

# ANALYZING GUN-VIOLENCE-PREVENTION TAXES UNDER EMERGING FIREARM FEE JURISPRUDENCE

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## ABSTRACT

Gun and ammunition taxes and fees have long been used to fund wildlife conservation programs and regulatory schemes that ensure guns are being purchased and possessed lawfully. In recent years, taxes have been proposed as a policy tool to help mitigate the staggering social and economic costs of gun violence by providing a reliable source of funding for gun safety and violence prevention programs. These proposed “gun-violence-prevention taxes” have been met with opposition, including from Second Amendment litigants who argue that courts should strike down gun and ammunition taxes under the Supreme Court’s First Amendment fee jurisprudence—a body of cases examining taxes on protected expressive or religious activity. This Article aims to evaluate that argument under accepted principles of both First and Second Amendment law. Although just ten years have passed since *Heller* recognized an individual right to possess handguns in the home for self-defense, this Article argues that enough is known about the history of gun and ammunition taxes, the differences between the First and Second Amendments, and the decade of post-*Heller* lower-court jurisprudence to conclude that most proposed gun-violence-prevention taxes are constitutional.

## I. INTRODUCTION

The American gun lobby did not obstruct—and today supports—a 1937 federal law that diverts proceeds from a firearm and ammunition excise tax to fund wildlife conservation.<sup>1</sup> The 1937 law came about after decades of

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<sup>1</sup> *Pittman-Robertson Act: Friend of the Hunter & Hunted*, NRA-ILA INST. FOR LEGIS. ACTION (Aug. 28, 2001), <https://www.nraila.org/articles/20010828/pittman-robertson-act-friend-of-the-hu>

overhunting left game animals endangered, leading the American conservation movement to support license requirements and fees for hunters to fund the rescue of endangered species.<sup>2</sup> These efforts culminated with the federal Pittman-Robertson Federal Aid in Wildlife Restoration Act, which directs funds to conservation efforts from a ten-to-eleven percent federal tax on the sale of guns and ammunition by manufacturers, producers, and importers.<sup>3</sup> The Pittman-Robertson Act has been credited with bringing North American game animals back from the brink of extinction.<sup>4</sup>

Today, more Americans own firearms for self-defense than for hunting,<sup>5</sup> and with the deer population replenished, many would agree that gun violence is a bigger problem than game extinction.<sup>6</sup> Over the last few decades, certain gun crimes—including mass shootings and gun thefts—have increased,<sup>7</sup> and although overall homicide rates declined, gun deaths have recently spiked as a percentage of homicides.<sup>8</sup> From 2015 to 2016, the last year for which federal data is available, gun deaths rose by six percent<sup>9</sup> and nonfatal gun injuries jumped by nearly forty percent.<sup>10</sup> These deaths and

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(commending the Act as “a rare legislative model for efficiency and a godsend for hunters and animals alike”).

<sup>2</sup> *Decline in Hunters Threatens how U.S. Pays for Conservation*, NPR: ALL THINGS CONSIDERED (Mar. 20, 2018), <https://www.npr.org/2018/03/20/593001800/decline-in-hunters-threatens-how-u-s-pays-for-conservation>.

<sup>3</sup> Pittman-Robertson Wildlife Restoration Act, ch. 899, § 4, 50 Stat. 917 (1937) (current version at 16 U.S.C. § 669-669k (2012)), <https://legcounsel.house.gov/Comps/Pittman-robertson%20Wildlife%20Restoration%20Act.pdf>.

<sup>4</sup> NRA-ILA, *supra*, note 1.

<sup>5</sup> *Most Gun Owners Cite Protection as a Major Reason for Owning a Gun*, PEW RES. CTR. (Jun. 21, 2017), [http://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/psdt\\_2017-06-22-guns-00-06/](http://www.pewresearch.org/fact-tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/psdt_2017-06-22-guns-00-06/).

<sup>6</sup> Jennifer De Pinto et al., *CBS News Poll: American Attitudes Toward Gun Violence*, CBS NEWS (Dec. 11, 2017), <https://www.cbsnews.com/news/cbs-news-poll-americans-attitudes-to-gun-violence-sandy-hook-newtown-anniversary/>.

<sup>7</sup> Rob Arthur, *No Matter How You Measure Them, Mass Shooting Deaths Are Up*, FIVETHIRTYEIGHT (Nov. 7, 2017), <https://fivethirtyeight.com/features/no-matter-how-you-measure-them-mass-shooting-deaths-are-up/>; BUR. OF ALCOHOL, TOBACCO & FIREARMS, FEDERAL FIREARMS LICENSEE (FFL) BURGLARY AND ROBBERY STATISTICS FOR CALENDAR YEARS 2013 – 2017 (2018), <https://www.atf.gov/firearms/docs/undefined/ffl-robberystats2018pdf/download>; *see also* Brian Freskos, *Missing Pieces*, TRACE (Nov. 20, 2017), <https://www.thetrace.org/features/stolen-guns-violent-crime-america/>.

<sup>8</sup> Christopher Ingraham, *Guns are Responsible for the Largest Share of U.S. Homicides in Over 80 Years, Federal Mortality Data Shows*, WASH. POST: WONKBLOG (Apr. 2, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/04/02/guns-are-now-responsible-for-the-largest-share-of-american-homicides-in-over-80-years-federal-mortality-data-show/>.

<sup>9</sup> GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, FACTS ABOUT GUN VIOLENCE 2 (May 2018), <http://lawcenter.giffords.org/wp-content/uploads/2018/05/Facts-About-Gun-Violence-5.10.18.pdf> (citing fatal and non-fatal injury data published by the Centers for Disease Control and Prevention).

<sup>10</sup> *Id.*

injuries increased even while advancements in trauma medicine should have made gun injuries more survivable.<sup>11</sup>

Given these sobering statistics, it is unsurprising that commentators and elected officials have advocated for using firearm and ammunition taxes to help tackle the problem of gun violence the same way Pittman-Robertson tackled overhunting.<sup>12</sup> State and local gun or ammunition tax legislation has been proposed (and in some cases, enacted) to fund cash-strapped crime victims' compensation programs, public safety programs, and gun-violence research.<sup>13</sup> Some proposals address gun violence on the community level, such as by dedicating resources to high-violence areas or local trauma centers.<sup>14</sup> All of these tax proposals might be grouped together under the umbrella of "gun-violence-prevention taxes."

Unlike Pittman-Robertson, modern gun-violence-prevention tax proposals have met strong objections during the legislative process and in litigation.<sup>15</sup> Opponents of gun and ammunition taxes argue that the taxes burden Second Amendment rights and thus must be reviewed under a demanding version of strict scrutiny; they claim that taxes funding violence-prevention efforts fail to meet this standard.<sup>16</sup> Opponents have raised this argument to try to invalidate even relatively minimal measures, such as a county's \$25 gun tax and a \$5 portion of a state's background checks fee.<sup>17</sup> In particular, they have sought to draw support from First Amendment "fee jurisprudence," a body of Supreme Court decisions that treat some fees—

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<sup>11</sup> See Anupam Jena et al., *Does the Declining Lethality of Gunshot Injuries Mask a Rising Epidemic of Gun Violence in the United States?*, 29 J. GEN. INTERN. MED. 1065, 1067–68 (2014).

<sup>12</sup> See, e.g., Kathryn Varn, *Democratic Candidate for Florida Governor Wants to Tax Bullets to Fund School Safety*, MIAMI HERALD (Jun. 1, 2018), <http://www.miamiherald.com/news/politics-government/state-politics/article212368729.html>; see also Asha Rangappa, *The Cost of Freedom: Using the Tax Power to Limit Personal Arsenals*, 32 YALE L. & POL'Y REV. INTER ALIA 17, 18 (2013) (proposing an incremental gun tax to deter stockpiling firearms in "personal arsenals" like the one accessed by the Sandy Hook shooter), [https://ylpr.yale.edu/sites/default/files/IA/the\\_cost\\_of\\_freedom\\_32\\_yale\\_l\\_poly\\_rev\\_inter\\_alia\\_17\\_2013.pdf](https://ylpr.yale.edu/sites/default/files/IA/the_cost_of_freedom_32_yale_l_poly_rev_inter_alia_17_2013.pdf).

<sup>13</sup> See *infra* notes 95–96 and accompanying text.

<sup>14</sup> See, e.g., H.B. 5167, 97th Leg., Reg. Sess. (Ill. 2012) (proposed firearm tax to fund grants to trauma centers in high-crime areas); A.B. 187, 2013-2014 Leg., Reg. Sess. (Cal. 2013) (proposed ammunition tax to fund public safety programs in high-crime municipalities).

<sup>15</sup> See, e.g., Andrew Ozaki, *Bill to Tax Ammo Draws Fire in Legislature*, KETV 7 OMAHA (Jan. 24, 2018), <http://www.ketv.com/article/bill-to-tax-ammo-draws-fire-in-legislature/15876387>; Jonathan Bilyk, *Gun Rights Group Lawsuit Targets New Cook County Ammo Tax*, COOK CTY. REC. (Dec. 22, 2015), <https://cookcountyrecord.com/stories/510654230>; Aaron Smith, *NRA Sues Seattle Over \$25 Gun Tax*, CNN MONEY (Aug. 25, 2015), <http://money.cnn.com/2015/08/25/smallbusiness/nra-seattle-gun-tax-lawsuit/index.html>.

<sup>16</sup> See, e.g., *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018) (noting plaintiff's argument that the court should apply strict scrutiny to review a challenge to a \$5 portion of a state's background checks fee).

<sup>17</sup> See Complaint at 1, *Guns Save Life v. Ali*, No. 2015-CH-18217 (Ill. Cir. Ct. filed Dec. 17, 2015) (citing *Follett v. Town of McCormick*, 321 U.S. 573, 578 (1944)); *Bauer*, 858 F.3d at 1222.

including those that raise general revenue through taxes on protected activity—like presumptively unconstitutional prior restraints.<sup>18</sup>

This Article argues that it is misguided to import First Amendment fee jurisprudence without modification into the very different context of gun-violence-prevention taxes. These proposed taxes do not seek to raise general revenue for a city or state, but rather, address specific consequential costs of gun violence that flow from the purchase, possession, and proliferation of guns and ammunition. Moreover, First Amendment fee jurisprudence arose from a concern about fees or taxes being used as a prior restraint to suppress protected expression.<sup>19</sup> Opponents of gun and ammunition taxes have offered no basis to apply the prior-restraint doctrine in the Second Amendment context, where firearm licensing requirements have been upheld and recognized as necessary incidents to permissible laws regulating who may possess and carry firearms.<sup>20</sup>

This Article seeks to do what gun and ammunition tax opponents have not yet done: evaluate such taxes based on accepted principles of First *and* Second Amendment law. To the extent there is a “Second Amendment fee jurisprudence,” it is in early development: Just ten years have passed since *Heller* recognized an individual right to possess handguns in the home for self-defense<sup>21</sup> while leaving many issues open.<sup>22</sup> Despite this, the authors believe that enough is known about the history of gun and ammunition taxes, the differences between the First and Second Amendments, and the decade of post-*Heller* lower-court jurisprudence to conclude that most proposed gun-violence-prevention taxes are permissible.

This Article identifies three main arguments in favor of gun-violence-prevention taxes’ legality. *First*, these taxes are constitutional because they are historically longstanding. *Heller* classified certain regulations as “presumptively lawful,” including “conditions and qualifications of the commercial sale of arms” and other longstanding regulations.<sup>23</sup> Gun and ammunition taxes fall into this category. Because they are firmly rooted in

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<sup>18</sup> Jimmy Swaggart Minis. v. Bd. of Equalization, 493 U.S. 378, 389 (1990).

<sup>19</sup> *Jimmy Swaggart*, 493 U.S. at 386, 389.

<sup>20</sup> *E.g.*, *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1249 n.2, 1253–55 (D.C. Cir. 2011); *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 278 (D.C. Cir. 2015); *Berron v. Ill. Concealed Carry Licensing Rev. Bd.*, 825 F.3d 843, 847 (7th Cir. 2016).

<sup>21</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

<sup>22</sup> *E.g.*, J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009) (writing one year after *Heller*: “the actual holding of [*Heller*] does not provide much guidance for future cases”); *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (writing two years after *Heller*: “much of the scope of the right remains unsettled”); Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1434 (2018) (ten years out, “[d]isputes about the underlying purposes and themes of the Second Amendment remain important and, in significant ways, unresolved”).

<sup>23</sup> *Heller*, 554 U.S. at 626–27, 627 n.26.

history and tradition, it is inappropriate to apply an imported First Amendment doctrine that would potentially invalidate these taxes despite *Heller*'s cautioning that historical regulations are lawful.<sup>24</sup>

*Second*, even if First Amendment fee jurisprudence were applied to gun and ammunition taxes (despite these taxes' long history and the distinctive nature of First and Second Amendment rights), a moderate tax employed to mitigate the social and economic costs of gun violence is consistent with the jurisprudence. The Supreme Court's First Amendment precedents recognize that taxes may fund efforts to mitigate potentially harmful effects of protected activities, which is exactly what gun-violence-prevention taxes do.<sup>25</sup>

*Third*, considered apart from the First Amendment lens, the Second Amendment authorizes gun-violence-prevention taxes because the Amendment allows for regulations that substantially further public safety goals without materially impeding individuals' self-defense rights.<sup>26</sup> As they would with the Pittman-Robertson excise tax, courts conducting Second Amendment analyses of gun and ammunition taxes are likely to either conclude that gun and ammunition taxes do not implicate the Second Amendment at all, or that the taxes do enough to reasonably further gun violence prevention efforts to survive heightened constitutional scrutiny.

The three parts of this Article address each argument. Part I surveys historical gun and ammunition taxes and fees, summarizes modern proposals, and argues that the longevity of these taxes and fees weighs in favor of their constitutionality. Part II.A reviews First Amendment fee jurisprudence and authorities suggesting that this body of law should not affect analysis of gun and ammunition taxes, while Part II.B assumes "fee jurisprudence" applies and argues that most gun and ammunition taxes would satisfy such scrutiny. Part III evaluates the strength of the justifications for gun taxes and fees under post-*Heller* Second Amendment doctrines and concludes that most taxes either would not pose a constitutionally significant burden, or would survive

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<sup>24</sup> *Id.*

<sup>25</sup> See *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943) (suggesting that "a nominal [fee], imposed as a regulatory measure and [narrowly drafted] to defray the expense of protecting those on the streets and at home against the abuses of solicitors" may be constitutional).

<sup>26</sup> Since *Heller*, courts reviewing Second Amendment claims often use a sliding-scale approach to heightened scrutiny, under which "the level of scrutiny . . . depend[s] on 'the nature of the conduct being regulated and the degree to which the challenged law burdens the right,'" *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013), and a lower level of scrutiny is applied to laws that do not burden "core" Second Amendment rights. See, e.g., *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012). The sliding-scale is "consistent with [courts'] jurisprudential experience analyzing other enumerated rights." *Kachalsky*, 701 F.3d at 93. Under these precedents, a moderate gun-violence-prevention tax could be subject to intermediate scrutiny, which generally asks whether a challenged measure is "substantially related to an important governmental objective." E.g., *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) (citations omitted).

heightened scrutiny on grounds that the taxes adequately and reasonably mitigate the dangers of gun acquisition and ownership.<sup>27</sup>

## II. GUN-VIOLENCE-PREVENTION TAXES ARE CONSISTENT WITH THE SECOND AMENDMENT BECAUSE THEY ARE HISTORICALLY LONGSTANDING

In its 5–4 ruling in *Heller*, the Supreme Court held that the Second Amendment protects an individual right of law-abiding citizens to possess an operable handgun in the home for self-defense.<sup>28</sup> The Court cautioned that like all other rights, the Second Amendment has limits.<sup>29</sup> The Court identified a non-exhaustive list of “presumptively lawful” regulations that were intended to survive *Heller*, including “longstanding prohibitions” on gun possession and “conditions and qualifications on the commercial sale of firearms.”<sup>30</sup>

*Heller* did not conduct “an exhaustive historical analysis . . . of the full scope of the Second Amendment.”<sup>31</sup> In subsequent cases considering the scope of the Amendment, lower courts have disagreed on how old a law must be to be considered “longstanding” and thus, presumptively lawful.<sup>32</sup> These courts have tended to apply a two-step approach to Second Amendment challenges, asking at step one whether the challenged regulation burdens conduct that is protected or unprotected by the Second Amendment.<sup>33</sup>

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<sup>27</sup> The term “tax” usually refers to a charge that raises public revenue, whereas “fee” typically describes a charge that defrays the cost of government regulation. *See infra* note 75. This Article focuses on taxes but is informed by arguments made in litigation over gun-related fees as well. For clarity we will use the term “fee” and “tax” to characterize (1) charges for providing a regulatory service and (2) revenue raising measures, respectively.

<sup>28</sup> *Heller*, 554 U.S. at 635.

<sup>29</sup> *Id.* at 626.

<sup>30</sup> *Id.* at 626–27, 627 n.26. This statement recognized that “a regulation that is ‘longstanding,’ which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right.” *Heller II*, 670 F.3d at 1253 (citations omitted); *see also infra* note 104 and accompanying text. Note that some courts have found *Heller*’s reference to “conditions and qualifications on the commercial sale of firearms” to be “opaque” and avoided relying solely on this language to uphold a challenged regulation. *Peña v. Lindley*, 898 F.3d 969, 976, 976 n.7 (9th Cir. 2018) (citing *Silvester v. Harris*, 843 F.3d 816, 827–29 (9th Cir. 2016); *see also Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016); *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 967–68 (9th Cir. 2014)).

<sup>31</sup> *Heller*, 554 U.S. at 626.

<sup>32</sup> Compare *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016), with *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). Several courts have recognized that under *Heller*, “a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue.” *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (citations omitted); *see also Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

<sup>33</sup> *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (“As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges”); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (“This two-step rubric flows from the dictates of *Heller*

Conduct may be deemed unprotected if it has been subject to longstanding regulation.<sup>34</sup> Courts only proceed to step two—application of heightened scrutiny—if they decide (or assume without deciding) that the regulation does indeed burden protected conduct.<sup>35</sup> In assessing the constitutionality of a gun-violence-prevention tax under this framework, courts may need to survey the history of analogous fees and taxes to decide if the challenged measure survives review on grounds that such taxes are historically longstanding.<sup>36</sup>

#### A. Early Gun and Ammunition Taxes

The United States has taxed the sale of guns and ammunition by manufacturers, producers, and importers since 1919.<sup>37</sup> This tax is known as the federal Firearms and Ammunition Excise Tax or “Pittman-Robertson,” after sponsors of legislation that amended the tax to designate its proceeds to support state wildlife conservation and restoration.<sup>38</sup> The tax rate is ten percent for handguns and eleven percent for long guns and ammunition.<sup>39</sup> The federal excise tax is still in force today and has not been challenged on Second Amendment grounds during its nearly century-long tenure.

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and *McDonald*”; observing test has been adopted by the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

<sup>34</sup> See *Marzzarella*, 614 F.3d at 91 (“based on the text and the structure of *Heller* . . . longstanding limitations are exceptions to the right to bear arms”) (citing Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009)); see also *Peterson v. Martinez*, 707 F.3d 1197, 1210–12 (10th Cir. 2013); *United States v. Rene E.*, 583 F.3d 8, 12–16 (1st Cir. 2009).

<sup>35</sup> E.g., *Marzzarella*, 614 F.3d at 89; *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 254; *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012).

<sup>36</sup> Note that this historical inquiry could be avoided by assuming without deciding that a challenged regulation burdens the Second Amendment, an approach some courts have favored. *Peña v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., writing for the court as to Part III.B). It also possible that a court could conclude that a gun or ammunition tax is a law “imposing conditions and qualifications on the commercial sale of arms” (*Heller*, 554 U.S. at 626-27), and thus lawful without further review even if *not* longstanding. See *Bauer v. Harris*, 94 F. Supp. 3d 1149, 1155 (E.D. Cal. 2015), *aff’d on other grounds*, 858 F.3d 1216 (9th Cir. 2017). But at least one court has declined to rely solely on this language from *Heller* and engaged in a “full textual and historical review” of a commercial regulation. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682–87 (9th Cir. 2017) (en banc).

<sup>37</sup> *What is Firearms and Ammunition Excise Tax (FAET)?*, TTB ALCOHOL AND TOBACCO TRADE & TAX BUR., <https://ttb.gov/firearms/background.shtml> (last visited Jun. 17, 2018); Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 490 (current version at 26 U.S.C. § 4181 (2012)).

<sup>38</sup> Pittman-Robertson Wildlife Restoration Act, *supra* note 3.

<sup>39</sup> 26 U.S.C. § 4181(a) (2018); 27 C.F.R. § 53.61(a) (2018).

The federal government adopted additional firearm-related taxes in the 1934 National Firearms Act.<sup>40</sup> This law taxed the transfer of particularly dangerous weapons that had gained popularity among organized crime groups, including machine guns, silencers, and short-barreled shotguns.<sup>41</sup> The \$200 tax has not been increased since 1934.<sup>42</sup> Since *Heller*, the National Firearms Act has faced Second Amendment challenges from criminal defendants charged with violating its tax and registration requirements, but it has been uniformly upheld.<sup>43</sup>

There is an even longer history of state firearm and ammunition taxes. As detailed below, most of these taxes predate both the 1919 federal firearm excise tax and the National Firearms Act of 1934. Starting in the mid-1800s, at least twelve states implemented special taxes on gun and ammunition sales, possession, carrying, or use.<sup>44</sup> While additional research might uncover even more laws like this, this history is already significant enough to inform a constitutional analysis of whether a gun-violence-prevention tax is historically longstanding and constitutional under the Second Amendment.

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<sup>40</sup> National Firearms Act (NFA), ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801-5872 (2012)); *see* 27 C.F.R. § 479.82 (2018) (setting \$200 tax); 27 C.F.R. § 479.11 (2018) (defining taxed firearms).

<sup>41</sup> CONG. RES. SERV., GUNS, EXCISE TAXES, WILDLIFE RESTORATION, AND THE NATIONAL FIREARMS ACT 7-8 (2018), <https://fas.org/sgp/crs/misc/R45123.pdf>.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *E.g.*, *United States v. Henry*, 688 F.3d 637, 642 (9th Cir. 2012); *United States v. Zaleski*, 489 F. App'x 474, 475 (2d Cir. 2012) (summary order); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008); *United States v. Cox*, 235 F. Supp. 3d 1221, 1227 (D. Kan. 2017).

<sup>44</sup> This survey of historical gun and ammunition taxes was conducted by searching the Duke Repository of Historical Gun Laws, <https://law.duke.edu/gunlaws>, and consulting Mark Anthony Frassetto's thorough compendium of historical firearm laws. DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws> (last visited June 5, 2018); Mark Anthony Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Jan. 15, 2013) (unpublished manuscript) (available at <https://ssrn.com/abstract=2200991>). An article by Robert Spitzer provides historical context for some of these early gun and ammunition taxes. Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONT. PROBS. 55, 76-78 (2017).

### 1. Taxes on Personal Firearms

At least nine states and territories—Mississippi (1844),<sup>45</sup> North Carolina (1857),<sup>46</sup> Georgia (1866),<sup>47</sup> Alabama (1867),<sup>48</sup> Hawaii (1870),<sup>49</sup> Nebraska (1895),<sup>50</sup> Florida (1898),<sup>51</sup> Wyoming (1899),<sup>52</sup> and Virginia (1926)<sup>53</sup>—required payment of taxes by people who possessed, carried, or used firearms. Three of these states taxed firearms incrementally, exempting one or more weapons from the tax. North Carolina<sup>54</sup> and Mississippi<sup>55</sup> exempted militia or military weapons, and Georgia exempted three personal guns—its annual tax applied only to the fourth and successive firearms.<sup>56</sup>

Most of the taxes ranged from about \$1 to \$15 per firearm, which amounts to approximately \$15 to \$270 in today’s dollars.<sup>57</sup> Florida, however, required owners and carriers of certain rifles to obtain a county license and

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<sup>45</sup> Mississippi taxed “dueling or pocket pistols” at the rate of two dollars per pistol, exempting pistols that were kept for use by “military companies.” *1844 Mississippi Registration and Taxation Law*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1844/mississippi/468676/> (last visited June 5, 2018).

<sup>46</sup> North Carolina adopted a \$1.25 annual tax for pistols that “have been used, worn or carried about” sometime during the year, while exempting weapons “used exclusively for mustering.” Act of Feb. 16, 1859, ch. 25, sched. A, § 27(15), 1858 N.C. Sess. Laws 28, 35–36.

<sup>47</sup> Georgia imposed a \$1 tax on “every gun pistol, musket or rifle over the number of three” kept or owned on any plantation in three counties, to be collected by the county justices and “applied to such county purposes as the said courts shall direct.” Act of Dec. 7, 1866, no. 41, § 1, 1866 Ga. Laws 27, 27–28.

<sup>48</sup> Alabama implemented an annual two-dollar tax on “all pistols or revolvers in the possession of private persons not regular dealers holding them for sale.” *Revised Code of Alabama Page 169, Image 185 (1867)*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1867/alabama/468672/> (last visited June 12, 2018).

<sup>49</sup> When Hawaii was a monarchy, it implemented a \$5 licensing fee that enabled payers to “use and carry fire-arms for sporting purposes, in the District of Kona, Island of Oahu.” Act of July 18, 1870, ch. XX, §§ 1-3, 1870 Haw. Sess. Laws 26, 26, <https://law.duke.edu/gunlaws/1870/hawaii/467533>.

<sup>50</sup> Nebraska authorized the mayor of the city of Lincoln to issue annual concealed weapon licenses and directed the city Treasurer to collect “[a] fee of fifty cents” per license for the police fund. LINCOLN, NEB., REV. ORD. ch. XIV, art. XVI, § 6 (1895).

<sup>51</sup> Florida required owners and carriers of Winchesters or other repeating rifles to obtain a county license and pay a \$100 bond to the Governor. Act of June 2, 1893, ch. 4147, 1898 Fla. Laws 71, 71–72.

<sup>52</sup> Wyoming required hunters to pay a county licensing fee in the amount of one dollar for Wyoming residents and \$40 for non-residents. Act of Feb. 15, 1899, ch. 19, § 14, 1899 Wyo. Sess. Laws 27, 32–33.

<sup>53</sup> Virginia imposed an annual one dollar pistol or revolver tax. 1926 VA. ACTS 285-87 (requiring “every person residing in this State and owning a pistol revolver therein, to pay on or before the first day of January of each year a license tax of one dollar on each pistol or revolver”).

<sup>54</sup> *Supra* note 46.

<sup>55</sup> *Supra* note 45.

<sup>56</sup> *Supra* note 47.

<sup>57</sup> *Consumer Price Index (Estimate) 1800-*, FED. RESERVE BANK OF MINN., <https://www.minneapolisfed.org/community/financial-and-economic-education/cpi-calculator-information/consumer-price-index-1800> (last visited Jun. 12, 2018). All references to 2018 dollars were calculated using this estimation table.

pay a bond of \$100 for the “proper and legitimate use” of the gun,<sup>58</sup> an amount equal to a staggering \$3,000 in 2018 dollars.<sup>59</sup> Wyoming required hunters to pay a county licensing fee in the amount of one dollar for Wyoming residents and \$40 for non-residents,<sup>60</sup> which amounts to about \$30 and \$1,200 in 2018 dollars.<sup>61</sup>

Some states used their taxes to raise general revenue, while others funded county departments and infrastructure development. Robert Spitzer has suggested that some early gun and ammunition taxes were enacted to help states address the problem of arms trafficking, which might explain Florida’s bond requirement as well as Nebraska’s and Georgia’s use of the taxes to fund a county police department<sup>62</sup> and county court systems,<sup>63</sup> respectively.<sup>64</sup>

## 2. Taxes on Gun or Ammunition Manufacture or Sale

Throughout approximately this same time period, at least six states taxed manufacturers or sellers of guns and ammunition. In 1898, Mississippi imposed a \$5 privilege tax on manufacturers and dealers of pistol cartridges.<sup>65</sup> In 1923, South Carolina taxed retail sales of ammunition at a rate of \$2 per 1,000 rounds.<sup>66</sup> In 2018 dollars, that tax amounts to approximately \$30 per 1,000 rounds.<sup>67</sup> The other states with similar tax laws were California (1876),<sup>68</sup> Alabama (1892),<sup>69</sup> Georgia (1894),<sup>70</sup> and

<sup>58</sup> Act of June 2, 1893, ch. 4147, 1898 Fla. Laws 71, 71–72.

<sup>59</sup> *Consumer Price Index (Estimate) 1800-*, *supra* note 57.

<sup>60</sup> Act of Feb. 15, 1899, ch. 19, § 14, 1899 Wyo. Sess. Laws 27, 32–33.

<sup>61</sup> *Consumer Price Index (Estimate) 1800-*, *supra* note 57.

<sup>62</sup> LINCOLN, NEB., REV. ORD. ch. XIV, art. XVI, § 6 (1895).

<sup>63</sup> Act of Dec. 7, 1866, no. 41, § 1, 1866 Ga. Laws 27, 27–28.

<sup>64</sup> Robert Spitzer, *supra* note 54, at 45.

<sup>65</sup> *Act Creating Privilege Taxes on Certain Industries in Mississippi*, ch. 5, § 63, 1898 MISS. LAWS 22, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1898/mississippi/467767/> (last visited July 31, 2018).

<sup>66</sup> *1923 S.C. Acts 19-20*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1923/south-carolina/468087/> (last visited July 31, 2018).

<sup>67</sup> *Consumer Price Index (Estimate) 1800-*, *supra* note 58.

<sup>68</sup> *1883 Cal. Stat. 156, § 153*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1883/california/467391/> (last visited July 31, 2018) (creating a “Firearms Charitable Fund” and authorizing cities and counties to fund it through “a municipal tax” on gunpowder manufacture and sale).

<sup>69</sup> Alabama taxed “wholesale dealers in pistol or rifle cartridges” at a rate that varied based on the size of the city or town in which a dealer was located. *1898 Ala. Acts 190*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1898/alabama/467364/> (last visited July 31, 2018) (dealers were charged \$10 in communities with population of 20,000 or more, and \$5 in smaller towns).

<sup>70</sup> *1893–1894 Treasurer’s Report, 1894 Ga. Laws 325, 326*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1894/georgia/467519/> (last visited July 31, 2018) (reporting \$2,522 in state revenues from a “[p]istol [d]ealers [t]ax” — equivalent to about \$73,000 in 2018 dollars).

Tennessee (1937).<sup>71</sup> Tennessee's privilege tax payable by ammunition sellers and distributors funded, and still funds today, a wildlife fund.<sup>72</sup>

Adding these to the list from subsection I.A(1) means that 12 states either taxed personal firearm ownership or taxed the manufacture and sale of guns or ammunition; three states had both types of laws. In addition, four jurisdictions regulated gun or ammunition dealers through licensing systems that required payment of fees.<sup>73</sup> While licensing fees typically have a different purpose than specific taxes on manufacture or sale, these laws illustrate another way in which states controlled firearm vendors and imposed gun-related fees.<sup>74</sup>

## B. Modern Gun Fees and Gun-Violence-Prevention Taxes

The term “fee” usually describes charges that defray regulatory costs for government entities, whereas a “tax” refers to something that raises revenue for a public purpose.<sup>75</sup> As things stand today, firearm and ammunition *fees* are very common, but *taxes* on the sale of firearms and ammunition are rarer than they were in earlier American history.<sup>76</sup> Still, the

<sup>71</sup> TENN. ACTS 1937, ch. 84, §§ 42, 69; TENN. CODE ANN. § 70-3-101 (2017). In 1937, this tax was set at three percent of the retail sale price of shotgun shells and cartridges. It is still in force today at a rate of ten cents per container of ammunition.

<sup>72</sup> *Id.*

<sup>73</sup> These are Alabama, South Carolina, Ohio, and Chicago, Illinois. *See 1892 Alabama Registration and Taxation Laws*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1892/alabama/468679/> (last visited July 31, 2018); *1893 S.C. Acts 426*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1893/south-carolina/468086/> (last visited July 31, 2018); *Archive of 1884 Ohio Registration and Taxation Law*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1884/ohio/468688/> (last visited June 5, 2018); *Chi., Ill., Ordinance of May 25, 1914, § 4a (May 25, 1914)*, DUKE L.: REPOSITORY OF HIST. GUN L., <https://law.duke.edu/gunlaws/1914/illinois/468684/> (last visited July 31, 2018).

<sup>74</sup> *See generally* *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 685, 687–89 (9th Cir. 2017) (en banc) (cataloging evidence that the American colonies “substantially controlled the firearms trade” and regulated weapon sales).

<sup>75</sup> *Compare, e.g.,* *Watson v. City of Seattle*, 401 P.3d 1, 4 (Wash. 2017) (“a charge intended to raise revenue for the public benefit is a tax”), *with* *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n. of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (a “‘regulatory fee’ is imposed by an agency upon those subject to its regulation”; it can serve regulatory purposes directly or indirectly). *See generally* *Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 352 (2003).

<sup>76</sup> The rarity of local taxes may reflect the fact that local gun taxation is off-limits in at least the 19 states that have preemption laws barring local jurisdictions from taxing the ownership or possession of firearms or taxing their sale at higher rates than other goods. *See* ALA. CODE § 13A-11-61.3 (2018); ALASKA STAT. § 29.35.145(a) (2018); ARIZ. REV. STAT. ANN. §13-3108 (2018); FLA. STAT. § 790.33(1) (2018); IDAHO CONST., art. I, § 11; IND. CODE § 35-47-11.1-2 (2018); KAN. STAT. ANN. § § 12-16,124 (2018); KY. REV. STAT. ANN. § 65.870 (LexisNexis 2018); ME. STAT. tit. 25, § 2011 (2018); MD. CODE ANN., CRIM. LAW § 4-209(a) (LexisNexis 2018); MICH. COMP. LAWS § 123.1102 (2018); MO. REV. STAT. § 21.750(2) (2018); MONT. CODE ANN. § 45-8-351(1) (2018); N.H. REV. STAT. ANN. § 159:26(I) (2018); N.C. GEN. STAT. §§ 14-409.40(b) (2018); OKLA. STAT. tit. 21, § 1289.24(B) (2018); R.I. GEN. LAWS § 11-47-58 (2018); TENN. CODE ANN. § 39-17-1314(a) (2018); WIS. STAT. § 66.0409(3)(a) (2018); WYO. STAT. ANN. § 6-8-401(c) (2018).

prevalence of firearm fees indicates that there is an unbroken history of requiring gun and ammunition purchasers to shoulder certain additional costs. This in turn supports the idea that gun and ammunition taxes—like other laws “imposing conditions and qualifications on the commercial sale of arms”—are consistent with the Second Amendment.<sup>77</sup>

As of mid-2018, at least 10 states and Washington, D.C. have licensing or registration laws that require payment of one or more administrative fees in order to purchase or possess guns or ammunition.<sup>78</sup> In addition, at least thirteen states charge transaction fees for federally-required background checks that are conducted by state agencies.<sup>79</sup> (The states in this category elected to handle background checks that way instead of having the FBI conduct the checks directly.)<sup>80</sup>

As distinct from these transaction *fees*, taxes on the sale of firearms and ammunition are less common today than they were in the past. Only two states and two localities currently tax the retail sale of guns or ammunition. The latter two taxes—in Cook County and Seattle—can be fairly categorized as gun-violence-prevention taxes since their revenues are directed into a public safety fund and gun violence medical research fund.

**Pennsylvania.** Pennsylvania imposes a \$3 surcharge on the retail sale of any firearm (on top of a \$2 background checks fee per transaction) that is

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<sup>77</sup> District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008). This assumes, of course, that a tax is truly a condition and qualification, and not a destruction of the right. See Peña v. Lindley, 898 F.3d 969, 1008 (9th Cir. 2018) (Bybee, J., dissenting) (although “a law imposing a \$1,000,000 point-of-sale tax on the purchase of firearms for self-defense (presumably, to fund firearms training and education) . . . can be characterized as [a] ‘condition[] and qualification[] on the commercial sale of arms,’ we would have to find such restrictions inconsistent with the ‘scope of the Second Amendment’”) (citations omitted); see also Murphy v. Guerrero, No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684, at \*77–84 (D. N. Mar. I. Sep. 28, 2016) (invalidating a \$1,000 handgun excise tax that appeared intended to function as a handgun ban).

<sup>78</sup> The fees range in amount from five dollars (Nebraska and North Carolina) to \$100 (Massachusetts). CAL. PENAL CODE § 31650 (Deering 2018); CONN. GEN. STAT. §§ 29-36h, 29-38i(b) (2018); D.C. MUN. REGS. tit. 24, § 2320.3 (2018); HAW. REV. STAT. § 134-3(b) (2018); 430 ILL. COMP. STAT. 65/5 (2018); MASS. ANN. LAWS ch. 140, § 129B(9A) (LexisNexis 2018); MD. CODE ANN., PUB. SAFETY § 5-117.1(g) (LexisNexis 2018); NEB. REV. STAT. § 69-2404 (2018); N.J. STAT. ANN. § 2C:58-3 (2018); N.J. ADMIN. CODE § 13:54-1.4 (2018); N.Y. PENAL LAW § 400.00(14) (Consol. 2018); N.C. GEN. STAT. §§ 14-402, 14-404(e) (2018).

<sup>79</sup> Of the states that set a fixed statutory fee, the fees range from \$2 per transaction (Illinois and Pennsylvania) to \$50 (Connecticut). See CAL. CODE REGS. tit. 11, § 4001 (2018); COLO. REV. STAT. § 24-33.5-424(3.5) (2018); CONN. GEN. STAT. § 29-17a (2018); FLA. STAT. § 790.065(2) (2018); 430 ILL. COMP. STAT. 65/3.1(a) (2018); MD. CODE ANN., CRIM. PROC. § 10-221(b)(7) (2018); NEV. REV. STAT. § 179A.140 (2018); OR. REV. STAT. § 166.414 (2018); 18 PA. CONS. STAT. § 6111(b)(3) (2018); TENN. CODE ANN. § 38-6-109(d) (2018); UTAH CODE ANN. § 76-10-526(12) (LexisNexis 2018); VA. CODE ANN. § 18.2-308.2:2(J1) (2018); WIS. STAT. § 175.35(2i) (2018).

<sup>80</sup> See generally LAW CTR. TO PREVENT GUN VIOLENCE & AM. FOR RESPONSIBLE SOLUTIONS, FOR THE RECORD: NICS & PUBLIC SAFETY 13 (Dec. 2016), <http://lawcenter.giffords.org/wp-content/uploads/2016/12/NICS-and-Public-Safety.pdf>.

deposited into the state firearm background checks fund.<sup>81</sup> Of the jurisdictions that charge buyers for state background checks,<sup>82</sup> Pennsylvania appears to be the only one that imposes an additional fee on every firearm purchased, making it more analogous to a tax than a transaction “surcharge.”<sup>83</sup>

**Tennessee.** A law dating back to 1937 imposes a ten-cent “privilege tax” on each container of ammunition, payable by businesses engaged in the sale or distribution of shotgun shells or metallic cartridges.<sup>84</sup> The tax revenues go to a wildlife fund.<sup>85</sup>

**Cook County, Illinois.** Cook County requires gun and ammunition purchasers to pay a \$25 firearm sales tax, as well as a one- to five-cent sales tax on ammunition cartridges.<sup>86</sup> The revenue is allocated to a county public safety fund.<sup>87</sup> There is a pending Second Amendment lawsuit challenging Cook County’s tax.<sup>88</sup>

**Seattle, Washington.** Seattle’s tax requires retailers to pay a \$25 tax on each firearm sold and a two- or five-cent tax per round of ammunition sold.<sup>89</sup> The tax may be passed on to consumers, although the ordinance does not require this.<sup>90</sup> The tax ordinance authorizes Seattle to use the proceeds to fund gun violence-related programs.<sup>91</sup> The measure has not been challenged

<sup>81</sup> 18 PA. CONS. STAT. § 6111.2 (2018) (\$3 firearm surcharge); *id.* § 6111(b)(3) (\$2 background check fee).

<sup>82</sup> *See supra* note 79.

<sup>83</sup> This is true even though the revenue funds a service: state background checks. *See, e.g.*, Hugh D. Spitzer, *supra* note 75, at 352 (describing conceptual difficulties in distinguishing taxes and fees). The \$3 surcharge is more like a per-gun tax because buyers could have to pay multiple surcharges for a single background check if they buy multiple guns. Interestingly, Pennsylvania’s fee- and surcharge-funded background checks system is, by one assessment, the nation’s strongest, though the \$2 fee and \$3 surcharge are reportedly not enough to fully fund the system. Jane C. Timm, *How Pennsylvania Created a Model Gun Background Check System*, NBC NEWS (Nov. 25, 2017), <https://www.nbcnews.com/politics/politics-news/how-pennsylvania-created-model-gun-background-check-system-n822026>; Jeffrey Benzing, *In Pennsylvania, Taxpayers Subsidize Background Checks for Gun Buyers*, PUB. SOURCE, (June 29, 2016), <https://www.publicsource.org/in-pennsylvania-taxpayers-subsidize-background-checks-for-gun-buyers/>.

<sup>84</sup> TENN. CODE ANN. § 70-3-101 (2018) (imposing a ten-cent tax); *see also* TENN. ACTS 1937, ch. 84, §§ 42, 69 (1937 version of the law imposing a three percent tax).

<sup>85</sup> TENN. CODE ANN. § 70-3-101 (2018).

<sup>86</sup> COOK COUNTY, ILL., CODE § 74-665 to 74-677 (2018); *id.* § 74-668 (specifying firearm and ammunition tax rates).

<sup>87</sup> *Id.* § 74-677.

<sup>88</sup> *Guns Save Life v. Ali*, No. 2015-CH-18217 (Ill. Cir. Ct. filed Dec. 17, 2015).

<sup>89</sup> SEATTLE, WASH., MUN. CODE § 5.50.030 (2018)

<sup>90</sup> The tax is collected from dealers when they file and pay to renew their business license, *id.* § 5.50.040, suggesting they need not necessarily impose a tax at the point of sale. *Cf.* COOK COUNTY, ILL., CODE § 74-668(c) (2018) (“It shall be deemed a violation of this Article for a retail dealer to fail to include the tax imposed in this Article in the sale price of firearms and/or firearm ammunition to otherwise absorb such tax.”).

<sup>91</sup> SEATTLE, WASH., MUN. ORD. No. 124833, § 13 (2015), [http://clerk.seattle.gov/~archives/Ordinances/Ord\\_124833.pdf](http://clerk.seattle.gov/~archives/Ordinances/Ord_124833.pdf) (tax intended to “provide broad-based public benefits for residents of Seattle related to gun violence,” including but “not limited to basic research, prevention and youth

on Second Amendment grounds, and the Washington Supreme Court rejected a state-law challenge to the tax.<sup>92</sup>

The shift away from state laws imposing annual firearm taxes could be a manifestation of a broader trend over the last thirty years toward deregulating guns.<sup>93</sup> On the other hand, the existence of modern firearm-related fees suggests that the likelier explanation is that there has simply been a shift in *how* firearm and ammunition sales are commercially regulated, with a focus on using fees to administer background check systems and related law enforcement efforts. The popularity of broad state preemption laws, including some that prohibit municipalities from adopting specific firearm taxes, also explains the absence of widespread local taxes.<sup>94</sup>

While taxes on gun or ammunition sales are not particularly common today, legislators have recently shown renewed interest in gun-violence-prevention taxes. From 2013 to 2017, legislators in twelve states introduced bills that would tax guns or ammunition to fund violence-prevention efforts,<sup>95</sup>

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education and employment programs”); Daniel Beekman, *Seattle’s Gun Tax Raised \$93,000 Last Year*, SEATTLE TIMES (updated Mar. 16, 2018), <https://www.seattletimes.com/seattle-news/politics/seattles-gun-tax-raised-93000-last-year/> (tax proceeds funded a gun violence research program at a Seattle hospital).

<sup>92</sup> *Watson v. City of Seattle*, 401 P.3d 1, 14 (Wash. 2017).

<sup>93</sup> PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 215 (Oxford Univ. Press 2014).

<sup>94</sup> *Supra* note 76; see also Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. OF PUB. HEALTH 900, 900 (2017). These preemption laws have likely prevented localities from adopting gun-violence-prevention taxes even as municipal taxes in other areas have multiplied. *E.g.*, Julia Belluz, *The US Had No Soda Taxes in 2013. Now Nearly 9 Million Americans Live with Them.*, VOX (Jun. 8, 2017, 9:06 AM), <https://www.vox.com/science-and-health/2017/6/6/15745908/>; TAX FOUND., VAPOR PRODUCTS AND TAX POLICY 1 (Mar. 2016), <https://files.taxfoundation.org/legacy/docs/TaxFoundation-FF505.pdf>.

<sup>95</sup> S.B. 1071, 2013 Leg., Jan. Sess. (Conn. 2013) (\$10 per firearm tax on manufacturers and importers to fund victims’ compensation fund); A.B. 3727, 2013 Leg., 215th Sess. (N.J. 2013) (five percent sales tax on guns and ammunition to fund safety infrastructure improvements); A.B. 760, 2013-2014 Leg., Reg. Sess. (Cal. 2013) (retailer tax of five cents per item of ammunition to support school-based mental health interventions); H.B. 1703, 2013-2014 Leg., 63rd Sess. (Wash. 2013) (\$15 to \$25 tax on firearms sold at retail, and one-cent tax per round tax for ammunition, to fund a gun violence prevention program); H.B. 1275, 2013 Leg., 433rd Sess. (Md. 2013) (\$10 surcharge on handguns and assault weapons for mental health services fund); S.B. 2325, 98th Leg., Reg. Sess. (Ill. 2013) (18% surcharge on firearms and ammunition to fund mental health and crime victim services); H.B. 3253, 2013-2014 Leg., 188th Sess. (Mass. 2013) (25% tax on retail sales of firearms to fund mental health and victims services); H.B. 1209, 2013 Leg., Reg. Sess. (Fla. 2013) (administrative fee of 4% on dealer sales of firearms and ammunition to fund behavioral health intervention and treatment programs); A.B. 234, 2013 Leg., 77th Sess. (Nev. 2013) (gun dealer excise tax of \$25 per firearm and two cents per round of ammunition to fund victims’ compensation and violence prevention programs); H.B. 1399, 97th Leg., 2nd Reg. Sess. (Mo. 2014) (one cent transaction tax on handguns and ammunition to fund mental health services); S.B. 6752, 2015-2016 Leg., 238th Sess. (N.Y. 2016) (\$5 tax gun purchases to fund gun violence research); A.B. 806, 2017-2018 Leg., Reg. Sess. (Wis. 2017) (tax to fund crime victim services, imposed on manufacturers in the amount of 0.5% of the list price of each firearm sold). This list covers only the first-introduced bill in each state during this time period.

and members of Congress authored two federal bills that would increase the Pittman-Robertson excise tax and appropriate the additional funds to violence prevention.<sup>96</sup> Many of these bills were introduced following the massacre of elementary school students and educators in Newtown, Connecticut, in December 2012. In just the first half of 2018, after a series of high-profile mass shootings in late 2017 and early 2018, two states introduced gun or ammunition tax bills,<sup>97</sup> and New Jersey's governor proposed collecting \$1.4 million in firearm sales taxes to fund a gun violence research center.<sup>98</sup>

### C. What Historical Gun and Ammunition Taxes Mean for Modern Gun - Violence-Prevention Taxes

Firearm licensing and registration fees have been subject to Second Amendment lawsuits since *Heller*,<sup>99</sup> but litigation over specific gun or ammunition taxes has been less frequent, reflecting the fact that few jurisdictions have these taxes. A lawsuit over Cook County's gun-violence-prevention tax may soon result in the first decision issued on the constitutionality of such a tax under the Second Amendment.<sup>100</sup>

Of the courts that have upheld gun-related fees to date, none did so on grounds that such fees themselves are historically longstanding as *Heller* used that term.<sup>101</sup> The D.C. Circuit came close to doing so, upholding the District of Columbia's handgun registration fee on grounds that it is "incidental" to a lawful handgun registration requirement, which the court found was historically longstanding and thus outside the scope of the Second Amendment.<sup>102</sup> But every other court to assess the constitutionality of firearm-related fees has instead either applied First Amendment principles, Second Amendment heightened scrutiny, or both First and Second

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<sup>96</sup> H.R. 167, 115th Cong. (2017); H.R. 4214, 114th Cong. (2015).

<sup>97</sup> A.B. 2497, 2017-2018 Leg., Reg. Sess. (Cal. 2018); L.B. 730, 105th Leg., 2nd Sess. (Neb. 2018).

<sup>98</sup> STATE OF N.J., THE GOVERNOR'S FY 2019 BUDGET: BUDGET IN BRIEF 6, 50 (2018).

<sup>99</sup> None of the challenges succeeded. *Bauer v. Becerra*, 858 F.3d 1216, 1227 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018); *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 290 (D.C. Cir. 2015); *Kwong v. Bloomberg*, 723 F.3d 160, 176 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *People v. Stevens*, 2018 IL App (4th) 150871, ¶ 21 (2018); *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 846 (N.D. Ill. 2011).

<sup>100</sup> *Guns Save Life v. Ali*, No. 2015-CH-18217 (Ill. Cir. Ct. filed Dec. 17, 2015).

<sup>101</sup> *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

<sup>102</sup> *Heller II*, 670 F.3d at 1249 n.2, 1253-55; *Heller III*, 801 F.3d at 278; *accord* *Commonwealth v. Cassidy*, 81 N.E.3d 822 (Mass. App. Ct. 2017), *review granted*, 88 N.E.3d 1166 (Mass. 2017), *and aff'd*, 96 N.E.3d 691 (Mass. 2018) (rejecting argument that gun licensing scheme is unconstitutional "excise tax" on Second Amendment rights).

Amendment analytical frameworks to ultimately uphold the fee in question.<sup>103</sup>

History suggests a fourth way for courts to resolve constitutional challenges to gun and ammunition taxes. Nineteenth and early twentieth century laws taxing people who possessed, carried, used, or sold firearms demonstrate that gun and ammunition taxes are historically longstanding. Their prevalence means that these taxes are traditionally acceptable under the Second Amendment and do not burden a protected right.<sup>104</sup> As detailed above, the federal government has imposed a firearm and ammunition excise tax since 1919 and a tax on certain categories of weapons since 1934. Between 1844 and 1937, nearly one-quarter of states—12 in total—taxed the possession or sale and guns or ammunition, and several states had more than one such tax.<sup>105</sup>

Multiple courts have correctly recognized that laws dating from this period should be considered longstanding.<sup>106</sup> The federal excise tax and state taxes surveyed above actually predate the examples that *Heller* itself identified as archetypically “longstanding” regulations. At least one court seeking to identify the traditional underpinnings of a more recent federal law referenced in *Heller*—the felon-possession ban—drew on evidence that just seven states had adopted roughly analogous laws before 1923.<sup>107</sup> Gun and

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<sup>103</sup> *Bauer*, 858 F.3d at 1223, 1224-1225, 1224 n.5 (applying both First Amendment and Second Amendment principles); *Kwong*, 723 F.3d at 166-70 (applying both First Amendment and Second Amendment principles); *Stevens*, 2018 IL App (4th) at ¶ 21 (applying First Amendment principles only); *Town of Cicero*, 827 F. Supp. 2d at 843-46 (applying First Amendment principles only).

<sup>104</sup> *Heller II*, 670 F.3d at 1253 (citations omitted); see also Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 335 (2016) (“If liability for negligence with a weapon, taxes on ammunition, or storage requirements for weapons are historically indicated, then they cannot be ‘infringements,’ because there is no corresponding right.”). Conversely, the “absence of any historical warrant” for restrictions on a right can necessitate application of heightened scrutiny. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 795 n.3 (2011).

<sup>105</sup> In other contexts, the Supreme Court has recognized that laws need not be adopted by a majority of states to reflect a constitutionally significant consensus. *Atkins v. Virginia*, 536 U.S. 304, 321-22 (2002) (Rehnquist, J., dissenting) (critiquing majority conclusion that there was a “consensus” not to apply death penalty to some defendants based on 18 state laws); *id.* at 315, 316 n.21 (“[i]t is not so much the number of these States that is significant, but the consistency of the direction of change” and the “broader social and professional consensus”).

<sup>106</sup> *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (“we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791”); *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 196 (“*Heller* demonstrates that a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue”); see also *Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016). *But see* *Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (limiting historical inquiry to Founding era and the adoption of the Fourteenth Amendment notwithstanding *Heller*’s later examples).

<sup>107</sup> See *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011), *overruled on other grounds* by *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016).

ammunition taxes have an even stronger basis in history and tradition than this, having been adopted in 10 states by 1923 and 12 states by 1937.<sup>108</sup>

Certain tax structures would fare even better under a historical analysis. Taxes on dangerous weapons selected by mass shooters to exact high death tolls—like assault weapons, large-capacity magazines, and bump-fire stocks—are analogous to the National Firearms Act taxes imposed on machine guns after these weapons were increasingly used in organized crime.<sup>109</sup> Several federal and state courts have held that assault weapons and large-capacity magazines are unprotected by the Second Amendment or may be prohibited,<sup>110</sup> meaning in these jurisdictions, taxing their possession or sale should pose no Second Amendment issue. If a weapon itself is outside the scope of the Second Amendment, so is a tax on that weapon.

Another proposed tax structure of historical significance is an incremental tax where the first firearm or first several firearms purchased is tax-free and each successive gun purchased is taxed at a higher rate. Asha Rangappa has observed that incremental taxes like this could be employed to tax large “personal arsenals” of weapons that are unnecessary for everyday self-defense and can become targets for theft or used to carry out mass shootings.<sup>111</sup> Such a tax structure has historical antecedents: it resembles North Carolina’s annual pistol tax that exempted weapons “used exclusively for mustering”<sup>112</sup> and Georgia’s \$1 tax on pistols, muskets, and rifles that applied only to the fourth and successive firearm owned.<sup>113</sup>

The above historical analysis provides a necessary foundation for a discussion of gun and ammunition taxes. It also illustrates one compelling rationale for courts to resolve constitutional challenges to these taxes: by finding that the history of gun and ammunition taxes confirms that these regulations fall outside of the scope of the Second Amendment. Nonetheless, tax opponents have argued that history does not end the constitutional inquiry. Plaintiffs who have challenged recent gun-violence-prevention taxes have routinely argued that the taxes should be subject to review under First Amendment principles. The next section examines the legitimacy of this argument and the approaches courts have taken when confronted with it.

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<sup>108</sup> The twelve states we identify may be an undercount, as it is difficult to survey early laws working from historical records where key terms may be spelled archaically. See Frassetto, *supra* note 44, at 2; Robert B. Spitzer, *supra* note 44, at 59; see also *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 204 (“we face institutional challenges in conducting a definitive review of the relevant historical record”).

<sup>109</sup> *Supra* notes 40 and 41.

<sup>110</sup> *Kolbe v. Hogan*, 849 F.3d 114, 135-38 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 263-64 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *People v. Zondorak*, 220 Cal. App. 4th 829, 838 (2013).

<sup>111</sup> Rangappa, *supra* note 12, at 18, 21–22.

<sup>112</sup> *Supra* note 46.

<sup>113</sup> *Supra* note 47.

### III. FIRST AMENDMENT DOCTRINES ARE NO OBSTACLE TO GUN-VIOLENCE-PREVENTION TAXES

Litigants opposing firearm and ammunition taxes and fees rely heavily on the Supreme Court's jurisprudence on First Amendment fees. They argue that this body of law precludes any taxes on a constitutional right, including the acquisition of firearms and ammunition, unless it satisfies a rigorous standard of review akin to strict scrutiny.<sup>114</sup>

This critique makes too much of the jurisprudence, which approved several First Amendment fees<sup>115</sup> and recognized that such fees are constitutional even if they do not directly reimburse the government for the costs of license processing or an administrative transaction.<sup>116</sup> The Court's two most recent First Amendment fee decisions acknowledge that not all expressive activities are free from the burden of taxation.<sup>117</sup>

The argument that the Supreme Court's fee jurisprudence precludes gun and ammunition taxes also ignores critical differences between the First and Second Amendments. *Heller* does not require courts to treat Second Amendment fees as presumptively unlawful by applying strict scrutiny as in prior restraint cases, or to review taxes with the same skepticism they reserve for regulations that target the press or religious exercise.<sup>118</sup> There are good reasons not to conflate the First and Second Amendments in this way because there are fundamental differences between the rights.

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<sup>114</sup> See, e.g., *supra* note 17.

<sup>115</sup> *Cox v. New Hampshire*, 312 U.S. 569, 571, 576-78 (1941) (upholding law charging up to \$300 license fee to hold a parade or procession on a public street, as applied to Jehovah's Witnesses who held a religious procession without paying the fee); *Jimmy Swaggart Minis. v. Bd. of Equalization*, 493 U.S. 378, 386 (1990) (upholding requirement that religious group pay a general sales tax on proceeds of religious materials).

<sup>116</sup> *Cox*, 312 U.S. at 557 (upholding \$300 parade license fee designed to "meet the expense incident to the administration" of licensing law and "maintenance of public order in the matter licensed"); *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 114 (1943) (fees to "defray the expenses of policing the activities in question" or a tax on "property used or employed in connection with [First Amendment] activities" could be permissible).

<sup>117</sup> *Minneapolis Star & Tribune v. Minn. Comm'r. of Revenue*, 460 U.S. 575, 582, 585 (1983); *Jimmy Swaggart*, 493 U.S. at 386.

<sup>118</sup> To the contrary, *Heller* deemed "laws imposing conditions and qualifications on the commercial sale of arms" presumptively *lawful*. *District of Columbia v. Heller*, 554 U.S. 570, 626-27, 627 n.26 (2008). Applying strict scrutiny, or treating such a "condition and qualification" like a prior restraint, would turn *Heller* on its head, treating them as presumptively unlawful. See *Minneapolis Star*, 460 U.S. at 585 (treating differential tax on newspapers as presumptively unconstitutional); Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. V. Heller: Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1083-84 (2009) (expressing concern that the Supreme Court "might someday hold that special regulatory treatment of firearms," including gun taxes, "is prima facie evidence of a constitutional violation" though "[n]othing in *Heller* commits the Court to this path").

### A. Fee Jurisprudence Is Inapplicable to Gun-Violence-Prevention Taxes

At the threshold, it is not clear that any court should look to First Amendment fee jurisprudence to evaluate a gun or ammunition tax or fee. Although courts have drawn on First Amendment methodology when evaluating Second Amendment challenges, substantive and historical differences between the two Amendments preclude drawing other analogies between them.<sup>119</sup> For example, *Heller* approved “conditions and qualifications on the commercial sale of arms” and laws prohibiting dangerous individuals, like those with felony convictions, from possessing firearms.<sup>120</sup> But analogous First Amendment restrictions—like government conditions on the commercial sale of expressive content or barring convicted criminals from engaging in speech or religious exercise—would surely flunk constitutional scrutiny.<sup>121</sup>

A comparison between taxes and fees under the First and Second Amendments breaks down for similar reasons. The Supreme Court’s First Amendment fee cases were animated by a concern that the fees operated as “prior restraints” on expressive or religious activity.<sup>122</sup> In the First Amendment context, prior restraints on speech, or orders that function to prohibit speech before it has occurred, bear a “heavy presumption . . . [of in]validity.”<sup>123</sup> This presumption arose because the Supreme Court interprets the “First Amendment as providing greater protection from prior restraints than from subsequent punishments.”<sup>124</sup> Because of the importance placed on the concept of First Amendment prior restraints, regulations or fees operating as such are highly suspect and typically warrant application of strict scrutiny.<sup>125</sup>

There is no prior-restraint analogy in the Second Amendment context, and neither the Supreme Court nor other courts have expressed a special concern with taxes targeting the right to keep and bear arms. When adopting the First Amendment, a primary motivation of the founders was to protect the right to speak against the government and prevent censorship of the press.<sup>126</sup> While prohibiting prior restraints was the “main purpose” of the

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<sup>119</sup> See, e.g., *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) (although “the structure of First Amendment doctrine should inform our analysis of the Second Amendment,” that does not “compel us to import” other substantive First Amendment doctrines) (citation omitted).

<sup>120</sup> *Heller*, 554 U.S. at 626–27.

<sup>121</sup> *Berron v. Ill. Concealed Carry Licensing Rev. Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (“[E]veryone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public.”); see also *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 688–90 (9th Cir. 2017).

<sup>122</sup> *Jimmy Swaggart Minis. v. Bd. of Equalization*, 493 U.S. 378, 389 (1990).

<sup>123</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

<sup>124</sup> *Alexander v. United States*, 509 U.S. 544, 554 (1993).

<sup>125</sup> See *Jimmy Swaggart*, 493 U.S. at 389.

<sup>126</sup> E.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 128, 128 n.14 (1943) (Reed, J., dissenting) (“This Court has held that the chief purpose of the free press guarantee was to prevent previous restraints

First Amendment,<sup>127</sup> the Supreme Court has said that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>128</sup> By specifically approving gun regulations that restrict access to firearms by lawbreaking or irresponsible citizens,<sup>129</sup> *Heller* endorsed gun-licensing regimes that might be an invalid prior restraint if the licenses pertained to First Amendment speech.<sup>130</sup>

Recognizing that the First and Second Amendments are animated by different concerns and subject to different limitations, lower courts have uniformly rejected the importation of the prior-restraint concept into other areas of Second Amendment jurisprudence.<sup>131</sup> Even the one federal appellate court to hold that fee jurisprudence should apply in Second Amendment fee cases did not mention or rely on the prior-restraint rationale.<sup>132</sup>

In total, six federal circuit courts have rejected the idea that the prior-restraint doctrine should be applied to gun taxes and fees, and litigants and others urging courts to apply this doctrine in the Second Amendment context have failed to offer any persuasive reason to depart from this consensus. Instead, they have simply asserted that taxes affecting a constitutional right

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upon publication”; “[i]o this Professor Chafee adds the right to criticize the Government”) (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931); ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 18 (1941); *Minneapolis Star & Tribune v. Minn. Comm’r. of Revenue*, 460 U.S. 575, 585 (1983) (press-specific taxes can be “a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government”); *Leathers v. Medlock*, 499 U.S. 439, 446 (1991) (the tax invalidated in *Minneapolis Star* had “potential for abuse” because it “resembled a penalty for certain newspapers”).

<sup>127</sup> *Schenk v. United States*, 249 U.S. 47, 51–52 (1919).

<sup>128</sup> *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). *Heller* did not credit the interpretation that the Second Amendment was intended to allow citizens the means to defend themselves from government tyranny, a theory that might otherwise make a Second Amendment prior-restraint doctrine more plausible. See Cook et al., *supra* note 118, at 1088.

<sup>129</sup> *Heller*, 554 U.S. at 626.

<sup>130</sup> *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (“If the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to enforce them.”); see also Eugene Volokh, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller; Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1546–47 (2009) (presumption against licensing is not “normal rule for constitutional rights”).

<sup>131</sup> *E.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012) (it would be “imprudent to assume” that First Amendment doctrines like prior restraint “apply equally to the Second [Amendment]” as “there are salient differences between the state’s ability to regulate each of these rights”) (citing L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997)); accord *United States v. Focia*, 869 F.3d 1269, 1284 (11th Cir. 2017); *Hightower v. City of Boston*, 693 F.3d 61, 80 (1st Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 883 n.11 (4th Cir. 2013); *Berron*, 825 F.3d at 847.

<sup>132</sup> *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

warrant a form of strict scrutiny.<sup>133</sup> But the Court’s own First Amendment cases belie this construct,<sup>134</sup> and strict scrutiny is actually applied “rarely in fundamental rights cases.”<sup>135</sup> Most amendments in the Bill of Rights have never been held to trigger strict scrutiny, and lesser scrutiny is quite often applied even in First Amendment cases.<sup>136</sup>

There are especially good reasons not to build a presumption in favor of strict scrutiny in broad areas of Second Amendment law. Unlike other fundamental rights that “can be exercised without creating a direct risk to others,” firearms physically injure and kill people.<sup>137</sup> Even firearms obtained in legal transactions can be stolen or trafficked and used to commit crimes,<sup>138</sup> and when not stolen, they can be involved in gun accidents<sup>139</sup> and escalate everyday disputes<sup>140</sup> or domestic abuse.<sup>141</sup> Since a major consequence of firearm access is gun violence—which infringes constitutional rights of victims and others<sup>142</sup>— the inherent dangerousness of firearms makes it

<sup>133</sup> E.g., Petition for Writ of Certiorari at 13-14, *Bauer v. Becerra*, 138 S. Ct. 982 (No. 17-719) (articulating a version of strict scrutiny under which any fee targeting a constitutional right may only be narrowly targeted at “cost-recovery” for the government).

<sup>134</sup> E.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 113–14 (1943) (“tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities” might be acceptable); *Minneapolis Star & Tribune v. Minn. Comm’r. of Revenue*, 460 U.S. 575, 585 (1983) (differential tax treatment of newspapers might not trigger strict scrutiny if “justified by some special characteristic of the press”).

<sup>135</sup> Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 CONST’L COMMENTARY 227, 239 (2006). For example, courts have declined to apply strict scrutiny in cases challenging “marriage penalties” that make it more expensive to marry, even though marriage is a fundamental right. *In re Talmadge*, 832 F.2d 1120, 1126 n.3 (9th Cir. 1987); *Druker v. Comm’r.*, 697 F.2d 46, 50 (2d Cir. 1982); *but see Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,” but applying strict scrutiny to regulation that “clearly does interfere directly and substantially” with the right to marry).

<sup>136</sup> Winkler, *supra* note 135, at 239 (citing Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007)).

<sup>137</sup> *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).

<sup>138</sup> Freskos, *supra* note 7; *see generally* EVERYTOWN RESEARCH, *INSIDE STRAW PURCHASING: HOW CRIMINALS GET GUNS ILLEGALLY* (2008), at <https://everytownresearch.org/reports/inside-straw-purchasing-criminals-get-guns-illegally/>; MAYORS AGAINST ILLEGAL GUNS, *TRACE THE GUNS: THE LINK BETWEEN GUN LAWS AND INTERSTATE GUN TRAFFICKING* (2010), <http://www.tracetheguns.org/report.pdf>.

<sup>139</sup> Deborah Azrael et al., *Firearm Storage in Gun-owning Households with Children: Results of a 2015 National Survey*, J. URBAN HEALTH, May 10, 2018, at 1 (4.6 million minors in the United States live in homes with unlocked, loaded firearms).

<sup>140</sup> E.g., Christopher Mele, *Road Rage Cases with Guns More Than Double in Three Years*, *Report Says*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/road-rage-guns.html>.

<sup>141</sup> Jacquelyn C. Campbell, et al., *Risk Factors for Femicide Within Physically Abuse Intimate Relationships: Results From A Multi-State Case Control Study*, 93 AM. J. OF PUBLIC HEALTH 1089–97 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/> (abusers are five times more likely to kill their intimate partners if a firearm is present in the home).

<sup>142</sup> *See generally* Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J. L. & PUB. POL’Y 187 (2016).

appropriate to afford governments more leeway to regulate the lethal effects of weapons than strict scrutiny would allow.

On the other hand, the costs of allowing taxes to evade strict scrutiny may be lower in the Second Amendment context than the First. An absolutist approach might make sense for the First Amendment, where declining to closely scrutinize one tax opens the door to government censorship of the press or discriminatory treatment of indigent religious evangelists.<sup>143</sup> First Amendment doctrine has long recognized the importance of an unrestricted “marketplace of ideas.”<sup>144</sup> But the risk a tax could be used to deprive citizens of Second Amendment rights is more attenuated because keeping arms for self-defense does not require a person to continually replenish them. Guns and ammunition last for a long time. This makes gun and ammunition taxes more akin to an indirect “tax on property used or employed in connection with” constitutionally protected activity (permissible under the Supreme Court’s decision in *Murdock v. Pennsylvania*) than a direct tool of suppression or censorship.<sup>145</sup>

Deeming the prior restraint doctrine inapplicable in the Second Amendment does not treat the right to keep and bear arms as a “second-class right”<sup>146</sup> or “constitutional orphan;”<sup>147</sup> it simply recognizes that different rights are different, that different interests animate different constitutional rights, and that it often makes little sense to apply the doctrine governing one to another very different context.

#### B. Gun-Violence-Prevention Taxes Would Survive Analysis Under Fee Jurisprudence if Applied

Even if courts *did* apply First Amendment fee jurisprudence to a Second Amendment tax, most gun-violence-prevention taxes would pass constitutional muster. The three leading First Amendment cases on this subject recognize several categories of permissible fees and taxes that are analogous to gun-violence-prevention taxes.

In *Cox v. New Hampshire*, the Supreme Court unanimously rejected a First Amendment challenge to a law that required groups to obtain a license and pay an up to \$300 fee before holding a parade or procession on a public

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<sup>143</sup> *Minneapolis Star & Tribune v. Minn. Comm’r. of Revenue*, 460 U.S. 575, 583-85 (1983); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). *See also* Cook et al., *supra* note 118, at 1088.

<sup>144</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Rangappa, *supra* note 12, at 20 (“speech begets more speech, and in order to fully exercise this right it must be presumptively unlimited”).

<sup>145</sup> *Murdock*, 319 U.S. at 112.

<sup>146</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

<sup>147</sup> *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the denial of certiorari).

street.<sup>148</sup> The Court explained that the law was permissible because it was tailored to “meet the expense incident to the administration” of the licensing law “and to the maintenance of public order in the matter licensed.”<sup>149</sup> The Court did not advance a narrow “cost-recovery” rationale in which fees may only be used to recoup necessary administrative expenditures.<sup>150</sup> Rather, the Court endorsed a broader “public order-maintaining” theory for when fees permissibly may be charged.<sup>151</sup> The fact that the marchers in *Cox* committed “no technical breach of the peace” reinforces that the Court’s rationale was broader than cost-recovery, since government officials could permissibly use the parade fee to target potentially disruptive actors other than the ones paying the fee.<sup>152</sup>

In two subsequent cases, the Court distinguished *Cox* and invalidated fees it found could *not* be characterized as “regulatory measure[s] to defray the expenses of policing the activities in question” under the public order-maintaining rationale.<sup>153</sup> In *Murdock v. Pennsylvania*, the Court struck down a law that required a permit and fee to solicit donations door-to-door as it applied to evangelizing Jehovah’s Witnesses.<sup>154</sup> The Court held that the fee tended to suppress First Amendment-protected religious activity, warranting rigorous review under which the city’s interest in raising general revenue was an insufficient justification.<sup>155</sup> The *Murdock* decision acknowledged that it could be acceptable to “tax . . . property used or employed in connection with [First Amendment] activities,” though not the activities themselves,<sup>156</sup> and appeared to reserve the question whether a door-to-door fee could be required for the *sale* of religious material.<sup>157</sup>

In *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, the Supreme Court struck down a state use tax on ink and paper.<sup>158</sup> Because of an accompanying tax credit, the use tax affected only a specific group of

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<sup>148</sup> *Cox v. New Hampshire*, 312 U.S. 569, 571 (1941).

<sup>149</sup> *Id.* at 577.

<sup>150</sup> Petition for Writ of Certiorari at 15, *Bauer v. Becerra*, 138 S. Ct. 982 (No. 17-719).

<sup>151</sup> *Cox*, 312 U.S. at 573-74 (holding that it is permissible to use a parade fee to “assure the safety and convenience of the people in the use of public highway” even when the parade marchers themselves are peaceful).

<sup>152</sup> Compare *id.* at 573 (observing that the marchers convicted of not paying the parade fee committed no “breach of the peace” themselves), with Petition for Writ of Certiorari at 13, *Bauer v. Becerra*, 138 S. Ct. 982 (No. 17-719) (arguing that fee jurisprudence precludes using a gun fee to “pay for general law enforcement activities designed to ferret out and punish unrelated third parties who abuse the rights that the Constitution protects”).

<sup>153</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943).

<sup>154</sup> *Id.* at 110, 117.

<sup>155</sup> *Id.* at 110-11.

<sup>156</sup> *Id.* at 112.

<sup>157</sup> *Id.* at 111-12 (explaining that “[i]t is a distortion of the facts of record to describe [the Jehovah’s Witnesses’] activities as the occupation of *selling* books and pamphlets”; their “main object . . . was to preach and publicize the doctrines of their order”) (emphasis added) (citation omitted).

<sup>158</sup> *Minneapolis Star & Tribune v. Minn. Comm’r. of Revenue*, 460 U.S. 575, 592 (1983).

larger newspapers.<sup>159</sup> The Court reasoned that, unless the use tax were “justified by some special characteristic of the press,” it must presume the tax functioned at least in part to suppress free expression and apply strict scrutiny; as in *Murdock*, the Court determined that such scrutiny was not satisfied by the state’s general revenue-raising interest.<sup>160</sup>

A modest gun or ammunition tax that funds victim compensation or gun-violence-prevention efforts is best characterized as a fee “to defray the expenses of policing” gun purchase and misuse—the type of fee upheld in *Cox*—rather than either of the fees the Court has struck down. To date, each court that has considered the constitutionality of Second Amendment fees under the First Amendment framework has agreed that *Cox* controls, either because a challenged fee directly reimburses the administrative costs of a particular licensing law,<sup>161</sup> or because the proceeds fund later-in-time costs of policing or maintaining public order in the matters licensed.<sup>162</sup> For example, after applying First Amendment fee jurisprudence, courts have upheld the following types of fees under *Cox*, *Murdock*, and *Minneapolis Star*:

- \$300 licensing fee charged to nonresidents for concealed handgun permits;<sup>163</sup>
- five-dollar background check fee to fund a database that identifies firearm purchasers who become prohibited from possession;<sup>164</sup>
- \$25 firearm registration fee;<sup>165</sup> and
- \$340 handgun licensing fee, payable every three years.<sup>166</sup>

A recent decision from the Ninth Circuit illustrates why firearm-related fees are analogous to the parade permit found permissible in *Cox*. In *Bauer v. Becerra*, the court rejected a Second Amendment challenge alleging that a five-dollar portion of California’s background checks fee was unconstitutionally allocated toward reducing “criminal misuse of firearms” by funding a law enforcement tool for identifying prohibited gun possessors.<sup>167</sup> The challengers argued that this use of the fee is not sufficiently related to the legal acquisition of firearms to survive First Amendment scrutiny.<sup>168</sup> The panel rejected this argument, citing *Cox* and

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<sup>159</sup> *Id.* at 578-79.

<sup>160</sup> *Id.* at 585-86.

<sup>161</sup> *E.g.*, *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

<sup>162</sup> *People v. Stevens*, 2018 IL App (4th) 150871, ¶ 21 (2018).

<sup>163</sup> *Id.* at ¶ 17.

<sup>164</sup> *Bauer v. Becerra*, 858 F.3d 1216, 1220 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018).

<sup>165</sup> *Justice v. Town of Cicero*, 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011).

<sup>166</sup> *Kwong*, 723 F.3d at 172.

<sup>167</sup> *Bauer*, 858 F.3d at 1220.

<sup>168</sup> *Id.* at 1220, 1224.

observing that “where the initial fee enables an activity that has ongoing impacts, such as the purchase of firearms or the licensing of an adult entertainment establishment . . . there is an even stronger argument for including ongoing enforcement as part of the costs of ‘policing the activities in question.’”<sup>169</sup> This reasoning fairly captures the animating principle of the *Cox* decision: fee proceeds can be used to maintain public order if the disruption is a consequential effect of protected activity—even when fee payers are not themselves responsible for the effects.

Beyond the Ninth Circuit’s stated rationale, there are two additional reasons *Bauer* was correct to uphold California’s tax under First Amendment fee jurisprudence. First, absent any plausible allegation that a five dollar background check fee made it impossible for anyone to buy sufficient weapons to engage in self-defense, taxing or requiring payment of a fee to purchase a firearm is more like a “tax on property used or employed in connection with [Second Amendment] activities” rather than a tax on the activity itself, which *Murdock* suggests is permissible.<sup>170</sup> Second, as the Ninth Circuit observed, the five-dollar fee is “justified by some special characteristic” of gun or ammunition sales—which *Minneapolis Star* explained could make a targeted tax constitutional.<sup>171</sup> The special characteristic justifying a targeted tax is that guns and ammunition are designed to injure and kill people, and even lawful sales can later result in accidents, thefts, crimes, and murders.<sup>172</sup>

Thus, even if a court were to apply First Amendment fee jurisprudence to a gun-violence-prevention tax, a tax would likely survive review if it is aimed at mitigating the public order-disturbing secondary effects of gun transactions. This describes most—if not all—of the proposed taxes surveyed in this Article. Two types of taxes might be particularly vulnerable to invalidation as a prior restraint. One is a gun or ammunition tax that raises general revenue for a city or county, as this was a feature of the invalidated tax in *Minneapolis Star*.<sup>173</sup> On the other hand, as discussed in Part I.A, many of the historical examples of gun or ammunition taxes were general-revenue raising. This reinforces the notion that it simply is inappropriate to apply First Amendment fee jurisprudence altogether: unlike with ink taxes and

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<sup>169</sup> *Id.* at 1226 (citing *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty.*, 274 F.3d 377, 395–96 (6th Cir. 2001)).

<sup>170</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

<sup>171</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

<sup>172</sup> See *supra* notes 138–141. In this respect, *Bauer* correctly analogized to a First Amendment “secondary effects” case addressing the government’s ability to regulate harmful consequences of adult entertainment establishments. See *Bauer*, 858 F.3d at 1226 (citing *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty.*, 274 F.3d 377, 395–96 (6th Cir. 2001)).

<sup>173</sup> *Minneapolis Star*, 460 U.S. at 586–89.

religious solicitation fees, there is a longstanding tradition of taxing guns and ammunition to raise general revenue.<sup>174</sup>

The other type of gun or ammunition tax more vulnerable to invalidation would be one set at a high enough rate that it raises concerns that the tax is prohibitive rather than modestly designed to defray enforcement costs and mitigate secondary effects of gun acquisition. One federal district court invalidated an obviously prohibitive tax—a \$1000 handgun excise tax—on this basis,<sup>175</sup> but lower taxes could raise this concern as well.<sup>176</sup> If fee jurisprudence is applied at all in the very different context of a gun-violence-prevention tax, the severity of a firearm-related fee or tax seems a better indicia of invalidity than whether the tax raises general revenue.<sup>177</sup>

To recap Parts I and II, while the Supreme Court’s fee jurisprudence cases applied the presumption against prior restraints, that presumption is not present in the Second Amendment context or implicated by most firearm-related taxes and fees. The long history of gun and ammunition taxes at the federal and state level further suggests that these taxes are both constitutional and in a constitutional class of their own, not directly comparable to press taxes or fees charged for religious solicitation. Nonetheless, should courts elect to compare gun-violence-prevention taxes to First Amendment fees, they are likely to uphold the gun taxes—as many courts have already done.

Courts might also elect to apply a more traditional Second Amendment analysis to a gun-violence-prevention tax. With this in mind, Part III will consider gun and ammunition taxes under the Second Amendment framework courts typically use to determine if a regulation is consistent with the right to keep and bear arms.

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<sup>174</sup> Cf. *Murdock*, 319 U.S. at 115 (calling the invalidated tax “a new device for the suppression of religious minorities”) (emphasis added).

<sup>175</sup> *Murphy v. Guerrero*, No. 1:14-CV-00026, 2016 U.S. Dist. LEXIS 135684, at \*79-80 (D. N. Mar. I. Sep. 28, 2016).

<sup>176</sup> At least one higher-end fee—a \$340 handgun license fee payable every three years, amounting to \$115 annually—has been upheld under First Amendment fee jurisprudence. *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014). The Second Circuit based its ruling on undisputed evidence that the entire fee was used to reimburse the costs of administering New York City’s licensing scheme; the average administrative cost for processing a handgun license was \$343. *Id.* at 163. That means that even the narrow cost-recovery argument advanced by some challengers (*see, e.g.*, *Petition for Writ of Certiorari* at 15, *Bauer v. Becerra*, 138 S. Ct. 982 (2018) (No. 17-719)), would not be sufficient to disturb the outcome in *Kwong*: in that case, the \$340 undisputedly *only* recovers costs.

<sup>177</sup> *Volokh*, *supra* note 130, at 1544 (“[T]here is ample precedent for such tolerance for modest fees in other constitutional rights contexts, and it thus seems neither likely nor normatively appealing for the courts to conclude that the right to bear arms is more protected than these other rights.”).

#### IV. THE SECOND AMENDMENT ALLOWS IMPOSING GUN-VIOLENCE-PREVENTION TAXES

Courts that decline to apply First Amendment fee jurisprudence to Second Amendment claims challenging gun-violence-prevention taxes are likely to instead review those claims under a pure Second Amendment framework. Even in courts that do apply fee jurisprudence, surviving a First Amendment analysis may not be the end of the road for a gun or ammunition tax. The two federal appellate courts that applied *Cox* and progeny to gun-related fees also analyzed those fees under Second Amendment principles.<sup>178</sup> This section will address how Second Amendment analyses of gun-violence-prevention taxes are likely to work—and predicts most taxes will be found constitutional.

##### A. Step One: De Minimis Taxes May Not Trigger Second Amendment Review

The two-step method<sup>179</sup> most courts apply in Second Amendment challenges typically asks, first, whether a challenged law burdens conduct falling within the scope of the Second Amendment's protections.<sup>180</sup> Part I of this Article argued that gun-violence-prevention taxes are constitutional under this threshold assessment because such taxes are historically longstanding and thus do not burden Second Amendment-protected conduct.<sup>181</sup> A court might also elect to uphold a gun or ammunition tax at the outset because it is a “condition [and] qualification on the commercial

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<sup>178</sup> *Bauer v. Becerra*, 858 F.3d 1216, 1224-1225 & n.5 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018); *Kwong*, 723 F.3d at 166-70. It does not necessarily make sense to perform parallel First and Second Amendment analyses to a gun tax or fee challenge because such challenges do not assert an actual First Amendment claim; they suggest applying fee jurisprudence to a Second Amendment claim. *E.g.*, Complaint at 1, 17-19, *Guns Save Life v. Ali*, No. 2015-CH-18217 (Ill. Cir. Ct. filed Dec. 17, 2015). But courts may elect to do so if they are skeptical of the helpfulness or applicability of First Amendment fee jurisprudence, or because they wish to avoid deciding definitively whether, or how, fee jurisprudence applies. *See Bauer*, 858 F.3d at 1224.

<sup>179</sup> *See supra* note 33 and accompanying text.

<sup>180</sup> *See, e.g.*, *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012).

<sup>181</sup> A competing approach some jurists have proposed is to examine text, history, and tradition to determine whether a regulation is consistent with the Second Amendment right, rather than applying tiers of scrutiny. *E.g.*, *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment) (“the text, history, and tradition of the Second Amendment” should not be subordinated to the “modern (and judge empowering) regime of heightened-scrutiny review”). The long history of federal and state tax legislation and traditions (*see Part I.A.*), suggest gun-violence-prevention taxes are constitutional under this competing approach as well.

sale of arms,” another category of regulations *Heller* deemed presumptively lawful.<sup>182</sup> However, if a court were to reject or avoid ruling on the argument that a gun or ammunition tax is longstanding or presumptively lawful, it would proceed to the second step of the analysis, and select a tier of heightened constitutional scrutiny based on a sliding scale that is tied to the severity of the burden the regulation imposes.<sup>183</sup>

At least two circuit courts build flexibility into the *first* step as well as applying a sliding scale at the second step. In *United States v. Decastro*, the Second Circuit recognized that in some cases, a regulation that burdens Second Amendment rights may do so in such a marginal way that it is unnecessary to proceed to heightened scrutiny at the second step—the regulation is categorically constitutional because it does not substantially burden a protected right.<sup>184</sup> The *Decastro* approach was informed by precedents that eschewed heightened scrutiny for regulations or fees that only incidentally burden fundamental rights like marriage and voting,<sup>185</sup> as well as the court’s observation that the *Heller* majority appeared to categorize early American laws cited by the dissent as only minimally burdensome.<sup>186</sup> In *Heller II*, the D.C. Circuit similarly suggested that only regulations that pose more than de minimis burden need be reviewed under heightened scrutiny.<sup>187</sup>

These burden-based approaches have intuitive appeal for gun and ammunition taxes. Many such taxes are de minimis,<sup>188</sup> and all are fairly classified as presumptively lawful, historically longstanding “conditions and

<sup>182</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 628 n.27 (2008); *Bauer v. Harris*, 94 F. Supp. 3d 1149, 1155 (E.D. Cal. 2015), *aff’d on other grounds*, 858 F.3d 1216 (9th Cir. 2017) (upholding background check fee under *Heller* because, “[a]s Plaintiffs strenuously argue,” the challenged Dealer Record of Sale (DROS) fee “is a condition on the sale of firearms: unless and until an individual pays the DROS fee, he/she may not purchase and possess the firearm”).

<sup>183</sup> See, e.g., *Nat’l Rifle Ass’n*, 700 F.3d at 195; *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

<sup>184</sup> *United States v. Decastro*, 682 F.3d 160, 166–67 (2d Cir. 2012), *cert. denied*, 568 U.S. 1092 (2013); see also Volokh, *supra* note 130, at 1454–61, 1542–44 (articulating “substantial burden” framework for Second Amendment cases and for gun and ammunition taxes). In *Nordyke v. King*, the Ninth Circuit briefly adopted a substantial burden framework, but the decision was vacated and the case decided *en banc* on different grounds. *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), *vacated*, 664 F.3d 774 (9th Cir. 2011).

<sup>185</sup> *Decastro*, 682 F.3d at 166–67.

<sup>186</sup> See *id.* at 166 (colonial regulations of the “time, place, and manner for the discharge of firearms . . . did not much burden self-defense and had a minimal deterrent effect on the exercise of Second Amendment rights”).

<sup>187</sup> *Heller II*, 670 F.3d at 1253 (longstanding regulations are presumptively lawful under *Heller*; “[a] plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right”); *id.* at 1255 (regulations “that are not longstanding” also affect the Second Amendment right if they are not de minimis).

<sup>188</sup> Of the eleven states that proposed gun-violence-prevention taxes from 2013 to 2018, most of the taxes were in the amount of \$25 per firearm or less, with some higher-end proposals to tax firearms or ammunition at rates of 18% to 25%. More typical proposals included a five percent sales tax on guns and ammunition and firearm taxes ranging from \$10 to \$25. See *supra* note 95.

qualifications on the commercial sale of arms.”<sup>189</sup> The two-step approach makes little sense for minimal or moderate taxes. It would be odd to subject a hypothetical \$25 tax on a firearm that costs several hundred dollars to the same level of scrutiny as a \$250 tax,<sup>190</sup> which suggests lower taxes might need to be subjected to intermediate scrutiny and substantial taxes to strict scrutiny.<sup>191</sup> But there is no compelling basis in Second Amendment law to subject a marginal tax of roughly \$25 or less (less than 5% of an average handgun’s value) to robust intermediate scrutiny review,<sup>192</sup> especially given that taxes on this scale have been enacted by nearly one-quarter of states and the federal government within the last century and a half.<sup>193</sup> It would be even odder to subject a 5% gun or ammunition tax to rigorous review if the tax applied only to a certain class of weapons, like semiautomatic rifles, or was structured incrementally so as to exclude a person’s first firearm purchase and increase with successive purchases,<sup>194</sup> because under these taxes consumers would retain the ability to purchase untaxed or minimally taxed arms for self-defense.

Applying a burden-based approach would often make the initial determination of whether a tax is *de minimis* outcome-determinative. The stakes of determining the degree of the burden will be somewhat high,<sup>195</sup> and

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<sup>189</sup> See *Bauer v. Harris*, 94 F. Supp. 3d 1149, 1154 (E.D. Cal. 2015), *aff’d on other grounds*, 858 F.3d 1216 (9th Cir. 2017) (“Plaintiffs have operated on the assumption that regulations on firearms commerce fall within the scope of the Second Amendment. But Plaintiffs do not provide—and the Court cannot find—any binding authority that so holds.”).

<sup>190</sup> A \$250 handgun tax would be a nearly 50% tax on an average handgun costing \$525, so is undoubtedly more burdensome than a \$25 tax. Dan Zimmerman, *The True Cost of Buying a Handgun*, THE TRUTH ABOUT GUNS (Oct. 20, 2013), <http://www.thetruthaboutguns.com/2013/10/daniel-zimmerman/true-cost-buying-handgun/> (describing the Glock 19 as the “Toyota Camry of handguns”; it cost roughly \$525 in 2013). Note that a federal \$200 weapons tax (imposed in 1934) has been upheld against a constitutional challenge, but it applies only to machine guns and similar highly-regulated weaponry. See *supra* notes 40–41 and accompanying text.

<sup>191</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 628, 628 n.27 (2008) (rational basis test cannot “be used to evaluate the extent to which a legislature may regulate a specific, enumerated right”).

<sup>192</sup> Some demands of intermediate scrutiny may not map well onto gun-violence-prevention taxes. The Third Circuit has held that Second Amendment intermediate scrutiny requires the government to show that a regulation does not “burden more [conduct] than is reasonably necessary,” though “‘the fit’ between the asserted interest and the challenged law need not be ‘perfect.’” *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (citing *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010)). The “reasonably necessary” piece would be challenging if it required governments to provide a specific justification for setting a tax at, say, \$25 as opposed to \$20.

<sup>193</sup> See Part I.A.

<sup>194</sup> Rangappa, *supra* note 12, at 20–21.

<sup>195</sup> Even so, the consequences of an imperfectly-calibrated gun or ammunition tax may be less dire than taxes on other fundamental rights. A prohibitively high gun or ammunition tax generally does not close off all options for exercising Second Amendment rights before a court can review the tax, the way hypothetical taxes on time-sensitive speech or abortion services might. See *id.* at 22 (“with each additional weapon an owner moves farther from the goal of self-defense and closer to luxury or convenience”).

line-drawing could be hard with borderline taxes.<sup>196</sup> Courts might look for line-drawing guidance in cases involving fees that affect the exercise of other constitutional rights, like the right to marry.<sup>197</sup> They should also look to the allegations made in Second Amendment complaints. The absence of any allegation that a plaintiff has actually been unable to purchase needed weapons (or reasonably expects to be unable to) suggests the tax is not burdening the exercise of rights,<sup>198</sup> or that there are adequate alternatives to purchasing taxed weapons or ammunition.<sup>199</sup>

### B. Step Two: Gun and Ammunition Taxes Would Survive Intermediate Scrutiny

If a court concluded a tax did pose a substantial burden (or declined to follow a burden-based approach), it might proceed to the second step of Second Amendment analysis. At this step, courts are likely to apply intermediate scrutiny to gun-violence-prevention taxes, as is typical when evaluating laws that do not impose a severe burden on “core” self-defense rights.<sup>200</sup>

No court has previously evaluated a gun or ammunition tax under intermediate scrutiny. However, the Ninth and Second Circuits have performed intermediate scrutiny analysis for gun-related fees.<sup>201</sup> The Ninth Circuit’s decision is more relevant because the \$5 fee it examined is closer

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<sup>196</sup> *But see* Volokh, *supra* note 130, at 1459–1460 (suggesting that the “answer” about whether a firearm regulation imposes a minimal or serious burden “should often be fairly clear”).

<sup>197</sup> *United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012), *cert. denied*, 568 U.S. 1092 (2013) (identifying fundamental rights cases that evaluate burden).

<sup>198</sup> *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018) (“Bauer has neither alleged nor argued that the \$19 DROS fee—let alone the smaller, \$5 challenged portion of the fee—has any impact on the plaintiffs’ actual ability to obtain and possess a firearm.”); *Kwong v. Bloomberg*, 723 F.3d 160, 167, 167 nn.13-14 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014) (“plaintiffs have put forth no evidence to support their position that the fee is prohibitively expensive” and “each individual plaintiff was able to, and did, obtain a residential handgun license”).

<sup>199</sup> *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45, 57 (2d Cir. 2018) (“No substantial burden exists . . . if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.”) (quoting *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 259 (2d Cir. 2015)).

<sup>200</sup> *E.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 876–78 (4th Cir. 2013) (internal quotations and citation omitted) (applying intermediate scrutiny to laws concerning weapons outside of the home, but noting that strict scrutiny may apply to restrictions on the “core right of self-defense in the home”); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 691–92 (6th Cir. 2016) (intermediate scrutiny is appropriate for “severe” but “narrow” burdens like the federal laws prohibiting gun possession by certain individuals).

<sup>201</sup> Both courts applied intermediate scrutiny, but neither ruled that the intermediate scrutiny standard definitively applies to the fees in question. Rather, the courts did so after assuming, but not deciding, that the fees implicated the Second Amendment or that heightened scrutiny was warranted. *Kwong*, 723 F.3d at 168; *Bauer*, 858 F.3d at 1221.

in scale to proposed gun-violence-prevention taxes, and because the Second Circuit case was resolved on narrower grounds.<sup>202</sup>

In *Bauer v. Becerra*, plaintiffs challenged a \$5 portion of California’s \$19 background checks fee charged for every firearm transaction, arguing that it is unconstitutional to use \$5 of the fee to fund a law enforcement database known as APPS (the Armed Prohibited Persons System).<sup>203</sup> The APPS database is a crime-solving tool that lets state law enforcement identify people who bought a gun but later became prohibited from possessing one.<sup>204</sup>

The *Bauer* court assumed without deciding that the California fee at issue burdened conduct within the scope of the Second Amendment,<sup>205</sup> then determined it should apply intermediate scrutiny.<sup>206</sup> Next, the court upheld the \$5 fee under intermediate scrutiny after finding that it reasonably furthered the important public safety goal of investigating “unlawful firearm possession,” which the court explained is a “direct result” of acquiring a firearm in a taxed transaction.<sup>207</sup> The court rejected the argument that the fee was impermissible because “not all” fee payers will later become prohibited possessors, noting that intermediate scrutiny may be satisfied even if a “regulation could have been drawn more narrowly.”<sup>208</sup>

*Bauer* lends compelling support to state efforts to fund gun violence prevention with gun and ammunition taxes. Though focused on the facts at hand, the *Bauer* decision likely does not stand *only* for the narrow proposition that states can tax a transaction and use the proceeds to regulate some people who made a taxed purchase. An easy way to understand this is to examine the crime-solving tool California’s \$5 fee funds. The APPS database targets people who acquired firearms in a taxed transaction,<sup>209</sup> but it sensibly and importantly enables enforcement of criminal laws that extend beyond individual transactions.<sup>210</sup> For instance, in 2017, California law enforcement officials used the APPS database to recover over 800,000 rounds of illegally possessed *ammunition* from people investigated for illegal gun possession, even though ammunition transactions in California are not currently subject

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<sup>202</sup> The Second Circuit case addressed a \$340 handgun licensing fee, payable every three years, and was resolved on the narrow ground that the undisputed facts showed that the \$340 directly reimbursed (and “did not exceed”) costs of administering the city’s handgun licensing regime. *Kwong*, 723 F.3d at 166.

<sup>203</sup> *Bauer*, 858 F.3d at 1218–20.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1221.

<sup>206</sup> *Id.* The court reasoned that intermediate scrutiny—which requires regulators to demonstrate a “reasonable fit” between a law and important regulatory objectives—was appropriate given that the \$5 fee was “exceedingly minimal” and not alleged to impede firearm acquisition. *Id.*

<sup>207</sup> *Id.* at 1223–24.

<sup>208</sup> *Id.* at 1224 (citing *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014)).

<sup>209</sup> *Id.* at 1219–20.

<sup>210</sup> See CAL. DEP’T OF JUSTICE, OFFICE OF THE ATT’Y GEN., APPS 2017 ANNUAL REPORT TO THE LEGISLATURE 2 (revised 2018) (APPS is a “proactive way to prevent crime and reduce violence, including incidents of domestic violence.”)

to the APPS fee.<sup>211</sup> The Second Amendment does not compel California to limit its use of the APPS database to investigating the specific firearm transactions for which a fee was paid.

Accordingly, *Bauer* stands for the broader idea that states imposing modest gun-related transaction taxes may treat firearm acquisition as a reasonable proxy for firearm misuse where there is enough overlap between the two categories to satisfy intermediate scrutiny.<sup>212</sup> The *Bauer* court was satisfied by the state's undoubtedly correct inference that there is a direct overlap between *some* gun purchasers who pay the challenged \$5 fee and prohibited possessors in California.<sup>213</sup> Applying intermediate scrutiny, the court appropriately credited the legislature's reasonable—and correct—logical inference on this score rather than demanding proof that all or a certain number of gun purchasers will become prohibited.<sup>214</sup>

*Bauer's* logic could mean that intermediate scrutiny is satisfied for a variety of moderate taxes where a reasonable proxy between a taxed transaction and gun violence can be assumed. Assuming a looser proxy is constitutionally sufficient for taxes about as minimal as the *Bauer* fee, the following measures could satisfy intermediate scrutiny:

- 5% tax on items of ammunition to fund community violence prevention and intervention programs—because ammunition obtained in legal straw purchases fuels cyclical urban violence;
- \$20 surcharge on handgun purchases to fund mental health crisis counseling and mental health records reporting to background check systems—because some taxed handguns will be used in suicide attempts;
- \$10 surcharge on concealed carry permits to fund installing security features in schools or other public buildings—because some publicly carried firearms will be used to carry out public shootings.

*Bauer's* “reasonable proxy” approach also means that existing gun taxes, like the Pittman-Robertson federal excise tax and Tennessee's ten-cent ammunition tax, would also survive intermediate scrutiny. Those measures

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<sup>211</sup> *Id.* at 7.

<sup>212</sup> *See Bauer*, 858 F.3d at 1224 (“Because the APPS program involves the investigation of illegally armed individuals and enforcement of firearms laws, there is certainly a fit between the legislative objective and the use of the DROS fee.”).

<sup>213</sup> *Cf. id.* (“the unlawful firearm possession targeted by APPS is the direct result of certain individuals’ prior acquisition of a firearm through” transactions subject to the \$5 fee).

<sup>214</sup> The Supreme Court has often endorsed this sort of legislative deference in heightened scrutiny. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (even under strict scrutiny, the Court has “permitted litigants . . . to justify restrictions based solely on history, consensus, and ‘simple common sense’”) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)); *see also* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (“We do not demand of legislatures ‘scientifically certain criteria of legislation.’”) (internal citation and quotation omitted).

use tax revenues to further an important regulatory goal—wildlife conservation—that is made necessary because some gun and ammunition transactions result in the hunting and killing of game animals. The connection is reasonably close even though not every gun purchaser is a high-volume hunter (or even hunts at all).

Notwithstanding the Ninth Circuit’s approach in *Bauer*, some courts might conclude that it is necessary to apply a more rigorous form of heightened scrutiny even to somewhat minimal taxes.<sup>215</sup> These decision-makers might eschew a “reasonable proxy” approach and require regulators imposing a fee or tax to demonstrate a tighter link between gun transactions and unlawful gun ownership than the fact that some individuals engaged in harmful gun violence obtained guns in a taxed transaction (or through theft or trafficking from somebody who did).

For any courts that demand it, there is a significant body of empirical data linking *legal* gun acquisition with many of the proposed uses for violence prevention taxes. For instance, there is research demonstrating that “[t]he concentration of guns mirrors the rate of gun thefts,”<sup>216</sup> that gun homicides are higher in states with higher rates of gun ownership,<sup>217</sup> that states with the highest rates of gun ownership experience twice as many suicide deaths than other states,<sup>218</sup> that many individuals incarcerated for a gun crime acquired their weapon legally,<sup>219</sup> that lawful private sales are a “leading source of guns used in crimes,”<sup>220</sup> and that many mass shooters obtain guns and ammunition in legal transactions.<sup>221</sup> This research demonstrates that there are substantial, empirically backed links between lawful gun purchases and criminal possession, thefts, suicides, and gun homicide. These and other studies could support taxes that propose to fund

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<sup>215</sup> For example, the Seventh Circuit recognizes a form of Second Amendment heightened scrutiny that is in between intermediate and strict. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); see also *People v. Chairez*, 2018 IL 121417, ¶ 35 (2018) (“The Seventh Circuit . . . teaches us that the argument is not strict versus intermediate scrutiny but rather how rigorously to apply intermediate scrutiny to second amendment cases.”).

<sup>216</sup> Rangappa, *supra* note 12, at 22 n.38 (citing Lisa Hepburn et al., *The U.S. Gun Stock: Results from the 2004 National Firearms Survey*, 13 INJ. PREVENTION 15, 16 (2007)).

<sup>217</sup> Lisa Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAVIOR 417, 417 (2004).

<sup>218</sup> Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 951–52 (2013).

<sup>219</sup> Katherine Vittes et al., *Legal Status and Source of Offenders’ Firearms in States With the Least Stringent Criteria for Gun Ownership*, 19 INJURY PREV. 26, 26–31 (2013).

<sup>220</sup> Garen J. Wintemute et al., *Private-Party Gun Sales, Regulation, and Public Safety*, 363 NEW ENG. J. MED. 508, 510 (2010).

<sup>221</sup> *America’s Ammunition Crisis: Few Laws Exist to Prevent Purchases by Dangerous People Online and in Stores*, GIFFORDS L. CTR. (July 30, 2012), <http://lawcenter.giffords.org/american-ammunition-crisis-few-laws-exist-to-prevent-purchases-by-dangerous-people-online-and-in-stores/>; Elizabeth Chuck, *More Than 80 Percent of Guns Used in Mass Shootings Obtained Legally*, NBC (Dec. 5, 2015), <https://www.nbcnews.com/storyline/san-bernardino-shooting/more-80-percent-guns-used-mass-shootings-obtained-legally-n474441>.

law enforcement efforts to prevent and solve gun crimes, mental health and suicide prevention programs, violence intervention strategies in high-crime communities, or mass shooting risk reduction measures.

The empirical research undoubtedly does not show that all gun purchasers contribute to violence. Rather, it demonstrates that targeting all gun or ammunition purchasers is a reasonable legislative choice because lawful purchases are significant contributors to gun thefts and crime. Gun-violence-prevention taxes necessarily apply to some law-abiding people who will never contribute to violence or crime. Still, such taxes are constitutional because they represent both a permissible and correct predictive judgment by regulators that some amount of lawfully purchased guns and ammunition will contribute to firearm violence.<sup>222</sup>

The above research and reasoning also suggest that gun and ammunition taxes are constitutionally acceptable even if they are not a cure-all that brings the costs of gun violence to zero. Total revenues raised from gun-violence-prevention taxes may be a drop in the bucket for many cities and states, particularly because tax revenues could be negatively affected by volatile demand for guns and ammunition.<sup>223</sup> But this “drop in the bucket” aspect of gun-violence-prevention taxes does not mean they flunk heightened constitutional scrutiny or are not reasonably related to important regulatory interests. Should courts proceed to heightened scrutiny to evaluate such a tax, the proper question is not whether the tax will *fully* fund a specific area of gun violence prevention, but whether it funds violence prevention efforts that bear a reasonable relationship to firearm or ammunition acquisition.<sup>224</sup> The fact that governments cannot fully fund all desirable programs with one tax does not render the tax unconstitutional, but makes it an important incremental step towards this compelling end.

## V. CONCLUSION

In *Cox v. New Hampshire*, the Supreme Court determined that it is constitutional to require payment of a licensing fee to maintain public order and police public events. The Court reasoned that the licensing fee helped guarantee constitutionally guaranteed civil liberties; those liberties “imply

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<sup>222</sup> See, e.g., *Drake v. Filko*, 724 F.3d 426, 436–37 (3d Cir. 2013) (“When reviewing the constitutionality of statutes, courts ‘accord substantial deference to the [legislature’s] predictive judgments.’” (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997))).

<sup>223</sup> Seattle’s tax was expected to bring in at least \$300,000 in annual revenue, but raised \$104,000 in 2016 and \$93,000 in 2017. See *Watson v. City of Seattle*, 401 P.3d 1, 8 (Wash. 2017). Beekman, *supra* note 91; see also NAT’L PUB. RADIO, *supra* note 2 (a decline in hunting license revenues has strained the budgets of state wildlife management agencies).

<sup>224</sup> *Mance v. Sessions*, 880 F.3d 183, 191 (5th Cir. 2018) (“[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns”) (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668, 191 L. Ed. 2d 570 (2015)).

the existence of an organized society maintaining public order without which” everyone’s liberty would be compromised.<sup>225</sup> The Court elaborated:

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the social order upon which they ultimately depend.<sup>226</sup>

The Court highlights an important reason why gun and ammunition tax proposals are consistent with the Constitution. Gun-violence-prevention taxes propose to mitigate grave safety threats that interfere with public order and citizens’ freedom to exercise all of their civil liberties. Opponents of gun and ammunition taxes may deny that lawful gun purchases lead to violence the same way holding a parade can lead to traffic-control problems. But there are no gun suicides or homicides without guns, and even law-abiding owners can furnish the link when their weapons are stolen or accessed by a child or family member in crisis. And firearm violence undoubtedly impedes people from exercising other civil liberties by making it harder to go to church<sup>227</sup> or school,<sup>228</sup> or simply to go about one’s daily life free from fear.<sup>229</sup>

Gun-violence-prevention taxes are a constitutional response to America’s gun violence epidemic because there is a long regulatory history of taxing guns and ammunition at the state and federal level to raise general revenue or fund public programs. The longstanding acceptability of gun and ammunition taxes and the many differences between the First and Second Amendment rights confirm that courts should apply Second Amendment law when evaluating challenges to gun-violence-prevention taxes, rather than relying inflexibly on the Supreme Court’s First Amendment fee jurisprudence. The two-step Second Amendment methodology the lower federal courts have developed will ensure that gun and ammunition taxes and fees that burden lawful self-defense are reviewed skeptically, while minimal taxes survive constitutional review.

Should more jurisdictions implement gun-violence-prevention taxes, and more courts review them, the relevant historical and constitutional

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<sup>225</sup> Cox v. State of New Hampshire, 312 U.S. 569, 574 (1941).

<sup>226</sup> Id.

<sup>227</sup> Sutherland Springs, Charleston, Wichita: A History of Attacks at Churches, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/us/church-shooting-history.html>.

<sup>228</sup> Niki Graf, A Majority of U.S. Teens Fear A Shooting Could Happen at Their School, And Most Parents Share Their Concern, PEW RES. CTR. (April 18, 2018), <http://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/>.

<sup>229</sup> E.g., Kevin Rector, These Baltimore Students Aren’t Afraid of Mass Shootings. They’re Facing Gun Violence in Their Everyday Lives., BALTIMORE SUN (Mar. 1, 2018), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-excel-students-on-guns-20180219-story.html>.

principles will come into clearer focus. The eventual development of a Second Amendment fee jurisprudence will make adjudicating these cases easier and benefit policymakers engaging in the important work of developing and funding initiatives to address America's gun violence epidemic. Given the pace of Second Amendment litigation generally and the consistency with which local taxes have been challenged, this future may not be far off.