Article

Paying for Gun Violence

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INTRODUCTION

In 2018, the U.S. saw 57,472 instances of gun violence, killing nearly 15,000 people and injuring twice that number.[1] And yet Congress has been singularly unable to enact legislation to reduce this violence. For example, after the 2018 shooting at Marjory Stoneman Douglas High School President Donald Trump promised to "never let this happen again."[2] In spite of the president's promise, Congress has refused to even hold hearings on gun violence, preventing even the first step in the legislative process from happening.[3]

The majority of Americans favor some sort of gun control.[4] Yet, for various reasons, ranging from politics to the Constitution to the state in which they live, they are unlikely to see it.[5] The difficulty of enacting federal gun legislation is longstanding,

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1. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, http://www.gunviolencearchive.org/past-tolls [https://perma.cc/QF4C-VH99]. Those numbers do not include an estimated 20,000 suicides. *Id.*

2. Susan Jaffe, *Gun Violence Research in the USA: The CDC's Impasse*, 391 LANCET 2487, 2487 (2018).

3. *Id.*

4. Robert Richards, *The Role of Interest Groups and Group Interests on Gun Legislation in the U.S. House*, 98 SOC. SCI. Q. 471, 480 (2017).

5. *Id.* at 471–72.

not new to the contemporary polarized political climate. The federal government enacted its first significant gun control laws between the two World Wars.[6] Even that trio of laws proved less effective than lawmakers had hoped.[7] For state or federal legislatures to effectively regulate guns, both have to consider the contours of the Second Amendment, which imposes significant restrictions on the permissible reach of firearm regulation while, at the same time, leaves the scope of those restrictions ambiguous.[8]

For individuals worried about the costs of gun violence, Congress's inability to directly regulate firearms means they need to find an alternative approach to reduce these costs. One possibility is through a Pigouvian tax. Pigouvian taxes are "[c]orrective taxes . . . that are designed primarily to change behavior rather than raise revenue."[9]

Using taxes to regulate gun ownership and use is not a new idea. Commentators have pointed out that taxes can potentially break the regulatory logjam that gun legislation has faced. Some have suggested that sales taxes on guns may "have an important effect on gun sales, use, and misuse."[10] Others propose that property-style taxes on gun ownership, determined by the likelihood that the taxpayer's gun will do harm, may encourage safer behavior by gun owners.[11]

Among academics, using taxes to indirectly regulate what the government is incapable of directly regulating has grown increasingly popular in recent years.[12] Its popularity masks a significant problem with using Pigouvian taxes in place of command-and-control regulation: where the cost of an activity varies among those engaged in the activity, it is difficult to use Pigou-

6. Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38*, 455 ANNALS 48, 49 (1981).

7. *Id.* at 56–57.

8. *See infra* Part II.

9. Victor Fleischer, *Curb Your Enthusiasm for Pigovian Taxes*, 68 VAND. L. REV. 1673, 1675 (2015).

10. Philip J. Cook et al., *Gun Control after* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1086 (2009).

11. Philip J. Cook & James A. Leitzel, *"Perversity, Futility, Jeopardy": An Economic Analysis of the Attack on Gun Control*, 59 LAW & CONTEMP. PROBS. 91, 98–99 (1996).

12. Fleischer, *supra* note 9, at 1675–76.

vian taxes to arrive at "an optimal allocation of economic resources."[13] Professor Victor Fleischer points to Pigouvian taxes on guns as among the least promising applications of Pigouvian taxes because the costs imposed on society by individual gun owners vary widely.[14]

In this Article, I propose a tax regime for firearms. At the same time, I take Professor Fleischer's skepticism of firearms taxes as an effective regulatory regime seriously. This Article's purpose is more modest than using a Pigouvian tax to fundamentally change gun owners' behavior. Instead, my tax proposal here is meant to compensate society for the negative externalities caused by gun violence.

The firearms tax I propose, then, is almost the inverse of a Pigouvian tax. Rather than change behavior, it is intended to raise revenue for a particular purpose. In the course of raising revenue, the firearms tax will cause gun owners to internalize more of the cost of gun ownership and may, on the margins, affect their behavior. Any such behavioral change would be incidental, however, to the tax's primary purpose of making society financially whole. That is, while the reduction of gun violence is an urgent goal, it is not the goal of this particular proposal, and my proposed firearms tax regime will not have failed even if it did nothing to stem the scourge of gun violence.

The imposition of a firearms tax is not meant to replace the appropriate regulation of guns. In fact, legislation that reduces gun violence will reduce the costs society bears for that gun violence, in turn reducing the need for a firearms tax. Without gun violence, there would be virtually no externalities that needed recompense. The appropriate gun legislation, then, could obviate the need for this tax. Until then, though, a firearms tax will allow the victims of gun violence to be made (financially) whole.

This Article will proceed as follows: Part I will provide a foundation for why the government might want to impose a tax on firearms. It will discuss both the scope and the categories of gun violence-related costs in the United States.

Part II will then go through the history of current jurisprudence surrounding the Second Amendment. Through most of the history of the Second Amendment the question of whether the right to bear arms was an individual right or a collective one,

13. *Id.* at 1676–77.

14. *Id.* at 1677.

tied to militia service, continued unresolved. In 2008, the Supreme Court definitively held that the right to bear arms was an individual right, albeit not an absolute right.[15] In subsequent years, lower courts have worked to establish where the line dividing permissible from impermissible limitations on that right lies. Part II will trace those cases and the lines they have drawn.

Part III will introduce Pigouvian taxes as a regulatory tool and as a method to counteract negative externalities. It will provide examples of different types of Pigouvian taxes, as well as arguments for and against them.

Part IV will discuss a number of constraints that the Constitution places on a firearms tax. Naturally, the Second Amendment comes into play, but a firearms tax must also comply with the Constitution's Taxing Clause, and it requires consideration of the Takings Clause and the Ex Post Facto Clauses.

Finally, having gone through both the purpose of and the constitutional constraints on any firearms tax, Part V will discuss how a firearms tax regime should look. It will go over both the form—an excise and a property tax—and the rate. It will also discuss how the revenue raised by the tax should be allocated, and finally, it discusses some potential behavioral effects of a firearms tax.

Well-designed, a firearms tax will reimburse society for the social costs of gun violence. The tax must be designed with revenue, expenditures, and the Constitution in mind, and its purpose—reimbursing society, not banning guns—must always be in the forefront of legislators' minds. Drafted appropriately, though, this tax would shift at least a significant portion of the cost of gun violence off of society and back to gun owners, who should bear those costs.

I. GUN VIOLENCE IN THE UNITED STATES

Gun violence is expensive. It can be difficult, however, to quantify the cost and to determine who bears it. In part, this is because the costs range from the purely financial to the purely personal. This Part will lay out three categories of costs imposed by gun violence and discuss estimates of how much they cost. The Part will then demonstrate that, while it may be difficult to

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

determine exactly who bears which costs, taxpayers bear a significant amount of firearm-related costs.

In 2016, 38,658 people died from firearm-related injuries in the United States.[16] On top of that, the U.S. saw 116,414 nonfatal injuries.[17] While those numbers are sobering on their own,[18] these deaths and injuries come with financial costs. Calculating those costs can be difficult, though. Different analyses use "widely differing accounting principles and procedures."[19]

For purposes of this analysis, though, there are three main categories of costs that derive from gun violence: the cost of personal injury and death, the cost of damage to property, and the cost of first responders.

The costs associated with injury and death can be difficult to quantify. But, while difficult, we quantify those numbers on a daily basis. Both tort law and administrative regulations have procedures for determining the value of a life, though their procedures differ.[20] Both attempt, however, to take into account the direct and the indirect costs of death or injury.[21] Direct costs include primarily medical care, while indirect costs "stem from the reduced productivity of victims, measured in the labor market by earnings."[22] While the specifics of how to calculate these direct and (especially) indirect costs are outside the scope of this

16. *WISQARS Fatal Injury Data*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2019), https://webappa.cdc.gov/sasweb/ncipc/mortrate.html [https://perma.cc/3HST-TPNE]; *see also* Christine Hauser, *Gun Death Rate Rose Again in 2016, C.D.C. Says*, N.Y. TIMES (Nov. 4, 2017), https://www.nytimes.com/2017/11/04/us/gun-death-rates.html.

17. *WISQARS Nonfatal Injury Reports, 2000 – 2016*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://webappa.cdc.gov/sasweb/ncipc/nfirates.html [https://perma.cc/5E9V-WP24].

18. These numbers are also unique among developed economies. The U.S. murder rate of 5.5 murders per 100,000 people is triple the murder rate in Canada, France, and the U.K., and five times the rate in Italy, Germany, and Spain. William N. Evans et al., *Guns and Violence: The Enduring Impact of Crack Cocaine Markets on Young Black Males* (Nat'l Bureau of Econ. Research, Working Paper No. 24819, 2018), http://www.nber.org/papers/w24819 [https://perma.cc/2XKY-BGVQ].

19. PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 45 (2000).

20. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 538 (2005).

21. COOK & LUDWIG, *supra* note 19, at 50.

22. *Id.*

article, gunshot victims certainly face medical bills and lost wages.[23] However calculated, those costs may be significant.

And costs may fall, in no small part, on taxpayers broadly. To the extent the victim has assets herself, or has insurance, or can recover damages from the shooter in tort, she can personally bear the costs of her medical care. But where she is uninsured or on public insurance, taxpayers bear at least a portion of the costs of her medical care. An Urban Institute study of firearm injuries in six states found that in each state, more than sixty percent of the hospital costs were incurred by people either without insurance or with public insurance.[24]

The six states the Urban Institute chose to look at are not representative of the country as a whole; all six have higher-than-average rates of armed robbery, and four of the six have higher-than-average rates of gun homicide.[25] Still, the government is likely to bear a significant portion of the cost of care for firearm injuries in other states, too. On average, the government offsets about sixty-five percent of medical providers' uncompensated care.[26] As long as some percentage of shooting victims are uninsured or have public insurance, the government will bear a significant portion of the direct costs of gun violence. And if the government bears the cost, its incidence ultimately falls on taxpayers.[27]

23. Those bills are often significant. Several victims of the October 1, 2017, mass shooting in Las Vegas, for example, turned to crowdfunding to try to defray some of the costs of medical treatment and future lost wages. *See, e.g.*, Anna Almendrala, *Las Vegas Shooting Victims Are Turning to GoFundMe for Help with Medical Bills*, HUFFPOST (Oct. 27, 2017), https://www.huffingtonpost.com/entry/vegas-shooting-victims-crowdfunding_us_59f3a51be4b07fdc5fbe465c [https://perma.cc/TBN8-BPTH].

24. EMBRY HOWELL ET AL., STATE VARIATION IN HOSPITAL USE AND COST OF FIREARM ASSAULT INJURY, 2010, at 6 (2014), https://www.urban.org/sites/default/files/publication/22881/413210-state-variation-in-hospital-use-and-cost-of-firearm-assault-injury-.pdf [https://perma.cc/2JS4-VT4G]. The six states the Urban Institute study looked at were Arizona, California, Maryland, New Jersey, North Carolina, and Wisconsin. *Id.* at 1.

25. *Id.* at 2.

26. Teresa A. Coughlin et al., *An Estimated $84.9 Billion in Uncompensated Care Was Provided in 2013; ACA Payment Cuts Could Challenge Providers*, 33 HEALTH AFF. 807, 812 (2014).

27. EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY xxI (2015) ("[E]very decision by government to spend money necessarily requires an offsetting commitment to raise the revenues to pay for that spending.").

The second category of costs are the costs of property damaged by firearms. Whether or not gun violence results in injury or death, it can damage property. Anecdotally, it appears that property damage is more common than injury and death. For example, during the first two months of 2018, Nashville saw seventeen homicides and fifty-five injuries from gunfire.[28] During the same period, there were 104 reports of property damage from gunfire, almost double the number of injuries, and more than six times the number of homicides.[29] Similarly, in Aurora, Illinois, a Chicago suburb, there were 132 shootings in 2016.[30] Six people died and another forty were injured in those shootings.[31] Meanwhile, in eighty-six shootings there was property damage or nothing was hit.[32]

In general, property owners bear the cost of property damage from gun violence. In some cases, though, insurance may cover part or all of the cost. Some insurers offer personal liability policies that cover property damage that results from the insured's accidental or self-defense shootings.[33] Without insurance, though, the property-owning victim of the shooting must either bear the cost of repairs or replacement or must deal with damaged property.

The third category of costs are the costs of first responders. Police and firefighters must respond when a shooting occurs. The cost of the response will depend, among other things, on the scope and the location of the shooting, but it can be substantial. Officials in Las Vegas estimated that the October 1, 2017, shooting at the Route 91 Harvest music festival cost the city at least $3.5 million for the police response, and another $500,000 for the

28. Julie Edwards, *Shootings Resulting in Homicide Up 54 Percent in Nashville Compared to Last Year*, WKRN.COM (Mar. 8, 2018), https://www.wkrn.com/news/crime-tracker/shootings-resulting-in-homicide-up-54-percent-in-nashville-compared-to-last-year_20180326035017797/1077198378 [https://perma.cc/95R5-J95R].

29. *Id.*

30. Hannah Leone, *Number of Shootings Down, But Gun Violence More Spread Out in Aurora*, AURORA BEACON-NEWS (Mar. 22, 2017), http://www.chicagotribune.com/suburbs/aurora-beacon-news/crime/ct-abn-aurora-shootings-spread-2016-st-0306-20170321-story.html [https://perma.cc/XM6X-UGAE].

31. *Id.*

32. *Id.*

33. Rob Hillenbrand, Note, Heller *on the Threshold: Crafting a Gun Insurance Mandate*, 95 B.U. L. REV. 1451, 1460 (2015).

fire department, coroner, and social services.[34] The amount spent on police overtime in response to the shooting represented half a percent of the Las Vegas police department's annual budget.[35] The costs of this single, albeit devastating, incident were so steep that the federal government stepped in to reimburse the city for overtime costs.[36]

Unlike medical costs, taxpayers bear the full cost of first responders. In 2015, spending on police and corrections constituted six percent of state and local spending.[37] Since 1996, this category of spending has been the "fifth-largest source of direct general spending at the state and local level."[38] For the two decades prior, police and corrections spending was the sixth-largest.[39] In total, state and local governments spent $105 billion on police in 2015.[40]

The important thing about each of these three categories of costs is that the gun owner does not bear them. Rather, the costs are imposed on the victims and on society at large. Gun ownership represents a textbook example of a negative externality.[41] Negative externalities are social costs "that are not taken into

34. Ken Ritter, Officials Project Cost of Response to Vegas Shooting at $4M, LAS VEGAS SUN (Oct. 25, 2017), https://lasvegassun.com/news/2017/oct/25/officials-project-cost-of-response-to-vegas-shooti/ [https://perma.cc/EW79-XSAW].

35. *Id.*

36. Gary Martin, *Feds Will Reimburse Nevada $2M for Las Vegas Shooting Costs*, LAS VEGAS REV. J. (June 25, 2018), https://www.reviewjournal.com/crime/shootings/feds-will-reimburse-nevada-2m-for-las-vegas-shooting-costs/ [https://perma.cc/99JU-UHJK].

37. *Police and Corrections Expenditures*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/state-and-local-backgrounders/police-and-corrections-expenditures [https://perma.cc/2GJR-S37T].

38. *Id.*

39. *Id.*

40. *Id.*

41. Phillip J. Cook & Jens Ludwig, *Litigation as Regulation: Firearms*, *in* REGULATION THROUGH LITIGATION 78 (W. Kip Viscusi ed., 2002) ("If the calculations presented in our . . . paper are even roughly correct, then the implication is that gun ownership has a substantial negative externality associated with it.").

account by private decision-makers."[42] By imposing costs on others, negative externalities encourage inefficient behavior.[43] In this case, because gun owners do not bear the full cost of ownership, they have an incentive to overconsume guns (e.g., to purchase more than they would if they bore the full cost).[44] Moreover, because they do not bear the full cost of the acquisition of guns or of the harm imposed on others by guns, they have less incentive to protect their guns from theft and to otherwise handle their guns safely.[45]

How much is the cost associated with gun violence? It is hard to nail down precisely, since different measures will include different direct and indirect harms. The total cost depends, among other things, on which costs are included and on how the costs are calculated. The cost is significant, though. Recent estimates of the annual economic cost of gun violence in the United

42. Michel Callon, *An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology*, 46 SOC. REV. 244, 248 (1998).

43. William H. Sandholm, *Negative Externalities and Evolutionary Implementation*, 72 REV. ECON. STUD. 885, 885 (2005).

44. Cook & Ludwig, *supra* note 41, at 75. This societal subsidy may help explain gun ownership trends in the United States. There are about 1.2 guns for every resident. Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST: WONKBLOG (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/?utm_term=.748428d0beb9 [https://perma.cc/E8SW-2RF5]. The guns are not evenly distributed, though: in 2017, Pew found that only forty-two percent of U.S. adults reported either owning a gun or living with someone who owned a gun. KIM PARKER ET AL., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS: AN IN-DEPTH LOOK AT THE ATTITUDES AND EXPERIENCES OF U.S. ADULTS 7 (2017). While there is approximately one gun per U.S. resident, the average gun-owning household owned 8.1 guns in 2013, double the 4.1 guns it owned in 1994. Christopher Ingraham, *The Average Gun Owner Now Owns 8 Guns—Double What It Used to Be*, WASH. POST: WONKBLOG (Oct. 21, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/21/the-average-gun-owner-now-owns-8-guns-double-what-it-used-to-be/?utm_term=.b665e15fcf79 [https://perma.cc/4V4N-GBFR]. While there may be several reasons that gun-owning households own so many guns, in part, it is because the societal subsidy allows them to acquire more than they would if they bore the full cost.

45. Cook & Ludwig, *supra* note 41, at 75.

States range from $45.6 billion[46] to $229 billion.[47] The precise number is less important for our current purposes, though, than is the fact that gun violence imposes significant costs on society at large. Gun ownership creates significant negative externalities.

Generally speaking, when a government wants to ameliorate negative externalities, it has two choices: it can regulate the activity in question or it can impose a tax.[48] Each approach has advantages and disadvantages. In the case of guns, though, there may be practical reasons why a tax is a better tool than regulation to cause gun owners to internalize the costs of gun violence. The next two Parts will go over those reasons.

II. THE SECOND AMENDMENT AND CONSTRAINTS ON GUN REGULATION

Even though gun violence imposes significant costs on society, legislatures face limits on their ability to respond. This Part will first discuss the history of Second Amendment jurisprudence, leading up to the Supreme Court deciding that the right to bear arms is an individual, albeit not absolute, right. It will then discuss the problems legislatures and lower courts have had in determining the contours of permissible firearm regulation.

When legislatures in the United States consider regulating guns, they must work within the contours of the Second Amendment. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[49]

For much of U.S. history, it was unclear whether the Second Amendment provided an individual right, or if it conferred merely a collective right—that is, as a member of a militia—to

46. Faiz Gani et al., *Emergency Department Visits for Firearm-Related Injuries in the United States, 2006–14*, 36 HEALTH AFF. 1729, 1736 (2017).

47. *Statistics on the Costs of Gun Violence*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/costs-of-gun-violence-statistics/ [https://perma.cc/7XP6-VCKX].

48. Michael Kremer & Jack Willis, *Guns, Latrines, and Land Reform: Dynamic Pigouvian Taxation*, 106 AM. ECON. REV. 83, 83 (2016).

49. U.S. CONST. amend. II.

bear arms.[50] In its 2008 opinion in *D.C. v. Heller*,[51] the Supreme Court answered the question. D.C. law made it a crime to carry an unregistered firearm while, at the same time, prohibited the registration of handguns.[52] Separately, the law required D.C. residents to keep their legally-owned guns either unloaded and disassembled, or disabled by a trigger lock, unless the gun was located in a place of business or was being used for legal recreational purposes at the time.[53]

A resident of D.C. challenged the law after attempting to register his handgun and having his request denied.[54] The Court of Appeals held that the Second Amendment conferred an individual right to bear arms, and therefore the law violated his Second Amendment rights.[55] The Supreme Court upheld the D.C. Circuit's decision, embracing the D.C. Circuit's holding that the right to bear arms was an individual right, separate from and unrelated to any militia service.[56]

In finding that the right to bear arms was an individual right, the Court analyzed the relationship between the prefatory clause and the operative clause of the Second Amendment.[57] The operative clause "codifies a 'right of the people,'" which, the Court said signals an individual, rather than collective, right in the Constitution.[58] Further cementing its point, the Court found that when the Bill of Rights was drafted, the phrase "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia."[59] Putting these strands together,

50. Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 613 (2004).

51. District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

52. *Id.* at 574–75. It did allow individuals to carry handguns if they got a one-year license from the chief of police. *Id.* at 575.

53. *Id.*

54. *Id.* at 575–76.

55. *Id.* at 576.

56. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

57. The prefatory clause states, "[a] well regulated Militia, being necessary to the security of a free State . . . ." *Id.* at 595 (quoting U.S. CONST. amend. II). The rest of the Second Amendment constitutes the operative clause. *Id.*

58. *Id.* at 579.

59. *Id.* at 584. It turns out that Justice Scalia was wrong as a historical matter. In the founding era, "[n]on-military uses of 'bear arms' are not just rare—they're almost nonexistent." Dennis Baron, *Antonin Scalia Was Wrong*

the Court held that the Second Amendment conferred an individual—albeit limited—right to keep and bear arms.[60]

What, then, did the Court make of the prefatory clause's invocation of a "well-regulated militia"?[61] The Court asserted that historically, tyrants had eliminated militias not by banning them, but by taking their weapons.[62] Thus, the prefatory clause announced what had inspired the Amendment's codification—to prevent the elimination of a militia.[63] The prefatory clause does not, however, signal the sole purpose underlying the Second Amendment. According to Justice Scalia, most Americans "undoubtedly thought [the right to bear arms was] even more important for self-defense and hunting."[64] The Court emphasized that a right to self-defense is central to the individual right enshrined in the Second Amendment.[65]

The Court's decision in *Heller* meant that the Second Amendment limited the federal government's ability to regulate firearms. It was not immediately clear, however, whether the Second Amendment was equally applicable to state governments. Two years later, the Supreme Court gave clarity regarding the Amendment's applicability to the states when it held that the Fourteenth Amendment incorporated the right to bear arms, and thus that the Second Amendment applied to state laws.[66]

The Supreme Court's decision did not foreclose the possibility of gun regulation. In writing the majority opinion, Justice Scalia explicitly recognized that there are constitutionally-permissible limitations on gun ownership.[67] The Court declined to provide significant contours for these permissible limitations, though. Instead, it listed a handful of historical limitations that

About the Meaning of "Bear Arms," WASH. POST (May 21, 2018), https://www.washingtonpost.com/opinions/antonin-scalia-was-wrong-about-the-meaning-of-bear-arms/2018/05/21/9243ac66-5d11-11e8-b2b8-08a538d9dbd6_story.html?utm_term=.cf2c5d029c9e [https://perma.cc/B7TK-NCKC]. Nonetheless, historically accurate or not, unless *Heller* is eventually overturned, the Court's decision is still binding.

60. *Heller*, 554 U.S. at 635.
61. U.S. CONST. amend. II.
62. *Heller*, 554 U.S. at 598.
63. *Id.* at 599.
64. *Id.*
65. *Id.* at 628.
66. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).
67. *Heller*, 554 U.S. at 626–27.

would not violate the Constitution,[68] while emphasizing that an absolute ban on handguns used for self-defense in the home was impermissible.[69]

At the federal level, *Heller* has been more or less irrelevant. Even in the wake of high-profile shootings, Congress has been unable to pass even the most basic and uncontroversial gun legislation.[70] Some states, on the other hand, have been actively working to rein in gun violence, passing various laws intended to reduce such violence.[71] And how have these laws fared in the post-*Heller* world? In spite of more than 1,000 challenges to gun laws on Second Amendment grounds during the ensuing years, challengers have enjoyed relatively few victories.[72] In the years following *Heller*, lower courts read *Heller* narrowly.[73] In fact, only nine percent of the challenges to firearm legislation heard between 2008 and 2016 succeeded.[74]

Still, legislatures' ability to pass constitutionally-permissible gun regulation remains cloaked in uncertainty. While in general courts have read *Heller* narrowly, success rates vary depending on, among other things, location.[75] Litigants challenging gun laws "have succeeded most frequently—both in

68. These permissible limitations include laws forbidding felons and those with mental illness from owning guns, laws forbidding guns in certain places (including schools and government buildings), laws regulating the commercial sales of guns, and laws banning certain types of guns that are not in common use. *Id.*

69. *Id.* at 636.

70. Nicholas Fandos & Thomas Kaplan, *Victims Vent Frustration as Lawmakers Show Inability to Act on Guns*, N.Y. TIMES, Feb. 16, 2018, at A19.

71. *See* Michael Siegel et al., *Firearm-Related Laws in All 50 US States, 1991–2016*, 107 AM. J. PUB. HEALTH 1122, 1125–26 (2017).

72. Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath* Heller *Wrought?*, 23 WM. & MARY BILL RTS. J. 1143, 1179 (2015); Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1435, 1498 (2018).

73. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 962 (2016).

74. Ruben & Blocher, *supra* note 72, at 1473. About eight percent of challenges to firearms laws succeeded at the federal trial court level, while thirteen percent of federal appellate challenges succeeded. *Id.* At the state appellate level, challengers similarly prevailed nine percent of the time. *Id.*

75. *Id.* at 1474–75.

absolute terms and proportionally—in the Second, Fourth, Seventh, Ninth, and D.C. Circuits."[76]

In fact, in two 2018 cases, the Ninth Circuit invalidated gun laws as violative of the Second Amendment.[77] In the first of those cases, *Duncan v. Becerra*,[78] the district court granted a preliminary injunction against a law banning firearm magazines that held more than ten rounds of ammunition.[79] The law had been enacted by ballot initiative, and not only banned the sale of such magazines in the future, but criminalized their ownership, even by individuals who had acquired them prior to the effective date of the law.[80]

The court found that high-capacity magazines qualified as "arms" within the definition of the Second Amendment.[81] Moreover, the court found that they were the type of arms commonly used to defend "self, home, and state."[82] As a result, it held that under the Supreme Court's analysis in *Heller*, the absolute prohibition on such magazines likely violated the Second Amendment, and given the potential harms to gun owners, warranted a preliminary injunction against the law.[83] On appeal, the Ninth Circuit found that the district court had not abused its discretion and upheld the preliminary injunction.[84]

A week later, the Ninth Circuit issued its second gun-related opinion. *Young v. Hawaii*[85] dealt, for the first time, with the question of "the degree to which the Second Amendment protects, or does not protect, the carrying of firearms outside of the home."[86] Hawaiian law generally required gun owners to leave their guns at their home or place of business unless they had an

76. *Id.* at 1475. In fact, these five circuits account for all but one of the successful federal appellate challenges to firearms laws. *Id.*

77. *See* Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018), *reh'g granted*, 915 F.3d 681 (9th Cir. 2019); Duncan v. Becerra, 742 Fed. Appx. 218 (9th Cir. 2018).

78. Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *aff'd*, 742 Fed. Appx. 218.

79. *Id.* at 1139–40.

80. *Id.* at 1109–10.

81. *Id.* at 1139.

82. *Id.*

83. *Id.* at 1114–15, 1139.

84. Duncan v. Becerra, 742 Fed. Appx. 218 (9th Cir. 2018).

85. 896 F.3d 1044 (9th Cir. 2018), *reh'g granted*, 915 F.3d 681 (9th Cir. 2019).

86. *Id.* at 1051.

open or concealed carry license.[87] Absent a license, gun owners could only transport a firearm if it was unloaded and in a closed container, and could only transport it between certain statutorily-delineated locations.[88]

Mr. Young applied for a license twice, and had his application denied both times.[89] He then challenged the regulatory scheme, asserting that he had a Second Amendment right to carry a loaded handgun in public.[90] The Ninth Circuit reasoned that because the Second Amendment provided an individual, rather than a collective, right to bear arms, the fact that Hawaii's law "entirely foreclosed" individual citizens' ability to carrying a loaded gun in public "violates the core of the Second Amendment and is void."[91]

Even if other Circuits do not follow the Ninth Circuit's lead, and continue to read *Heller* narrowly, the Supreme Court can always step in to reassert the importance of the Second Amendment. Justice Clarence Thomas has criticized lower courts for failing to protect the Second Amendment and failing to comply with the Court's Second Amendment jurisprudence, decrying "the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right."[92] The Supreme Court could, at any point, reverse lower courts' deference to legislatures on gun legislation.

And where does that leave legislatures that want to enact laws to reduce gun violence? Under *Heller*, they can constitutionally enact laws aimed at reducing gun violence, including certain regulation of handguns.[93] Such laws cannot, however, impose "an absolute prohibition [on] handguns held and used for self-defense in the home."[94] If this analysis is any indication, courts

87. *Id.* at 1048.

88. *Id.*

89. *Id.*

90. *Id.* at 1049.

91. *Id.* at 1071.

92. Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari); s*ee also* Friedman v. City of Highland Park, 136 S. Ct. 447, 448–49 (2015) (same); Jackson v. City of San Francisco, 135 S. Ct. 2799, 2799 (2015) (same).

93. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

94. *Id.*

are capable of being deeply skeptical of laws that limit an individual's access to guns, even while acknowledging the danger and tragedy of firearm violence.[95]

III. NEGATIVE EXTERNALITIES AND TAXES

The post-*Heller* uncertainty surrounding the permissible regulation of firearms makes legislation significantly more difficult. And where direct regulation is difficult, it makes sense to try to address gun violence through alternative means. In dealing with negative externalities, the main alternative to regulation is a Pigouvian tax.[96] A Pigouvian tax is a small tax imposed on an activity or product that creates a negative externality.[97] If determined correctly, the tax will equal the marginal social cost of the activity or product, thus causing consumers to internalize the full cost of the activity.[98] A Pigouvian tax forces individuals to "consider the extra social cost when they decide to undertake [a] taxed activity."[99] If it is designed correctly, then, a Pigouvian tax can discourage the overconsumption of socially costly activities by raising individuals' costs, and can reimburse society for the negative externalities imposed by the proper level of consumption of such products and activities.[100]

Perhaps the textbook example of a Pigouvian tax is a carbon tax.[101] Because carbon-intensive goods and activities contribute to climate change, their use imposes a cost on society which is

95. *See* Duncan v. Becerra, 265 F. Supp. 3d 1106, 1139 (S.D. Cal. 2017) ("Every injury or death caused by the misuse of a firearm is a tragedy. That the mentally ill and violent criminals choose to misuse firearms is well known. This latest incremental incursion into solving the 'gun violence' problem is a reflexively simple solution. But as H.L. Mencken wrote, 'There is always a well-known solution to every human problem—neat, plausible, and wrong.'"), *aff'd*, 742 F. App'x 218 (9th Cir. 2018).

96. Fleischer, *supra* note 9, at 1682 ("The particular appeal of Pigovian [sic] taxes today can be traced back to our collective awareness of the pitfalls of command-and-control regulation.").

97. *See id.* at 1675.

98. *Id.*

99. LEONARD E. BURMAN & JOEL SLEMROD, TAXES IN AMERICA: WHAT EVERYONE NEEDS TO KNOW 98 (2013).

100. *See* Erin Adele Scharff, *Green Fees: The Challenge of Pricing Externalities Under State Law*, 97 NEB. L. REV. 168, 195–96 (2018).

101. *See* Gary M. Lucas, Jr., *Voter Psychology and the Carbon Tax*, 90 TEMP. L. REV. 1, 6 (2017).

not fully borne by those who consume the goods.[102] A carbon tax increases the price of carbon-intensive goods and activities so that consumers bear "their full social cost."[103]

In theory, so-called "sin taxes" are also Pigouvian taxes.[104] The idea underlying sin taxes is that individuals' consumption of certain things imposes a cost on society and this cost is not fully internalized by the user.[105] Traditionally, states have imposed sin taxes on tobacco, alcohol, and gambling.[106] Secondhand smoke, for instance, harms nonsmokers who thus bear part of the cost of tobacco use.[107] Likewise, alcohol consumption can lead to societal costs which are not internalized by the consumer of alcohol, including accidents from driving drunk.[108]

Recently, in fact, a number of cities have expanded—or tried to expand—the realm of sin taxes to sugary drinks.[109] The theory behind taxes on sugary drinks is that they lead to obesity and by raising the cost of such drinks the government can reduce the rate of obesity.[110] Regarding the negative externalities sugary beverages impose, proponents of soda taxes argue that medical costs related to obesity represent about nine percent of U.S. healthcare costs, and that half of these costs are paid for by the public through Medicare and Medicaid.[111]

102. *Id.*

103. *Id.*

104. Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 FORDHAM L. REV. 2565, 2567–68 (2016).

105. *Id.*

106. Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1042 (2009).

107. Carruthers, *supra* note 104, at 2567–68.

108. *See* Michael Grossman et al., *Policy Watch: Alcohol and Cigarette Taxes*, 7 J. ECON. PERSP. 211, 212 (1993).

109. These taxes have been vehemently opposed by the soda industry, which recently convinced the state of California to ban taxes on sugary drinks until 2031. Editorial, *California's Ban on Soda Taxes Should Not Stand*, BLOOMBERG, (July 23, 2018, 9:00 AM), https://www.bloomberg.com/opinion/articles/2018-07-23/california-soda-tax-ban-should-not-stand [https://perma.cc/4CNU-8EY6].

110. Roland Sturm et al., *Soda Taxes, Soft Drink Consumption, and Children's Body Mass Index*, 29 HEALTH AFF. 1052, 1052 (2010).

111. Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599, 1601–02 (2009).

It is tempting, both for advocates and opponents of stricter gun regulation, to think of a Pigouvian tax on firearms as another type of sin tax.[112] If the principal goal underlying the firearms tax were to reduce gun violence, however, this type of tax would be far more difficult to design. There are two significant, and related, objections to the idea of imposing a Pigouvian firearms tax with the intention of modifying gun owners' behavior. The first is that it is difficult to design a tax that will change behavior. As Professor Fleischer points out,

> If a carbon tax is the most promising application of Pigovian taxation, a tax on guns is among the least. . . . In the aggregate, there is no question that the social cost of guns far exceeds the private cost of manufacturing a gun. At the individual level, however, where incentives matter most directly, people vary widely in how they use a gun. Some people attend gun safety workshops, practice shooting at the range, and keep guns secure. Others are more lackadaisical, increasing the risk of accidental shootings. And of course, a small number of criminals use guns to commit violent crimes.[113]

A tax on guns could not reasonably differentiate between the individual who keeps her guns unloaded and locked in a safe and the individual who keeps her guns loaded under her bed, much less encourage the second to behave in a safer manner. Both the responsible and the irresponsible gun owners would pay the same amount in taxes. As a result, a Pigouvian tax would provide no incentive for irresponsible gun owners—or even criminal gun owners—to act more responsibly.[114]

Relatedly, the vast majority of gun owners do not commit violent crimes with their guns,[115] and the vast majority of guns

112. For example, one opponent of stricter firearm regulation asserts that excise taxes on firearms represent "*indirect* restrictions on gun ownership," and investigates "the economic case for broad-based taxes on firearms as a method for controlling the criminal misuse of firearms." Bruce H. Kobayashi, *Gun Control, Strict Liability, and Excise Taxes*, *in* TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 309, 310 (William F. Shughart II ed., 1997).

113. Fleischer, *supra* note 9, at 1677.

114. In theory, a tax on guns could be designed in a manner that would provide incentives to behave more responsibly. Gun owners who kept their guns secure and who attended gun safety workshops, could pay a lower rate of tax than individuals who acted irresponsibly. As a practical matter, though, such a tax regime would be unadministrable and deeply invasive. Unless the taxing authority took gun owners' words that they acted responsibly, it would have to somehow monitor how gun owners stored and treated their guns. Such monitoring would both require significant resources and effort *and* would require the government to have an intimate knowledge of citizens' private behaviors.

115. In fact, a study of Pittsburgh crime in 2008 showed that in almost

are not used in crimes.[116] Opponents of such taxation argue that the broad Pigouvian taxation of firearms "punishes those who do not misuse them."[117]

Both of these objections have played a part in the design of my proposed tax regime. To the first, the proposal is not intended to change individuals' behavior. Its goal is much more modest: to cause gun owners to internalize the externalities gun ownership imposes on society and, to the extent that gun violence still imposes costs, to reimburse society for those costs.[118]

While it is true that most gun owners do not personally commit acts of gun violence that impose costs on society, it is also true that their gun ownership is correlated to the amount of gun violence that occurs.[119] Compelling evidence demonstrates that in the United States, "where there are more guns, there are more violent deaths."[120] It is not clear whether the relationship is causal, but at the very least there is a strong correlation.[121] Moreover, it is impossible to know in advance whether a particular gun will be used in a violent crime, a suicide, or will other-

eighty percent of crimes that involved firearms, the perpetrator was not the legal owner of the gun. Anthony Fabio et al., *Gaps Continue in Firearm Surveillance: Evidence from a Large U.S. City Bureau of Police*, 10 SOC. MED. 13, 19 (2016).

116. It is hard to determine precisely how many guns there are in the United States. Estimates range from 270 million to 310 million. Drew DeSilver, *A Minority of Americans Own Guns, but Just How Many Is Unclear*, PEW RES. CTR.: FACTTANK (June 4, 2013), http://www.pewresearch.org/fact-tank/2013/06/04/a-minority-of-americans-own-guns-but-just-how-many-is-unclear/ [https://perma.cc/VV3Z-6BLJ]. In 2011, 467,321 individuals were the victims of crimes committed with a firearm. *Gun Violence*, NAT'L INST. JUST. (Mar. 13, 2018), https://www.nij.gov/topics/crime/gun-violence/pages/welcome.aspx [https://perma.cc/TC56-YD5W]. Even assuming that every victim was victimized by a different gun, that means that less than 0.2 percent of guns were involved in crimes.

117. Kobayashi, *supra* note 112, at 311.

118. Provided that gun ownership is economically elastic, the proposed gun tax may affect behavior at the margins. Because the tax raises the cost of gun ownership, gun owners are likely to reduce their consumption of guns to a socially-optimal level. I discuss this behavioral change more *infra* Part V.D.

119. Matthew Miller et al., *Firearms and Violent Death in the United States*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 3, 13 (Daniel W. Webster & Jon S. Vernick eds., 2013).

120. *Id.* at 13.

121. *Cf. id.* at 12–13 (acknowledging causal inferences between suicide rates and firearm availability).

wise impose costs on society. As a result, rather than punishment, a broad tax on guns merely recognizes that the gun ownership is correlated with higher externalities.

Even acknowledging the weaknesses of a Pigouvian tax on firearms as a regulatory regime, there is a reason to impose such a tax. Though it may be too blunt an instrument to effectively channel behavior, a firearms tax can raise revenue to compensate taxpayers for the negative externalities they would otherwise bear.

IV. CONSTITUTIONAL CONSTRAINTS ON A PIGOUVIAN GUN TAX

As I will explain in Part V, a Pigouvian firearms tax should have two components. The first would be an excise tax on firearms, bullets, and other gun accessories. The second would be an annual tax on each firearm owned by an individual. Before getting to the particular design of the taxes, though, we must look at the constitutional regime within which the tax must function. A tax on firearms implicates three potential constitutional barriers and must be designed with those barriers in mind. First, the tax must comply with the Second Amendment right to bear arms; second, it must fit within the legislature's constitutional taxing authority; and third, it cannot violate the Fifth Amendment Takings Clause or the Ex Post Facto Clauses of the Constitution. This Article will discuss the scope and relevance of each of these constitutional limitations below.

A. RIGHT TO BEAR ARMS

While taxes can influence an individual's behavior, taxes are different from regulation and legislatures face different constitutional constraints in imposing taxes than they do in regulating behavior.[122] Where the legislature chooses to directly regulate behavior through law, a legislature can require individuals to take or avoid particular actions and can impose a variety of punishments if an individual does not take or avoid the regulated action.[123] By contrast, when a legislature imposes a tax on a particular action, individuals can decide whether they will pay the

122. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 572–74 (2012) (upholding components of the Affordable Care Act, such as the individual mandate to purchase insurance or incur a penalty as a "tax").

123. *Id.* at 573.

tax or face punishment if they decline.[124] "But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."[125]

Of course, if the courts always ignored the economic incentives of taxation, the government could circumvent individual rights by imposing prohibitive taxes on the exercise of those rights. In that vein, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Supreme Court held that a Minnesota tax on the use of ink and paper violated the First Amendment's guarantee of press freedom.[126]

Although Minnesota law exempted the retail sale of periodicals from its sales tax, in 1971 it "impose[d] a 'use tax' on the cost of paper and ink products consumed in the production of a publication."[127] Three years later, the legislature exempted the first $100,000 of paper and ink used annually by a publication.[128] This tax on paper and ink was the only tax imposed on goods in the chain of commerce before they were sold at retail,[129] and the $100,000 exemption meant that only fourteen and sixteen of the state's 388 newspapers paid the tax in 1974 and 1975, respectively.[130] Moreover, a single publication—the *Star Tribune*—paid about two-thirds of the tax collected.[131]

The Court was skeptical of the tax; not only was it unusual for a use tax,[132] but it singled out the press.[133] Because the press functions as a constraint on governmental overreach, a tax focusing exclusively on the press "gives a government a powerful weapon against" the press.[134] For the Court to uphold the tax

124. *Id.* at 574.

125. *Id.*

126. 460 U.S. 575, 592–93 (1983).

127. *Id.* at 577.

128. *Id.* at 578.

129. *Id.*

130. *Id.* at 578–79.

131. *Id.*

132. *See id.* at 581 ("Minnesota's treatment of publications differs from that of other enterprises in at least two important respects: it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale.").

133. *Id.* at 583. A tax of general applicability that fell on newspapers *and* other businesses would not have sustained a First Amendment challenge. *See id.* at 585.

134. *Id.* at 585.

regime, Minnesota had to demonstrate a compelling interest in applying a differential tax.[135] The need to raise revenue was found to be insufficient, given that the state could have raised revenue equally well with a generally-applicable tax.[136] Additionally, not only was the tax aimed solely at the press, but it only applied to a handful of newspapers.[137] Whatever the Minnesota legislature's goal with the tax, the Court saw its effect as penalizing the state's largest papers.[138] As a result, the Court struck the tax down as an unconstitutional infringement of the freedom of the press.[139]

The Court's decision in *Minneapolis Star & Tribune* is not directly applicable to a tax on guns, of course. The Court's concerns about the press's role in preventing government overreach do not directly apply to gun ownership. The core of the right to bear arms, according to the Court, is self-defense, not the limitation on government that a free press helps ensure.[140] Still, the case underscores that, imposed recklessly, a tax *can* violate an individual's constitutional rights.[141]

While the modern Court generally "decline[s] to closely examine the regulatory motive or effect of revenue-raising measures,"[142] there is a point at which the nature of a tax shifts to "become[] a mere penalty with the characteristics of regulation and punishment."[143]

The Court has not laid out where the line between tax and regulation falls.[144] However, it is relatively clear that if the tax is so prohibitively burdensome that it makes gun ownership economically infeasible, it would cross that line. To design a tax on

135. *Id.*

136. *Id.* at 586.

137. *Id.* at 591.

138. *Id.* at 591–92.

139. *Id.* at 593.

140. *See supra* notes 56–65 and accompanying text.

141. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 593.

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

143. Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922).

144. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 573 ("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."). The Court does recognize, though, that every tax has *some* regulatory effect; the simple existence of such effect does not automatically disqualify it from being treated as a tax. Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

guns that would not violate the Second Amendment, it would need to be reasonable. Moreover, although the policy underlying the *Minneapolis Star & Tribune Co.* decision is easily distinguishable from the policy underlying the individual right to bear arms, an articulate legislature would bolster its case for the constitutionality of its firearms tax by stating why the tax applied solely to guns, rather than to personal property generally.

B. DIRECT TAXES

The Constitution prohibits the federal government from levying any "capitation, or other direct, Tax . . . unless in Proportion to the Census or Enumeration herein before directed to be taken."[145] To the extent the federal government wants to impose a direct tax, then, that tax must be apportioned to states on the basis of their population.[146]

While the rule is simple enough, the definition of "direct tax" has historically been extremely ambiguous.[147] During the first century of the Constitution, the Supreme Court took a narrow view of direct taxes, holding that the definition of "direct taxes" encompassed only poll taxes and taxes on land.[148] At the end of the nineteenth century, the Supreme Court expanded the definition to also include taxes on personal property and income from personal property.[149] While the passage of the Sixteenth Amendment gave the federal government authority to tax income without apportioning the tax,[150] the Supreme Court "continued to consider taxes on personal property to be direct taxes."[151]

This interpretation of direct tax poses a significant impediment to a federal tax on firearms. Because firearms are personal property, a property tax on firearms would be a tax on personal

145. U.S. CONST. art. I, § 9, cl. 4; *see also id.* § 2, cl. 3.

146. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 570 ("[A]ny 'direct Tax' must be apportioned so that each State pays in proportion to its population.").

147. Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2336 (1997).

148. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 571.

149. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895) ("We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.").

150. U.S. CONST. amend. XVI.

151. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 571; *see also* Eisner v. Macomber, 252 U.S. 189, 218–19 (1920).

property.[152] As long as firearms are not spread across the states proportionate to state populations, apportioning the tax would, in the words of Justice Chase, "evidently create great inequality and injustice."[153]

How would apportioning the firearms tax result in inequity and injustice? A simplified example illustrates how. Imagine that the United States is made up of only two states, Wyoming and New York. In the 2010 census, New York had a population of 19,378,102.[154] Wyoming's population was 563,626.[155] According to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), in 2017, there were 76,207 registered firearms in New York and 132,806 in Wyoming.[156]

This stylized United States has just under 20 million residents. Of those, about 97 percent live in New York, and three percent live in Wyoming. If the federal government wanted to raise $1 million from the gun tax, New York taxpayers would be responsible for $970,000 of the apportioned direct tax, and Wyoming would be responsible for $30,000. But in spite of Wyoming's population being a fraction of New York's, Wyoming has almost

152. An excise tax, on the other hand, would not be a direct tax. *See* Jensen, *supra* note 147, at 2405 ("As long as a value-added tax (or other form of national sales tax) is uniform in its application, it should survive constitutional scrutiny."). Although the federal government considered imposing its own sales tax on a number of occasions, it never did. *See* Lawrence A. Zelenak, *The Federal Retail Sales Tax That Wasn't: An Actual History and an Alternate History*, 73 L. & CONTEMP. PROBS. 149, 149 (2010). The fact that the federal government has never imposed a sales tax does not, however, suggest that it faces a constitutional obstacle in doing so.

153. Hylton v. United States, 3 U.S. 171, 174 (1796).

154. *QuickFacts New York; United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NY,US/POP010210 [https://perma.cc/2YZM-WNC6].

155. *QuickFacts Wyoming; United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/WY,US/POP010210 [https://perma.cc/K6QN-BYE2].

156. U.S. DEP'T. OF JUST., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICAL UPDATE 2017, at 15 (2017), https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download [https://perma.cc/4TJX-K583] [hereinafter ATF, STATISTICAL UPDATE]. The number of registered firearms undoubtedly understates the actual number of firearms in the states, but it will work for purposes of this hypothetical. In imposing the actual firearms tax, of course, a government would have to know how many firearms exist in its jurisdiction. I discuss how it might do so *infra* notes 232–35 and accompanying text.

twice as many guns as New York. As a result, in Wyoming, gun owners would pay a tax of about $0.23 per gun.[157] New York gun owners, on the other hand, would have to pay $12.73 per gun, or more than fifty-five times as much as Wyoming gun owners would have to per gun.[158]

Because states vary dramatically in the number of guns per person, the rate of tax per gun would necessarily vary by state. In spite of the injustice, under contemporary direct tax jurisprudence, the tax would, nonetheless, need to be apportioned.

This apportionment rule only applies to the federal government, however. The Constitution does nothing to impede states' ability to levy direct taxes.[159] Even if a federal firearms tax were preferable on policy grounds to state taxes, as long as the Supreme Court considers taxes on personal property to be direct taxes, a federal gun tax would be fundamentally unfair, treating similarly-situated individuals radically differently.[160] States, however, face no such constitutional constraint. States can impose Pigouvian gun taxes with no constitutional infirmity.

In fact, state-level Pigouvian firearms taxes may be better as a practical matter than federal taxes. Among other things, the immediate costs of first responders and medical care are borne at the local level, and state and local governments are closer to the people who are hurt. Moreover, as Justice Brandeis explained in a dissent, it "is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[161]

157. That is, the $30,000 tax allocated to Wyoming divided by the 132,806 guns in the state.

158. New York would have to divide the $970,000 tax allocated to the state by the 76,207 guns in the state.

159. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 620 (1895) (explaining that the states "retained the power of direct taxation").

160. *Cf.* Barry Sullivan, *Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in U.S. Constitutional Law*, 20 EUR. J.L. REFORM 181, 188 (2018) ("The central meaning of equal protection—that like cases should be treated alike, and those that are different should be treated differently—is both a characteristic and an aspiration of the rule of law.").

161. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Some state legislatures can decide that they do not believe that gun ownership produces negative externalities and not impose a firearms tax at all. Other states can design a firearms tax in different ways, using different bases and rates for the tax. And because these taxes would be imposed (or not) at the state level, policymakers could evaluate the different results from different tax regimes and determine what best achieves the goal of reducing the negative externalities borne by the state and its taxpayers.

C. TAKINGS

In *Duncan*, the district court did not enjoin the prohibition on high-capacity magazines solely on Second Amendment grounds.[162] The court was also particularly concerned that the law represented an uncompensated governmental taking, in violation of the Fifth Amendment.[163] Had it gone into effect, California's law would have done more than prospectively prevent residents from acquiring high-capacity magazines. It would have criminalized the possession of high-capacity magazines owned before the law went into effect.[164]

The law provided residents of California who already owned high-capacity magazines three avenues to avoid criminal liability. They could (1) remove the magazine from the state, (2) sell it to a licensed firearms dealer, or (3) surrender it to a law-enforcement agency for destruction.[165] The court believed that the options to sell magazines or remove them from the state were more illusory than real options.[166] Because that just left the op-

162. Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D. Cal. 2017). In *Duncan*, the Ninth Circuit upheld the district court's preliminary injunction against a firearm magazine band. Duncan v. Becerra, 742 Fed. Appx. 218, 221 (9th Cir. 2018). *See supra* notes 78–84 and accompanying text.

163. *Duncan*, 265 F. Supp. 3d at 1138 ("The public interest also favors the protection of an individual's core Second Amendment rights and his or her protection from an uncompensated governmental taking that goes too far.").

164. *Id.* at 1110. The federal district court in Maryland disagreed with the Ninth Circuit, holding that a possession ban was not a *per se* taking. Md. Shall Issue v. Hogan, 353 F. Supp. 3d 400, 416 (D. Md. 2018).

165. *Duncan*, 265 F. Supp. 3d at 1110.

166. With high-capacity magazines banned in California, the court said that prices were likely to fall to nearly zero as the date the law took effect approached

tion of giving up ownership and physical possession, the law represented a taking that constitutionally required just compensation.[167]

Like the California law, an annual tax on firearms would apply both to firearms acquired before and after the law went into effect. But from a legal perspective, the two laws would be entirely different. Most importantly, complying with the tax law would not require gun owners to give up ownership and possession of their firearms. The tax would not force the taking of a gun.

The Supreme Court has been clear that taxation is not a taking under the Fifth Amendment.[168] Governments can impose taxes on property even though taxes necessarily impose financial burdens on property owners.[169] An annual tax on guns—even if the guns were owned before the tax was enacted—is not a taking requiring just compensation.[170]

and removing magazines to another state both required that another state accept them, and was potentially more expensive than the fair market value of the magazine. Neither, then, represented a realistic option. *Id.* at 1138.

167. *Id.*

168. *See, e.g.*, Mobile Cty. v. Kimball, 102 U.S. 691, 703 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution.").

169. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013) ("This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."). In fact, in some cases, the government can take money through taxes that it could not have taken directly. For instance, the Court has held that "a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue." *Id.* at 616.

170. Taxing guns that were owned before the tax was enacted is different from applying the tax retroactively (that is, imposing the tax for years before the tax was passed). Retroactivity is constitutionally permissible under certain circumstances. *See* United States v. Carlton, 512 U.S. 26, 30 (1994) ("This Court repeatedly has upheld retroactive tax legislation against a due process challenge."). The precise contours of acceptable retroactive tax legislation are uncertain, though. Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291, 292 (2009) ("The [*Carlton*] majority opinion declined to articulate a bright-line standard or set forth concrete, objective criteria to use in evaluating due process challenges to retroactive tax measures."). There is no reason that the gun tax needs to be applied retroactively, though, so searching for the line separating permissible from impermissible retroactivity is beyond the scope of this article.

Even if the tax is not a taking, though, would it violate the Ex Post Facto Clauses of the Constitution? Article I of the Constitution prohibits both the federal government and state governments from passing any "ex post facto Law."[171] Would a property tax on guns constitute an ex post facto law? After all, even if the legislature did not make the tax retroactive, it would apply to guns that individuals had acquired prior to the enactment of the tax.

In general, the Ex Post Facto Clauses "forbid[ ] the application of any new punitive measure to a crime already consummated."[172] The Constitution prohibits legislatures from retroactively changing the definition of a crime or increasing its punishment.[173] Historically, though, the Supreme Court held that it was "settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description."[174]

Because a firearms tax is a civil, not criminal, law, the Ex Post Facto Clauses would presumptively do nothing to prevent legislatures from enacting it, even if it were retroactive. The Court recognizes, though, that just because a legislature calls a law civil does not mean that it is, in fact, civil. Still, the Court generally defers to the legislature's intent,[175] deeming a civil law criminal only where it is "so punitive either in purpose or effect as to negate" the legislature's intent that it be treated as civil.[176]

In evaluating the question of whether a putatively civil law is punitive enough to invoke the Ex Post Facto Clauses, courts look at several factors including whether a regulatory scheme has historically been treated as punishment, whether it affirmatively restrains conduct, whether it has a "rational connection to a nonpunitive purpose," and whether it is excessive.[177] More-

171. U.S. CONST. art 1, § 9, cl. 3; *see also id.* § 10, cl. 1.

172. Lindsey v. Washington, 301 U.S. 397, 401 (1937).

173. Collins v. Youngblood, 497 U.S. 37, 38 (1990).

174. Johannessen v. United States, 225 U.S. 227, 242 (1912).

175. Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (holding that in determining whether a statute is civil, the Court "ordinarily defer[s] to the legislature's stated intent").

176. United States v. Ward, 448 U.S. 242, 249 (1980).

177. Smith v. Doe, 538 U.S. 84, 97 (2003). These four criteria (as well as three others) are neither exhaustive nor dispositive, but are useful guides in

over, the burden is on the individual challenging the law to provide "clearest proof" that the law is so punitive as to be effectively a criminal statute.[178]

Taxes are not punitive.[179] And even penalties for the nonpayment of taxes, which are clearly punitive, are generally not treated as the effective equivalent of criminal sanction.[180] As long as the penalties are designed to prevent loss of revenue, to reimburse the government for the costs of investigation, and are not disproportionate, penalties for nonpayment of tax do not violate the Ex Post Facto Clauses.[181]

Ultimately, then, a Pigouvian tax on firearms, like any other tax, will not be a taking that requires just compensation. Moreover, as long as the tax is not punitive—which it should not be—it will not be an unconstitutional ex post facto law. In fact, even if it were retroactive—which it also should not be—it would not violate the Ex Post Facto Clauses unless someone challenging the law provided clear and compelling proof that the law was meant to be as punitive as a criminal statute.

V. DESIGNING THE TAX

Designed properly, a Pigouvian tax on firearms can be an effective way to deal with the negative externalities gun ownership imposes on society.[182] An effective firearms tax should be

determining whether a statute labeled "civil" by a legislature is, in fact, criminal. *Id.*

178. United States v. Ward, 448 U.S. 242, 249 (1980) (citing Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

179. Bankers' Tr. Co. v. Blodgett, 260 U.S. 647, 651 (1923) ("The payment of taxes is an obvious and insistent duty.").

180. *See id.*

181. *See* Karpa v. Comm'r, 909 F.2d 784, 787 (4th Cir. 1990).

182. Tax is, of course, not the only way to deal with the externalities. Tort liability and insurance also can require gun owners to internalize the social costs they impose by virtue of their gun ownership. *Cf.* Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the "Choice Architecture" of Auto Insurance Pricing*, 44 LOY. L.A. L. REV. 69, 72–73 (2010) ("Driving has many negative externalities, including greenhouse gas emissions, risks of causing or suffering physical injury, highway costs, and negative public health consequences that were not considered when the current tort-and-insurance framework was built."). Both tort and insurance have their problems, though. Individual shooters may well be judgment-proof, or at least have insufficient assets to compensate victims for their injuries and, while firearm manufacturers may have more assets, Congress has deliberately shielded them from most tort liability for the criminal use of firearms. Stephen

imposed at the state or local level, both for political reasons[183] and so that it does not have to be allocated to the states according to their populations.[184] Moreover, a tax may be easier to design in a way that does not risk violating the Constitution than other types of gun regulation, making it more politically palatable.

What should such a tax look like? I recommend two parts to the tax: an excise tax on firearms and ammunition, and an annual property tax on firearms.[185] The first two Sections will discuss the excise tax and the property tax, respectively. Section C will proceed to discuss how states should use the revenue raised from the firearms taxes. It will explain that after a state collected the revenue raised by the firearms taxes, it would earmark the revenue from the taxes to a fund used exclusively to pay for the costs of gun violence. While the tax itself would not be excessive, nonpayment would subject a gun owner to significant civil and, in some cases, criminal penalties. Finally, Section

D. Sugarman, *Torts and Guns*, 10 J. TORT L. 3, 5 (2017) ("PLCAA is primarily intended to protect gun makers and gun sellers from liability in situations in which the gun is then *criminally* used."). And an insurance mandate has two potential problems. The first is, if social cost is imposed by an individual without insurance, society bears the full cost of the externalities. Second, insurers must be willing to insure gun owners. While insurance companies are private actors and not subject to the Second Amendment, if they were unwilling to insure gun owners or only willing to do so at exorbitant prices, requiring gun owners to carry insurance could be the economic equivalent of banning guns, and thus violate the Second Amendment.

183. The federal government has been singularly unable to enact firearms legislation. The last major federal restrictions on firearms enacted by Congress was the 1993 Brady Bill, which required background checks on buyers when they bought from retail sellers. Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 160–61 (2015).

184. *See supra* notes 154–58 and accompanying text. While a state-level tax makes the most sense, not every state can currently enact a firearms tax. Forty-four states have state constitutional provisions that enshrine a right—separate from the federal right—to bear arms. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006). Most of these provisions "are written quite differently from the Second Amendment." *Id.* While I suspect that few of these state constitutions would prohibit the taxation of firearms, analyzing each one is beyond the scope of this Article. Without such analysis, it is still clear that not every state could enact the firearms tax I propose. For example, the Idaho state constitution prohibits, among other things, "special taxation on the ownership or possession of firearms or ammunition." IDAHO CONST. art. I, § 11.

185. The sales tax could also apply to other firearm accessories, especially those like bump stocks and high-capacity magazines, that increase the likelihood of negative externalities.

D will discuss certain effects that the firearms taxes could have on gun owners' behavior.

A. EXCISE TAX

An excise tax is "a consumption tax on a particular item."[186] An excise tax on firearms and ammunition is an important initial step in the firearms tax regime. Part of the inefficiency in the gun market is that, because society bears some of the cost of gun ownership while gun owners fully internalize the benefits, gun purchasers pay too little for their guns. As a result, they acquire more guns than they would if they bore the full cost of gun ownership.

An excise tax should help correct that market failure, leading to the more efficient consumption of firearms and ammunition.[187] More importantly, though, whether or not the excise tax would correct market failures, it would begin to reimburse the costs of gun violence not borne by gun owners.

An excise tax is relatively easy to design; in fact, models of what it can look like already exist. There is already a federal excise tax on guns, for example. Manufacturers, producers, and importers of firearms must pay a ten-percent tax on pistols and revolvers, and an eleven-percent tax on other firearms, shells, and cartridges.[188] In 2017, the federal firearms excise tax raised $761.6 million in revenue.[189]

It is unlikely, however, that the federal excise tax has substantively reduced gun violence. It does raise the cost of acquiring guns, but because it does not apply to private gun sales, private gun owners can often sell guns for less than retail sellers.[190]

186. BURMAN & SLEMROD, *supra* note 99, at 96.

187. *Cf.* Michael L. Marlow & Alden F. Shiers, *Would Soda Taxes Really Yield Health Benefits?*, 33 REG. 34, 36 (2010). Note that Marlow and Shiers are skeptical that a Pigouvian tax on sugary drinks would correct the market failure that leads to obesity, because it is not clear either that sugary drinks lead to obesity or that policymakers have the technical knowledge and skills necessary to set the correct level of tax. *Id.* at 38.

188. I.R.C. § 4181 (2012).

189. Wesley Elmore, *Proposed Increase in Gun Taxes Seen as Limited in Effectiveness*, 158 TAXNOTES 1697, 1698 (2018).

190. Robert McClelland, *New Gun and Ammo Taxes Sound Like Promising Ways to Reduce Gun Violence. But There Are Problems.*, TAX POL. CTR.: TAXVOX (May 24, 2018), https://www.taxpolicycenter.org/taxvox/new-gun-and-ammo-taxes-sound-promising-ways-reduce-gun-violence-there-are-problems [https://perma.cc/6ZTT-RF3Q].

Moreover, in some states, private sales are not subject to background checks,[191] which may perversely *increase* the risk of firearms being used to impose societal costs.

Not only does the federal excise tax do little to prevent gun violence, it does almost nothing to reimburse society for the negative externalities it faces from gun ownership. Rather, revenues from the federal excise tax are deposited in the Wildlife Restoration Trust Fund and used to support wildlife restoration and hunter education.[192] In essence, the current federal firearms excise tax functions to "support the activities of those taxed" rather than "curtail use of" firearms.[193] The federal excise tax has no relationship at all to the negative externalities imposed by gun violence.

Moreover, Congress seems as immobile with respect to its excise tax on firearms as it is with respect to any other federal gun legislation. In February 2018, Representative Danny K. Davis introduced the Gun Violence Prevention and Safe Communities Act of 2018.[194] The Act would raise the excise tax on firearms to twenty percent, and the tax on ammunition to fifty percent.[195] Revenue raised by the Act would be allocated to various organizations that work to study and prevent gun violence.[196] The enactment of the Act would transform the federal firearms excise tax into something closer to the kind of Pigouvian tax I recommend in this Article.

The Act is unlikely to pass, though. Over the last several Congressional sessions, a number of bills intended to increase the excise tax on firearms and ammunition have been proposed.[197] Not only have none of the bills passed, but none saw any action after being introduced.[198] While Congress's failure to act until now is no guarantee that it cannot enact an excise tax in the future, it seems unlikely that Congress will.

191. *Id.*

192. R. ELIOT CRAFTON ET AL., CONG. RESEARCH SERV., GUNS, EXCISE TAXES, WILDLIFE RESTORATION, AND THE NATIONAL FIREARMS ACT 1–2 (2018), https://fas.org/sgp/crs/misc/R45123.pdf [https://perma.cc/XB83-CUJU].

193. *Id.* at 2.

194. H.R. 5103, 115th Cong. (2d Sess. 2018).

195. *Id.* § 2(a).

196. *Id.* § 2(c)(1).

197. CRAFTON ET AL., *supra* note 192, at 12–13.

198. *Id.* at 13.

States have proven to be more willing than the federal government to enact legislation regulating firearms. Over the first half of 2018, twenty-six states enacted fifty-five gun safety bills.[199] In August 2018, the California legislature passed three additional bills.[200] Moreover, some state and local governments have enacted firearms taxes, and these examples may also be instructive. For example, in 2015, the city of Seattle enacted an excise tax on firearms on top of the federal excise tax.[201] Under the Seattle Firearms and Ammunition Tax, retail sellers had to pay a tax of $25 on each firearm sold in the city, $0.02 on each round of .22 caliber (or less) ammunition, and $0.05 on each round of other ammunition sold in the city.[202]

Unlike the federal excise tax, which supported the activities of gun owners, Seattle intended to use the tax to "raise general revenue for the City and to use that revenue to provide broad-based public benefits for residents of Seattle related to gun violence by funding programs that promote public safety, prevent gun violence and address in part the cost of gun violence in the City."[203]

Looking at both the federal excise tax and Seattle's firearms tax reveals three principal design questions a legislature must address in crafting an excise tax on firearms and ammunition. The first is the tax base,[204] the second is the rate, and the third is who technically pays the tax.

While a legislature can decide precisely what it wants the tax to cover, the Seattle tax provides a good model. It imposes its

199. Allison Anderman, *Gun Law Trendwatch: 2018 Mid-Year Review*, GIFFORDS L. CTR. 3 (July 21, 2018), http://lawcenter.giffords.org/wp-content/uploads/2018/07/Mid-year-Trendwatch-2018%E2%80%94FINAL-7.19.18-pages.pdf [https://perma.cc/YR87-SMNQ].

200. Amanda Michelle Gomez, *California Passes Trio of Gun Control Bills, Including Lifetime Ban on Domestic Violence Convicts*, THINKPROGRESS (Aug. 28, 2018), https://thinkprogress.org/california-passes-trio-of-gun-control-bills-including-lifetime-ban-on-domestic-violence-convicts-cffcef596dc7/ [https://perma.cc/RW37-VV7Q].

201. Watson v. City of Seattle, 401 P.3d 1, 4–5 (Wash. 2017).

202. SEATTLE, WASH., MUNI. CODE § 5.50.030.B (2015).

203. SEATTLE CITY COUNCIL B. 118437 (Aug. 3, 2015).

204. The "tax base" means those things that the tax in question taxes. *See, e.g.*, Robert H. Gleason, Comment, *Reevaluating the California Sales Tax: Exemptions, Equity, Effectiveness, and the Need for a Broader Base*, 33 SAN DIEGO L. REV. 1681, 1690 n.30 (1996).

excise tax on "firearms" and "ammunition."[205] It defines *firearm* as "a weapon from which a projectile or projectiles may be fired by an explosive such as gunpowder."[206] It defines *ammunition* as "any projectiles with their fuses, propelling charges, or primers designed to be fired from firearms."[207] Seattle thus has chosen a fairly comprehensive tax base. The tax base is administratively simple, though: it does not try to differentiate between different types of firearms. Moreover, while it differentiates between types of ammunition, the dividing line is objectively measurable. A .22 caliber bullet or smaller is taxed at one rate, while larger ammunition is taxed at a slightly higher rate.[208]

Once a legislature has chosen the tax base, it must choose the rate of tax. Seattle chose a flat rate, irrespective of the cost of the firearm or the ammunition. The $25 per firearm would be the same, whether the retail sale was of a $120 rifle[209] or a $10,250 rifle.[210] Alternatively, the rate could be some percentage of the retail price of the firearms and ammunition. A ten-percent tax would yield a $12 tax on the first rifle, and a $102.50 tax on the second.

Either choice is defensible. On the one hand, an individual who pays more for a gun can also afford to pay more in taxes. A flat per-firearm rate means that purchasers who buy cheaper guns face an excise tax that makes up a much larger portion of the gun's ultimate cost. On the other hand, there is no evidence that expensive guns create more externalities than cheaper guns.[211]

205. SEATTLE, WASH., MUNI. CODE § 5.50.030.A.

206. *Id.* § 5.50.020.

207. *Id.*

208. *Id.* § 5.50.030.B.

209. Dick's Sporting Goods sells a Mossberg Plinkster Rifle for $119.99. DICK'S SPORTING GOODS, https://www.dickssportinggoods.com/p/mossberg-plinkster-rifle-muzzle-break-16mosasmt22lrrfl1rif/16mosasmt22lrrfl1rif [https://perma.cc/QZ2K-SJQF].

210. Cabela's sells a Barrett 82A1 Centerfire Rifle for $10,249.99. CABELA'S, https://www.cabelas.com/product/shooting/firearms/centerfire-rifles/semiautomatic-centerfire-rifles/pc/104792580/c/553829580/sc/105522480/i/105524280/barrett-a-cf-rifles/2468452.uts?slotId=0 [https://perma.cc/UZ4Q-HAPM].

211. Some survey data indicates that felons carry mid-priced guns, rather than cheap guns. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 170 (1986).

Ultimately, under my proposed firearms tax regime, determining precise rate of the excise tax is unnecessary. As I will discuss in the next section, the excise tax portion of the firearms tax makes up a small portion of the ultimate tax; the property tax portion will do the bulk of the work when it comes to paying for externalities.[212] Because the excise tax would be imposed on retail sales, though, it makes sense for it to be calculated as a portion of the sales price. My proposed excise tax is broadly structured like a targeted retail sales tax.[213] Sales taxes are calculated by adding a percentage of the retail price to a purchaser's ultimate price and remitting that additional amount to the taxing authority.[214]

The legislature enacting the gun excise tax would have to determine the rate of the tax. The legislature does not have to calibrate the rate to precisely capture the externalities imposed by gun violence, both because the purpose of the tax is not primarily to change behavior and because the excise tax is only one part of the tax. Moreover, the excise tax cannot be so high that it effectively prevents individuals from buying firearms they have a constitutional right to acquire. But, while the precise number is unimportant, a ten-percent excise tax on the purchase of firearms and ammunition makes sense: it would raise revenue without being unduly burdensome.

Finally, a legislature would have to determine whether the tax was imposed on the seller or the purchaser. As a practical matter, the difference here is mostly unimportant. Retail sales taxes are imposed on the purchaser of goods but are collected and remitted by the seller.[215] The principal difference would be the salience of the tax: if it were imposed on the seller the firearm's price would reflect the cost both of the firearm and the tax. If it were imposed on the purchaser, the seller would not have to include the excise tax in the sticker price. The amount of tax would be less salient to gun purchasers and would do less to counteract market failures.

212. *See infra* notes 231–35 and accompanying text.

213. *See* BURMAN & SLEMROD, *supra* note 99, at 96.

214. *Id.* at 93. Note that the excise tax would be imposed in addition to the ordinary retail sales tax.

215. William F. Fox & Matthew N. Murray, *The Sales Tax and Electronic Commerce: So What's New?*, 50 NAT'L TAX J. 573, 576 (1997).

There is one important difference, though: if the tax is imposed on sellers, an individual who purchases a firearm or ammunition outside of the taxing jurisdiction has no tax liability. If the tax is imposed on purchasers, it is possible to require gun owners who reside in the taxing jurisdiction, and those who bring their firearms into the jurisdiction, to pay the excise tax irrespective of where they live.[216]

B. PROPERTY TAX

Relying solely on an excise tax to deal with externalities creates two major problems. The first is that it encourages potential gun purchasers to adjust their purchase to avoid the tax. They can do that, for example, by accelerating their purchases. The Seattle Firearms and Ammunition Tax was enacted in August 2015 but did not apply until January 1, 2016.[217] That gave gun buyers four months in which they knew the additional tax was coming, but they did not have to pay it. If an individual knew that she was likely to buy a gun in the foreseeable future, she had an incentive to accelerate that purchase, allowing her to buy the gun without bearing the excise tax, and depriving the government of revenue to offset the social costs gun violence inflicts.[218]

Alternatively, because the firearm excise tax would be a local or a state tax, a gun purchaser could buy her firearm in a jurisdiction without a firearm excise tax. The excise tax could be designed with a concurrent use tax-style requirement, under which she would owe the difference between the tax (if any) that she paid in the other jurisdiction and the tax she owed in her home jurisdiction.[219] If she really wanted to avoid the tax, she

216. *See infra* note 219.

217. Watson v. City of Seattle, 401 P.3d 1, 4–5 (Wash. 2017).

218. In fact, although Seattle estimated that the tax would raise $300,000 to $500,000 in its first year, it ended up raising only about $200,000. Lynsi Burton, *Supreme Court Upholds Seattle Gun Tax*, SEATTLEPI (Aug. 10, 2017), https://www.seattlepi.com/seattlenews/article/Supreme-Court-upholds-Seattle-gun-tax-11747876.php [https://perma.cc/EZG2-BF3R]. Even if the tax went into effect on the day that it was enacted, individuals would have a similar ability to accelerate their purchases. Such a tax could not be enacted without some discussion and debate, alerting potential purchasers that there was at least a risk of the tax being imposed.

219. Most states with sales taxes also have use taxes. If a purchaser avoids her home sales tax by buying a product in another state, she must remit the use

could even build her own gun, whether from readily-available parts or using a 3-D printer.[220]

And that relates to the second problem: an excise tax on firearms and ammunition is likely insufficient to pay for the externalities of gun violence. In the first instance, it is a purely prospective tax. Although guns acquired before the enactment of the tax also impose negative externalities, an excise tax alone would not cause those gun owners to internalize any of the cost. There are a lot of old guns still being used. Guns are remarkably durable, often lasting for decades.[221] If a legislature solely enacted an excise tax it would force new purchasers to bear the externalities caused by generations of firearms.

The cost of those generations of guns would be heavy. While it is impossible to know precisely how many guns are sold in any given year in the United States, in 2017, the FBI's National Instant Criminal Background Check System processed more than 25 million background checks.[222] Assuming that number accurately represents the number of guns sold in the United States, and using the lowest estimate of the public costs of gun violence—$45.6 billion[223]—state governments would have to collect an average of more than $1,800 per gun sold to pay for gun violence. At $500—a not-uncommon price for a 9-millimeter handgun[224]—that would be a tax of 360 percent. That level of taxation would be so prohibitively high that the tax would probably fail to withstand Second Amendment scrutiny.

tax "as long as the good is consumed in the consumer's state of residence." BURMAN & SLEMROD, *supra* note 99, at 94. The consumer, not the retailer, is responsible for paying the use tax, though, and compliance is "virtually nonexistent." Adam B. Thimmesch, *Testing the Models of Tax Compliance: The Use-Tax Experiment*, 2015 UTAH L. REV. 1083, 1086.

220. Jon Stokes, *The Boring Truth About 3-D Printed Guns*, L.A. TIMES (Aug. 8, 2018), http://www.latimes.com/opinion/op-ed/la-oe-stokes-3d-guns-20180808-story.html [https://perma.cc/NZV8-Q8TP].

221. D. KIRK DAVIDSON, SELLING SIN: THE MARKETING OF SOCIALLY UNACCEPTABLE PRODUCTS 57 (2003) ("Guns are unusually sturdy mechanical products; they seldom wear out from use and typically last for decades.").

222. U.S. DEP'T. OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NCIS) OPERATIONS, 2017, at ii (2017), https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf [https://perma.cc/KGWT-LXFP].

223. *See supra* note 46 and accompanying text.

224. *See* Jay Willis, *Owning a Gun in America Is a Luxury*, GQ (Apr. 30, 2018), https://www.gq.com/story/gun-ownership-cost [https://perma.cc/8JYS-3N5Z].

To better approximate the actual cost of gun violence, as well as to spread that cost among not only new gun purchasers, but all gun owners, states should impose a property tax on firearms to ensure the comprehensiveness of the firearms tax. A property tax, imposed on all guns within the taxing jurisdiction, creates a broader base for taxation, allowing a lower rate of tax per gun than an excise tax. An excise tax rate standing alone would have to be higher because it would only apply to retail sales, and would only tax a given firearm once.[225] It also spreads the cost out over the lifetime of the gun, rather than trying to capture the full externalities of a gun's potential decades of life at a single point in time.

In its simplest form, the property tax aspect of the firearms tax would be set by calculating the cost of gun violence within the taxing jurisdiction and dividing it by the number of guns in the jurisdiction. That would yield a per gun tax owed by gun owners on each gun they own.

Of course, as a practical matter, calculating the tax is more complicated than that. It requires determining how much gun violence costs and how many guns exist within the taxing jurisdiction. As I have pointed out, calculating the cost of gun violence is a complicated endeavor.[226] In addition, it requires knowing how many guns exist within the taxing jurisdiction. Currently, the federal government does not have a comprehensive database of firearms, and federal law would make it practically impossible to assemble, even if the federal government had the political will to create one.[227] By contrast, a handful of states require the registration of some or all firearms.[228] The Supreme Court has implicitly acknowledged the constitutionality of state gun registration requirements.[229]

225. If the excise tax were imposed on secondary market sales, it might reach a firearm multiple times. Still, the excise tax would apply rarely at best.

226. *See supra* Part I.

227. *See* Stephen P. Halbrook, *The Empire Strikes Back: The District of Columbia's Post*-Heller *Firearm Registration System*, 81 TENN. L. REV. 571, 579 (2014).

228. *Registration*, GIFFORDS L. CTR. (2019) http://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/ [https://perma.cc/4E6C-LFWA].

229. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.").

But while determining the cost of gun violence and the number of guns can be difficult, neither problem should prove insurmountable. To calculate the societal cost of gun violence, a legislature would first need to determine which costs counted. I would include three: the costs of medical care to victims, the cost of repairing or replacing property damaged, and the additional marginal cost of first responders.

The first two costs present little difficulty in calculating. The third, however, requires a certain amount of judgment. After all, not all police action imposes additional cost. A salaried police officer gets paid the same whether she is making an arrest or writing a report. There is no obvious cost difference between her responding to gun violence or responding to a traffic accident. But sometimes gun violence can impose an additional marginal cost. Most obviously, where the gun violence requires hiring additional first responders or paying them overtime those costs can be clearly traced to gun violence.[230]

To determine the amount of revenue the property tax should raise, I recommend taking a three-year rolling average of the costs of gun violence less the amounts raised by the excise tax.[231] In other words, the total amount of revenue to be raised should be calculated by adding the relevant costs for the last three years, subtracting the amount of revenue the excise tax has provided, and dividing that amount by three.

230. For example, during the first weekend of August 2018, seventy-four people were shot in Chicago, and twelve were killed as a result of gun violence. In response, the city deployed 600 additional officers the following weekend. Those officers had regular days off canceled. Sean Lewis & Courtney Gousman, *CPD Deploying 600 Officers to Violence Plagued Neighborhoods This Weekend*, WGN9 (Aug. 7, 2018), https://wgntv.com/2018/08/07/cpd-deploying-600-officers-to-violence-plagued-neighborhoods-this-weekend/ [https://perma.cc/S6TY-S74Q]. Though the city said it was funding them through sources other than overtime, that additional surge in officers was directly caused by gun violence, and should be included in the costs. Similarly, the overtime costs in the 2017 Las Vegas mass shooting ran into the millions of dollars. Caroline Bleakley, *Nevada to Receive $2.1M to Cover Police Overtime Costs for 1 October Shooting*, 8NOW.COM (Jun. 25, 2018), https://www.8newsnow.com/news/nevada-to-receive-21m-to-cover-police-overtime-costs-for-1-october-shooting/ [https://perma.cc/56TY-S74Q].

231. The goal of the firearms taxes is to reimburse society for the costs imposed by gun violence. In my proposal, the amount raised by the excise tax has no direct connection with the total externalities caused by gun violence. But using those amounts to reduce the property tax portion of the firearms tax ensures that the amount of tax tracks the costs of gun violence.

Using a three-year rolling average provides two major benefits. The first is it smooths the amount of the tax, ensuring that an outlier year does not radically increase or decrease the amount of tax individuals pay. The second is it allows the tax to reflect the direction of gun violence: as gun violence increases, it becomes more expensive to own a gun; as gun violence decreases, the tax per gun also decreases.

Determining the number of firearms subject to the tax requires a state to have a database of firearms. For purposes of the tax, it does not matter whether the database associates the firearms with individual owners or not. The important thing is knowing how many guns are within the taxing jurisdiction, and thus, what to use as the divisor. In large part, unless the taxing jurisdiction has a comprehensive list of firearms already, creating a database will require the voluntary compliance of gun owners.[232]

Of course, not all gun owners will voluntarily comply. To encourage compliance, there needs to be a penalty for failing to pay the firearm property tax. The penalty should be severe enough that it provides real incentive for gun owners to comply with the tax. At the very least, if the taxing authority discovers a firearm on which tax has not been paid, the owner should be required to pay the unpaid tax plus interest.[233] In addition, the law should subject her to a penalty for nonpayment, one that increases over time.[234] Finally, in egregious cases of nonpayment, gun owners

232. In the language of tax administration, "voluntary compliance" does not mean that taxpayers volunteer to pay their taxes. Rather, it acknowledges that the tax-collecting agency lacks the capacity to directly assess all taxes or to review all tax returns. Instead, it relies on taxpayers to assess their own tax liability, file necessary returns, and pay the amount due. J. T. Manhire, *What Does Voluntary Tax Compliance Mean?: A Government Perspective*, 164 U. PA. L. REV. ONLINE 11, 17 (2015).

233. The unpaid tax would go back to when she acquired the firearm or when the firearm tax went into effect, whichever date is later. To determine the interest rate, the state could follow the federal government's lead. For underpayment of federal taxes, the interest rate is the federal short-term rate plus three percentage points. I.R.C. § 6621(a)(2) (2012). The IRS issues its short-term rate each calendar quarter. *Id.* § 6621(b).

234. For example, the Internal Revenue Code imposes a five-percent penalty on underpayments of tax where the underpayment lasts for one month or less. Each month, the penalty increases by another five-percent, up to a maximum penalty of twenty-five percent. *Id.* § 6651(a)(1). How high should the penalty for failure to pay the firearms tax be? Probably higher than twenty-five percent. Until the state is aware of a gun's existence, it is relatively easy to hide the gun,

should face criminal liability.[235] Making it costly to evade the tax should encourage gun owners to take the steps necessary to pay their firearms taxes. Those steps include disclosing their gun ownership, which is especially important if they purchase their guns out of state, make their own guns, or otherwise acquire their guns in a manner that would be difficult for the state to discover.

While stiff penalties should decrease noncompliance with the firearms tax, some firearms owners will nonetheless fail to comply. It is at least plausible that those who pay their firearms tax are less likely to engage in costly violence than those who evade the tax.[236] Even assuming that the percentage of taxes that law-abiding gun owners pay will significantly exceed the percentage of financial cost they impose on society, it is still fair that they face this tax, for at least two reasons.

First, while they do not personally impose costs on society, they nonetheless benefit from the current regime that allows for negative externalities. Because the cost of firearm ownership does not include the costs of gun violence, even law-abiding gun owners pay less for their guns than the cost of guns.[237] The

meaning it is relatively easy to evade the gun tax. Professor Raskolnikov points out that, to set the optimal deterrence, tax penalties should take into account the "probability of detection." Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 571 (2006). Tax evasion that is harder to detect should face higher penalties than tax evasion that is easier to detect. *Id.*

235. To look at federal tax law one more time: the difference between civil and criminal tax avoidance is *mens rea*. It is a felony to "willfully" attempt to evade or defeat tax. *See, e.g.*, I.R.C. § 7201 (2012). Where the attempt is willful (and thus criminal), in addition to the civil penalties, taxpayers face a fine of up to $100,000 and imprisonment of up to five years. *Id.* That same idea of willfulness could draw a line between failure to pay that resulted solely civil penalties and failure to pay that also resulted in criminal liability.

236. It is not, of course, certain that this is the case. There is some evidence of a correlation between "law-abidance" and unwillingness to engage in tax evasion. Marta Orviska & John Hudson, *Tax Evasion, Civic Duty and the Law Abiding Citizen*, 19 EUR. J. POL. ECON. 83, 93 (2002). But that evidence is merely that individuals who believe in law-abidance are more likely to be unwilling to engage in tax evasion than we would otherwise expect, not that they were completely unwilling to evade taxes. *Id.*

237. This is because the cost of guns is largely unrelated to the likelihood that a buyer will use the gun for violent purposes. A retail firearms dealer does not—and, in fact, cannot—set a price based on the buyer's propensity to break the law. Rather, the dealer sells the gun based on the ordinary supply and demand curves, setting a price that applies to any buyer.

Pigouvian firearms tax corrects that mispricing, by requiring gun owners to internalize the full cost of firearm ownership. While it misprices the amount of negative externality that any given firearm owner imposes on society, determining that cost on a person-by-person basis would be administratively impossible. It makes sense, then, to impose the tax on a proportional basis.[238]

This leads to the second reason the tax is fair, even if it falls more heavily on law-abiding firearms owners than it does on those who actually impose costs on society: a firearm owner who does not want to pay the tax can easily avoid liability. Assume that a firearm owner complies completely with the law. In fact, she not only complies with the law, but she complies with best practices, keeping her gun secure in such a way that not only will she never use it to impose costs on society, but that nobody else will be able to use it to impose such costs. As such, the firearms taxes she pays make up for costs she did not cause.

At the same time, some firearm owners act violently and impose financial costs on society. In a perfect world, those owners would pay the costs they impose. For various reasons, though, they are unable to fully internalize these costs. As a result, taxpayers bear those costs.[239] In this stylized example, then, an innocent party is going to pay costs that she did not impose. The innocent firearm owner has at least two ways to legally avoid those costs if she is unwilling to bear them, though. She can either get rid of her firearms or she can move to a jurisdiction that does not impose a firearms tax. If she is unwilling to move or part with her firearms, she has accepted that living in the jurisdiction and owning firearms is worth more to her than the cost of the tax.

Even though calculating the amount of tax per gun is relatively mechanical, it still requires some amount of judgment. In some cases, either where there are significant costs or few guns, the amount of tax could potentially be unconstitutionally draconian.[240] To avoid the risk of a firearm tax violating the Second

238. It is worth noting that sin taxes work like this. The amount of tax a purchaser pays is determined by the amount of alcohol or tobacco she purchases, irrespective of her personal propensity to drive drunk, or her personal likelihood of getting cancer or emphysema.

239. *See supra* Part I.

240. In New Jersey, for example, the Giffords Law Center calculated that gun violence in New Jersey imposes $1.2 billion of direct costs annually.

Amendment right to bear arms, a legislature needs to include a per gun ceiling in its legislation.[241] If, in any year, the calculated

GIFFORDS LAW CENTER., THE ECONOMIC COST OF GUN VIOLENCE IN NEW JERSEY: A BUSINESS CASE FOR ACTION 9 (2019), https://lawcenter.giffords.org/wp-content/uploads/2018/04/Cost-of-Gun-Violence-in-New-Jersey_Full-Report_4.20.18.pdf [https://perma.cc/S6F6-ACQX]. According to the ATF, in 2017, there were 57,507 registered firearms in New Jersey. ATF, STATISTICAL UPDATE, *supra* note 156, at 15. To fully internalize the costs would require a tax of almost $21,000 per firearm, an amount that would clearly violate gun owners' Second Amendment right to bear arms. The $21,000 figure is almost certainly too high. New Jersey probably has more than just 57,507 guns. And about 76% of the cost the $1.2 billion of cost—$918 million—is lost income. GIFFORDS L. CTR., *supra*, at 11. A state could certainly calculate the costs of gun violence differently than the Giffords Law Center does. But the fact remains that even if we only include the $224 million of healthcare and police and criminal justice costs, *id.*, the resultant tax would be almost $4,000 per gun.

241. There is clearly no bright line where the tax becomes draconian. And, in fact, historically, gun taxes could be significant. The National Firearms Act that created that ten- and eleven-percent transfer tax on certain firearms and ammunition, *see supra* notes 188–91, created an alternative tax for certain types of firearms. Machine guns, short-barreled shotguns, silencers, and a handful of other kinds of firearms are exempt from the normal transfer tax. I.R.C. §§ 4182(a), 5845(a) (2012). Instead, transferors pay a tax of $200 on these kinds of firearms. *Id.* § 5811(a). While $200 does not necessarily sound excessive, the amount was not indexed to inflation. It has been $200 since the National Firearms Act was enacted in 1934. National Firearms Act, Pub. L. No. 73-474, § 3(a), 48 Stat. 1236, 1237 (1934). Had the tax been adjusted for inflation, it would be roughly $3,700 today. McClelland, *supra* note 190. And, in fact, Senators and Representatives recognized that the purpose of this excise tax was to allow Congress to use its taxing power to regulate the "evil" of machine guns and sawed-off shotguns. Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 611 (1995). And the legislative history was even more explicit about the regulatory purpose behind the tax:

> The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.

H.R. REP. NO. 1780, at 1 (1934). Of course, the fact that Congress enacted a draconian tax on sawed-off shotguns, machine guns, silencers, and similar firearms tells us nothing about the permissible line for imposing a tax on all firearms today. In the first place, *Heller* was decades from being decided when Congress enacted the National Firearms Act. In the second place, *Heller*'s guidance likely would not have applied to machine guns and sawed-off shotguns even had

cost per gun exceeds the ceiling, the government will collect less revenue than it needs. It can recoup that in future years by keeping the tax at the ceiling amount until it has made up for the shortfall.

C. EARMARKING REVENUES

Although the bulk of this Article has been dedicated to the design of an appropriate tax system, how state governments use the revenue from the firearms tax is just as critical as the methods they use to raise it.[242] Here, because the goal of the firearms tax is to compensate third parties for the costs gun violence imposes on them, the revenue from the firearms tax must be earmarked exclusively to pay for those costs.[243]

Governments commonly earmark taxes imposed on a narrow base. For example, "airline ticket tax revenue is designated for spending on airports, air traffic control, and other aviation-related infrastructure," while revenue from gas taxes pays for

its analysis been in place. Those were guns used by law enforcement and gangsters, not guns commonly used for self-defense. *See supra* note 82 and accompanying text.

242. *Cf.* KLEINBARD, *supra* note 27, at xxii ("Tax policy is the handmaiden, and spending policy the sovereign.").

243. It is worth pointing out that, although gun violence imposes very clear costs on society, some people could argue that guns also provide positive externalities (that is, benefits to society that aren't full internalized by gun owners). Many gun owners believe that they carry guns, not merely for self-defense, but "as a way to claim their right to self-protection and as representing a duty to protect others." JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 96 (2015). And even without explicitly protecting others, John R. Lott, Jr. argues that broad gun ownership has significant positive externalities, with gun owners bearing the full cost of gun ownership while "receiv[ing] only a small fraction of the total benefits." JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 119 (3d ed. 2010). He asserts that every one-percent increase in gun ownership saves victims more than $3 billion. *Id.* The "more guns, less crime" thesis has been tremendously controversial, and Lott's conclusions have been criticized on a number of grounds. *See, e.g.*, Ian Ayres & John J. Donohue III, *The Latest Misfires in Support of the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1371, 1398 (2003) ("We feel confident concluding that we have indeed shot down the more guns, less crime hypothesis."). Deciding whether guns provide positive externalities, and if so, the amount of those externalities is beyond the scope of this article, however. It is sufficient to say that, if a state legislature believes that gun ownership creates positive externalities, it can also legislate that, by, for instance, reducing the amount of tax on firearms or providing a tax subsidy for firearm ownership.

highways.[244] And, as a practical matter, there is evidence that earmarking tax revenues "reduces resistance to paying taxes."[245]

But beyond the potential for reducing resistance, there is a compelling legal reason to earmark revenue from the firearms tax: it underscores the tax's relationship to actual costs imposed by guns. If the revenue from the firearms tax went into a state's general revenue basket it would be hard to make an argument for why the tax was on such a limited—and constitutionally-protected—base.[246] A broader base, even with lower rates, could raise at least as much revenue, without being aimed at a particular product.

But earmarking the revenues establishes a reason why the tax is aimed specifically at the ownership of firearms. The state will not use the revenues broadly; instead, it will use them to pay for specific costs imposed by firearms. That connection should bolster a state's argument that the tax is not a punitive measure that infringes on gun owners' constitutional rights, but rather acts as a remedial measure meant to correct a specific negative externality.

And how would earmarking work? Broadly, a state government would establish a fund from the revenues raised by the firearms taxes. The state would use that fund to pay for first responder overtime that resulted from gun violence. In addition, individuals who suffered gun violence-related costs could receive reimbursement from the fund. The fund would reimburse the types of injuries the law used to calculate the per gun tax.[247]

Using a government fund to reimburse the costs of negative externalities would not be unique to the firearms tax. Most notably, in 1986, the federal government created the National Vaccine Injury Compensation Program.[248] The Program was instituted to protect vaccine manufacturers from liability claims that

244. BURMAN & SLEMROD, *supra* note 99, at 96.

245. Margaret Wilkinson, *Paying for Public Spending: Is There a Role for Earmarked Taxes?*, 15 FISCAL STUD. 119, 122 (1994).

246. *See supra* notes 136–39 and accompanying text.

247. For example, if the state calculated the cost of gun violence as including police overtime, medical bills from gunshot injuries, and property damage from bullets, an individual could be reimbursed for hospital bills that resulted from a shooting. She couldn't, however, receive reimbursement for lost wages, because the state did not include lost wages in calculating the amount of the tax on firearms.

248. Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National*

could inhibit their ability to produce necessary vaccines, while compensating individuals who suffered unpreventable harms from vaccination.[249] An individual who suffers vaccine-related harms covered by the Program files a petition in the Court of Federal Claims.[250] A successful petitioner receives compensation from a trust fund funded by an excise tax on vaccines.[251] A petitioner who accepts compensation from the trust fund is barred from filing a civil claim against vaccine manufacturers.[252]

While the National Vaccine Injury Compensation Program can serve as a model for the compensation of victims of gun violence, there are some details that would necessarily differ. In the first instance, accepting compensation should not foreclose an injured party's ability to sue the shooter. The federal government recognized the importance of having vaccines, but litigation risk "led manufacturers and investors to question whether vaccines were financially worthwhile."[253] Creating this quasi-no-fault-insurance regime largely eliminated the litigation risk, reducing the cost to manufacturers producing vaccines. The government does not, however, need to provide incentives to shooters to impose costs on society. To the extent a shooter has resources that could reimburse victims of her gun violence, victims should have recourse against those assets.[254]

In addition, the funds should be distributed through an administrative, not judicial, proceeding. It makes sense that the National Vaccine Injury Compensation Program would require a judicial proceeding; vaccine claims, while filed in the Court of

Vaccine Injury Compensation Program, J. HEALTH POL., POL'Y & L. 59, 62 (1999).

249. *Id.*

250. Efthimios Parasidis, *Recalibrating Vaccination Laws*, 97 B.U. L. REV. 2153, 2211 (2017).

251. Ridgway, *supra* note 248, at 62.

252. *Id.* at 63.

253. Parasidis, *supra* note 250, at 2208.

254. Allowing individuals to sue the shooter does create some mixed incentives. If a victim can collect both from the government-administered fund *and* the shooter, she can be reimbursed twice for the same injury. If, on the other hand, she has to reduce the amount she receives from the fund by the amount she receives in a civil suit, she loses the incentive to sue the shooter, and the shooter may not face financial liability for the shooting. Perhaps the ideal solution would be to prohibit victims of gun violence who are compensated by the trust fund from suing the shooter, but provide that the fund has standing to sue the shooter for amounts it has paid out.

Federal Claims, are adjudicated by special masters.[255] The special masters who oversee vaccine claims "were intended to be expert decisionmakers with substantial knowledge of vaccine injuries and substantial authority to structure how each case proceeds."[256] Vaccines require knowledgeable decisionmakers, and semi-adversarial proceedings[257] because the causality between vaccines and injuries is complex and takes significant effort to evaluate.[258]

Demonstrating injury and causality stemming from gun violence is far less complicated. While there may be situations where the injury is attenuated, in most cases an individual can easily demonstrate that she has been injured by gun violence. An administrative process should allow for sufficient oversight of the trust fund and allow for simpler compensation for victims of gun violence. As long as a claimant can demonstrate a harm caused by a firearm, and document the costs of that harm, the fund should generally reimburse the claimant for the harm she suffered.

That reimbursement must face a couple caveats, however. One caveat is when reimbursement is not appropriate. Clearly, if the trust fund operates at the state or local level, it is not going to reimburse all harms stemming from gun violence. If California were to impose a firearms tax and Texas were to decline to impose one, it would make very little sense for the California trust fund to reimburse all victims of a shooting in Texas, for example.

A legislature enacting a firearms tax and earmarked trust fund would have to decide which damages to reimburse and who qualifies for reimbursement. Because the tax is imposed on all gun owners within a particular jurisdiction, I suggest that the trust fund reimburse residents of the jurisdiction—and only residents—irrespective of where their injuries occur.

To do this, of course, a state or local jurisdiction has to define who qualifies as a resident. Many states already have statutes

255. 42 U.S.C. § 300aa-11(a)(1) (2012).

256. Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 807 (2011).

257. *Id.* at 806.

258. The petitioner in a vaccine case has the burden of proof to demonstrate a compensable vaccine-related injury. Parasidis, *supra* note 250, at 2214. The petitioner must substantiate her claims by medical records or medical opinion and must include relevant medical records with her petition. *Id.*

that define residency.[259] The Supreme Court has held that constitutionally "a jurisdiction . . . may tax *all* the income of its residents, even income earned outside the taxing jurisdiction."[260] Although states' definitions of residency differ, nearly half define an individual as a resident if she has a "permanent place of abode" in the state and is physically present in the state for a set amount of time.[261] Other states look at permanent place of abode, without regard to actual physical presence, or actual physical presence without reference to abode.[262] For purposes of determining a victim of gun violence's eligibility to make a claim against the trust fund, states could use precisely the same definition of residency that they use for personal income tax purposes.

As a practical matter, allowing residents to make claims against the fund means that if California were to enact the firearms tax, and a California resident was injured in another state, the injured Californian could claim reimbursement from the state's firearms tax trust fund.[263] At the same time, the inverse should be true: the trust fund should not reimburse non-residents for their injuries stemming from gun violence.[264]

Allowing residents, but not nonresidents, access to the earmarked fund is an intuitive result when a non-resident is injured outside of the jurisdiction with the trust fund. But it is equally necessary when a non-resident is injured within the jurisdiction.[265] If the injured individual resides in a jurisdiction with a

259. *See* Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 543–44 (2014).

260. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995).

261. Zelinsky, *supra* note 259, at 543–44.

262. *Id.* at 544.

263. This is not an unrealistic hypothetical. More than half of the individuals killed in the 2017 Las Vegas mass shooting appear to have been California residents. Alan Gomez & Kaila White, *Here Are All the Victims of the Las Vegas Shooting*, USA TODAY (Oct. 6, 2017), https://www.usatoday.com/story/news/nation/2017/10/06/here-all-victims-las-vegas-shooting/733236001/ [https://perma.cc/56GQ-SWSE]. If California had a trust fund and Nevada did not, the California residents should be able to get reimbursed for their injuries.

264. That means that if Nevada instituted a firearms tax and California did not, those Californians injured in the 2017 shooting would have no recourse in the firearms tax trust fund, but residents of Nevada could claim a reimbursement.

265. It is important that the legislature not limit reimbursement to residents merely to discriminate against non-residents. The privileges and immunities

similar firearms tax and trust fund, she can claim reimbursement from her jurisdiction of residence. But if a taxing jurisdiction will reimburse anybody injured within its boundaries, it potentially sets up a free-rider problem, reducing the incentive for other jurisdictions to impose a firearms tax and trust fund.[266]

Even where the person and the injury qualify for reimbursement, the administrator of the trust fund must determine the amount to be reimbursed. The legislature cannot anticipate any given year's costs stemming from gun violence when setting the rate. Using a three-year rolling average merely provides an approximation of the likely amount of negative externalities gun ownership will cause during a given year.[267] If gun violence spikes, the trust fund may not have enough money to reimburse all of the costs. In addition, because the legislature needs to avoid imposing a draconian tax, it may (deliberately) raise less revenue than it needs to fully fund the trust fund.[268]

During a year when claims against the trust fund exceed the amount in the trust fund, each claimant should only receive a pro rata portion of her claim.[269] The number of unpaid claims would roll over to the next year and be added to the three-year rolling average, subject to the per-gun cap. In addition, the amount by which claimants were underpaid would roll over to

clause of the Constitution bars discrimination against non-residents if there is no substantial reason for the discrimination. "But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." Toomer v. Witsell, 334 U.S. 385, 396 (1948). And what qualifies as a valid reason? The Supreme Court has held, for example, that preferential tuition for state residents meets the constitutional bar because it "furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." Martinez v. Bynum, 461 U.S. 321, 328 (1983). Similarly, the legislature would have to explain that it limited the pool of potential claimants to residents of the jurisdiction because the costs of gun violence ultimately fell on the taxpayers of the jurisdiction.

266. Alternatively, of course, a jurisdiction could choose to pay for any injuries that occur within its boundaries and not pay for injuries that occur outside its boundaries, irrespective of victims' residence. That seems unfair, though: residents of the jurisdiction are subject to the tax when they buy or own firearms, where nonresidents are not. Moreover, it is residents whose taxes pay for the externalities caused by gun violence within the jurisdiction, so the firearms tax is intended, in part, to alleviate those taxpayers' costs.

267. *See supra* note 231 and accompanying text.

268. *See supra* notes 240–41 and accompanying text.

269. Mathematically, that means that if the fund has $750,000, and there are $1 million of claims against it, each claimant will receive seventy-five percent of the amount she claims.

the next year and become a claim for that year, equal in priority to claims that arose in that year.[270] If, in any given year, the firearms tax revenue exceeded claims against the trust fund, the surplus would roll over to pay claims in subsequent years.

These caveats—that a victim who files a claim against the trust fund must be a resident of the jurisdiction and that in some cases the claims will not match the amount of revenue the trust fund has raised—do not undercut the ability of an administrative agency to administer the trust fund. For the most part, questions of residence and amount can be resolved administratively. In the marginal case, where amount, causation, or residence is less clear, the legislature can provide for an administrative or judicial appeals process. It is not necessary, however, to start with the complexity and expense that a semi-adversarial judicial process would require.

D. BEHAVIORAL EFFECTS

Before addressing possible behavioral effects of a firearms tax, it is important to emphasize that the principal purpose behind the tax is *not* to change behavior. It is unlikely that imposing a reasonable Pigouvian tax on firearms and ammunition will meaningfully reduce gun violence, and the tax is certainly not intended to "punish[] innocent and responsible gun owners;"[271] for that matter, it is not intended to punish guilty and irresponsible gun owners. Instead, the principal goal of this proposed firearms tax is to raise revenue to pay for the societal costs of gun violence. Because there is no correlation between individuals' demand elasticities and the social cost they will impose, a general Pigouvian tax will be too blunt an instrument to meaningfully modify individuals' behavior in a targeted manner.[272]

Still, the firearms tax is likely to cause some behavioral change. In the first instance, because it forces gun owners to internalize a higher percentage of the costs of gun ownership, it

270. For instance, imagine that in Year 1, the fund has $750,000, and there are 100 claims against the fund for $10,000 each. Each claimant will be reimbursed $7,500. In Year 2, the three-year rolling average is $800,000. The state will add the $250,000 to the $800,000, and divide the $1.05 million dividend by the number of guns in the taxing jurisdiction. At the same time, each of the 100 individuals has a new claim in Year 2 for $2,500, which will be added to new claims arising in Year 2.

271. Kobayashi, *supra* note 112, at 320.

272. Fleischer, *supra* note 9, at 1703.

may correct market failures to some extent by discouraging individuals from purchasing too many firearms. It is not clear, however, that even this behavioral modification will be meaningful. There is some empirical evidence that hunting demand is relatively indifferent to changes in hunting fees.[273] Of course, hunting fees are different from broad-based taxes, and hunters' elasticities may differ from other gun users', so it is difficult to draw broad conclusions about the effectiveness of a Pigouvian tax at reducing the number of guns individuals acquire.[274] Still, it is at least possible that a firearms tax will have little effect on the rate of gun ownership.

In addition, a firearms tax may encourage gun owners to support policies that will reduce gun violence in the aggregate. Because the tax is calculated by dividing the costs of gun violence by the number of guns in the taxing jurisdiction, there are two ways to reduce the per gun tax. One, of course, is to increase the number of guns in the jurisdiction. Because the number of guns and the amount of gun violence are correlated, though,[275] increasing the number of guns could potentially increase the cost of gun violence.

The second way to reduce the per gun tax is to decrease the cost of gun violence. Less cost, spread over the same number of guns, will also reduce the per gun tax. For the most part, individual gun owners' personal behavior likely has little effect on the total cost of gun violence in a state. But the possibility of reducing their tax bill could provide an additional incentive for gun owners to support reasonable firearm regulation. For example, a gun owner who stores her guns securely in a gun safe can do little to reduce the chances that her guns are used to inflict externalities on others; and she currently has limited incentive to support legislation that would require individuals to store their firearms securely.

But if she paid a firearms tax, and the amount were based on the historic cost of gun violence in her jurisdiction, she may have an incentive to support regulation requiring *all* gun owners to store their firearms securely. That type of regulation would

273. *Firearm and Ammunition Taxes*, RAND CORPORATION (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/essays/firearm-and-ammunition-taxes.html [https://perma.cc/7CN-M7CU].

274. *Id.*

275. *See supra* note 120 and accompanying text.

not impose any additional costs on her as a responsible gun owner because she already meets its requirements, but it could reduce the overall costs of gun violence by reducing gun thefts and suicides, thus ultimately lowering her tax bill. The imposition of this firearms tax would give responsible gun owners incentive to support this type of no-additional-cost regulation.

CONCLUSION

Gun violence in the United States is an enormous, and costly, problem. It has no easy solution. Limiting individuals' ability to own firearms faces significant cultural, political, and constitutional impediments, impediments that are unique to the United States.[276] The uniqueness of United States gun culture means that solutions to gun violence that work elsewhere may not be viable in the United States.[277]

That is not to say there is nothing we can do to address gun violence. The Supreme Court left the door open to some level of regulation, though lower courts differ on where to draw the line. As Congress and the states attempt to figure out how they can address gun violence in a constitutionally- and politically-viable way, though, there is something states can do to ameliorate the costs gun violence imposes on society: enact a firearms tax.

The tax will not end gun violence; it may not even impact the amount of such violence. But, properly designed, with revenues earmarked appropriately, this type of tax will at least shift the financial cost of gun violence from innocent victims to gun owners themselves. And while the shifting is imperfect because gun owners whose guns will never be used to commit violence will pay the same amount of taxes per gun as those whose guns inflict significant damage, it is impossible to know in advance how much negative externality each gun owner will impose on society. Because the purpose of my proposed firearms tax is primarily to make society financially whole, and not to reduce gun violence, it is unimportant to determine just how much expense

276. *See, e.g.*, Glenn H. Utter & James L. True, *The Evolving Gun Culture in America*, J. AM. & COMP. CULTURES, Summer 2000, at 67, 70.

277. For instance, gun control advocates like to point to Australia which, after a mass shooting, effectively banned all semiautomatic weapons. *See* Clifton Leaf, *How Australia All But Ended Gun Violence*, FORTUNE (Feb. 20, 2018), https://fortune.com/2018/02/20/australia-gun-control-success/ [https://perma.cc/R6S2-JNG9]. But, as we have seen, the blanket ban on a class of guns is likely to violate individuals' Second Amendment right to bear arms.

each gun owner will cause. As long as gun owners as a class internalize the costs of gun violence, society does not have to bear them.

It is important to keep in mind that the financial cost of gun violence, while both real and significant, is far from its only cost. And financial reimbursement for the costs of medical care do not undo the pain or death that firearms can cause. While we can quantify pain and death,[278] reimbursement does not make the pain or death go away. The taxing and reimbursement regime I propose is by no means a substitute for substantive regulation of firearms.

Until that regulation occurs, though, a firearms tax can at least reduce the social costs of gun ownership and reduce the market failures related to firearm ownership. The constitutional impediments to a firearms tax are lower than for regulation, and the constitutional contours are far clearer. Additionally, done at the state level, the firearms tax benefits from an easier political atmosphere, at least in some states, and the natural experiment that federalism allows.

278. *See, e.g.*, Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 168 (2004) (noting that in tort law, compensatory damages include damages "based on the noneconomic effects of victim's pain and suffering").