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The National Firearms Act is an Unconstitutional Tax

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ABSTRACT

The National Firearms Act (NFA) regulates certain firearms (most importantly, short-barreled rifles and suppressors) under the taxing power. The Supreme Court upheld it as such in the 1930s. But those precedents are subject to attack under *Heller* and *Bruen*, since the NFA taxes the exercise of constitutional rights the earlier precedents did not recognize—and does so without any historical precedent. Moreover, consideration of rarely considered limitations on the taxing power that the Supreme Court reaffirmed in *Sebelius* leads to the conclusion that several provisions of the NFA violate the taxing power, independent of any Second Amendment concerns. In sum, the NFA violates the Constitution, in total or in parts.

I. INTRODUCTION

The National Firearms Act (NFA) was originally adopted in 1934[1] under the taxing power.[2] At the time, the Supreme Court deemed the Commerce Power substantially more limited than it does today.[3] Thus, "Congress frequently sought to achieve regulatory objectives it could not attain through its commerce power by imposing excise taxes designed to

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1 The NFA defines "firearms" as eight categories of things, including, generally, short-barreled shotguns, short-barreled rifles, machine guns, firearm suppressors or silencers, and "destructive devices" (such as explosives, artillery, and missiles). 26 U.S.C. § 5845(a), (f) (listing the eight categories and defining "destructive devices"). Only a "small fraction of the American gun supply" is regulated by the NFA. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD E. KILMER, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 660 (3d ed. 2022). "Note this unusual definition of 'firearm.' As used in the NFA, a 'firearm' does not include most weapons that are normally called firearms, such as most rifles, shotguns, and handguns." *Id.* at 574 n.58. In this article, "firearms" will refer only to firearms regulated by the NFA, unless specifically noted otherwise.

2 National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872) ("AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof."); U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises[.]"); JOHNSON ET AL., *supra* note 1, at 660 ("[T]he National Firearms Act of 1934 is based on Congress's tax power[.]"). In contrast, "the Gun Control Act of 1968 (GCA) applies to all firearms manufactured after 1898 and is based on the interstate commerce power." *Id.*

3 U.S. CONST. art. I, § 8, cls. 1, 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"). In the decade following the NFA's enactment, the Supreme Court upheld almost all federal legislation as proper under the Commerce Clause. *See*, *e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942).

discourage disfavored activities."[4] The Supreme Court quickly upheld the NFA as a valid exercise of the taxing power in *Sonzinsky* and *Miller*.[5] Courts have considered the constitutional validity of the NFA as a tax to be settled since then.[6]

There are many reasons to question that conclusion today. *Sonzinzky* did not consider most potential arguments against the NFA's original provisions, and *Miller* is infamous for its unsupported reasoning and conclusory Second Amendment analysis, which later decisions have abandoned.[7] Of course, neither opinion addressed the many changes and additions by the 1968 amendments to the NFA.[8] In short, neither *Sonzinsky* nor *Miller* have settled the constitutionality of the NFA as an exercise of the taxing power.[9]

Under the modern doctrine, the right to keep and bear arms is an individual constitutional right.[10] The government may not tax the exercise of a constitutional right.[11] Only regulations that fit in our historical tradition of firearms regulation are lawful.[12] There is no 1790s-era tradition of taxing firearms. Thus, the entire NFA is an unconstitutional exercise of the taxing power.[13] Moreover, the Supreme Court's recent discussion of

4 Barry Cushman, NFIB v. Sebelius *and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 134 (2013) (citing R. ALTON LEE, A HISTORY OF REGULATORY TAXATION 1–141 (1973)).

5 *See* Sonzinsky v. United States, 300 U.S. 506, 512 (1937) (upholding the dealer occupation tax in section two of the NFA); United States v. Miller, 307 U.S. 174, 177–78 (1939) (declaring summarily the more regulatory parts of the NFA constitutional by analogy to "sundry causes" upholding similar provisions in the Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914)); *infra* Part II.C.

6 United States v. Cox, 906 F.3d 1170, 1181 (10th Cir. 2018); United States v. Lim, 444 F.3d 910, 913 (7th Cir. 2006); United States v. Ross, 458 F.2d 1144, 1145 (5th Cir. 1972); United States v. Wilson, 440 F.2d 1068, 1069 (6th Cir. 1971) (per curiam). *But see* United States v. Bolatete, 977 F.3d 1022, 1031, 1033 & n.7 (11th Cir. 2020) (deciding whether "the [NFA] in general, and 26 U.S.C. § 5861(d) [prohibiting receiving or possessing an unregistered firearm] in particular, are unconstitutional both facially and as applied because they exceed Congress' power to tax" and concluding in part, "[t]he *Sonzinsky* decision did not decide the issues before us, however, because it did not involve the transfer tax and because the Act was markedly different in 1937 than it is today.").

7 *See infra* Part II.C.

8 *See* National Firearms Act Amendments of 1968, Pub. L. No. 90-618, sec. 201, 82 Stat. 1227 (codified as amended in scattered sections of 26 U.S.C.) (Title II of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–28)).

9 *See infra* Part II.C.

10 District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

11 Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."); *see Heller*, 554 U.S. at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

12 United States v. Rahimi, 602 U.S. 680, 691 (2024).

13 *See infra* Part IV.A.

the inherent limitations on the exercise of the taxing power in *Sebelius*[14] demonstrates that particular aspects of the NFA unconstitutionally exceed those limitations.[15]

Part II of this Article describes the adoption of the NFA in 1934, the contemporary Supreme Court opinions upholding the NFA under the taxing power, and the 1968 and 2002 amendments to the NFA.[16] Part III describes the taxing power and the limitations of that power.[17] Part IV argues the entire NFA is an unconstitutional exercise of the taxing power because it violates the Second Amendment.[18] It goes on to argue that ten aspects of the NFA unconstitutionally exceed limitations on the taxing power for reasons unrelated to the Second Amendment.[19] The Article concludes that courts should enjoin enforcement of the NFA.[20]

II. THE HISTORY OF THE NFA

When Congress decided to regulate firearms in 1934, it still viewed the Commerce Power as greatly limited compared to today. But the Supreme Court had upheld the Harrison Narcotics Tax Act, regulating narcotics under the taxing power.[21] The NFA was modeled on the Harrison Act.[22] United States Attorney General Homer S. Cummings, the "leading spokesman" for the bill that became the NFA, testified, "We have followed, where we could, the language of existing laws as to revenue terminology; and we have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act."[23]

Cummings was prophetic. The Court would soon uphold the NFA, based on precedent set by the Harrison Act—but the Harrison Act itself barely survived the Court's scrutiny.[24]

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14 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012) (describing the limitations).

15 *See infra* Part IV.B.

16 *Infra* Part II.

17 *Infra* Part III.

18 *Infra* Part IV.A.

19 *Infra* Part IV.B

20 *Infra* Part V.

21 United States v. Doremus, 249 U.S. 86 (1919) (upholding the Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914)).

22 JOHNSON ET AL., *supra* note 1, at 579.

23 Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Bear Arms*, 62 TENN. L. REV. 597, 606 (1995) [hereinafter Halbrook, *Congress Interprets the Second Amendment*] (quoting *National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 6 (1934)).

24 *See infra* Part II.A, II.B.

A. The Harrison Narcotics Tax Act

The Pure Food and Drug Act of 1906 and the Opium Exclusion Act of 1909 prohibited the manufacture, importation, and interstate transport of narcotics except for medicinal purposes.[25] The Harrison Act supplemented those Acts by requiring persons distributing narcotics for non-medicinal purposes to register, pay a $1 dealer tax, and document that distribution on official forms that were subject to inspection.[26] The other alternative was to become tax scofflaw by distributing narcotics without a license or paying the $1 dealer tax.

Either way, the government could punish distributors of narcotics not for the distribution, but for violating a putative tax statute that regulated how they distributed narcotics. The Harrison Act retained the prior law's exception for transfers of narcotics for medical reasons or authorized by a prescription.[27] The Harrison Act thus regulated purely local drug deals outside the Commerce Power's reach as interpreted at the time.

The Supreme Court first considered the Harrison Act's constitutionality in 1919.[28] Doremus was a physician whom authorities accused of distributing narcotics without obtaining an official order form and without a legitimate medical purpose.[29] He challenged the Harrison

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[25] Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768; Opium Exclusion Act of 1909, Pub. L. No. 60-221, 35 Stat. 614.

[26] Harrison Narcotics Tax Act § 1 (requiring dealers in narcotics to register and pay a $1 dealer occupation tax); *id.* § 2 (making it unlawful for dealers to distribute narcotics without receiving an order for the narcotics and documenting the sale on official forms and requiring keeping the forms for two years for inspection); *id.* § 4 (prohibiting distribution of narcotics by unlicensed persons who did not pay the tax); *id.* § 8 (making possession of narcotic by unlicensed persons illegal).

The tax increased a few years after its enactment:

> By the Revenue Act of 1918, the Anti-Narcotic Act was amended so as to increase the taxes under section 1, making an occupation tax for a producer of narcotic drugs of $24 a year, for a wholesale dealer $12, for a retail dealer, $6, and for a physician administering the narcotic, $3. The amendment also imposes an excise tax of one cent an ounce on the sale of the drug. Thus the income from the tax for the government becomes substantial. Under the Narcotic Act, as now amended[,] the tax amounts to about $1,000,000 a year[.]

Nigro v. United States, 276 U.S. 332, 353 (1928). This amendment made the Harrison Narcotics Tax Act into much more of a revenue-generating tax than the original version, which only collected $1 per year from narcotics dealers and did not tax narcotics transactions.

[27] United States v. Doremus, 249 U.S. 86, 92–93 (1919).

[28] *Id.* at 89.

[29] *Id.* at 90.

Narcotics Tax Act as an unconstitutional, invalid exercise of the taxing power.[30] In a 5-4 decision, the Court disagreed.[31] It first noted that:

> [T]he fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.[32]

And "[t]he act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress-that is sufficient to sustain it."[33] This was consistent with previous Supreme Court holdings that courts do not review the supposed "hidden motives" of a tax when reviewing the constitutionality of an exercise of the taxing power.[34]

Next, the Court determined the challenged provisions, which did not raise revenue, were nevertheless constitutional because they "facilitat[e] the collection of revenue" by keeping all narcotics traffic "aboveboard and subject to inspection by those authorized to collect the revenue" and therefore "the provisions in question [are related] to the raising of revenue[.]"[35]

Although the Court did not say so, legislation that facilitates the collection of revenue is constitutional under the Necessary and Proper Clause. "[L]evying taxes . . . [is] a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them."[36] But statutes that facilitate the collection of revenue are "[l]aws which shall be necessary and proper for carrying into Execution the foregoing Powers [including the power to lay and collect taxes]."[37]

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30 *Id.* at 89 ("Upon demurrer to the indictment the District Court held the section unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police power reserved to the state.").

31 *Id.* at 94–95.

32 *Id.* at 93.

33 *Id.* at 94.

34 Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."); McCray v. United States, 195 U.S. 27, 59 (1904) ("[I]f a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.").

35 *See Doremus*, 249 U.S. 94–95.

36 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

37 *See* U.S. CONST. art. I, § 8, cl. 18.

Under the Necessary and Proper Clause, Congress can enact statutes that facilitate the collection of revenue even though that power is not specifically enumerated.

The Constitution "wisely omit[s] . . . all the means for carrying into execution the great powers vested in government," and only lists "distinct and independent" powers "among the enumerated powers of the government."[38] It does not need to list the power to enact statutes that facilitate revenue collection because that is an incidental power.[39] Chief Justice Roberts reaffirmed these foundational principles in the solo part of his majority opinion of the "Obamacare" case. "Each of our prior cases upholding laws under [the Necessary and Proper Clause] involved exercises of authority *derivative of*, and in service to, a granted power."[40]

A few years after upholding the Harrison Narcotics Tax Act as a proper exercise of the taxing power, the Court disallowed an exercise of the taxing power to regulate child labor. In *Drexel Furniture*, the Court invalidated a 10% "tax" on the annual revenue of companies employing any amount of child labor, ruling it exceeded the scope of the taxing power.[41] Shortly

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38 *See McCulloch*, 17 U.S. at 421–22. As professors Lawson and Seidman have explained, "*McCulloch* asked the right question about the role of the doctrine of principals and incidents in understanding the necessary and proper clause. That has proven to be a surprisingly rare event over the course of the nation's history. For reasons we do not understand, the clear structure for analyzing incidental, or implied, powers laid out in *McCulloch* largely disappeared from U.S. law for two centuries." GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION 90 (2017).

39 *Cf.* ARTICLES OF CONFEDERATION of 1781, art. II ("Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."). For an excellent discussion of incidental powers as they were known to the Framers and how courts might view them today if they only would take them seriously, see LAWSON & SEIDMAN, *supra* note 38, at 76–103.

40 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (emphasis added); *see also id.* at 559 ("Although [the Necessary and Proper Clause] gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the Constitution,' it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." (quoting *McCulloch*, 17 U.S. at 421)); United States v. Kebodeaux, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) (alteration in original) (citations omitted) (quoting majority opinion at 395):

> [F]ederal police power . . . does not exist . . . .
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> . . . .
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> . . . It is difficult to imagine a clearer example of such a 'great substantive and independent power' than the power to 'help protect the public . . . and alleviate public safety concerns [citing the majority opinion at 395].' I find it implausible to suppose—and impossible to support—that the Framers intended to confer such authority by implication rather than expression.

Id. (quoting majority opinion at 395).

41 Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 44 (1922).

thereafter, in 1926, the Court announced a willingness to reconsider allowing the Harrison Act as an exercise of taxing power.[42] But two years later, the Court upheld the Harrison Act again, concluding:[43]

> In this case, the qualification of the right of a resident of a state to buy and consume opium or other narcotic without restraint by the federal government is subject to the power of Congress to lay a tax by way of excise on its sale. Congress does not exceed its power if the object is laying a tax and the interference with lawful purchasers and users of the drug is reasonably adapted to securing the payment of the tax.[44]

Thus, the Court upheld the Harrison Act as a valid exercise of the taxing power.[45] This set the stage for Congress to adopt the NFA as a similar exercise of the taxing power.

B. The NFA as Originally Enacted

The NFA had several similarities to the Harrison Narcotics Tax Act in both the original enactment of the NFA and the current version; however, there were several key differences.

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[42] United States v. Daugherty, 269 U.S. 360, 362–63 (1926) ("The constitutionality of the Anti-Narcotic Act, touching which this court so sharply divided in [*Doremus*], was not raised below, and has not been again considered. The doctrine approved in [*Drexel Furniture*, among other cases] may necessitate a review of that question, if hereafter properly presented.") (citations omitted).

[43] *See* Nigro v. United States, 276 U.S. 332 (1928).

> In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid, just as the Child Labor Act of Congress was held to be, in [*Drexel Furniture*]. Everything in the construction of section 2 [requiring transfers of narcotics by licensed dealers to be recorded on official forms] must be regarded as directed toward the collection of the taxes imposed in section 1 [the occupation tax on dealers] and the prevention of evasion by persons subject to the tax. If the words cannot be read as reasonably serving such a purpose, section 2 cannot be supported.

Id. at 341–42.

[44] *Id.* at 354.

[45] See generally A. Christoper Bryant, Nigro v. United States, *The Most Disingenuous Supreme Court Opinion, Ever*, 12 NEV. L. REV. 650 (2012), for a harsh criticism of *Nigro*.

Like the current NFA, the original NFA only applied to a small minority of firearms. Generally, it applied to short-barreled shotguns, short-barreled rifles, machine guns, and firearm suppressors or silencers.[46]

Both versions of the NFA required every importer, manufacturer, and dealer in firearms to register and pay an occupation tax.[47] The original NFA imposed a transfer tax of $200 per firearm, payable by the transferor.[48] The amount of the tax "was suggested because that amount represented the average cost of a machine-gun" in 1934.[49] That amount is about $4,689 in 2024 dollars.[50] The current transfer tax has not been adjusted for inflation and is still $200.[51] Although the transfer tax is paid by the transferor, of course this cost is passed on to the transferee.

Transferring firearms was illegal without a written order from the person seeking to obtain the firearm. The order had to be documented on government-approved forms with fingerprints and a photograph of the transferee.[52] Every manufacturer or importer of a firearm had to identify and stamp the firearm with a number or other identification mark that was illegal to remove.[53] The transferor had to provide a copy of the form to the Internal Revenue Service (IRS) and give the original to the transferee with stamps showing payment of the transfer tax. Thus, the owner of the transferred firearm would have proof that the transferor had paid the transfer tax, and the Commissioner would know who legally owned the

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46 National Firearms Act of 1934, ch. 757, §1, 48 Stat. 1236, 1237 (codified as amended at 26 U.S.C. § 5845(a)) (listing the eight categories). The 1968 amendments, Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 921(3) 82 Stat. 1213, 1214, discussed *infra*, added "destructive devices" (such as explosives, artillery, and missiles) to the list of "firearms" regulated by the NFA.

47 National Firearms Act of 1934 § 2(a)–(b) (codified as amended at 26 U.S.C. §§ 5801 (occupation tax), 5802 (registration requirement)). The tax was $500 a year for importers and manufacturers, $200 a year for dealers other than pawnbrokers, and $300 a year for pawnbrokers. *Id.* § 2(a). It is now $1,000 a year for importers and manufacturers and $500 a year for dealers. 26 U.S.C. § 5801(a)(1). The dealer occupation tax was at issue in *Sonzinsky*. Sonzinsky v. United States, 300 U.S. 506, 511 (1937).

48 National Firearms Act of 1934 § 3(a) (codified as amended at 26 U.S.C. § 5811).

49 Halbrook, *Congress Interprets the Second Amendment*, *supra* note 23, at 606.

50 This amount was calculated by using the Bureau of Labor Statistics' inflation calculator, *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=200&year1=196612&year2=193406 [https://perma.cc/WFW3-EXWG].

51 26 U.S.C. § 5811(a).

52 National Firearms Act of 1934 § 4(a). The current NFA requires the use of official forms to apply for permission to transfer firearms. 26 U.S.C. §§ 5812(a)(1), 5861(b), (e).

53 National Firearms Act of 1934 § 8. The current NFA requires manufacturers, importers, and makers of firearms to place a serial number on firearms manufactured, imported or made. 26 U.S.C. § 5842(a). Regulation of makers of firearms was added in 1968. National Firearms Act Amendments of 1968, Pub. L. No. 90-618, sec. 201, 82 Stat. 1227.

transferred firearm. Importers could only bring firearms into the country for a lawful purpose and if "such firearm [was] unique or of a type which [could not] be obtained within the United States."[54]

Persons possessing firearms before the date of the Act had to register them retroactively.[55] It was unlawful to receive or possess a firearm not properly transferred under the terms of the Act, after the date of its enactment.[56] It was unlawful to transport an unregistered firearm in interstate commerce owned before the date of the Act.[57] Violation of the Act was punishable by up to five years in prison, up to a $2,000 fine, or both.[58]

C. Sonzinsky and Miller

Max Sonzinsky was convicted of violating the NFA on two counts: (1) operating a firearms dealership without paying the required tax under the NFA and (2) possessing a sawed-off shotgun with a 15 7/8 inch barrel without obtaining the necessary written order from the Commissioner of Internal Revenue.[59]

On appeal, the circuit court disagreed with the defendant's first argument that the $200 occupation tax on firearms dealers was an unconstitutional, invalid exercise of the taxing power because it raised revenue and was "unusually free from regulative provisions."[60] The court found insufficient evidence to support the second count.[61] The court did not contemplate the constitutionality of the remaining NFA sections.[62]

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54 National Firearms Act of 1934 § 10(a). The current NFA generally bans firearm imports, with a few exceptions. Firearms may be imported if they are for U.S. government use, scientific or research purposes, or testing or sample use by a registered importer or manufacturer. 26 U.S.C. § 5844.

55 *See* National Firearms Act of 1934 § 5.

56 *Id.* § 6 (currently at 26 U.S.C. § 5861(b)).

57 *Id.* § 11. *Miller* concerned a violation of this provision. United States v. Miller, 307 U.S. 174, 177 (1939).

58 National Firearms Act of 1934 § 14. Currently, the penalty for violation is a fine of not more than $10,000, imprisonment for not more than ten years, or both. 26 U.S.C. § 5871. But a different statute establishes that the maximum fine is actually $250,000. *See* 18 U.S.C. § 3571(b), (e); *see also* Mock v. Garland 75 F.4th 563, 571 (5th Cir. 2023).

59 Sonzinsky v. United States, 86 F.2d 486, 487 (7th Cir. 1936), *aff'd*, 300 U.S. 506 (1937).

60 *Id.* at 490.

61 *Id.* at 489.

62 *Id.* at 490–91 ("As to the constitutionality of other sections of the [NFA] we express no opinion.").

Sonzinsky appealed his conviction for dealing firearms without paying the occupation tax to the Supreme Court.[63] The Court "granted certiorari, limited to the question of the constitutional validity of the statute in its application under the first count in the indictment [dealing in firearms without paying the occupation tax]."[64] Sonzinsky agreed that "Congress may tax his business as a dealer in firearms" but insisted "that the present levy is not a true tax, but [is instead] 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 [it is] not granted to the national government."[65] The Court disagreed:

> 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. [66]

It bears repeating that the validity of only one of the provisions of the NFA under the Taxing Clause was at issue in *Sonzinsky*—a provision that assessed and collected a tax, and thus one of the easiest provisions to defend against constitutional attack.[67] The *Sonzinsky* Court did not consider any of the provisions that are not such obvious exercises of the taxing power, such as the requirement that transferees provide their fingerprints and photograph, or the requirement that each firearm be marked with a serial number.[68]

A few years later, Jack Miller challenged his conviction for transporting an unregistered short-barreled shotgun in interstate commerce, arguing "The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution[.]"[69] The district court agreed and quashed the indictment.[70]

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

64 *Id.*

65 *Id.* at 512.

66 *Id.* at 514 (footnote omitted).

67 But see *infra* Part IV.B.4, where this Article attacks it on the ground that it assesses and collects a *direct* tax that must be apportioned among the states—but it is not.

68 National Firearms Act of 1934, ch. 757, §§ 4(a), 8, 48 Stat. 1236, 1237–38, 1239.

69 United States v. Miller, 307 U.S. 174, 176 (1939).

70 *Id.* at 177.

The government appealed, and the Supreme Court reversed. The Court disagreed with Miller's first argument, reasoning in full: "Considering [*Sonzinsky*] and what was ruled in sundry causes arising under [and upholding] the Harrison Narcotic Act, the objection that the Act usurps police power reserved to the States is plainly untenable."[71]

Suffice to say that this "explanation" fails to explain. The Court also disagreed with Miller's argument, but the accompanying discussion of the Second Amendment is inadequate.[72] Yet another reason to discount *Miller* is that "[r]search suggests that *Miller* was a collusive prosecution."[73] Nonetheless, courts have viewed *Sonzinsky* and *Miller* as decisive in upholding the NFA's constitutionality as a valid exercise of the taxing power since the late 1930s.[74]

D. The 1968 Amendment to the NFA

Congress amended the NFA in 1968, at least in part because of a successful appeal of a conviction under the Act. Miles Edward Haynes was charged with knowingly possessing an unregistered firearm.[75] He moved to dismiss the indictment on the grounds that the firearm registration requirement violated his privilege against self-incrimination under the Fifth Amendment.[76] The district court denied the motion.

But, in January 1968, the Supreme Court reversed.[77] As it was explained later, anyone who illegally obtained possession of a firearm was required to register it, meaning the possessor was required to "furnish potentially incriminating information."[78] Such information might include the fact that the possessor had not paid the transfer tax or used official forms—perhaps because the transferor did not collect the tax, or the possessor had simply stolen the firearm.

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71 *Id.* at 177–78 (footnote omitted) (citations omitted).

72 *See*, *e.g.*, District of Columbia v. Heller, 554 U.S. 570, 624 & n.24 (2008) (calling *Miller* "virtually unreasoned" and stating that it "discusses *none* of the history of the Second Amendment.").

73 JOHNSON ET AL., *supra* note 1, at 584. Incredibly, "Miller was not represented by counsel in the Supreme Court. Instead, the Solicitor General briefed and argued the case unopposed. Miller's attorney filed no brief but wrote a letter telling the Court to rely on the government's brief." *Id.* (citing Nelson Lund, Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335, 336−39 (2009)).

74 *See supra* text accompanying note 6.

75 Haynes v. United States, 390 U.S. 85, 86 (1968).

76 *Id.*

77 *Id.* at 87.

78 United States v. Freed, 401 U.S. 601, 603 (1971) (citing *Haynes*, 390 U.S. at 95–100).

As a result, according to the Supreme Court in 1971 "Congress revised the National Firearms Act with the view of eliminating the defects in it which were revealed in *Haynes*."[79] In fact, the 1968 amendments did far more than that. The amended statute requires that anyone seeking to transfer a firearm must ask for and receive permission to do so.[80] It further provided, "[a]pplications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."[81] Thus, for instance, permission to transfer a firearm to a felon should not be granted.[82]

Another change was rather than requiring the transferee to register the firearm, neither the transferor nor the transferee was the required registrant. Instead, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) itself registers the firearm when it authorizes the transfer.[83]

The 1968 amendments also added a $200 making tax to the NFA for the first time.[84] "Make" or "making" is defined as "manufacturing," but by somebody "other than by one qualified to engage in such business under this chapter."[85] A "Manufacturer" is likewise defined as "any person who is engaged in the business of making firearms."[86] Thus, a maker makes firearms not for sale and does not pay an annual occupation tax, while a manufacturer makes firearms for sale and must pay an occupation tax to do so.

As with firearm transfers, before a firearm can be made, the maker must ask for permission to make the firearm, and registration of the firearm to be made is "effect[ed]" by authorization to make the firearm.[87]

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79 *Id.* at 602. Congress sought to fix these defects by enacting the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Title I of the Act regulates all firearms under the Commerce Power. Title II of the Act, the National Firearms Act Amendments of 1968, Pub. L. No. 60-618, sec. 201, 82 Stat. 1227, amended the NFA but maintained its basis in the Taxing Power.

80 National Firearms Act Amendments of 1968, Pub. L. No. 90-618, sec. 201, § 5812, 82 Stat. 1227, 1228 (codified at 26 U.S.C. § 5812(1), (6)).

81 *Id.*

82 *See* 18 U.S.C. § 922(g)(1) (making it unlawful for any person convicted of a crime punishable for a term exceeding one year to possess firearms).

83 *See* 26 U.S.C. § 5841(c), (e).

84 *Id.* § 5821(a). ATF incorrectly reports that the making tax was in the original version of the NFA. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL FIREARMS ACT HANDBOOK 1 (rev. ed. 2009), https://www.atf.gov/firearms/national-firearms-act-handbook [https://perma.cc/47U2-XHNW] [hereinafter NFA HANDBOOK] ("The NFA was originally enacted in 1934. Similar to the current NFA, the original Act imposed a tax on the making and transfer of firearms defined by the Act[.]") (footnote omitted).

85 26 U.S.C. § 5845(i).

86 *Id.* § 5845(m).

87 *Id.* § 5822.

Making, receiving, or possessing firearms made without permission, in violation of the NFA, is unlawful, as is receiving or possessing an unregistered firearm whose registration has not been "effect[ed]" via an approved application.[88] A maker of firearms must also place a serial number on the made firearm.[89] "Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law."[90] Thus, similar to the right to transfer, a felon must be denied permission to make a firearm.[91]

Incidentally, the Gun Control Act (GCA) does not prohibit the making of the many firearms unregulated by the NFA for personal use—including the making of handguns and rifles other than short-barreled rifles.[92] But no one may make firearms regulated by the NFA without permission. The 1968 amendments also prohibited importing firearms except for use by the government, "scientific or research purposes," testing, or use as a sample.[93]

E. The Homeland Security Act of 2002

Before the enactment of the Homeland Security Act, the Bureau of Alcohol, Tobacco, and Firearms, an agency of the Treasury Department, enforced the National Firearms Act of 1934.[94]

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88 *Id.* § 5861(c), (d), (f).

89 *Id.* § 5842(a).

90 *Id.* § 5822.

91 18 U.S.C. § 922(g)(1).

92 18 U.S.C. § 922 lists many prohibitions, but there is no prohibition on making such firearms. ATF acknowledges this fact. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *Does an Individual Need a License to Make a Firearm for Personal Use?*, ATF, https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use [https://perma.cc/SA7L-4WNW].

93 26 U.S.C. § 5844.

94 *See Transfer of ATF to U.S. Department of Justice*, ATF, https://www.atf.gov/our-history/timeline/transfer-atf-us-department-justice [https://perma.cc/ML4H-F379] [hereinafter *Transfer of ATF*] ("Except for a brief period during Prohibition era, ATF and its predecessor bureaus functioned within the U.S. Department of the Treasury for more than 200 years. In January of 2003, ATF's functions and responsibilities were transferred to the Department of Justice.") ATF's predecessor agency, the Bureau of Prohibition, was transferred from the Treasury Department to the Department of Justice in 1930. Prohibition Reorganization Act of 1930, ch. 342, § 3(b), 46 Stat. 427, 428 (repealed Act of Aug. 27, 1935, ch. 740, 49 Stat. 872).

When Prohibition ended in 1933, the Bureau of Prohibition was abolished by executive order and its functions transferred to the Treasury Department's Alcohol Tax Unit, which evolved into ATF. *See History of the Badges*, ATF (July 3, 2015), https://www.atf.gov/our-history/photo-gallery/history-badges [https://perma.cc/YDU4-DU55].

The Homeland Security Act transferred those responsibilities to the ATF and moved ATF to the Department of Justice.[95] ATF continues to enforce the NFA today. ATF does not collect any other tax.

III. THE TAXING POWER

The NFA is an exercise of the taxing power, not the Commerce Power.[96] This Part describes the taxing power and its limitations.

The NFA's taxes are regulatory taxes, not revenue taxes. They raise some revenue—rapidly increasing in recent years, but miniscule compared to the trillions in federal revenue collected annually.[97] According to ATF itself, the purpose of NFA taxes is "to discourage or eliminate transactions

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95 28 U.S.C. § 599A.

96 JOHNSON ET AL., *supra* note 1, at 660 ("While the National Firearms Act of 1934 is based on Congress's tax power and only covered [a] small fraction of the American gun supply, the Gun Control Act (GCA) of 1968 applies to all firearms manufactured after 1898 and is based on the interstate commerce power.").

97 NFA taxes collected in recent fiscal years:

Fiscal Year	Making and Transfer Tax Collected	Special Occupation Tax Collected
2024	$145,072,241.60	$10,438,289.03
2023	$96,018,784.61	$10,131,788.76
2022	$91,462,604.64	$9,569,698.25
2021	$78,564,959.72	$9,165,887,65
2020	$51,677,000	$7,982,000
2019	$37,285,000	$7,014,000

Benjamin Hiller, Deputy Assoc. Chief Couns., Firearms & Explosives L. Div., ATF, Presentation at the University of Wyoming College of Law (Oct. 18, 2024) (figures for fiscal year 2024); *Fact Sheet - Facts and Figures for Fiscal Year 2023*, ATF (July, 2024), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2023 [https://perma.cc/5M6D-A38U] (figures for fiscal year 2023); *Fact Sheet - Facts and Figures for Fiscal Year 2022*, ATF (January, 2023)), https://web.archive.org/web/20250202145304/https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2022 [https://perma.cc/92XF-AWUZ] (figures for fiscal year 2022); *Fact Sheet – Facts and Figures for Fiscal Year 2021,* ATF (August, 2022) https://web.archive.org/web/20220812175229/https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2021 [https://perma.cc/V35R-NKPR] (figures for fiscal year 2021); 2021 ATF FIREARMS COM. IN THE U.S.: ANN. STATS. UPDATE, https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download [https://perma.cc/V35R-NKPR] (figures for fiscal years 2020 and 2019).

in these firearms [regulated by the NFA]," as opposed to raising revenue.[98] Regulatory taxes are generally constitutional.[99]

A. Colonial Attitudes Towards Regulatory Taxes and Revenue-Generating Taxes

The proximate cause of the Revolutionary War was a disagreement over tax policy. Colonists distinguished taxes for regulatory purposes from taxes to raise revenue for the government in London, and did not accept the latter on the grounds that they were not represented in Parliament.[100]

While the Declaration of Independence identified "establish[ing] Commerce" as one of the "Acts and Things which Independent States [like the British Crown] may of right do," it nevertheless complained about the British Crown "imposing Taxes [for revenue] upon us without our consent."[101] Indeed, regulating commerce was a royal prerogative, but Parliament wrested the power to tax without its consent from the King via the Petition of Right of 1628.[102]

In 1774, James Wilson argued that Parliament had no legal authority over the colonies, and thus no authority to impose revenue-generating taxes in North America. But he made a careful distinction. While he maintained that the colonies were *legislatively* independent of Parliament, he conceded that they were still *constitutionally* dependent on the King.[103] Wilson argued that this constitutional dependency included the King's legitimate power to direct domestic and foreign commerce by his prerogative.[104]

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98 NFA HANDBOOK, *supra* note 84, at 1 ("While the NFA was enacted by Congress as an exercise of its authority to tax, the NFA had an underlying purpose unrelated to revenue collection. As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms.")

99 *Infra* Part III.A.

100 Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises,"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RSRV. L. REV. 297, 305−07 (2015); John PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 26−27 (abridged ed. 1995); BERNARD BAYLIN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 212 (Harvard fiftieth anniversary ed. 2017) 214−16 (citing Benjiman Franklin, Jonn Dickinson, and others); STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 651 (2020). ("Founding-era theories of taxation wondered whether taxes could ever be used as regulatory measures . . . or purely for the purposes of raising revenue.")

101 THE DECLARATION OF INDEPENDENCE paras. 19, 32 (U.S. 1776).

102 Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 120 (2020) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263–68 (Oxford, Clarendon Press 1765)); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 281, 307 (Cambridge Univ. Press 1908).

103 John Mikhail, *The Path of the Prerogatives*, 63 AM. J. LEGAL HIST. 196, 201 (2023).

104 *Id.*

The Constitution recognizes the difference between taxing for regulation of commerce and taxing for revenue by listing the taxing power separately from the Commerce Power.[105] Additionally, the House-origination requirement applies only to "Bills for raising Revenue," not other types of bills, such as regulatory bills.[106]

Moreover, the No-Preference Clause for Ports refers to "any Regulation of Commerce or Revenue," acknowledging a difference between the two types of regulations.[107]

On the other hand, the Constitution grants Congress the power to "lay and collect Taxes . . . to . . . provide for . . . the general Welfare of the United States."[108] This language arguably "clarified that taxes could be used for purposes other than pure revenue-raising."[109] Accordingly, the First Congress enacted a regulatory tariff.[110]

Yet the constitutionality of protective tariffs was not immediately universally accepted. The argument over their validity drove the Nullification Crisis.[111] Nonetheless, in 1833, Joseph Story could declare it to be black-letter law that "the taxing power is often, very often, applied

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105 *See* U.S. CONST. art. I, § 8, cls. 1, 3.

106 Natelson, *supra* note 100, at 307 (quoting U.S. CONST. art. I § 7, cl. 1).

107 *Id.* at 304 (quoting U.S. CONST. art. I, § 9, cl. 6).

108 U.S. CONST. art. I, § 8, cl. 1.

109 *See* CALABRESI & LAWSON, *supra* note 100, at 652; *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 93 (1999) ("Providing the general government with the means to collect its own taxes and to regulate trade among the states and between the states and other nations was a primary goal in the movement to replace the Articles of Confederation.").

110 *See* CALABRESI & LAWSON, *supra* note 100, at 652 ("As a result [of the "general welfare" language], the second statute passed by the First Congress in 1789 was a tariff measure that announced its purposes to [include] 'for the . . . encouragement and protection of manufactures.'") (quoting Act of July 4, 1789, 1 Stat. 24, 24); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 567 (2012) ("Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry.") (citing W. BROWNLEE, FEDERAL TAXATION IN AMERICA 22 (2d ed. 2004)).

111 In November 1832, South Carolina called a popular convention which declared federal protective tariffs unconstitutional and directed state officials to ensure that they not be enforced in the State. WHITTINGTON, *supra* n. 109, at 72−73. President Jackson responded by seeking Congressional authorization to use military force to collect the revenue. *Id.* In February 1833, as part of a compromise, Congress adopted a tariff that "gradually brought duties to a revenue standard[.]" *Id.*; *see also id.* at 72–112 (providing more details and background information). South Carolina was not alone in questioning the constitutionality of protective tariffs. In 1820, Daniel Webster "was the first to elaborate" the argument "[i]n a speech . . . which he excluded from his official papers" before he became a leading intellectual defender of their constitutionality ten years later. *Id.* at 82−85, 94.

for other purposes, than revenue."[112] Although the government may use the taxing power to regulate, other limitations restrict its use.

B. Taxes May Not Be Imposed on the Exercise of a Constitutional Right

The government "may not impose a charge for the enjoyment of a right granted by the federal constitution."[113] Moreover, raising revenue is not a sufficient justification for specifically taxing the exercise of a constitutional right.[114] As the Supreme Court said in the First Amendment context, while enjoining enforcement of a tax on newspapers' purchases of paper and ink:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.[115]

But the government may collect a fee to defray administrative costs associated with the exercise of a constitutional right.[116] Now that the Supreme Court has definitively ruled that the Second Amendment refers to an individual right,[117] a fresh look at whether the NFA taxes a constitutional right is warranted because "the enshrinement of

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[112] *Sebelius*, 567 U.S. at 567 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 432, § 962 (Boston, Hilliard, Gray, & Co. 1833)).

[113] Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943); *see also* United States v. Bolatete, 977 F.3d 1022, 1035 (11th Cir. 2020).

[114] *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586–90 (1983).

[115] *Id.* at 585 (citation omitted).

[116] Cox v. New Hampshire, 312 U.S. 569, 577 (1941):

> The fee was held to be not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed. There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated.

Id. (internal quotations omitted).

[117] *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

constitutional rights necessarily takes certain policy choices off the table."[118]

C. The Modern Taxing Power as Described in Sebelius

In *Sebelius*, the Supreme Court held that "Obamacare's" individual mandate did not fall under the Commerce Power but qualified as a tax under the taxing power rather than a penalty.[119] In so doing, the *Sebelius* majority noted that the taxing power can be used to "affect individual conduct."[120] "[T]axes that seek to influence conduct are nothing new."[121] It recognized the NFA as one of many "obviously regulatory measures" enacted under the taxing power and previously upheld by the Supreme Court.[122] And it reaffirmed that courts do not review the supposed "hidden motives" of a tax.[123]

Nonetheless, the *Sebelius* Court recognized three constitutional limits on otherwise legitimate exercises of the taxing power to regulate behavior: (1) direct taxes must be apportioned, (2) taxing statutes may not impose penalties, and (3) taxes must raise revenue—and taxes can only regulate by requiring taxpayers to pay money.[124]

1. Direct Taxes Must Be Apportioned

First, the *Sebelius* Court reaffirmed that all direct taxes must be apportioned among the states.[125] Direct taxes include capitation or "head taxes," "taxes on real estate," and "taxes on personal property."[126]

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118 *Id.* at 636.

119 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 566 (2012).

120 *See id.* at 567.

121 *Id.*

122 *See id.* (citing Sonzinsky v. United States, 300 U.S. 506, 513 (1937)); *see also* United States v. Freed, 401 U.S. 601, 609 (1971) (The NFA is "a regulatory measure in the interest of the public safety."); *see generally* Cushman, *supra* note 4, at 137−53 (discussing precedents upholding, and occasionally denying, the constitutionality of regulatory measures passed under the taxing power).

123 *Sebelius*, 567 U.S. at 573 (courts "decline[] to closely examine the regulatory motive or effect of revenue-raising measures [except to determine if they are really a penalty]."); see also *supra* note 34 (citing *Sonzinsky*, 300 U.S. at 513–14 ("hidden motives") and McCray v. United States, 195 U.S. 27, 59 (1904) for similar holdings.

124 *Sebelius*, 567 U.S. at 570 ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution."); *id.* at 570−74 (describing the three limitations).

125 *Id.* (citing U.S. CONST. art. I, § 9, cl. 4); *see also* New York Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921) (If "the tax is direct [it] therefore is void for want of apportionment.").

126 *Sebelius*, 567 U.S at 571; *see also* Moore v. United States, 602 U.S. 572, 582 (2024) ("Generally speaking, direct taxes are those taxes imposed on persons or property.").

To the modern reader, the apportionment rule may seem obscure and perhaps pointless, especially since the federal government has not collected apportioned direct taxes in living memory.[127] But the rule can be understood from a historical perspective.

Direct taxes and the apportionment requirement descended from the Articles of Confederation's framework for funding a common treasury. The states were supposed to supply the treasury based on the proportional value of all land within their borders and the buildings and improvements on it. Congress was to determine the valuation method for such land and improvements as needed over time. The taxes for paying the proportion directed by Congress was to be "laid and levied by the authority and direction of the legislatures of the several states."[128] The Confederation Congress had no authority to collect the tax itself, and states frequently did not pay.[129]

The apportionment formula "proved inadministrable in absence of reasonable appraisals of the value of land and improvements."[130] In 1783,

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127 PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787−88, at 465 (2010) ("Congress levied direct taxes on only three occasions, all of which were, as the Federalists promised, times of war or threats of war—in 1798, during the Quasi-War with France, the War of 1812, and, finally, the Civil War."); *see also* Charles Dunbar, *The Direct Tax of 1861*, 3 Q. J. ECON. 441–46, (1889) (describing the three occasions); *Moore*, 602 U.S. at 582 ("[I]t appears that Congress has not enacted an apportioned tax since the Civil War.").

Moore provides an explanation of how direct taxes generally function:

> As a practical matter, . . . Congress has rarely enacted direct taxes because the Constitution requires that direct taxes be apportioned among the States. To be apportioned, direct taxes must be imposed "in Proportion to the Census of Enumeration." In other words, direct taxes must be apportioned among the States according to each State's population. So if Congress imposed a property tax on every American homeowner, the citizens of a State with five percent of the population would pay five percent of the total property tax, even if the value of their combined property added up to only three percent of the total value of homes in the United States. To pay five percent, the tax rate on the citizens of that State would need to be substantially higher than the tax rate in a neighboring State with the same population but more valuable homes. To state the obvious, that kind of complicated and politically unpalatable result has made direct taxes difficult to enact.

Id. at 582 (citations omitted) (quoting U.S. Const., Art. I, § 9, cl. 4).

128 ARTICLES OF CONFEDERATION of 1781, art. VIII.

129 Lane Cnty. v. Oregon, 74 U.S. (7 Wall.) 71, 76–77 (1868) ("Under the Articles of Confederation the government of the United States was limited in the exercise of [taxing] power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property . . . was acknowledged to belong exclusively to the States[.]"); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 1 (2005) (requisitioning $3.8 million in 1786, the Confederation Congress was only able to collect $663).

130 JOHNSON, *supra* note 129, at 108.

the Confederation Congress got one vote away from reforming the formula by adopting an amendment to the Articles of Confederation to use "[p]opulation, with slaves counted as three-fifths . . . [as] a proxy measurement for the wealth of a state that would be easier than assessments of real estate values."[131] The amendment also provided for an impost, which resulted in New York vetoing it.[132] New York had its own impost which "funded a third to a half of the state's annual expenses."[133]

The Constitution of 1787 made the national government stronger than it was under the Articles, including, importantly, by giving it the "Power To lay and collect Taxes, Duties, Imposts and Excises" itself, rather than requisitioning the states and hoping they complied.[134] It required direct taxes to be collected from the States by proportion of population, with slaves counted as three-fifths of a person, copying the failed 1783 amendment to the Articles. By the same logic, the three-fifths clause also applied to representation in the House of Representatives and, as a result, the Electoral College.[135] That might have made sense if the federal government had taxed states in proportion to their population (adjusted for the three-fifths clause), but it has rarely imposed direct taxes.

During the post-ratification debate over the Bill of Rights, Anti-Federalists attempted to add an amendment to the Constitution to require Congress to ask states to pay direct taxes and only allow the federal government to collect taxes itself if a state failed to act.[136] Federalists opposed the amendment, insisting that "[d]irect taxes would only be needed on crises such as wars, when the delays caused by requisitioning the states could be fatal."[137] George Washington did not oppose any amendments that became the Bill of Rights "except that wh[i]ch goes to direct taxation."[138] As it turned out, Congress levied direct taxes on only three occasions.[139] The slave states got the representation but did not have to pay the taxes.

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131 *Id.* at 107, 108.; *see also* Natelson, *supra* note 100, at 342−43 (defending the three-fifths formula as "purely economic.").

132 JOHNSON, *supra* note 129, at 108. The Articles of Confederation required unanimous consent of all states for amendments. ARTICLES OF CONFEDERATION of 1778, art. XIII.

133 MAIER, *supra* note 127, at 324.

134 *See* U.S. CONST. art. I, § 8, cl. 1; *see also* U.S. CONST. art. I, § 10, cl. 2 (eliminating New York's harbor advantage by prohibiting states from collecting taxes on imports without Congress's permission).

135 *See* Natelson, *supra* note 100, at 351 ("The three-fifths apportionment formula was designed to approximate taxation and representation.").

136 *See* MAIER, *supra* note 127, at 427.

137 *Id.* at 428.

138 *See id.* (alteration in original).

139 *Id.* at 465.

This Article argues that the NFA's occupation taxes are direct taxes, which states must apportion but have failed to do so. Therefore, they are unconstitutional.[140]

2. Taxing Statutes May Not Impose Penalties

Sebelius reaffirmed *Drexel Furniture*'s holding that some putative taxes are penalties that cannot be imposed under the taxing power.[141] It "confirmed [*Drexel Furniture*'s] functional approach," which was "focused on three practical characteristics of the so-called tax on employing child laborers that convinced [the Court] the 'tax' was actually a penalty."[142]

First, the *Drexel Furniture* tax imposed "an exceedingly heavy burden" no matter how small the infraction, while the *Sebelius* tax charged an amount that most people can easily choose to pay rather than buying insurance.[143]

Second, the *Drexel Furntiure* tax penalized only knowing violators, implying an intent to punish, while the *Sebelius* tax contains no scienter requirement.[144] Third, the Department of Labor, a regulatory agency responsible for punishing labor law violations rather than collecting revenue, partly enforced the *Drexel Furniture* "tax, but the IRS collects the *Sebelius* tax.[145]

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140 *See* 26 U.S.C. § 5801; *infra* Part IV.B.4.

141 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012).

> The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.

Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 38 (1922); *see also id.* at 36−37 (suggesting that a "law [that] impose[s] a tax with only [an] incidental restraint and regulation which a tax must inevitably involve" is a proper exercise of the taxing power, but "regulat[ion] by the use of the so-called tax as a penalty" is not).

142 *Sebelius*, 567 U.S. at 565. *Compare Drexel Furniture*, 259 U.S. at 36–37 (invalidating the tax as an unconstitutional penalty), *with Sebelius*, 567 U.S. at 565–66 (determining that the tax did not constitute a penalty and upholding it as constitutional).

143 *Sebelius*, 567 U.S. at 565–66; *see also Drexel Furniture*, 259 U.S. at 36.

144 *Sebelius*, 567 U.S. at 565–66; *see also Drexel Furniture*, 259 U.S. at 36–37.

145 *Sebelius*, 567 U.S. at 566 (discussing how the Department of Labor enforces labor law violations rather than collecting revenue, while the IRS collects the individual mandate through standard tax procedures and cannot enforce it with punitive measures like criminal sanctions).

Sebelius and *Drexel Furniture* thus stand for the following: if a tax is assessed just like other taxes, not too high, and collected by the IRS then it is a tax, not a penalty, even if Congress calls it a penalty.[146] But if the measure is excessively punitive and its primary purpose is to regulate behavior, it may not survive constitutional scrutiny unless supported by another enumerated power.[147]

Thus, even under modern doctrine, Congress may not "tax" child labor by imposing a punishing 10% penalty (in the guise of a tax) on the annual receipts of companies who intentionally or knowingly use child labor, imposed by non-revenue agents. This Article maintains that Congress cannot penalize making and transferring firearms via the NFA taxes for similar reasons.[148]

3. Taxes Must Raise Revenue, and Taxes Can Only Regulate by Requiring Taxpayers to Pay Money

Sebelius's third limitation on the otherwise valid use of the taxing power is that it must raise revenue and can *only* regulate *via* raising revenue. The Court made this point by contrasting the taxing power with the Commerce Power:

> [A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal . . . . By contrast, 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

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146 *See Drexel Furniture*, 259 U.S. at 36–37; *Sebelius*, 567 U.S. at 565–66.

147 *See Sebelius*, 567 U.S. at 573:

> We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.

Id. (citation omitted).

148 *See infra* Part IV.B.3.

> Government has no power to compel or punish individuals subject to it.[149]

Judge Mark T. Pittman of the Northern District of Texas recently applied this third limitation in a challenge to two federal statutes enacted under the taxing power in 1868 "that regulate the location of distilled spirits plants, or 'stills,' which are used to distill beverage alcohol, or 'spirits.'"[150]

Since "'Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury,' it follows that any law that does not require one to pay money into the treasury is not [an] exercise of the taxing power."[151] And "every tax must produce *some* revenue for the government, period. Indeed, the production of revenue, however negligible, is any tax's 'essential feature.'"[152] Judge Pittman concluded that the challenged statutes were not a valid exercise of the Tax Power because they "do not raise revenue" but instead simply define a crime "without any reference to taxation, exaction, protection of revenue, or sums owed to the government," and thus are "not a tax."[153]

This Article argues that the NFA's requirements for applying to distribute or make firearms, along with its prohibition on importing firearms for taxable transfers, are invalid exercises of the taxing power.[154] These requirements do not qualify as a tax because they fail to raise revenue and are not in aid of any revenue purpose, similar to how the alcohol-distilling statutes considered by Judge Pittman do not raise revenue and are not in aid of any revenue purpose.

D. The Taxing Power Includes the Power to Adopt "Attendant Regulations in Aid of a Revenue Purpose"

The taxing power includes both the power to lay and collect taxes and also the power to adopt "provisions, which are obviously supportable as in aid of a revenue purpose" that do not themselves lay or collect taxes.[155]

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149 *Sebelius*, 567 U.S. at 573–74.

150 Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau, 740 F. Supp. 3d 509, 516−17 (N.D. Tex. 2024) (quoting 26 U.S.C. §§ 5601(a)(6), 5178(a)(1)(B)).

151 *Id.* at 525 (citation omitted) (quoting *Sebelius*, 567 U.S. at 574).

152 *Id.* at 524 (citation omitted) (quoting *Sebelius*, 567 U.S. at 564).

153 *Id.*

154 *See infra* Part IV.B.1, 2 (analyzing the application requirements for transfers pursuant to 26 U.S.C. §5812(a)(1), the application requirements for makings under 26 U.S.C. § 5822(a), and the import restrictions set forth in 26 U.S.C. § 5844).

155 *See* Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (referring to the NFA's registration provisions).

A familiar example is the requirement that a federal tax return accompany federal income tax payment on a form directed by the federal government. The tax return requirement is a valid exercise of the taxing power as a provision supportable as in aid of a revenue purpose, although the tax return itself does not raise revenue.

For another example, sellers of goods must comply with common requirements such as having a license to sell goods subject to sales tax, keeping records of their taxable sales of government-approved forms, and reporting taxable sales on sales tax returns. Such requirements are "provisions, which are obviously supportable as in aid of a revenue purpose."[156] Therefore, the government can impose such requirements under the Necessary and Proper Clause.

The NFA imposes three types of taxes: the occupation taxes, the distribution tax, and the making tax. The other provisions in the NFA do not raise revenue and can only be a valid exercise of the taxing power if they are in aid of the revenue purposes of the three taxes. Provisions that neither raise revenue nor are supportable as in aid of those revenue purposes are not valid exercises of the taxing power.

The NFA's manufacturer and dealer registration requirements do not raise revenue but are provisions that are supportable as in aid of a revenue purpose because they allow the taxing authority to better monitor tax collection and compliance with laws imposing taxes.[157] This Article argues that the NFA's importer registration requirement is not in aid of a revenue purpose because the NFA prohibits importing firearms to make taxable transfers—in other words, the government will rarely collect any revenue from an imported firearm regulated by the NFA.[158]

Additionally, the importation prohibition is not in aid of a revenue purpose. Thus, importing firearms raises no revenue, and consequently regulating importers is not in aid of a revenue purpose.[159] This Article further argues that the NFA's firearm registration and firearm serialization requirements are not valid exercises of the taxing power because they neither raise revenue nor are provisions obviously supportable as in aid of a revenue purpose.[160]

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156 *See id.*
157 *See* 26 U.S.C. § 5802.
158 *See infra* Part IV.B.2.
159 *See infra* Part IV.B.2.
160 *See infra* Part IV.B.5; *see also* 26 U.S.C. § 5841(c); 26 U.S.C. § 5842(a).

Incidentally, "[t]he Anti-Injunction Act bars any 'suit for the purpose of restraining the assessment or collection of any tax.'"[161] But it does not bar suits that do not seek to enjoin the assessment or collection of taxes—including suits to enjoin the enforcement of "activities that may improve [the] . . . ability to assess and collect taxes."[162] In other words, the Anti-Injunction Act does not bar a suit from enjoining "provisions, which are obviously supportable as in aid of a revenue purpose,"[163] as opposed to provisions that assess or collect taxes.

The NFA has many provisions that courts may enjoin without violating the Ani-Injunction Act, including the importer, manufacturer, and dealer registration requirements, the requirements to apply for permission to distribute or make a firearm, and the firearm-registration and firearm-serialization requirements—even if any of those requirements could arguably "help the IRS bring in future tax revenue."[164]

IV. THE NFA IS UNCONSTITUTIONAL

The NFA imposes unconstitutional taxes on activities protected by the Second Amendment. It taxes the manufacturing, making, importing, and transferring firearms, all of which fall under Second Amendment protections.[165] There is no historical tradition of taxing the manufacturing, making, importing, and transferring of firearms.

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161 CIC Serv., LLC v. Internal Revenue Serv., 593 U.S. 209, 211 (2021) (quoting 26 U.S.C. § 7421(a)). "Because of the [Anti-Injunction] Act, a person can typically challenge a federal tax only after he pays it, by suing for a refund." *Id.* at 212. Despite the seemingly clear language of the Anti-Injunction Act, courts recognize an exception:

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the [AIA] is inapplicable and, . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax."

Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 9 (1962) (quoting Miller v. Standard Nut Margerine Co., 284 U.S. 498, 509 (1932)). Thus, if this Article's argument that the assessment and collection of the occupation, transfer, and making taxes in the NFA are unconstitutional is correct, then the Anti-Tax Injunction Act, 26 U.S.C. § 7421(a), does not prohibit courts from enjoining the assessment and collection of those taxes because "under no circumstances could the Government" collect an unconstitutional tax.

162 *CIC Serv.*, 593 U.S. at 217 (quoting Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 11 (2015)).

163 *See* Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

164 *See CIC Serv.*, 593 U.S. at 216.

165 *See infra* Part IV.A.1.

In addition to the NFA taxes, federal law imposes taxes on sales of pistols and revolvers (at 10%) and firearms (other than pistols and revolvers), shells, and cartridges (at 11%). 26 U.S.C. § 4181. Transactions subject to the NFA's transfer tax, 26 U.S.C. § 5811, are exempt from the § 4181 tax. 26 U.S.C. § 4182(a). Allison Speaker wrote an

Additionally, ten specific aspects of the NFA are unconstitutional. The application processes for (1) transfers and (2) makings do not raise revenue and are not provisions that are obviously supportable as in aid of a revenue purpose.[166] The (3) registration of importers and the (4) restrictions on importing likewise do not raise revenue and are not provisions which are obviously supportable as in aid of a revenue purpose.[167] The (5) transfer tax and the (6) making tax are penalties that may not be imposed under the taxing power.[168] The (7) occupation taxes and the (8) making tax raise revenue but are unapportioned unconstitutional direct taxes.[169] The (9) firearm serialization and (10) firearm registration requirements are not supportable as in aid of a revenue purpose.[170]

A. The NFA is Generally Unconstitutional

All aspects of the NFA are unconstitutional because it imposes taxes on the exercise of a constitutional right and there is no historical tradition of taxing the exercise of those constitutional rights. While the NFA may have seemed constitutional in 1934 and 1968, the standards by which the Supreme Court determines constitutionality have changed. In light of recent developments in constitutional law, the NFA cannot be sustained as a valid exercise of the taxing power. Moreover, there is no apparent historical tradition of taxing firearms.

1. Statutes May Not Tax the Exercise of a Constitutional Right

In 2008, the Supreme Court recognized the right to keep and bear arms as an individual constitutional right for the first time.[171] That immediately called the constitutionality of the NFA into question, although no one seemed to notice. As the Court said, "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."[172] One such forbidden policy choice is the imposition of regulatory taxes on the exercise of a constitutional right.

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article considering, without determining, whether the § 4181 tax and the NFA's transfer tax might be unconstitutional post-*Heller*. *See generally* Allison Speaker, *Excise Taxes on a Fundamental Right: Do Excise Taxes on Firearms Survive in a Post-*Heller *World?*, 26 GEO. MASON U. C.R. L.J. 317 (2016). This Article takes a more definite position. The arguments in this Article that the transfer tax is an unconstitutional tax on the exercise of a constitutional right would apply equally to the § 4181 tax.

166 *Infra* Part IV.B.1.

167 *Infra* Part IV.B.2.

168 *Infra* Part IV.B.3.

169 *Infra* Part IV.B.4.

170 *Infra* Part IV.B.5.

171 District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

172 *Id.* at 636.

The NFA taxes firearms manufacturers, importers, and dealers (the occupation taxes). It also taxes transferring and making firearms. All these activities are the exercise of rights protected by the Second Amendment. Consequently, the government may not tax them.

Firearms do not exist in nature. They are a human invention. All firearms are made or manufactured. The only way a person can keep or bear a firearm is to (1) personally make or manufacture one, or (2) be the transferee of a firearm made or manufactured by someone else. This includes a firearm made or manufactured outside of the United States and imported into the United States. It follows that the Second Amendment protects the making, manufacturing, transferring, and importing of firearms—prohibiting taxation of these activities.[173]

Moreover, the amount of the taxes has no relation to administrative costs. On the contrary, they are only related to the price of a machinegun in 1934.[174] As the ATF admits, the NFA's taxes are regulatory taxes designed to "discourage or eliminate transactions in [NFA-regulated] firearms," and are therefore not designed to cover administrative costs.[175] Thus, they cannot be justified as fees to defray administrative costs associated with exercising a constitutional right. Other than taxes on firearms, there are no taxes on exercising constitutional rights in the United States Code.

2. There Is No Historical Tradition of Taxing Firearms

Bruen greatly changed judicial review of statutes under the Second Amendment.[176] Before *Bruen*, courts used an invented, ill-defined, and poorly justified balancing test that typically found the statute constitutional for ad-hoc reasons. After *Bruen*, regulations of conduct covered by the Second Amendment are unconstitutional unless "the government . . . demonstrate[s] that the regulation is consistent with this Nation's historical tradition of firearm regulation."[177] "To justify its regulation [of activities covered by the Second Amendment], the government may not simply posit that the regulation promotes an important [government] interest."[178]

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173 For a contrary view, see Graham Ambrose, Note, *Gunmaking at the Founding*, 77 STAN. L. REV. 235, 286–90 (2025). Ambrose does not acknowledge that no one can keep or bear firearms unless either they personally make or manufacture firearms themselves or acquire a firearm that has been made or manufactured by somebody else. Ambrose's argument is akin to arguing that the freedom of the press does not include the right to make or acquire paper and ink.

174 Halbrook, *Congress Interprets the Second Amendment*, *supra* note 23, at 606.

175 *See* NFA HANDBOOK, *supra* note 84, at 1.

176 *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

177 *Id.* at 17.

178 *See id.*

There is no apparent historical tradition, circa 1791, of taxing firearms in the United States.[179] No evidence suggests that any American government taxed firearms during that time. There is also no apparent evidence of any 1790s-era statute taxing the possession, making, manufacturing, transfer, importation, or sale of firearms, or imposing any occupation tax on dealers, manufacturers, makers, or importers of firearms.[180] The first tax on arms was Mississippi's tax on Bowie knives, adopted in 1841.[181]

On the other hand, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791."[182] "[W]hen a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'"[183] Courts also ask whether "a challenged regulation addresses a general societal problem that has persisted since the 18th century."[184]

Determining the "general societal problem" addressed by the NFA has the same logical and epistemological difficulties as determining Congress's "legislative intent" in enacting it. In one view, "[w]hat the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words."[185] From this perspective, *the* "societal problem" addressed by the NFA is the keeping and bearing of an arbitrary subset of firearms.

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179 Robert T. Lass has also noted that the NFA's taxes might not survive *Bruen*. Robert T. Lass, Heller*,* McDonald*,* Bruen*, and the Unconstitutional Tax Burden of the NFA*, 7 BUS. ENTREPRENEURSHIP & TAX L. REV. 94, 109–10 (2024) ("Given that 'there is very little historic precedent for using taxation to manage harms associated with gun violence,' it seems unlikely that the federal government would be able to show an analogous historic example of the taxing power of Congress used to combat gun violence.") (quoting Rosanna Smart, *Firearm and Ammunition Taxes*, RAND (Apr. 15, 2021), https://www.rand.org/research/gun-policy/analysis/essays/firearm-and-ammunition-taxes.html [https://perma.cc/E32W-ASFZ]).

180 No such statute appears in Duke's *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., https://firearmslaw.duke.edu/repository-of-historical-gun-laws [https://perma.cc/4K3F-255N]. Nor is any described in the apparently thorough survey in ROBERT A. BECKER, REVOLUTION, REFORM, AND THE POLITICS OF TAXATION, 1763–1783 *passim* (1980).

181 *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans of Types of Arms Before 1900*, 50 J. LEGIS. 223, 298 (2024) (omitting mention of earlier taxes, the article suggests the Mississippi Bowie knife tax was the first).

182 United States v. Rahimi, 602 U.S. 680, 692 (2024).

183 *Id.* (quoting *Bruen*, 597 U.S. at 30).

184 *Bruen*, 597 U.S. 1, 26 ("[T]he lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.").

185 Gardner v. Collins, 27 U.S. (2 Pet.) 58, 93 (1829).

Supreme Court *dicta* offers another perspective on the "societal problem" addressed by the NFA: "It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes."[186] Arguably, that is not at all "clear from the face of the Act." Some legislative history of the NFA and a 1954 Congressional report suggest that the arms selected for regulation were arms favored by gangsters during Prohibition.[187] But this cannot explain the failure to include pistols and revolvers on the list, the inclusion of silencers on the list, and the addition of "destructive device" to the list in 1968.[188]

Moreover, judicial use of legislative history is now considered intellectually incoherent.[189] And of course, "[w]e're all textualists now,"[190] and textualists do not consider legislative history. One commentator noted that courts have rarely looked at the purpose of the NFA.[191] Therefore, under this reasoning, no purpose can entirely justify any statute, including the NFA.

In any event, no historical evidence from the 1790s shows that lawmakers regulated or discouraged the use of firearms associated with criminals, or types of firearms linked to specific groups of people. The NFA fails the *Bruen* test.

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186 United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517 (1992).

187 Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 51 (2015) [hereinafter Halbrook, *Firearm Sound Moderators*]; United States v. Fogarty, 344 F.2d 475, 477 (6th Cir. 1965) (referring to the "clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters.") (quoting H.R. REP. NO. 83-1337, at A395 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4542, 1954 WL 6063).

188 Halbrook, *Firearms Sound Moderators*, *supra* note 187, at 41, 50, 49 (highlighting that "more was said about criminal misuse of pistols and revolvers than any other type of weapon," the legislative record demonstrates that the "criminal use of pistols, revolvers, and machine guns dominated the hearings," yet "[a]stonishingly no facts or data were ever set forth in the legislative record suggesting that suppressors were a crime problem," even though the NFA imposed a $200 tax on the transfer of a $5 silencer).

189 *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 369–96 (2012); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–23 (1997).

190 Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&list=PL2q2U2nTrWq1bz6_l-PPEUf9Pw-blX6Pl&index=4.

191 *See supra* text accompanying note 34; Univ. of Wyo. Firearms Rsch. Ctr., *NFA Conference – Panel Discussion "Regulated Arms and Taxation" at the 2024 Fall Conference*, YOUTUBE, at 49:25–50:49 (Oct. 18, 2024), https://www.youtube.com/watch?v=8kXCYh0tktY&t=24s (Stephen Halbrook presentation).

B. Specific Provisions of the NFA Are Unconstitutional

If arguments that the entire NFA constitutes an unconstitutional tax on the exercise of a constitutional right without historical precedent do not persuade a majority of the Supreme Court, there are other arguments to consider. Ten specific aspects of the NFA are unconstitutional for additional reasons.

1. The Application Processes Do Not Raise Revenue and Are Not in Aid of a Revenue Purpose

The application requirements for transfers and makings of firearms are regulations, not taxes.[192] They require would-be transferors and makers to ask permission to transfer or make firearms, prohibit transferors from transferring firearms "if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."[193] The requirements prohibit the making of firearms "if the making or possession of the firearm would place the person making the firearm in violation of law."[194] But "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more."[195]

While the transfer and making taxes are productive of some revenue, the application requirements are not.[196] In fact, the application process denies some applicants, reducing the number of people who would otherwise pay the tax. The application processes therefore actually *reduce* revenue collected. But "every tax must *produce some* revenue for the government, period."[197]

Further, the application processes are not provisions in aid of a revenue purpose. If, instead, the NFA simply required transferors and makers to report transfers and makings on tax returns, the tax returns would facilitate the collection of revenue, but the approval process adds nothing to the collection process. Consequently, the government cannot uphold the application requirements for transfers and makings as an exercise of the taxing power.

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192 Those requirements did not exist until 1968, so the Supreme Court did not consider their constitutionality in *Sonzinzky* or *Miller*.

193 *See* 26 U.S.C. § 5812(a).

194 *See id.* § 5822(a).

195 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

196 Sonzinsky v. United States, 300 U.S. 506, 514 (1937).

197 Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau, 740 F. Supp. 3d 509, 524 (N.D. Tex. 2024) (first emphasis added).

Enjoining enforcement of the application processes also enjoins registration of transferred or made firearms.[198] And there is no way to sever the registration requirement from the application process. "Before severing a provision and leaving the remainder of a law intact, [courts] must determine that the remainder of the statute is 'capable of functioning independently' and thus would be 'fully operative' as a law."[199] The application processes control the registration provisions for transfers and makings, preventing them from functioning independently or remaining separate. Enjoining the application processes also enjoins the registration processes.

2. The Prohibition of Importing Most Firearms Does Not Raise Revenue, and the Importer Registration and Record-Keeping Requirements Are Not a Provision in Aid of a Revenue Purpose

The NFA prohibits importation of firearms except in limited circumstances including, for use: by the government, "for scientific or research purposes," for testing, or for use as a sample by registered importers or dealers.[200] In other words, as ATF itself acknowledges, "NFA weapons are generally not importable except under very limited circumstances[.]"[201] This prohibition is a regulation, not a tax. Importing firearms for these limited purposes does not raise any revenue. Transfers of firearms by the government are exempt from the transfer tax, so importing firearms for government use raises no revenue.[202] Since importing firearms raises little to no revenue, it is impossible to see how the importer registration and record-keeping requirements are provisions in aid of a revenue purpose. Consequently, the government cannot uphold the prohibition of importing most firearms, or the importer registration and record-keeping requirements, as an exercise of the taxing power.

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198 26 U.S.C. § 5841(c) ("[A]uthorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.")

199 Barr v. Am. Ass'n of Pol. Consultants, 591 U.S. 610, 628 (2020) (quoting Selia L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 235 (2020)).

200 26 U.S.C. § 5844.

201 Extending the Term of Import Permits Rule, 79 Fed. Reg. 7392, 7394 (Feb. 7, 2014) (codified at 27 C.F.R. §§ 447.43, 479.111 (2025)). This rule increased the duration of import permits from one year to two. The ATF explained that because the rule would not alter the limited circumstances in which an NFA weapon could be imported, it would have minimal impact on public safety.

202 *See* 26 U.S.C. § 5852(a), (b).

3. The Transfer Tax and the Making Tax Are Really Penalties

Under *Sebelius* and *Drexel Furniture*, courts apply a three-part test to determine if a so-called "tax" is actually a penalty that exceeds the limits of the taxing power.

First, does the so-called "tax" impose "an exceedingly heavy burden"?[203] The "tax" on 10% of a company's yearly income in *Drexel Furniture* did.[204] The individual mandate in *Sebelius*, which was far less than the cost of health insurance for most Americans, did not.[205] The $200 transfer and making taxes are somewhere in between. They appear to fall on the *Drexel Furniture* side of the line.

The $200 transfer tax certainly imposed "an exceedingly heavy burden" in 1934, being approximately a 100% tax on $200 machineguns and an even bigger tax on the other, cheaper regulated items such as $5 silencers.[206] And no legal principle suggests inflation can transform an excessive amount *ab initio* into a non-excessive amount later.

The imposition of the $200 making tax in 1968 was less burdensome. That amount was equal to approximately $75 in 1934 dollars.[207] A $200 machinegun in 1934 would have cost approximately $530 in 1968.[208] Thus, the transfer tax rate on machineguns in 1968 would have been around 14%.[209] The state with the highest sales tax rate is Louisiana at 9.56%.[210] Since 14% is significantly higher than that, and doubts against the constitutionality of the exercise of power by the federal government must be settled against the government—14% is too high.[211]

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203 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565 (2012).

204 Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 36–37 (1922).

205 *Sebelius*, 567 U.S. at 566.

206 Halbrook, *Firearm Sound Moderators*, *supra* note 187, at 50; *see Sebelius*, 567 U.S. 519, 565 (2012).

207 *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=200.00&year1=196812&year2=193406 [https://perma.cc/WHV3-7AND].

208 *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=200&year1=193406&year2=196812 [https://perma.cc/4TDJ-YCHS].

209 $75/$530 = approximately 0.14.

210 Jared Walczak, *State and Local Sales Tax Rates, 2024*, TAX FOUND. (Feb. 6, 2024), https://taxfoundation.org/data/all/state/2024-sales-taxes/ [https://perma.cc/SP5V-5GEP].

211 This Article endorses, and encourages courts to adopt, Gary Lawson's argument that the Constitution has an implicit "Article VIII" which reads:

> In the event that there is any uncertainty about what this Constitution

Second, does the "tax" have a scienter requirement?[212] Hand grenades are "destructive devices" regulated by the NFA.[213] In 1971, the Supreme Court ruled that to secure a conviction for possessing unregistered hand grenades, the government is not required to prove that the defendant knew the grenades were unregistered.[214] "This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[215]

In 1994, while upholding a conviction for possessing an unregistered machinegun, the Court held, "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence."[216] Yet "[o]f course," the Court continued, "we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in *Freed*."[217]

The establishment of the right to keep and bear arms as an individual constitutional right makes *Freed*'s holding less certain now. Nonetheless, the *Bruen* Court recognized "the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[218] Perhaps citizens are already on notice that they might be violating the law if they possess "dangerous and unusual" weapons, such as hand grenades.

> means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power. In other words, presume that state laws and acts are constitutional unless something in this Constitution convinces you otherwise and presume that federal laws and acts are unconstitutional unless something in this Constitution convinces you otherwise.

Gary Lawson, *Dead Document Walking*, 92 B.U.L. REV. 1225, 1234 (2012).

212 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565–66 (2012).

213 26 U.S.C. § 5845(a)(8), (f).

214 United States v. Freed, 401 U.S. 601, 607 (1971).

215 *Id.* at 609.

216 Staples v. United States, 511 U.S. 600, 611–12 (1994).

217 *Id.*

218 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 21 (2022) (internal quotations omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

But it is likely that the Supreme Court will eventually determine that some firearms regulated by the NFA are no more "dangerous and unusual" than handguns and rifles—most obviously firearm suppressors, and perhaps short-barreled rifles and shotguns, maybe even machineguns—and thus the NFA has a scienter requirement after all, at least with respect to firearms that are not "dangerous and unusual."

Third, is the "tax" enforced by a taxing authority or by an agency responsible for punishing violations of laws?[219] In 1934 and 1968, the IRS enforced the NFA; however, the Homeland Security Act of 2002 transferred enforcement to ATF in the Department of Justice.[220] All three factors indicate that, for constitutional purposes, Congress imposes the distribution tax and the making tax as a penalty, which it cannot be justified under the taxing power.

4. The Occupation Taxes and the Making Tax Are Unapportioned Direct Taxes

The Constitution distinguishes between direct and indirect taxes, but the distinction is obscure. This Section will not attempt to harmonize or explain 250 years of doctrinal development in this field, as any such effort would likely fail.[221] Instead, the approach will begin with simple, largely undisputed premises to build a coherent doctrine.

First, "[o]nly three taxes are definitely known to be direct: (1) a capitation, U.S. CONST. art. I, § 9, (2) a tax upon real property, and (3) a tax upon personal property."[222] Second, the Constitution "implie[s] that taxes in the form of duties, excises, or imposts [are] indirect."[223] Robert Natelson has defined these types of indirect taxes:

> A duty was any imposition (whether regulatory or for revenue) that was not a direct tax. Duties included, but were not limited to, excises, imposts, and tonnage. Excises were duties on the consumption of commodities, usually manufactured goods. Excises often were levied at the point of sale, but if tied to consumption, they might be payable

219 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 566 (2012).

220 *Transfer of ATF*, *supra* note 94; 28 U.S.C. § 599A.

221 Even Oliver Wendell Holmes acknowledged that an "attempt to make some scientific distinction [between direct and indirect taxes] would be at least difficult." New York Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921). Rather than try, he issued what became one of his more famous aphorisms: "Upon this point a page of history is worth a volume of logic." *Id.*

222 Murphy v. Internal Revenue Serv., 493 F.3d 170, 181 (D.C. Cir. 2007); *Sebelius*, 567 U.S. at 571 (recognizing capitation taxes, and taxes on the ownership of land and personal property to be direct taxes).

223 Natelson, *supra* note 100, at 305.

> at other times. Imposts were duties on imports, whether or not import was accompanied by a sale or ownership transfer. Tonnage was a duty on ships entering or leaving harbors, assessed by cargo capacity. Duties that were not excises, imposts, or tonnage included fees for specific transactions, such as those on exports and the execution of legal documents or the delivery of specific services.[224]

Third, all taxes are either direct or indirect.[225] The *Sebelius* Court held that the individual mandate "does not fall within any recognized category of direct tax," and "is thus not a direct tax that must be apportioned among the several states."[226] But the Court should have also considered whether the individual mandate falls into any recognized category of indirect tax before declaring it to be a direct tax.[227]

The Constitution also recognizes income taxes.[228] Thus, we have eight kinds of taxes. Capitation taxes, taxes on ownership of real property, and taxes on ownership of personal property are direct taxes. Duties, excises, imposts, and tonnage are indirect taxes. Because the law does not require the apportionment of income taxes, their classification as direct or indirect is a purely academic question today.[229]

Of the taxes listed, the only tax that the NFA's occupation tax resembles is the capitation tax, which is a direct tax. It has no resemblance to any indirect tax or to an income tax. But that does not quite settle the matter because the *Sebelius* Court, citing Justice Chase's opinion in *Hylton*, stated, "Capitations are taxes paid by every person, 'without regard to property, profession, or any other circumstance.'"[230] That might suggest that occupation taxes cannot be capitation taxes, since they regard one's profession. Justice Chase's *Hylton* opinion is a weak source of authority on this point, a fact he himself acknowledged.[231]

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224 *Id.* at 350.

225 Moore v. United States, 602 U.S. 572, 622 (2024) ("The Constitution's original taxing provisions divided taxes into two classes: direct and indirect taxes."); Natelson, *supra* note 100, at 305 (The Constitution distinguishes "between direct taxes and other (presumably indirect) taxes.").

226 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

227 Natelson, *supra* note 100, at 349 ("[A] natural part of determining that the penalty was *not direct* should have been determining whether it was *indirect*.") (emphasis in original).

228 U.S. CONST. amend. XVI.

229 *See id.*

230 *Sebelius*, 567 U.S. at 571 (emphasis omitted) (quoting Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.)).

231 *Hylton*, 3 U.S. at 175 ("But, I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution, are only two, to wit, a

Occupation taxes are far closer to capitation taxes than any indirect or income tax. Since they must be either direct or indirect taxes, this Article concludes that occupation taxes are direct taxes. Since the NFA does not apportion its occupation taxes, they are unconstitutional.

There is a historical case that the making tax is an indirect excise tax because the First Congress enacted a tax on the production (making) of whiskey, and no one thought to challenge it at the time as an unapportioned direct tax (although it did lead to the Whiskey Rebellion). As Natelson says, "[e]xcises often were levied at the point of sale, but if tied to consumption, they might be payable at other times,"[232] and, arguably, since one typically produces whiskey or makes suppressors in order to consume or use them, taxes on those activities are indirect excises.

Nevertheless, this Article argues that the making tax most resembles a tax on personal property, which is a direct tax, and only slightly resembles an excise, which is an indirect tax. The Supreme Court noted the distinction between an excise tax and a property tax almost a hundred years ago. Taxes "upon the exercise of one of the numerous rights of property [i.e. an excise tax] [are] clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use and disposition made of his property [i.e. a property tax]."[233] Taxes "upon the exercise of one of the numerous rights of property . . . . were not understood to be direct taxes when the Constitution was adopted,"[234] and are indirect. Thus, common sales taxes are indirect because they are a tax on the exercise of the right of the sale of property. The NFA's transfer tax is indirect for the same reason.

Yet the line between taxing exercises of property rights and taxing the property itself can be blurry. The Supreme Court recognizes the possibility that:

> [S]ince property is the sum of all the rights and powers incident to ownership . . . [and] that one of the uses of property is to keep it, . . . a tax upon the possession or

capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND.") (emphasis added); Natelson, *supra* note 100, at 349 ("In citing Justice Chase's dictum on capitations, the *Sebelius* Court failed to acknowledge that Chase had advanced his definition only tentatively."). Chase also "doubt[ed]" whether a tax on personal property is a direct tax. *Hylton*, 3 U.S. at 175. He was wrong. He also "believe[d] some taxes may be both direct and indirect at the same time." *Id.* at 184. Wrong again. Natelson says that Chase was also wrong about capitations. "The historical record, after all, tells us that Chase's supposition was unquestionably false: In the real world, capitations frequently were adjusted or waived for all sorts of circumstances." Natelson, *supra* note 100, at 174.

232 Natelson, *supra* note 100, at 350.

233 Bromley v. McCaughn, 280 U.S. 124, 137 (1929).

234 *Id.* (citations omitted).

> keeping of property is no different from a tax on the property itself.[235]

The Court has reserved the question of whether "a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, and hence a direct tax requiring apportionment[.]"[236]

A tax on taking some items of personal property and making them into a new item of personal property is more obviously a tax on ownership of property than a tax on the exercise of a right of ownership, such as selling the items to someone else. Classifying the act of transforming personal property into other items of personal property as an exercise of a right of ownership creates a slippery slope, redefining even minimal interactions with personal property as "exercises of a right of ownership" rather than simple ownership. It is unhelpful, for instance, to characterize moving one's toothbrush to one's mouth as an exercise of a right of ownership—unless the characterization is merely meant to allow regulation of that activity.

States already tax the use of property separately from sale of the property.[237] Making something not for sale is far closer to using than selling. Therefore, the making tax is a direct tax, requiring apportionment among the several States. Because Congress has not apportioned it, the tax is unconstitutional.

5. The Firearm Registration and Serialization Requirements Are Not in Aid of a Revenue Purpose

The government primarily uses the NFA's firearm registration and firearm serialization requirements to track firearms and impose additional penalties on persons who possess, make, or transfer unregistered and unserialized firearms.[238] While possessing an unregistered, unserialized firearm is evidence of failure to pay a tax, far more direct evidence is a lack of documentation and lack of a tax stamp.[239]

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235 *See id.* at 138.

236 *Id.* (citation omitted).

237 *See* Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 555 (1977) ("All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax.").

238 *See* 26 U.S.C. § 5841(c); 26 U.S.C. § 5842(a).

239 *Cf.* Haynes v. United States, 390 U.S. 85, 98 (1968) ("[O]ther methods [i.e. other than registration], entirely consistent with constitutional limitations, exist by which such information [i.e. whether the registration tax has been paid] may be obtained.").

V. CONCLUSION

Litigants and courts should reevaluate the constitutionality of the National Firearms Act in light of the modern Second Amendment doctrine and the taxing power principles addressed in this Article. *Heller*, *Bruen*, and *Sebelius* have made the reasoning (or lack thereof) in *Sonzinsky* and *Miller* obsolete.[240] Under the modern Second Amendment doctrine, the NFA taxes the exercise of Second Amendment rights, and has no historical analogue.[241] That means it is facially unconstitutional because it has no constitutional applications.[242] Apart from Second Amendment questions, it also has many provisions that violate or cannot be justified under the taxing power—which means those provisions are void and facially unconstitutional.[243] In short, the courts should enjoin enforcement of the NFA and Congress should repeal it.

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240 *See supra* Part II.C.

241 *See supra* Part IV.A.1–2.

242 *See* Moody v. NetChoice, LLC, 603 U.S. 707, 718 (2024) (holding that in a facial challenge, the question is whether the statute's "unconstitutional applications are substantial compared to its constitutional ones.").

243 *See supra* Part IV.B.1–5.