The Marchetti Approach to Self-Incrimination in Cases Involving Tax/Registration Statutes

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I. INTRODUCTION

In the process of revenue collection, the government inevitably requires information from and about taxpayers who provide the revenue. The satisfaction of this governmental need clashes with the privilege against self-incrimination when the taxed activity is made illegal by nontax statutes. In 1968, the United States Supreme Court in *Marchetti v. United States*¹ held that the privilege against self-incrimination is a complete defense to prosecution under federal tax/registration statutes when compliance would admit commission of an act which is a crime under a nontax statute. Recently, two federal courts of appeals resolved this conflict between the government's need for information in the collection of liquor taxes and the privilege against self-incrimination in favor of the governmental interest.³ This note will examine the developments leading to and the reasoning of the *Marchetti* decision, the distinctions drawn by the two appellate courts in not applying *Marchetti*, and the problems resulting from the extension of the *Marchetti* rationale to the liquor tax area. It will also propose a course of action for the resolution of this conflict between the government's need for information in the collection of revenue and the unrestricted exercise of the privilege against self-incrimination.

II. EARLY DEVELOPMENTS

In 1927 in *United States v. Sullivan*⁴ the United States Supreme Court upheld a conviction for willful failure to file an income tax return where the defendant claimed the privilege against self-incrimination as a defense on the grounds that some or all of the income had been derived from illegal activity. The Court held the income from the illegal activity taxable and, while

². A "tax/registration statute" is a statute or system of statutes which provides for the payment of a tax and the simultaneous registration of the taxpayer and his taxed activity. The payment of the tax and the registration must be contemporaneous. Except where indicated, the cases in this note involve a tax/registration statute.
³. United States v. Reeves, 425 F.2d 1063 (10th Cir. 1970); United States v. Walden, 411 F.2d 1109 (4th Cir. 1969).
⁴. 274 U.S. 259 (1927).
the privilege might be asserted against a specific question in an income tax return, it could not be applied to the whole process of filing since this "would be an extreme if not an extravagant application of the Fifth Amendment..." In this way, Sullivan resolved the conflict between the government's need for information and the privilege against self-incrimination in favor of the governmental interest while still allowing the individual a certain degree of protection.

The Internal Revenue Act of 1951 contained provisions which required wagerers to pay a tax and to register with the Internal Revenue Service. These provisions were challenged in United States v. Kahriger where petitioner raised the privilege against self-incrimination. The Court held the privilege inapplicable because the information required in registering referred only to "prospective acts." That is, at the time of taxation and registration there would be no incriminatory compulsion because the criminal act would occur only after compliance with the tax/registration statute. Lewis v. United States presented essentially the same issue, and the Court held that tax/registration statutes were "wholly prospective," thereby disposing of the self-incrimination problem.

III. RECENT DEVELOPMENTS IN THE LAW

A. The Albertson Decision

The continued validity of Kahriger and Lewis was questioned in Albertson v. SACB. There petitioners sought review of a Subversive Activities Control Board order to register as Communists. The Court held that the order to register violated the privilege against self-incrimination because registration required admission of membership in the Communist Party and "[s]uch an admission... may be used to prosecute" under various statutes.

5. Id. at 263-64. The Court did not elaborate but it apparently feared that the vital self-reporting feature of the income tax system would collapse, with drastic revenue consequences, if the privilege were used in such a manner.
7. 345 U.S. 22 (1953).
10. Id. at 77.
In *Albertson* the government argued that the case was analogous to *Sullivan*\(^{11}\) and that the privilege against self-incrimination could be applied only to specific questions in the registration form, not to the whole registration process. The Court, however, ruled:

In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here [in *Albertson*] they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions . . . might involve petitioners in the admission of a crucial element of a crime.\(^{12}\)

B. **The Marchetti Decision**

In light of its decision in *Albertson*, the Court, recognizing the inconsistency in the *Kahriger* and *Lewis* results, agreed to re-evaluate those cases and granted certiorari in *Marchetti v. United States*.\(^{13}\) In *Marchetti*,\(^{14}\) the Court reversed a conviction for failure to pay a gambler's occupation tax and to register with the Internal Revenue Service on the ground that the privilege against self-incrimination is a complete defense to such prosecution.\(^{15}\) The Court examined the extensive federal and state anti-gambling statutes and concluded that "wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.'"\(^{16}\) The Court went on to examine and emphasize the presence of federal-state cooperation\(^{17}\) and concluded that Marchetti was faced with a

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\(^{11}\) 274 U.S. 259 (1927) (discussed in text accompanying notes 4 & 5 supra).

\(^{12}\) 382 U.S. at 79. (Emphasis added.)


\(^{15}\) In *Marchetti*, as in *Kahriger* and *Lewis*, there was a comprehensive federal statutory system dealing with the taxation of gamblers involving such matters as the payment of occupation taxes, 26 U.S.C. § 4411 (1964); registration with the IRS, 26 U.S.C. § 4412 (1964); possession and exhibition of tax stamps, 26 U.S.C. § 6806(c) (1964); records, 26 U.S.C. §§ 4403, 4423 (1964); distribution of a list of those paying taxes to local officials, 26 U.S.C. § 6107 (1964), repealed, 82 Stat. 235 (1968); and non-exemption from local prosecution, 26 U.S.C. § 4422 (1964).

\(^{16}\) 390 U.S. at 47.

\(^{17}\) *Id.* at 47-48. The Court noted three primary factors in its
“real and appreciable” risk of self-incrimination.\(^\text{18}\)

The Court rejected the government’s proposed alternative remedy of imposing “use restrictions” on the taxpayer-supplied information.\(^\text{20}\) The Court felt that it was inappropriate to frustrate congressional intent through such restrictions where Congress had manifested an intent that the taxpayer-supplied information be made available to state prosecutors.\(^\text{21}\) Congress itself, it was said, should adopt such provisions and provide the necessary scope of protection since Congress has the power to grant protection as broad as the privilege itself.\(^\text{22}\)

\textit{Grosso v. United States}\(^\text{23}\) and \textit{Haynes v. United States}\(^\text{24}\) were handed down together with \textit{Marchetti}. Both reached the same result. The conflict in \textit{Grosso} was between the excise tax on discussion of cooperation. First, there existed, at the time, statutory authority to release to state prosecutors taxpayer-supplied information. 26 U.S.C. § 6107 (1964), \textit{repealed}, 82 Stat. 1235 (1968). Second, it is not uncommon for states and localities to have laws which provide that possession of tax stamps evidencing compliance with federal tax/registration statutes is prima facie evidence of a violation of the local law prohibiting the taxed activity. \textit{See}, \textit{e.g.}, \textit{Marchetti v. United States}, 390 U.S. 39, 47-48 nn. 7-10; \textit{Kansas City v. Lee}, 434 S.W.2d 481 (Mo. 1968). \textit{See also} \textit{Porter v. Scribner}, 430 F.2d 1305 (10th Cir. 1970).


18. 390 U.S. at 48.

19. The Court rejected its prior reasoning regarding the prospective application of the tax/registration statutes. Two reasons were given for this turnabout. First, present registration provides investigatory leads to all activity whether past, present or future; and second, the appropriate test for application of the privilege against self-incrimination is not the chronology of events, but rather the reality of the danger of self-incrimination. 390 U.S. at 50-54. The Court also found that the “required records” doctrine (\textit{Shapiro v. United States}, 335 U.S. 1 (1948)\(^\text{23}\)) was inapplicable. 390 U.S. at 55-57.

20. “Use restrictions” means that the Court would prohibit the federal government from transferring information supplied by taxpayers to state authorities. This remedy would permit the continued enforcement of the tax/registration statutes and still provide the protection of the privilege against self-incrimination. 390 U.S. at 58-59. \textit{See} 26 U.S.C. § 6107 (1964), \textit{repealed}, 82 Stat. 1235 (1968).


22. 390 U.S. at 58, 60. Chief Justice Warren entered a vigorous dissent from \textit{Marchetti} and \textit{Grosso v. United States}, 390 U.S. 62 (1968), arguing that only the section authorizing the release of taxpayer-supplied information should be declared unconstitutional and severed from the tax/registration statute. He noted that a failure to do so frustrates congressional intent to provide revenue with the tax/registration statute. 390 U.S. at 77-84 (dissenting opinion).


gamblers and the privilege against self-incrimination. The statutory system of excise taxes on gamblers was compared with the occupation tax in *Marchetti*, and the excise taxes were found to differ in two ways from the occupation tax. First, the excise tax provisions required especially frequent and detailed informational filing, thereby increasing the risk of self-incrimination. Second, in the case of the excise taxes, there was no specific statutory authority for federal-state cooperation. However, there was no prohibition against it, and statutes of general application had been employed as authority for such cooperation. In spite of these differences the Court again reached the conclusion that there was a hazard of self-incrimination inherent in compliance with the tax registration statute and, accordingly, the privilege provided a complete defense.

In *Haynes v. United States*, the Court reversed a conviction for failure to register a firearm. The relevant statutes provided for the taxation and registration of certain peculiar firearms, such as sawed-off shotguns and machine guns, likely to be used by individuals engaged in criminal activity. The Court concluded that the registration program was not regulatory in nature but aimed at an inherently suspect group. This case involved federal rather than state criminal statutes, and therefore there was no issue of federal-state cooperation.

C. THE TWO-STEP INQUIRY

The rule developed in *Marchetti, Grosso* and *Haynes* attempts to alleviate the dilemma faced by a defendant in either risking sanction for noncompliance with a tax/registration statute or incriminating himself under a nonregulatory criminal statute.

From the *Marchetti* line of cases, it appears that the Court, in determining whether to apply the *Marchetti* rationale, will

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25. Grosso had been indicted under both the occupation and excise tax provisions, but he had not asserted the privilege against self-incrimination as a defense to the occupation tax since *Kahriger* and *Lewis* prevented it. Grosso had consistently urged that the privilege should protect him as far as the excise tax provisions were concerned. The attack on that tax is the primary thrust of the decision.

26. 390 U.S. at 65.
27. Id. at 66.
28. Id.
30. Id. at 87 n.4.
look to four factors, which merge into a two-step inquiry. The first step looks to one particular factor: the cooperation between federal and state or among federal authorities in the use of taxpayer-supplied information required by the tax/registration statute. The second step looks to three factors derived from language in Albertson:31 (1) whether the tax/registration statute is in "an area permeated with criminal statutes;" (2) whether it applies to a select group suspected of criminal activity; and (3) whether it has an effect on an activity in an area which is not essentially "regulatory" (as contrasted with criminal) in nature. If the factors in both steps are present the privilege is available.

1. Cooperation

In the application of the Marchetti rationale, courts have distinguished between specific cooperation in fact and a general statutory policy or continuing practice of cooperation. It appears that it is unnecessary for the defendant to establish specific cooperation in fact to avail himself of the privilege. In Marchetti specific cooperation between federal and state officials was required by statute.32 There was also cooperation in fact since Marchetti had been apprehended through the efforts of a federal undercover agent working in concert with local law enforcement officers.33 In Grosso there was neither specific statutory authority for federal-state cooperation nor any proof of actual specific cooperation but only testimony of a general practice of cooperation.34 The Court nevertheless found the existence of a general policy or practice of cooperation sufficient to meet the requirement. Such a standard in a defense for noncompliance with a tax/registration statute makes sense since it is difficult to see how a defendant who had not registered could show actual cooperation in his case, whereas he could demonstrate a practice of cooperation between federal and state officials in similar cases where there had been actual compliance with the information requirements of the tax/registration statute.

31. 382 U.S. at 79. See text accompanying note 12 supra.
32. 26 U.S.C. § 6107 (1964), repealed, 82 Stat. 1235 (1968). The legislative response to Marchetti was repeal of this provision. The legislative history of the repealing act suggests that Congress intended to make it clear that "it is not the desire or intent of the Congress that the entire system of Federal taxation be rendered impotent or ineffectual because a State or local jurisdiction has a law rendering aspects of the [taxed] activity illegal." S. REP. No. 1501, 90th Cong., 2d Sess. 52 (1968).
33. United States v. Costello, 325 F.2d 848, 850 (2d Cir. 1965).
2. The Albertson Characteristics

The dimensions of the second step of the Marchetti two-step inquiry were determined in the leading post-Marchetti cases. In Marchetti and Grosso, the Court looked only to the first and second factors. Finding that the tax/registration statute was in an area permeated with criminal statutes and that it was aimed at a select group suspected of criminal activity, the Court concluded that there was a substantial risk of self-incrimination. In Haynes the process was somewhat different. The Court began by observing that the tax/registration statute had a crime suppression motive rather than a regulatory purpose. From this it was concluded that the statute was aimed at a select group suspected of criminal activity (factor two), thereby creating the substantial risk of self-incrimination. Thus, both the Haynes approach and that of Marchetti and Grosso ultimately reach the central problem in these cases, the presence of a substantial risk of self-incrimination.

On the basis of the Court's approach to the three Albertson factors in the Marchetti case, it appears appropriate to consider them conjunctively in recognition of their inherent interdependence rather than as separate and individually sufficient elements. Moreover, there are two approaches that have been taken in considering these factors as interdependent. The first (that of Marchetti and Grosso) looks to whether the first and second factors are present and point to the conclusion that there is a risk of self-incrimination. The second method (that of Haynes) looks to the regulatory purpose of the tax/registration statute (factor three). If the purpose is primarily to be crime suppression, the statute is necessarily aimed at a suspect group and the crucial risk of self-incrimination is present. Whether the approach is that of Marchetti and Grosso or that of Haynes, the ultimate consideration in the process is this risk of self-incrimination.

It appears then from the Marchetti line of cases that there has emerged a two step test for applying the rationale. The first step is to satisfy the requirement of cooperation. Second, using either of the two methods described above, the Court looks to the three characteristics of the second step conjunctively. If both

37. See text accompanying note 31 supra.
steps are satisfied, the privilege against self-incrimination arising from the threat of nontax criminal statutes is available as a defense to prosecution for violation of the tax/registration statute.

D. Subsequent Case Developments

There have been several applications of the Marchetti rationale in the areas of gambling, narcotics, liquor and firearms. In addition to developments in these specific areas, it has been held generally that the rationale does not protect those whose registration with the Internal Revenue Service\(^{38}\) contains false information, and is not to be applied retroactively in criminal cases.\(^{39}\)

1. Gamblers

Lower courts have consistently applied Marchetti in prosecutions for noncompliance with tax/registration requirements for gamblers.\(^{40}\) Since these decisions seem to have successfully precluded such prosecutions in the future, imaginative methods of applying the doctrine are constantly attempted. Relying on Marchetti, some gamblers on trial in state courts have attempted unsuccessfully to obtain federal injunctions against federal agents to prevent them from testifying at state trials.\(^{41}\) Such evidence gathered by federal agents has been excluded in Pennsylvania\(^{42}\) but has been allowed in Missouri.\(^{43}\) Efforts have been made to suppress evidence in post-Marchetti prosecutions under local statutes when such evidence was obtained through warrants validly issued prior to Marchetti on the basis of probable cause for violation of the gamblers' occupational tax statute. Courts

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\(^{40}\) See, e.g., Scaglione v. United States, 396 F.2d 219 (5th Cir. 1968). One of the most interesting developments in the application of the Marchetti rationale to gambling cases has occurred in forfeiture proceedings (civil) against gamblers. While the Sixth Circuit has held that Marchetti does not preclude civil forfeiture of gambling paraphernalia since the civil liability for taxes remains (United States v. One 1965 Buick, 392 F.2d 672 (6th Cir. 1968)), the United States Supreme Court has taken the view of the Seventh Circuit, that there may be no civil forfeiture since this is an indirect punishment of something Marchetti prevents from being punished directly. United States v. U.S. Coin and Currency, 393 F.2d 499 (7th Cir. 1968), aff'd, 401 U.S. 715 (1971).

\(^{41}\) Rainery v. United States, 423 F.2d 628 (2d Cir. 1970); United States v. Boiardo, 408 F.2d 112 (3d Cir. 1969).


\(^{43}\) State v. Sellaro, 448 S.W.2d 595 (Mo. 1969).
have rejected this argument. If the warrant was valid when issued the evidence is not tainted.\textsuperscript{44}

2. Narcotics

The development of the Marchetti rationale in the narcotics area was slow until Leary \textit{v. United States}.\textsuperscript{45} There the Court applied Marchetti to possessors of narcotics and used the Haynes approach to the Albertson factors.\textsuperscript{46} But in Minor \textit{v. United States}\textsuperscript{47} the rationale was not applied to a seller of narcotics who challenged, as contrary to the privilege, the appearance of the seller's name on the order form required by statute\textsuperscript{48} to be presented to him by the purchaser of the narcotic. The Minor court found the privilege inapplicable since "[t]here is no real and substantial possibility that the . . . order form requirement will in any way incriminate sellers for the simple reason that sellers will seldom, if ever, be confronted with an unregistered purchaser who is willing and able to secure the order form".\textsuperscript{49} This distinction between possessors and sellers of narcotics has been followed by the lower courts in the application of the Marchetti rationale in the narcotics area.\textsuperscript{50}

3. Firearms

Subsequent cases in the firearms area have been concerned not with the registration statute,\textsuperscript{51} as was Haynes, but with a tax statute\textsuperscript{52} which requires the filing of a statement of intention of any person intending to make a firearm. Despite the fact that persons engaged in the business of manufacturing firearms are exempted from this filing requirement,\textsuperscript{53} which suggests that it is in fact aimed at a select, suspect group, the majority of the circuits have held that the defense based on the privilege against

\begin{itemize}
\item 45. 395 U.S. 6 (1969).
\item 46. See text accompanying note 36 supra.
\item 47. 386 U.S. 87 (1969).
\item 49. 396 U.S. at 93.
\item 50. See, e.g., United States \textit{v. Levy}, 428 F.2d 211 (1st Cir.), cert. denied, 400 U.S. 832 (1970); Alvarez \textit{v. United States}, 426 F.2d 301 (5th Cir. 1970).
\item 51. 26 U.S.C. \textsection 5841 (1954) requires every person "possessing a firearm" to register.
\item 52. 26 U.S.C. \textsection 5821 (1954).
\item 53. 26 U.S.C. \textsection 5821(b) (1971).
\end{itemize}
self-incrimination is unavailable.54 These courts have reasoned that unlike Haynes, where the registration statute55 and the criminal statute56 were said to be aimed at identical activity, here the activity required to be registered is not illegal under criminal statute. In 1968 Congress imposed restrictions on the use of tax information for prosecution purposes,57 which should alleviate the many problems of self-incrimination which have plagued the firearms acts.

4. Liquor

The fourth area of judicial development of the Marchetti rationale is that of liquor tax/registration statutes. Three major types of tax/registration statutes have been attacked in the liquor regulation area: possession of untaxed liquor statutes, distilling operations statutes and retail liquor sales laws.

The several attempts to apply the Marchetti rationale to cases involving illegal possession of liquor on which tax has not been paid have been singularly unsuccessful because they do not involve a true tax/registration statute. There is no statutory registration requirement.58

Attempts have also been made to apply the Marchetti rationale to tax/registration statutes dealing with the distilling process itself. Here, in order to comply with a state tax statute59 a distiller must register, thereby often admitting violation of a state criminal statute prohibiting the activity of distilling.60 A comparison of the reasoning in two distilling cases, United States v. McGee61 and United States v. Fine,62 is interesting because the

cases involved the same statutes yet reached opposite results. In both cases, the defendants were indicted for failure to register their distilleries, an illegal business under local law. In McGee a motion to dismiss based on Marchetti was denied. The court briefly reviewed Albertson and the leading cases following Marchetti and concluded, in line with long standing precedent, that the tax/registration statutes were regulatory (factor three) and that distillers are not a select group since the tax/registration statute was aimed at an entire industry (factor two). The court therefore held the Marchetti rationale inapplicable. The McGee court's approach was that used in Haynes. However, the court did not mention the risk of self-incrimination. This is perhaps explained by its conclusion that the three Albertson factors were not satisfied.

Both the result and the approach of the Fine court were opposite to those of McGee. The Fine court looked first to the permeation factor as evidenced by local criminal statutes while the McGee court essentially disregarded this factor. The Fine court concluded that the tax/registration statute was in a permeated area (factor one) and since that area was permeated with criminal statutes there was a select group (factor two). It then went on to explain why there existed a risk of self-incrimination. While aware of the McGee precedent and its emphasis on the regulatory nature of the tax/registration statute, the Fine court dismissed this factor in a footnote. Having concluded that the Albertson factors were present, the Fine court went on to find cooperation. This was easy since Fine had been apprehended simultaneously by state and federal authorities.

Other cases, employing a somewhat different approach,
have concluded that *Marchetti* is simply inapplicable to the liquor tax area. United States *v. Walden* and United States *v. Reeves* are examples of such cases resolving the conflict in favor of the governmental need for revenue. Although involving different statutes, both cases employ similar reasons in reaching identical results.

In *United States v. Walden* the defendant was a distiller, and therefore engaged in activity illegal under local law, who failed to comply with the requirements of the Internal Revenue Code. Evidence of his activity was gathered by the state prosecuting officials. The Fourth Circuit held the *Marchetti* rationale inapplicable to the liquor area. The court's approach to the *Albertson* factors was to consider the factors separately as independent elements. The "permeation" factor (factor one) was found not present because distilling is "not almost certain" of being illegal in most jurisdictions. Moreover, the tax/registration statute in the liquor area was said to be aimed at many rather than few people (factor two). However, the *Walden* court addressed itself primarily to factor three, finding the purpose of the statutes to be solely regulatory. In addition, per-

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71. In addition to the cases discussed in the text there have been two other important decisions at the circuit court level which have held that the *Marchetti* rationale does not apply to the liquor tax/registration area. But, as opposed to the cases discussed in the text, these other cases arose in jurisdictions in which the taxed activity was not illegal. Accordingly it was not possible, under the *Marchetti* rationale, for there to be any risk of self-incrimination. However, these other cases did go on to reflect much of the other thinking expressed in the cases discussed in the text. See, e.g., United States *v. Whitehead*, 424 F.2d 446 (6th Cir. 1970) (distilling a legal operation in Michigan); United States *v. Hunt*, 419 F.2d 1 (3d Cir. 1969), cert. denied, 397 U.S. 1016 (1970) (distilling not illegal per se in New Jersey).
74. 411 F.2d 1109 (4th Cir. 1969).
76. 26 U.S.C. §§ 5173, 5601(a) (4), 5222, 5601(a) (1967).
77. 411 F.2d at 1111.
78. Id. The *Walden* court pointed to the number of individuals who complied with the distilled spirits registration requirements to support the refutation of the presence of the "selective group" factor. Id. at n.3.
79. The Supreme Court had long since reached the same conclusion in United States *v. Ulrici*, 111 U.S. 38 (1884):
It is clear, even upon a cursory reading, that the well-considered and minute provisions of [the liquor tax statutes] were adopted with one purpose only, namely, to secure the payment of the tax imposed by law upon distilled spirits.
111 U.S. at 40.
haps in recognition of the Haynes approach, the court found that the tax/registration statutes were not intended to force self-incrimination. Although the court found that the three Albertson factors were not satisfied it nevertheless went on to examine the question of cooperation. Here there had been no actual specific cooperation nor had the defendant shown the existence of a general practice based on specific congressional intent.

In United States v. Reeves, the defendant sold liquor in violation of local law and neglected to pay the occupation tax on that activity in violation of federal law. The facts do not disclose the existence of either general or specific cooperation. The trial court denied a motion to apply Marchetti, reasoning like the Walden court with regard to the Albertson factors. The Tenth Circuit affirmed, basing its opinion primarily upon the regulatory aspects of the tax/registration statutes involved and using Walden as an indication of a trend toward not applying Marchetti in the liquor tax area. Reeves is the only case to date to consider the impact of the repeal of the specific statutory authorization for cooperation between state and federal authorities which the Marchetti court found objectionable. The Reeves court, without explanation, concluded that the repeal eliminated the problem of specific statutory cooperation.

80. See text accompanying notes 36-37 supra. The court, as had the Haynes court, balanced the governmental need for information against the privilege in favor of the government, noting that "the Supreme Court appears thus far to have resolved this conflict in favor of satisfying the governmental interests unless a statutory request for information affirmatively contemplates and seeks self-incrimination of the class to whom the request is directed." 411 F.2d at 1114-15.

81. 411 F.2d at 1112, 1114-15. To support this conclusion, the court compared the revenue generated by the liquor taxes ($3.7 billion) in 1966 with that obtained over several years under the occupational gambler's tax ($115 million). 411 F.2d at 1112. It then cited Chief Justice Warren's interesting dissent in Marchetti, where the Chief Justice justified the tax in question by noting the revenue collected. These figures were used in Walden to indicate the insignificance of the amount of revenue generated by the gamblers' tax.

82. 411 F.2d at 1112.


84. OKLA. CON. art. 27; OKLA. STAT. 37 § 538 (h) (1968).


87. 425 F.2d 1063 (10th Cir. 1970).

IV. ARE THE MARCHETTI CASES DISTINGUISHABLE FROM THE LIQUOR CASES?

In view of the trend of wider application of the privilege against self-incrimination and the seemingly analogous factual situations in the Marchetti line of cases it was clearly possible that the liquor cases might have followed the Marchetti line. In assessing whether the liquor cases were rightly distinguished, it is submitted that those courts incorrectly evaluated the three factors of the second step in the Albertson test and incorrectly viewed them separately rather than conjunctively.

A. IS THE AREA PERMEATED?

The first factor to be considered is whether the liquor tax/registration statutes are in an area “permeated” with criminal statutes. The liquor cases distinguished Marchetti by concluding that a single local prohibition is not sufficient “permeation.” In so doing they perpetuated an ambiguity already present in Supreme Court opinions as to the number of jurisdictions in which an activity must be illegal before it can be said that the area of that activity is permeated with criminal statutes. While the Supreme Court in Marchetti and Grosso noted that the activity in question was illegal in most other jurisdictions as well as the one in which it was conducted, it stated in Albertson that the privilege protects an individual from answering questions which admit “a crucial element of a crime” (emphasis supplied). The courts well might have been advised for policy reasons to adopt a standard whereby a single local prohibition would constitute sufficient permeation in its jurisdiction. Such a standard would

90. The Marchetti rationale was applied only in Shoffeitt v. United States, 403 F.2d 991 (5th Cir. 1968), cert. denied, 393 U.S. 1084 (1969); United States v. Fine, 293 F. Supp. 189 (E.D. Tenn. 1968); United States v. Lackey, Crim. No. 6979 (E.D. Tenn. 1968) (discussed in note 62 supra).
91. See text following note 31 supra.
be quite manageable and in harmony with the purpose of the privilege against self-incrimination. Since the privilege was designed to protect individuals, it seems appropriate to consider the law of the jurisdiction in which the activity took place, not that of numerous other jurisdictions. On the other hand, it seems irrefutable that such a standard would frustrate government collection of revenue to some extent. Moreover, it would detract from any uniformity in the administration of the tax/registration statutes.

The liquor case courts' treatment of the permeation factor separately from other relevant factors is an unsatisfactory approach to resolving the information-incrimination conflict. By such insistence on treating permeation as a necessary element to the availability of the privilege, the courts fail to consider in all cases the risk of self-incrimination thereby ignoring the truly relevant consideration. This tendency to give too much emphasis to factors extraneous to the availability of the privilege is further evidenced by the great emphasis given by the liquor case courts to the frustration of revenue collection that would result from the adoption of a single local statute standard.

B. A Select Suspect Group

The liquor cases decided that the tax/registration statutes were not aimed at a select group suspected of criminal activity. They so concluded by comparing the numerically few people engaged in the activities in the Marchetti line of cases with the large number engaged in the liquor industry. Support for their conclusion was drawn from the number of people who comply with the tax/registration statute and the amount of revenue it generates. This approach seems unacceptable because the question of whether the congressional motive was to combat crime or merely to provide a sanction for noncompliance with the registration statute is thereby determined solely on the basis of the number of people engaged in the relevant activity.

This deficiency is aggravated by the liquor case courts' view of this select group factor as an independent one. In placing

94. See text accompanying notes 35-36 supra.
95. See text accompanying note 78 supra.
96. See note 81 supra.
sole emphasis on the number of people engaged in tax/registration statute activity, such factors as the presence of criminal statutes and the attendant risk of self-incrimination are left unconsidered even though they are central to the availability of the defense.

C. A Regulatory Purpose

The liquor case courts considered the liquor tax/registration statutes to be regulatory in that they were adopted primarily for the purpose of raising revenue. This was a conclusion for which there is long standing precedent.97 In addition, these courts relied heavily on the lack of any authority to suggest that the statutes are intended to serve any crime suppression function.

In concluding that the Marchetti rationale does not apply, however, the liquor case courts assumed that registration statutes can be divided neatly into “regulatory” and “nonregulatory” categories.98 As one commentator recently noted,99 the statutes will not admit of such clear distinctions, but do fall into three general categories: (1) neutral tax/registration statutes, such as the gasoline tax laws,100 where there is no illegality in the activity with which the tax/registration statute is concerned; (2) criminal or inherently criminal statutes, such as the narcotics tax statutes, where all aspects of the activity are highly illegal; and (3) “in-between” tax/registration statutes, such as those concerned with manufacturers of vinegar,101 renovated or adulterated butter,102 filled cheese103 and distilled spirits, where some of the activities within the area of the tax/registration statute are free from suspicion but others are illegal. The in-between group of tax/registration statutes are arguably regulatory and

98. Admittedly, it appears that the Supreme Court also continues to make this assumption. See California v. Byers, 402 U.S. 424 (1971).
99. Note, Registration Statutes and the Privilege Against Self-Incrimination, 63 Nw. U. L. Rev. 398, 407 (1968). The author asserts that the Marchetti rationale would be applied only to the inherently criminal group. For an interesting example of a case which may be in the neutral category see United States v. Uhrik, 285 F. Supp. 475 (E.D. Pa. 1968), where the defendant unsuccessfully attempted to apply the Marchetti rationale to information required to be submitted to the ICC.
yet, due to the existence of criminal statutes prohibiting some aspects of the regulated activity, there exists a real risk of self-incrimination. Here, then, the information-incrimination conflict is most acute.

Since this conflict is acute, it is demonstrably inadequate for the liquor case courts to view the relevant factors independently of each other. By deciding whether a defense grounded on the privilege is available solely on the basis of a conclusion as to whether the tax/registration statute is regulatory or nonregulatory, the truly relevant factors in determining the availability of the defense are ignored (i.e., the presence of criminal statutes and the risk of self-incrimination). These latter factors were taken fully into account in the approach of the leading cases in the \textit{Marchetti} line. This latter approach provides the most suitable framework for balancing, on the one hand, the interests of the government in acquiring tax information and the probability that the Congressional motive in enacting the tax/registration statute was not crime suppression, and, on the other hand, the interests of the individual in the protection afforded him by the Fifth Amendment.\footnote{Marchetti v. United States, 390 U.S. 39, 58 (1968).} Of relevance in the balance is the notion that Congress may not legislate away the privilege,\footnote{Counselman v. Hitchcock, 142 U.S. 547 (1892). See text following note 118 infra for an alternative.} especially where there are alternative solutions to resolving the conflict.\footnote{See text accompanying note 35 supra.} Either the \textit{Marchetti-Grosso} approach, which emphasizes the existence of criminal statutes,\footnote{See text accompanying notes 36-37 supra.} or the \textit{Haynes} approach which emphasizes the purpose of the tax/registration statute\footnote{See text accompanying notes 118 infra for an alternative.} are suitable approaches to the problem. Had either approach been taken and the conflict set in this perspective, the liquor case courts might not have been so swayed by the revenue consequences of allowing the defense.\footnote{However, the decision may have been influenced by certain other problems. See text accompanying notes 113-16 infra.}

\textbf{D. Cooperation}

The first step of the two-step inquiry is cooperation, gener-

\footnote{McKay, supra note 89, at 213-14, has suggested that "only two [purposes] have any great probative force, and they are perhaps opposite sides of the same coin: (1) preservation of official morality, and (2) preservation of individual privacy."}
ally between federal and state officials. Under the current rule in the liquor cases it appears that either a general practice of cooperation or specific cooperation in fact is sufficient. A more serious problem arises where the burden of showing cooperation is placed on the defendant. This is an unrealistic burden when one considers the often informal nature of the cooperation between law enforcement agencies and the restricted use of depositions allowed under the Federal Rules of Criminal Procedure. While it may be argued strongly that one claiming the privilege against self-incrimination should have the burden of showing its application, it is perhaps more fair under the difficult circumstances in the liquor cases to lighten the defendant's burden.

V. PROBLEMS WITH EXTENSION OF THE MARCHETTI RATIONALE AND A PROPOSAL

A. PROBLEMS OF JUDICIAL EXTENSION OF THE MARCHETTI RATIONALE

As discussed above, each of the distinctions made by the courts in the liquor cases is subject to criticism. If the three Albertson factors were interpreted correctly and applied conjunctively, then the Marchetti rationale could be extended to tax/registration statutes both in the liquor area and in the in-between category. Judicial extension, however, would also create problems. First there would be diverse results in the enforcement of the liquor tax statutes in different jurisdictions. Such results are undesirable since the government's regulatory purpose of revenue collection would be frustrated through the loss of efficiency in enforcement. Congress has strongly indicated it does not desire and will not permit this result. Additionally, this diversity in enforcement might have the undesirable effect of frustrating the state's police power.

Another method of judicial extension of the Marchetti doctrine would impose use restrictions on information supplied by taxpayers or grant immunity from local prosecution to those

110. Additionally, the test of cooperation should cover that which flows either from the federal government to the state or vice versa. If Marchetti provided only one-way protection, it would be an incomplete protection and the results seem ludicrous.
111. See United States v. Walden, 411 F.2d 1109, 1112-13 (4th Cir. 1969). See also text accompanying notes 33-36 supra.
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complying with the tax/registration statutes in the in-between category. There are several problems with this alternative. First, in Marchetti, the dominant precedent, the Court indicated that it was unwilling to impose such use restrictions. Second, there is a long standing statute which provides that the payment of such taxes shall not exempt taxpayers from prosecution under state laws. Granting such immunity would deprive states of the power to effectively define and punish criminal activity. Finally, this emasculation of the state police power might be compounded by an accompanying increase in the locally prohibited activity.

These problems appear to underly the refusal of the liquor case courts to extend Marchetti. At the price of the availability of the defense based on the privilege against self-incrimination, these courts have weighed the balance in favor of administrative convenience and revenue collection. However, an alternative legislative answer to these problems might reduce the burden on the individual and serve to better implement the purposes of the Fifth Amendment.

B. LEGISLATIVE ANSWER

The Court in Marchetti and in Grosso invited Congress to protect the privilege against self-incrimination by enacting restrictions on the use of information collected for tax purposes. The response was the repeal of the statute authorizing the release to state prosecutors of information supplied by the taxpayer. This action was neutral. It removed a provision

114. 390 U.S. at 58-60.
The payment of any tax imposed . . . on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on such trade or business within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.
Similar provisions have existed since 1868. See, e.g., Act of July 20, 1868, ch. 186, § 58, 15 Stat. 151.
116. For a discussion of the purposes of the privilege see McKay, supra note 89, at 213-14. See also Tehan v. United States ex rel. Shott, 382 U.S. 406, 414-16 (1966). For a criticism of the purposes of the Fifth Amendment, see Friendly, supra note 89.
obnoxious to the Fifth Amendment but it did not provide affirmative protection. This problem could be eliminated by congressional action.

Congress should enact a statute prohibiting the transfer to state prosecutors of information supplied by the taxpayer. If the purpose of the various tax/registration statutes is only to gather revenue, then there should be no objection to such a statute because there would be no effect on the revenue effort. In addition, such a statute would be a positive indication of congressional intent to provide protection of the privilege as broad as the privilege itself. The statute would remove the problem of general cooperation and each case could be decided on the basis of specific cooperation. A related advantage to such congressional action is that it would then be fair, given wider discovery provisions, to place the burden of showing cooperation on the defendant. Arguably such a statute would encourage officials to conceal evidence of specific cooperation, making it all the more difficult for the defendant to prove; however, the likelihood of such governmental conduct is not so great as to preclude this legislative solution. Other benefits from such congressional action are the assured collection of federal revenue and the enforcement of tax laws without regard to geography. Moreover, the state police power to define and to punish criminal activity would not be abridged.

The biggest problem with such a legislative solution is securing Congressional action. This could be hastened if the liquor case courts were to extend the Marchetti rationale and thus call on Congress to react as the Supreme Court did, albeit with only partial success, in the Marchetti case itself.