
YALE LAW & POLICY REVIEW INTER ALIA

The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals

Asha Rangappa*

INTRODUCTION

Following the massacre at Sandy Hook Elementary School in Newtown, Connecticut, several state legislatures moved swiftly to create stronger gun control measures, many of them aimed primarily at restricting gun ownership and availability.¹ But the Newtown killings highlighted a problem that has not yet been addressed: the accumulation of personal arsenals. Adam Lanza was able to carry out the shootings because he was able to easily access a large cache of weapons; Lanza used two handguns and a rifle in his spree, three of the five weapons in his mother's legally-owned, personal arsenal.² As the tragedy revealed, personal arsenals make it possible for criminals and unauthorized individuals to obtain a large number of weapons, increasing the threat to public safety.

Arsenals are on the rise: although gun ownership in the U.S. is declining,³ fewer owners are collecting more weapons, with 20% of gun owners owning 65% of the nation's guns.⁴ Even if these owners obtained their guns legally, they disproportionately contribute to the pipeline of guns that end up in the wrong

* Associate Dean, Yale Law School. Dean Rangappa has previously served as a Special Agent for the Federal Bureau of Investigation.

1. Five states, including New York, Connecticut, and Colorado, passed stricter gun control laws in the wake of the Newtown shootings. James Eng, *After Newtown Shootings, Pro-Gun Measures Also Gain Ground*, MSN NEWS (Apr. 4, 2013), <http://news.msn.com/us/after-newtown-shootings-pro-gun-measures-also-gain-ground>.
2. Adam Lanza took a fourth weapon owned by his mother, a 12-gauge Saiga shotgun, which he left in his car during the shootings. See Michael Melia & Ted Shaffrey, *Adam Lanza, Newtown Gunman, Had an Arsenal of Weapons, Gun Safe, Swords, Search Warrants Reveal*, HUFFINGTON POST (Mar. 28, 2013), http://huffingtonpost.com/2013/03/28/newtown-shooting-search-warrants_n_2970351.html.
3. *A Shrinking Minority: The Continuing Decline of Gun Ownership in America*, VIOLENCE POLICY CENTER, <http://www.vpc.org/studies/ownership.pdf>.
4. Lisa Hepburn et al., *The U.S. Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 16 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2610545/pdf/15.pdf>; see Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN POLITICS (July 31, 2012), <http://www.cnn.com/2012/07/31/politics/gun-ownership-declining>.

hands. More than 232,400 firearms are stolen each year, with household burglaries accounting for almost three times as many stolen guns as other property crimes.⁵ Because of stockpiled weapons, 39% of burglaries involving firearms result in the theft of multiple guns,⁶ the vast majority of which are never recovered.⁷ These weapons, in turn, are either used in crimes or enter the black market and become a source of weapons for other criminals.⁸ In effect, personal arsenals offer a jackpot for individuals who would otherwise be unable to legally obtain firearms on their own.⁹

This article suggests that the federal government can use its taxing power to make it more expensive to build personal arsenals like the one owned by Nancy Lanza in Sandy Hook. Specifically, I argue for an incremental excise tax, which would be imposed on each successive gun after the initial purchase, which would be tax-free. I believe this approach would offer two advantages. First, given the current constitutional landscape, such a tax would be much harder to challenge than a restriction on gun ownership, which directly implicates the Second Amendment. Second, an incremental tax would distribute the costs of arsenals in proportion to the public safety risk created by each individual gun owner. A tax could be implemented with the adoption of universal background checks without limiting an individual's choice to own multiple weapons.

I. LEGAL BACKGROUND

In *District of Columbia et al. v Heller*, the Supreme Court held that the Second Amendment protects an individual's right to bear arms, unconnected to a militia, for self-defense in the home.¹⁰ Although *Heller* left open a wide margin for government regulations on commercial gun sales, prohibitions on ownership by the criminals and the mentally ill, and limitations on guns in

-
5. See Lynn Langton, *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005-2010*, U.S. DEP'T OF JUST. 3 (Nov. 2012), <http://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf>. Other property crimes include motor vehicle theft and other theft. *Id.* at 1.
 6. *Id.* at 3 (noting that “[a]n average of about three guns were stolen during burglaries involving the theft of multiple guns”).
 7. *Id.* at 4 (noting that of the 1.4 million guns stolen from homes between 2005 and 2010, more than 80 percent were never recovered).
 8. See Marianne W. Zawitz, *Guns Used in Crime*, DEP'T OF JUST. 3 (July 1995), <http://www.bjs.gov/content/pub/pdf/GUIC.PDF> (stating that “[a]ll stolen guns are available to criminals by definition” since they are unable to obtain weapons legally).
 9. See, e.g., Pierre Thomas et al., *‘Hot’ Guns Fueling Crime, U.S. Study Says*, ABC WORLD NEWS (Jan. 25, 2013), <http://abcnews.go.com/US/hot-guns-fueling-crime-us-study/story?id=18318610>; Todd South, *ATF Study: Criminals Use Stolen Guns*, TIMES FREE PRESS (June 11, 2013), <http://www.timesfreepress.com/news/2013/jun/11/criminals-use-stolen-guns-atf-study-says/> (referencing sentencing of six men in a burglary of a home where sixteen guns were stolen and then resold).
 10. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (incorporated against the States through the Fourteenth Amendment in *McDonald v. Chicago*, 561 U.S. 3025 (2010)).

public places,¹¹ outright restrictions on gun ownership still face an uphill battle moving forward as courts try to delineate the permissible constitutional boundaries of the Second Amendment.¹²

By contrast, the Supreme Court has consistently upheld broad use of the federal taxing power¹³ as constitutional, most recently in *National Federation of Independent Business et al. v. Sebelius*.¹⁴ Characterizing the penalty imposed by the Affordable Care Act on individuals who choose not to obtain health insurance as a tax, Chief Justice Roberts emphasized that, while the penalty might affect individual behavior, the “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.”¹⁵ Because taxes simply “nudge” behavior in a desired direction without directly curtailing individual rights,¹⁶ they are an effective vehicle to circumvent otherwise limited federal power. The government uses the tax code to create incentives for a number of personal choices that cannot be mandated directly, such as marriage, energy-efficient car and home purchases, charitable giving, and saving for retirement.

The excise tax, in particular, can be a powerful tool to shape social policy. Typically a tax on specific goods,¹⁷ the federal excise tax has been a favored way to raise revenue and/or discourage the purchase of specific kinds of items since the Court first upheld an excise tax levied on carriages—then a luxury vehicle—in 1796.¹⁸ The reach of excise taxes now extends beyond (modern) luxury automobiles to alcohol, gasoline, tires, airline tickets, coal, and insurance policies issued by foreign companies, among other items.¹⁹ A carefully crafted excise tax on guns could similarly reduce the stockpiling of weapons by gun owners and encourage them to purchase safer guns.²⁰

11. *Id.* at 626-27.

12. *See, e.g., Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding unconstitutional a law preventing individuals from carrying concealed weapons outside the home); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding law preventing issuance of a public concealed-carry permit except for “proper cause”); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (upholding law requiring public concealed-carry permit applicants to show a “good and substantial reason” why such permit should issue).

13. U.S. CONST. art. I, § 8, cl. 1.

14. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

15. *Id.* at 2600.

16. *See* CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE* 1-14 (2008).

17. Excise taxes can also be levied on activities, such as gambling or indoor tanning. *See Excise Tax*, INTERNAL REVENUE SERV. (Sept. 3, 2013), <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Excise-Tax>.

18. *Hylton v. United States*, 3 U.S. (Dall.) 71 (1796).

19. 26 U.S.C. § 32 (2012).

20. Cigarettes, which have been subject to an excise tax since the 1860s and are one of the most heavily taxed items today, illustrate the effectiveness of taxes on consumption. The federal excise tax was raised from \$0.39 to \$1.01 per pack in 2009. Most states levy an excise tax averaging \$1.46 per pack (ranging from \$1.70 in Missouri to \$4.35 in New York), and some localities impose an additional excise tax, such as New York City, which adds another \$1.50 per pack. An analysis

Currently, manufacturers pay a federal excise tax of 10% on handguns and 11% on long guns, some or all of which is passed onto the consumer in the price paid for the weapon.²¹ No case has yet challenged the firearms excise tax on Second Amendment grounds,²² although a First Amendment case in 1983, *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, reviewed the constitutionality of a tax singling out the press.²³ In that case, the Court held that a use tax²⁴ on paper and ink products consumed in publications, which affected a small number of newspapers, created an unconstitutional burden on the papers' First Amendment rights.²⁵ In establishing the right to bear arms as a fundamental right, *Heller* has opened the door for courts to potentially examine similar taxes under heightened scrutiny,²⁶ despite the wide latitude the government enjoys in exercising its taxing power, this power might be more limited in the context of the individual rights articulated in *Heller*.

Even so, taxes do not interfere with Second Amendment rights in the same way they do with First Amendment rights.²⁷ This is because speech begets more speech, and in order to fully exercise this right it must be presumptively unlimited. By contrast, the Second Amendment right articulated in *Heller* is inherently limited to what is necessary to achieve the specific goal of self

by the Congressional Budget Office suggests that an additional \$.50 increase in the federal excise tax for cigarettes, which would increase their current price by about 10 percent, would reduce the number of packs purchased by almost 6.5 percent in 2021. *Raising the Excise Tax on Cigarettes: Effects on Health and the Federal Budget*, CONG. BUDGET OFF. 1-2 (June 2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-13-Smoking_Reduction.pdf.

21. 26 U.S.C. § 4181 (2012).
22. See Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1084-86 (2009) (examining the threat of Second Amendment claims against the federal firearms excise tax in light of *Heller*).
23. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983).
24. *Id.* at 577. The federal firearms excise tax is also considered a "use tax," as its proceeds are used to support the activities of those taxed by funding grants for wildlife restoration and hunter education. A "sin tax," by contrast, is an excise tax levied on items or activities considered to be social vices and are placed in the general fund. See M. LYNN CORN & JANE G. GRAVELLE, *Guns, Excise Taxes, and Wildlife Restoration 2*, CONG. RESEARCH SERV. (2013), available at <http://www.fas.org/sgp/crs/misc/R42992.pdf>.
25. *Minneapolis Star*, 460 U.S. at 591.
26. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). See cases cited *supra* note 12, all of which applied intermediate scrutiny in the Second Amendment analysis.
27. See Cook, Ludwig, & Samaha, *supra* note 22, at 1087 (examining the difference between First and Second Amendment litigation when applying the anti-targeting principle in *Minneapolis Star*). Further, since archery equipment is taxed at the same rate as long guns and the revenue placed in the same fund as the proceeds from the firearms tax, firearms are not singled out in the same way as the newspapers in *Minneapolis Star*. See CORN & GRAVELLE, *supra* note 24, at 1-2.

THE COST OF FREEDOM

defense; effectively exercising this right—against an intruder in the home, for example—requires, and is only physically possible, using one gun. In this sense, guns are more like cars: having many of them might offer a variety of ways to reach an objective, but no matter how many an individual owns, ultimately only one is necessary and sufficient. Thus, to the extent that an excise tax might be vulnerable to a Second Amendment challenge, this claim can be avoided by waiving the tax for the first gun purchase an individual makes. Since the right to self defense is fully secured with at least one weapon (with potentially unlimited ammunition²⁸), exempting the first gun from the tax would leave an individual's Second Amendment right unencumbered and would allow taxes on additional gun purchases to pass constitutional muster.

II. LIMITING ARSENALS WITH AN INCREMENTAL EXCISE TAX ON GUNS

Only 20.8% of individuals in the United States reported owning a gun in 2010, representing a 32% decline in personal gun ownership since 1985.²⁹ This parallels a similar trend in household gun ownership, which has declined 40% over the last four decades.³⁰ Nevertheless, more guns are concentrated in fewer hands, with an estimated 57 million adults owning 283 million firearms.³¹ About half of all gun owners own four or more weapons, with the latter group owning an average of twelve guns per person;³² the top 3% of gun owners own twenty-five or more.³³ Even when the individual outliers owning the most guns are removed from the calculation, gun owners overall own an average of five weapons per person.³⁴ The distribution of firearms among owners suggests that the current flat excise tax³⁵ does not financially deter individuals from creating personal arsenals.³⁶

In order to reduce the gun stockpiles and curb their role in facilitating criminal activity, the excise tax needs to be structured differently. Specifically,

-
28. The use tax in *Minneapolis Star* is more analogous to a tax on ammunition; significantly burdening the use of ammunition would curtail how effectively an individual can defend himself, even with a single weapon.
 29. *A Shrinking Minority*, *supra* note 3, at 3.
 30. *Id.* at 2; see Robert Gebeloff & Sabrina Tavernise, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html?pagewanted=all&_r=0.
 31. Hepburn et al., *supra* note 4, at 17.
 32. *Id.*
 33. *Id.*
 34. *Id.*
 35. See CORN & GRAVELLE, *supra* note 24, at 1.
 36. Transfers of weapons between owners are exempted from the tax, leaving a vast swath of nonretail gun sales from being subject to it all. Instead, rifles, shotguns, and machine guns are subject to a \$200 transfer tax; all other weapons are subject to a \$5 transfer tax. See 26 U.S.C. § 5811 (2006), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleE-chap53-subchapA-partII-sec5811.pdf>.

an excise tax designed to limit the accumulation of weapons by a single individual would increase with each additional gun purchased after the first, which would be tax-free. Thus, for example, the tax on successive firearm purchases by the same person might increase by 10% per weapon, so that by the sixth weapon the purchaser would pay half the value of the weapon in taxes. The tax would not prevent individuals from owning as many guns as they like, but would make the choice to create an arsenal significantly more expensive.³⁷

Raising the flat excise tax could similarly reduce the number of weapons purchased but would not distribute the costs created by arsenals among gun owners as accurately. This is because while any gun owner potentially poses a risk to public safety simply by owning a gun—which has some likelihood of ending up in the hands of unauthorized users through theft or burglary—gun owners who own more firearms contribute to this risk at a higher rate by potentially introducing more weapons at a time to the pipeline of stolen guns.³⁸ Further, as noted above, with each additional weapon an owner moves farther from the goal of self-defense and closer to luxury or convenience. An incremental tax is therefore progressive, making the cost of owning additional weapons proportional to the risks they pose and the means of each owner.

III. IMPLEMENTING AN INCREMENTAL EXCISE TAX

Under the current system, in which private gun sales are unregulated (the so-called “gun show loophole”), tracking the number of guns a person owns would not be feasible. However, if universal background checks were required for all gun sales—a proposal with widespread political support—then tracking gun ownership would be feasible, because there would be an official monitor at the point of every initial sale or transfer.³⁹ Each background check could be supplemented with a requirement of a certificate of title, similar to those used with vehicles and houses, which would be issued to the initial buyer and

37. Such an excise tax also has the potential to raise significant revenue from those who remain undeterred from accumulating firearms. The existing federal firearms excise tax generated approximately \$555.3 million in revenue in FY2012. See CORN & GRAVELLE, *supra* note 24, at 1. States and localities can also use firearm taxes to raise revenue: in February 2013, Cook County, Illinois became the first large locality to approve a gun excise tax of \$25 per gun, which is expected to raise \$600,000 for this year. See Penelope Lemov, *Gun Taxes and State Revenues*, GOVERNING (Feb. 14, 2013), <http://www.governing.com/columns/public-finance/col-guns-money-states-localities-taxes.html>.

38. The concentration of guns mirrors the rate of gun thefts. For example, the South and rural areas have the highest concentration of gun ownership. However, while the South and rural areas comprise 37% and 17% of all households in the U.S., these regions respectively experience 56% and 34% of all burglaries involving gun theft, respectively. See Hepburn, Miller, Azrael, & Hemenway, *supra* note 4, at 17; Langton, *supra* note 5 at 5; see also J. David Goodman, *Seized Guns Offer Look at Pipeline from South*, N.Y. TIMES (Aug. 19, 2013), <http://www.nytimes.com/2013/08/20/nyregion/gun-seizure-exposes-pipeline-from-south.html> (discussing gun trafficking from the South).

39. Michael Martinez, ‘*Universal Background Check: What Does It Mean?*’, CNN (Jan. 28, 2013), <http://www.cnn.com/2013/01/14/us/universal-background-checks/index.html>.

THE COST OF FREEDOM

transferred to subsequent owners. A title would be required only for those weapons most likely to be stolen and used in crime—handguns and semi-automatic rifles and shotguns⁴⁰—allowing for the tax to be targeted to those firearms that pose the greatest public safety risk and leaving owners free to purchase recreational and low-caliber weapons without being subject to the incremental tax. A title system could be incorporated into the existing regulatory infrastructure,⁴¹ so the government could log the number of guns bought and sold between individuals, and track the number of taxable weapons owned by an individual at a given time.

Because a title would be issued and used only to assess the correct amount of tax for any purchase, it would not impact or restrict an individual's eligibility to own a weapon and therefore avoid Second Amendment concerns.⁴² In this regard, a title requirement is far less onerous and intrusive than the licensing

-
40. The stolen gun file at the FBI's National Crime Information Center lists 2 million reported stolen firearms, of which 60% are handguns, 22% are rifles, and 17% are shotguns. Based on the trace requests received by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) to trace the weapons used in crime, 79% of crimes involved handguns, 11% rifles, and 10% shotguns. See Zawitz, *supra* note 8, at 3-4.
 41. BATFE already operates a National Tracing Center, which monitors the movement of guns including multiple guns sold to the same purchaser. Since BATFE would be the enforcement entity for the excise tax, expanding the existing databases at the National Tracing Center would not require much additional infrastructure, and would also supplement efforts by the agency to detect the pattern of stolen and trafficked guns. See *Fact Sheet: National Tracing Center*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Feb. 2013), <http://www.atf.gov/publications/factsheets/factsheet-national-tracing-center.html>.
 42. Another option to avoid Second Amendment concerns would be to waive the incremental excise tax, as well as the title requirement, for guns that contain safety features, such as "smart gun" technology, which make guns less amenable to criminal activity. These safety features could include biometric trigger locks, which use sensors to read an individual's fingerprint, allowing only the registered owner of a weapon to use it; a stolen weapon with this feature would be unusable by a criminal and could prevent an incident like Newtown. Another could be microstamping (also known as ballistic imprinting), which allows law enforcement to immediately trace the weapon used in a crime based on just the cartridge, making it less appealing to criminals. A safety exception provision would not only allow gun owners an avenue through which to opt out of both the tax and additional government oversight, but would also further reduce the risks created by arsenals by encouraging gun enthusiasts to purchase safer guns. This kind of shift occurred with tax incentives in the car industry, which increased sales of then-nascent hybrid cars by 5% between 2000 and 2006. See Kelly Sims Gallagher & Erich Muehlegger, *Giving Green to Get Green: Incentives and Consumer Adoption of Hybrid Vehicle Technology* 61 J. ENVIRON. ECON. MANAGE. 1, 7 (2010), available at <http://fletcher.tufts.edu/CIERP/research/~media/Fletcher/Microsites/CIERP/Publications/2011/Gallagher11GivingGreenGetGreen.pdf>. The tax incentives for hybrid vehicles typically involved income tax deductions which could be taken on an income tax return; since an excise tax is incurred at the point of sale, the savings would be realized immediately and likely have an even greater impact on consumer behavior, particularly on those who want to own numerous guns and would otherwise be subject to increasing tax rates.

and registration requirements already in place for certain kinds of weapons at the federal and state levels.⁴³

CONCLUSION

The gun control legislation passed since the Sandy Hook shootings has largely addressed the kinds of weapons that may be sold or who may purchase them. But a larger problem highlighted by shootings has to do with the accumulation of weapons by individuals who are legally entitled to own them. As the Sandy Hook tragedy illustrates, arsenals like the one owned by Nancy Lanza create a significant public safety risk by making available a large number of weapons to people unauthorized to use them. The continued stockpiling of guns by a subset of gun owners directly and indirectly exposes weapons to individuals to whom they do not belong.

Given the murky constitutional landscape after *Heller*, an incremental excise tax allows the federal government to reduce the risks posed by arsenals while sidestepping a thorny civil liberties issue. A tax on successive gun purchases makes the choice to own a personal arsenal more expensive in proportion to the social costs imposed by the gun owner. Using the tax code to limit arsenals offers the possibility to influence this choice while preserving individual freedom.

43. See, e.g., 26 U.S.C. § 5841 (2006) (outlining registration requirements for specific weapons); N.Y. PENAL LAW § 400 (McKinney 2013) (outlining state firearms licensing requirements). At the same time, a title requirement could easily be incorporated into more stringent licensing and registration requirements if they already exist or are enacted.