regulatory measures is based on Miller v. Texas, 153 U.S. 535 (1894), where the common law concept of restricting weapons-bearing was firmly established. Defendant challenged a Texas statute prohibiting the carrying of a dangerous weapon (in this case a pistol) on a public street, contending that such a statute infringed upon his rights as a citizen and was in conflict with the second amendment provision that the right of the people to keep and bear arms shall not be infringed. The Court rejected this contention and held the statute valid because the second amendment limitations have "no reference whatever to proceedings in state courts." *Id.* at 538.

The Second Circuit has demonstrated a clear determination to keep firearms of insignificant value to the legitimate shooter (*i.e.*, .22 caliber derringers) out of the hands of unlicensed dealers who would presumably market them to those members of society who should probably be kept weaponless.[164] This toughness is demonstrated by the court's unwillingness to allow on the market pistols designed only to make noise (starter guns) but which could readily be converted to fire live ammunition. It has already been held that the regulation of dealers in firearms by Title 18 of the United States Code is not violative of the second amendment right of the people to keep and bear arms absent a showing that licensing in any way destroys or impairs the efficiency of a well-regulated militia.[165] *Molso* has further strengthened the law in this area by eliminating the requirement of scienter on the part of the dealer, thus clearly establishing the strict liability nature of the offense. In addition, by extending the law to cover potentially dangerous firearms such as blank-firing starter pistols which could readily be converted to fire live ammunition, the court demonstrated the clear judicial intention to fight the problem of weapons proliferation by utilizing fully the applicable provisions of the Federal Gun Control Act of 1968.[166]

The court in the earlier case of *United States v. Bass*,[167] on the other hand, reversed a conviction for possession of a firearm after finding itself faced with a serious constitutional dilemma, thereby creating a precedent-setting interpretation of Title 7 of the Omnibus Crime Control and Safe Streets Act.[168] In the course of an undercover investigation of the defendant for suspected narcotics violations, a United States Treasury agent observed him in his home carrying a "Baretta" automatic pistol while making arrangements for a purchase of narcotics. The agent then obtained an arrest warrant for the defendant and a search warrant for his apartment.[169] After the pistol was found under a bathtub and

---

164 *But see* Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718 (1968), where the outcry for stronger gun controls is seen as too simplistic a view. "Maniacs cannot be kept from murder, nor delinquents from delinquency, by laws which good citizens will obey." *Id.* at 747. In fact, the author sees the firearm as the least important of all the factors which affect the commission of a crime. *Contra*, Mosk, *Gun Control Legislation, Valid and Necessary*, 14 N.Y.L.F. 694 (1968).

165 United States v. Gross, 313 F. Supp. 1330 (S.D. Ind. 1970).

166 *See* United States v. Cobbler, 429 F.2d 577 (4th Cir. 1970), which held the Federal Gun Control Act constitutional.

167 434 F.2d 1296 (2nd Cir. 1970).

168 18 U.S.C. § 1201(a)(1) (Supp. V, 1970).

169 FED. R. CRIM. P. 3, 4. An arrest warrant shall be issued only upon a written and sworn complaint which as read by a reasonable man shows probable cause and belief that an offense has been committed and that the defendant has committed it. However, no warrant shall be issued unless it particularly describes the person or thing to be seized. *See* Giordenello v. United States, 357 U.S. 480 (1958). If the warrant had been defective

a sawed-off shotgun was found on a night table, the defendant was charged with two counts of possessing firearms in violation of the federal statute.[170] At his trial, the defendant did not deny ownership of the weapons but contended that the statute was intended to reach convicted felons only if their possession of firearms was shown to be either "in commerce or affecting commerce" and that absent such an allegation in the indictment, he must be acquitted. The lower court rejected this contention and convicted the defendant but nevertheless added that:

> [T]he defendant does not quite say, but tentatively hints that there may be constitutional doubts about the statute as it has been defined to apply to his case. [However] [t]he Court perceives no solid basis for such doubt.[171]

On appeal, defendant reiterated his contention that the government failed to prove that his possession of the firearms was "in commerce or affecting commerce" as required by the statute, and alternatively that the statute should be declared unconstitutional if it sanctioned a conviction for possession of firearms absent proof of some nexus between the possession and interstate commerce. The question presented focused on the phrase "in commerce or affecting commerce" and whether it modifies "transports" alone, or whether it also applies to receipt and possession. Not surprisingly this question has plagued several district courts with conflicting results.[172] Similarly, the only court of appeals decision interpreting the statute was *United States v. Daniels*,[173] where a conviction for possession of a firearm by a convicted felon under the statute in question, was affirmed by simply citing the opinion of the district court in *Bass*.[174] The government on appeal contended that the word "trans-

---

and the arrest technique declared illegal as a result, all evidence seized incidental to the arrest would have been inadmissible.

170 18 U.S.C. § 1201(a)(1) (Supp. V, 1970) provides substantially that any person who has been convicted of a felony, or adjudged a mental incompetent, or is a dishonorably discharged veteran, or who has renounced his citizenship, or is an alien illegally in the country who receives, possesses or transports in commerce or affecting commerce any firearm shall be subject to a $10,000 fine and/or up to 2 years' imprisonment. Defendant had previously been convicted of the felony of attempted grand larceny in the second degree so as to allegedly place him within the statute.

171 United States v. Bass, 308 F. Supp. 1385, 1388 (S.D.N.Y. 1970).

172 *See* United States v. Harbin, 313 F. Supp 50 (N.D. Ind. 1970), which invoked the rule that penal statutes should be construed in favor of the accused. Consequently, the court granted a motion dismissing the indictment charging defendant, a previously convicted felon, with possessing a firearm but not alleging any connection between his possession of the weapon and interstate commerce. *But see* United States v. Davis, 314 F. Supp. 1161 (N.D. Miss 1970), which held that the words "in commerce or affecting commerce" contained in the statute making it an offense for a convicted felon to possess firearms were surplusage and that their ommission from the indictment did not invalidate it.

173 431 F.2d 697 (9th Cir. 1970).

174 308 F. Supp. 1385 (S.D.N.Y. 1970). This inconsistency of judicial opinion concern-

ports" is the only word modified by the commerce requirement, citing the arrangement of the commas as well as a canon of statutory construction that a limiting clause is deemed to apply solely to its last antecedent unless the subject matter requires a different construction.[175] The thrust of the government's argument was interpreted by the court as an assertion that the language of the commerce requirement employed in section 1202 is mere surplusage,[176] a contention the court considered unsatisfactory. The court held that despite the government's failure to present a satisfactory argument via grammatical-statutory maxims, there remained the "cardinal principle of both statutory construction and constitutional law requiring the interpretations of statutes . . . to avoid a reading which would create serious constitutional doubts."[177] In reversing the conviction, the court further held that the only rational inter-

---

ing the statute in question is not surprising due to the absence of a meaningful legislative history of the statute. Sections 1201 and 1202 were enacted as part of the Omnibus Crime Control and Safe Streets Act at a time when the Congress and its constituencies were still suffering the effects of three tragic assassinations. The significant judgments of legislative fact reported in the statute are that the receipt, possession or transportation of firearms by specific classes of especially risky people would constitute: (1) a threat or burden on commerce affecting the free flow thereof, and (2) a threat to the safety of the President and Vice President of the United States. In view of the extended debate on numerous controversial issues which had occurred previously, Senator Long twice set forth the purpose of an amendment to Title VII, in 114 CONG. REC. 13,867-69, 14,772-75 (1968), where he said that both of these evils could be and would be mitigated by forbidding possession of firearms by the specific classes of high risk people regardless of whether the possession itself occurred "in commerce or affecting commerce." There was brief debate and a favorable, if cautious, reaction appeared. However, there was an unexpected call for a vote, and Title VII passed without the amendment.

175 *See* FTC v. Mandel Bros. Inc., 359 U.S. 385, 389 (1959), *cited in* United States v. Bass, 308 F. Supp. 1385 (S.D.N.Y. 1970); United States *ex rel.* Santanelli v. Hughes, 116 F.2d 613, 616 (3d Cir. 1940).

176 The Government also attempted to find support for its interpretation of the statute by referring to Section 1201 (18 U.S.C. § 1201 (Supp. V, 1970)), which provides that the receipt, possession or transportation of firearms by a member of a prohibited group constitutes four separate threats, only one of which burdens or deals with interstate commerce. Specifically, they: (1) threaten the safety of the President; (2) threaten the exercise of free speech and religion; (3) threaten the effective operation of the federal and state governments as guaranteed by article IV of the Constitution; and (4) burden or threaten the free flow of commerce. Therefore, the government reasoned that there was no intention to impose a commerce requirement. Again, the court reduced this argument to mean simply that the language imposed in § 1202 (18 U.S.C. § 1202 (Supp. V, 1970)), is mere surplusage, a contention the Court held unsatisfactory. United States v. Bass, 434 F.2d 1296, 1299 (2d Cir. 1970).

177 United States v. Bass, 434 F.2d 1296, 1299 (2d Cir. 1970). In an attempt to establish the constitutionality of the statute, the government cited those landmark cases which define the power of Congress to reach intrastate occurrences which threaten, or may threaten interstate commerce: Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickand v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941). However, the circuit court distinguished these cases on the ground that in each, "there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce." 434 F.2d at 1299.

pretation of the statute which avoids serious constitutional doubts is that which requires receipt, possession and/or transporataion to be shown to have been "in commerce or affecting commerce."[178] Therefore, in the face of casting serious constitutional doubts upon the entire statute, the court reversed petitioner's conviction.[179]

Since the powers of Congress are confined to those expressed in article I of the Constitution as limited by the tenth amendment, it would appear that state gun-control regulations would face fewer constitutional barriers save any restrictive provisions in the individual state constitutions. Despite this, their effectiveness in stopping firearms proliferation is often nil because of the non-uniformity of legislation from state to state.[180]

Clearly what is needed is pervasive legislation which by including substantial due process safeguards would serve the dual function of protecting society at large without infringing upon the rights of legitimate shooters to own and use firearms.[181]

CPLR 301
AND THE COMMERCE CLAUSE

In one of only three en banc hearings during the 1970 term, the court of appeals in *Scanapico v. Richmond, Fredericksburg & Potomac R.R.*[182] stated that its prior panel decision[183] upholding personal juris-

178 United States v. Bass, 434 F.2d 1296, 1300-01 (2d Cir. 1970).

179 *Id.*

180 Except for Florida, Hawaii, Illinois, New Jersey, Rhode Island and Utah, 44 of the 50 states have passed statutes making it possible for residents to purchase rifles and shotguns from federally licensed dealers in adjacent states. Under the 1968 Federal Gun Control Act, 18 U.S.C. § 921 *et seq.* (1968), enactment of such statutes allows residents to purchase firearms outside of their home states. Now, residents can "shop next door." For example, Missouri touches no fewer than eight other states. *See* AMERICAN RIFLEMAN, Sept. 1971, at 23.

181 *See* Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718 (1968), where a possible solution is presented. A procedure would be established whereby one would voluntarily apply for a United States Firearms Identity Card. The only reasons for refusal would be a recent conviction for a violent crime, confinement for alcoholism, narcotics addiction, or mental defects. There would be a provision for persons who had recovered from a restrictive disability to present evidence to that fact. Any denial of a card would be appealable to a board consisting of firearms experts, police, and ordinary citizens. A denial by this board would finally be appealable to the federal district court. All card holders would be then permitted to buy firearms anywhere as long as local laws were not thus violated. Also, there would be a specific provision which would invite the states to require that every gun owner in the state acquire the federal identity card. This proposed law would be a good start in establishing a uniform national system of screening gun owners and is a logical compromise, in the best of American political traditions, between opposing factions.

182 439 F.2d 17 (2d Cir. 1970).

183 The initial appeal was decided on July 16, 1970 before Circuit Judges Lumbard and Hays and District Judge Blumenfeld. The rehearing by the court en banc was decided December 18, 1970 in an opinion by Chief Judge Friendly.