
Gun Regulation Exceptionalism and Adolescent Violence: A Comparison to Tobacco

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Introduction

The National Rifle Association and their congressional allies claim that firearms are the most regulated product in America. Yet guns are less restricted than a number of other dangerous products. A comparison of the restrictions on the sales of firearms and tobacco — especially to non-adults — shows that along some dimensions, such as federal age restrictions, it is easier for an adolescent to purchase an assault weapon with 20 rounds of ammunition than a pack of 20 cigarettes.

That was not always so. Until the Master Settlement Agreement (MSA) ended a decade of litigation between the major tobacco companies and public health advocates in 1998, cigarettes — which had enjoyed a century of widespread public appeal, reaching their all-time high that year in sales to those under 18 — were as unfettered as firearms sales are today. And the MSA was not even codified into law until eleven years later in the 2009 Family Smoking Prevention and Tobacco Control Act. It took many decades of federal, state, and local enactments to dramatically reduce tobacco use by adolescents. Cigarette use by those in 12th grade, for example, decreased from 23.1% in 1999 to 3.6% in 2018.¹

Restrictions on the sales and use of cigarettes were all adopted without outlawing the products themselves or banning their legal purchase *by adults*. These tobacco restrictions may therefore be seen as a model for public health advocates similarly seeking to reduce

firearm violence that disproportionately involves adolescents as both perpetrator and victim.

Tobacco restrictions were made more politically palatable by specifically targeting restrictions to the youth market or emphasizing the impact of the regulation on youth. A similar youth-focused framing could be effective in promoting common-sense gun regulation as well. In addition, regulations targeting youth are more likely to pass constitutional muster, as laws that are explicitly youth-focused have been upheld as not violating the Second Amendment.²

This article considers six restrictions on tobacco purchase and use and compares tobacco's regulatory landscape to that of firearms: (a) minimum age for purchase, (b) sale by unlicensed individuals, (c) taxation, (d) advertising, (e) graphic warning labels, and (f) zoning.

The Special Status of Both Guns and Tobacco in America

Firearms and tobacco share several common features, including an elevated cultural and political status throughout American history, and have both been represented by powerful lobbies. These common features make tobacco an applicable comparison point to firearms, especially as it relates to protecting youth from the harms of both products.

First, tobacco and guns are dangerous both to self and other. The lethality of cigarettes to the individual smoker was recognized as official government policy in 1964, and later found to be deadly to others as well through second-hand smoke. Likewise for firearms, a meta-analysis found that the mere presence of a gun in a home increases the odds of suicide (3.24 pooled odds ratio) and of being a homicide victim (2.00

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pooled odds ratio).³ Guns harm tens of thousands of people each year through assault and homicide.

Second, despite such sobering statistics, both products long enjoyed a highly elevated status in the American economy and psyche. Tobacco was once so important to the American economy that its leaves were selected to grace the columns at the U.S. Capitol. Many Americans considered cigarettes to be central to their identities. For decades, tobacco's political power and its exemption from meaningful regulation were very similar to the status and power firearms still enjoy today.

Finally, the use of both products has long been asserted to be a matter of "right" by their users. Although tobacco has no Second Amendment equivalent, for years tobacco use was nearly ubiquitous. And attempts to ban cigarettes altogether have never been successful. The public health approach therefore shifted, in the 1990s, to focus on reducing *youth*

the FDA some authority to regulate tobacco product standards.

Gun regulation started earlier than tobacco regulation, but it has been slower; and, in contrast to tobacco, there have been several key laws that cut in the opposite direction and actually protect the firearm industry. The National Firearms Act of 1934 established a tax on the manufacture or sale of some firearms. The Federal Firearms Act of 1938 created federal license requirements for firearm manufacturers and retailers; it also established categories of "prohibited purchasers" (e.g., convicted felons). The Gun Control Act of 1968 established a minimum age for some firearm purchases. The Firearms Owners' Protection Act of 1986, however, reversed some of the previous regulatory gains; this law reduced restrictions on federally licensed dealers, limited the number of regular inspections that ATF can conduct, and prohibited the federal government from keeping a central database

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initiation of smoking. This special focus on youth finally turned the regulatory tide to convince the public, regulators, and the industry to adopt meaningful restrictions.

Federal Regulation of Tobacco and Guns

Federal law regulates the sale, marketing, and content of tobacco products. For decades, from the 1960s through the 1990s, tobacco was not effectively regulated, and youth smoking rates were very high. It was not until the late 1990s and 2000s that there was a major shift toward more tobacco regulation.

The 1965 Federal Cigarette Labeling and Advertising Act was the first law to mandate warning labels on every pack and advertisement, but it also preempted additional state or local warnings. The Federal Communications Commission has authority to ban cigarette advertisements from radio and television, which it did in 1970. In 1998, the Master Settlement Agreement implemented widespread restrictions after a decade of litigation, but ultimately, the most sweeping piece of legislation came in the form of the 2009 Family Smoking Prevention and Tobacco Control Act, which further regulated marketing and sales and gave

of gun sales. The Brady Act of 1993 strengthened background checks and waiting period requirements for firearm sales. The Federal Assault Weapons Ban, enacted in 1994, prohibited certain semi-automatic and large-capacity magazines. In another backslide from laws that expand gun restrictions, the Protection of Lawful Commerce in Arms Act was a 2005 landscape-changing law that immunized the gun industry from most tort claims.

Minimum Age for Purchase

In many situations, a person can buy a firearm, even an assault weapon, before he is old enough to purchase a pack of cigarettes. While the minimum age to purchase any tobacco or nicotine product is 21, some gun sales are not subject to a federal minimum age whatsoever.

In practice, the minimum age for firearm purchase ranges from nonexistent to 21, depending on the type of gun purchased and from whom. Under federal law, when a gun is purchased from a federally licensed gun dealer, the purchaser must be 21 for a handgun and 18 for a long gun.⁴ If purchased from an unlicensed individual, the customer must only be 18 to buy a hand-

gun, and there is no federal minimum age for a long gun if purchased from an unlicensed seller.⁵ Although some states have passed higher age minimums — such as California, where one must be 21 to buy any gun from any seller⁶ — these higher minimums are not the norm.

The distinction between handguns and long guns is historical. When Congress passed the Gun Control Act of 1968, it implemented a higher minimum age for handguns because they were, and still are, the type of gun used in the majority of criminal acts and suicide. A lower minimum age was supposedly implemented for long guns because they are used in hunting and sport.

Today, that distinction makes less sense, especially because many assault weapons are characterized as “long guns.” In the Parkland shooting, the shooter was 19 and had legally purchased an AR-15 style rifle — a “long gun” — from a licensed gun dealer.⁷ He would have been too young to buy a handgun from the same store, and could not have legally purchased a pack of cigarettes.

There is scientific support for minimum age regulations. Adolescent brains are still developing impulse control mechanisms until the mid-20s, which might make younger people more prone to violence and have a higher risk for suicide.⁸

Although somewhat limited, empirical evidence on the effect of firearm minimum age laws suggests minimum age laws are associated with a reduction in suicide and unintentional death rates, at least among some populations. One study found that firearm minimum age laws implemented at the state level were significantly associated with a reduction in firearm suicides among those 18-20 years old (although the effects on total suicides were uncertain).⁹ Federal firearm minimum age laws are likewise associated with a decrease in youth suicide and unintentional death rates.¹⁰

Young people are also disproportionately represented among both firearm offenders and gun violence victims. People aged 24 and younger commit nearly half of all gun homicides.¹¹ At the same time, those aged 18-24 are victims of gun violence at a higher rate than any other age group.¹² Taken to their logical end, these statistics could suggest raising the minimum age to 25 (and some do). A minimum age of 21 is more politically palatable, however, and is consistent with the legal age for drinking and smoking.

One objection to raising the minimum age for all firearm purchase to 21 is that the United States still requires males to register for Selective Service at age 18 and potentially be forced to use these types of weapons. There is a key difference, however, between

someone 18 years old who gets military training and is under constant supervision and one who is untrained and unsupervised.

Second, the fact that there is a minimum age distinction between sales by federally licensed dealers and by unlicensed individuals weakens the overall regulatory scheme. If a 16-year-old wanted to buy a gun in a state that does not have its own minimum age regulation for unlicensed sale, he would only need to go to armslist.com and find a listing. To close that loophole, Congress should impose an across-the-board federal minimum age which would apply to all firearm sales. In the absence of federal action, states should make the minimum age 21 for purchase of all guns.

Sale by Unlicensed Individuals

In most states, anyone who wishes to sell tobacco must obtain a tobacco retail license. However, one does not need a license to sell firearms as long as the individual is not “engaged in the business” of selling firearms (if so, they would need to register as a federal dealer).¹³ Requiring all sales to be performed through federally licensed dealers would protect youth, as federal dealers are more able and more motivated to verify minimum age requirements and help prevent youth access to firearms.

A retail license is even more important in the sale of guns than in the sale of tobacco given the safety considerations. Certain categories of people — domestic abusers, those with certain mental health conditions, those with records of criminal violence — are barred by law from buying a firearm. But, unlike licensed dealers, unlicensed sellers are not required to take affirmative steps to confirm that the buyer is not a prohibited purchaser. Although federal law requires a background check for anyone who wishes to purchase a gun from a federal dealer, background checks are not required by federal law for sales by unlicensed individuals (although some *states* do require background checks for such sales).¹⁴ Purchasing from an unlicensed seller is a well-known “loophole” to avoid a background check in many states, and 22% of gun owners are estimated to have obtained their last firearm with no background check.¹⁵

A recent House bill, the Bipartisan Background Checks Act of 2019, which stalled in the Senate, proposed to significantly close the gun private sale loophole.¹⁶ But ideally, any legislative solution would go further. The federal government, or more likely state governments, could require anyone who wishes to sell a firearm to obtain a license, regardless of the size of their retail business. A retail license is a requirement to sell tobacco in most states. Requiring a license to sell a firearm would create a record of people who have

sought authorization to sell any firearm, maintain a means of communicating with them, and create a sensible hurdle to selling firearms without preventing individuals from doing so.

Taxation

Taxes discourage consumption of products that our society deems harmful, from tobacco to alcohol to soft drinks. Taxes on tobacco have been one of the most effective anti-tobacco measures. Increased firearm (and ammunition) taxation might also be effective in decreasing youth access to firearms, as youth have less disposable income and are therefore more elastic gun purchasers. Current firearm taxes are nowhere near those of tobacco.

Excise taxes build in the externalities of the product's use both to the purchaser and to the public, yet still ultimately allow the user to make their own choice. Tobacco is heavily taxed at the federal, state, and local levels. Federal excise taxes are currently \$1.01 per pack, while state and local excise taxes range from \$0.17 to \$6.16; another \$0.60 per pack is typically added to fund the Tobacco Master Settlement Fund.¹⁷ The wide range in state and local tax levels thus results in different per-pack prices around the country, from \$4.70 in Virginia to \$13.50 in New York — representing an increase of between 250% and 600% of the untaxed cost of the product.

Tobacco excise taxes can effectively reduce consumption, with a 10% price increase leading to a 4% consumption decrease on average.¹⁸ At a certain level, such as \$13.50 per pack in New York City, a pack-a-day habit becomes prohibitively expensive for many.

Firearms are not taxed nearly as much. Handguns are currently subject to a 10% excise tax; long guns and ammunition to an 11% excise tax.¹⁹ Legislators have previously used gun taxes to discourage the purchase of some firearms. In the National Firearms Act, Congress implemented a then-prohibitive \$200 tax on the transfer or manufacture of machine guns, short-barreled shotguns and rifles, and silencers. In today's dollars that is about \$3,800; the tax has eroded significantly as it was never indexed to inflation.

The level of federal taxation on guns is thus an insignificant fraction of what it is on tobacco. Moreover, unlike tobacco, there has been relatively little state and local experimentation with firearm excise taxes. In the past decade, Seattle and Cook County, Illinois respectively passed a tax of \$25 on firearms and \$0.01 to \$0.05 per round of ammunition or cartridge sold. Importantly, both of these taxes withstood legal challenges; however, there is generally insignificant state or local progress on firearm taxes. There may be a constitutional limit to how high gun taxes can go; a

court found that a \$1,000 pistol tax in the Northern Mariana Islands (a U.S. Territory) ran afoul of the Second Amendment.²⁰ The precise constitutional limits of firearm taxes are not yet clear.

The lack of taxation on firearms is a missed opportunity for public health. The demand for firearms, especially handguns, is possibly quite elastic; one study estimated that a 1% handgun price increase leads to a 2-3% decrease in demand.²¹ (Other studies, however, find that for some groups the value of possessing a firearm is high and persistent; there may be a lower elasticity among these groups.²²)

Legislation has been proposed to increase federal firearm taxes through the Gun Violence Prevention and Safe Communities Act of 2018.²³ This legislation would set the excise taxes on guns at 20% and on ammunition at 50%; it would also raise the transfer tax to \$500. Although these levels would still be far below taxes on tobacco, they would be more than twice as high as the current levels. State and local governments can implement firearm excise taxes as well.

Advertising

Over the last 50 years, the U.S. has virtually eliminated tobacco advertising, for reasons that are explicitly youth-based: tobacco companies are not permitted to advertise anywhere likely to be viewed by youth. However, there are virtually no legal restrictions on gun advertising. Although some companies, such as Google and Facebook, have policies that prohibit gun marketing on their websites, those policies can be changed at any time. Firearm advertising restrictions should focus on eliminating advertising anywhere youth may see it, not least because this may engender maximum political support.

Before any advertising regulation was put into place, tobacco ads were ubiquitous — appearing on children's television networks, radio, billboards, and at sports games. Advertisements were then banned on TV and radio for cigarettes in 1971 and in 1986 for smokeless tobacco products. Still, tobacco was advertised in magazines, newspapers, billboards, and transit. In 1998, the most significant advertising restriction for tobacco came in the form of the Master Settlement Agreement (MSA), which banned advertising targeted to youth under 18, outdoor advertising, and "product placement." The Family Smoking Prevention and Tobacco Control Act of 2009 further strengthened advertising restrictions.

Guns, however, can be advertised on TV and radio (although networks may have policies against airing such advertisements), magazines, newspapers, and billboards. A House bill introduced in 2014, the Children's Firearm Marketing Safety Act, that would have

required the Federal Trade Commission (FTC) to promulgate rules prohibiting marketing guns to children, was not enacted.²⁴ Although Google and Facebook ban gun marketing, users with many followers — i.e., “influencers” — are still paid to post about firearms. And the restrictions that do exist are under attack. For example, a century-old California law restricting handgun advertisements at gun shops was struck down a few years ago.²⁵ Finally, and most troubling, it is alleged that some gun advertisements may actively “encourage violent, criminal behavior” as a lawsuit argues against Remington,²⁶ the manufacturer of the weapon used in the Sandy Hook mass shooting.

In addition to general prohibitions, the tobacco industry is specifically prohibited from making false or misleading claims in the very few advertisements that remain.²⁷ Tobacco advertisements are prohibited from using the terms “low tar” and “light” for fear of misleading consumers. Yet, gun advertisements still promote the idea of firearms as home protection, even though studies suggest that having a gun in the home makes its residents *less* safe given the risk that one of the inhabitants will be killed by their own gun.²⁸ Although the Federal Trade Commission has federal authority to regulate deceptive marketing, there is limited scrutiny of the claims made in gun advertisements. Regulating advertising about such dangerous products is even more important because the federal government lacks the authority to regulate the physical attributes of firearms in the same way it regulates those of other consumer products; firearms are explicitly carved out of the jurisdiction of the Consumer Product Safety Commission.²⁹

Some may contend the restriction on tobacco advertising is a gold standard unattainable for other products. But the form of the restrictions — e.g., bans on youth, severe bans on place and type of advertisement — show that some advertising restrictions are an attainable model for gun advertisements, whether through legislation or litigation, especially when focused on (a) prohibiting advertising anywhere that can be viewed by youth and (b) prohibiting false or misleading claims. The increasing restrictions on tobacco advertisements over the past 50 years, at least the extent to which advertising is targeted to youth, may set achievable goalposts for proponents of gun advertising restrictions.

Labeling

Today, one cannot imagine a cigarette pack without one of its familiar warning labels, such as: “WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.” And that message does not come close to the warning labels

on cigarettes in other countries, such as this one from Germany: “Smoking Can Cause a Slow and Painful Death,” or ones that carry graphic images of diseased lungs or deformed fetuses.

Graphic warning labels have a tumultuous history in the U.S. Although the 2009 Family Smoking Prevention and Tobacco Control Act required the FDA to implement graphic warning labels, tobacco companies successfully achieved a 2012 D.C. Circuit court ruling that these warnings, in their original formulation, were unconstitutionally compelled speech.³⁰ The FDA then failed to revise the graphic warning labels until it was sued to do so, in compliance with the 2009 Tobacco Control Act.

The FDA is finally making progress toward placing graphic warning labels on U.S. cigarette packs and issued a final rule in March 2020. The labels are horrific, which is the intent. One shows a child with an oxygen mask, another shows an eye with a syringe entering it.

Graphic warning labels on tobacco have been shown to be effective at deterring would-be smokers from purchasing cigarettes. In one study, graphic labels reduced the chance of cigarette purchase among people with lower nicotine dependence.³¹ Another study found that smokers who viewed graphic warning labels reported being more motivated to quit smoking than those not shown the images.³²

Graphic warning labels could apply to firearms as well. There has been at least one call for ammunition to carry graphic warning labels created by a team of advertising professionals.³³ They propose that each ammunition cartridge carry an image of a person with a facial gunshot wound, accompanied by the text “In homes where domestic violence occurs, a gun increases the risk of women being killed by 5 times.” These labels aim to deter ammunition purchase, the same way tobacco graphic warnings do. Gun boxes could also carry graphic warnings.

Tobacco graphic warnings have been viciously challenged, and firearm graphic warnings would be as well. However, graphic warnings on firearms and ammunition could potentially deter firearm or ammunition purchase, or at least make users think twice.

Zoning

Smoke- and gun-free zones are a type of “place restriction” — a prohibition on the locations where a person can engage in a given activity. Smoke-free laws have been a critical factor in decreasing the smoking rate in the U.S. Gun-free zones could be equally important but are vigorously opposed by the NRA.

Smoke-free zones are now ubiquitous — and they are important for a number of reasons. First, they “de-

normalize” smoking as smokers are more hesitant to smoke in public. Second, they provide a physical area free from smoking, making it less likely a would-be smoker would start and reinforcing the likelihood that a cessation effort might succeed. Third, restricting smoking from places where children are likely to be — schools, parks, beaches — reduces youth exposure and the likelihood children will start smoking at all.

New York City has among the most comprehensive smoke-free laws in the country, prohibiting smoking in nearly all workplaces, and many outdoor areas such as parks and beaches. New York City also restricts retailer density, limiting tobacco retail licenses and not issuing new ones until the existing number falls below a cap. Smoke-free laws are cited as one of the measures that contributed to NYC’s youth smoking rate decreasing 52% over ten years.³⁴

Gun-free zones exist at both the state and federal levels, but there is significant room to expand them — both where firearms can be carried and where they can be sold. Although federal law prohibits guns in federal buildings, airports and airplanes, and K-12 schools through the Gun Free School Zones Act, state and local governments may be better positioned to make zoning regulations due to conceivable limits on Congress’s authority to create new gun-free zones.³⁵ States can make more places gun-free — for example, prohibiting guns in banks, hospitals and mental health facilities, polling places, parks, anywhere tensions might cause violence (e.g., sports arenas, protests), anywhere alcohol is served, places of worship, daycare or childcare, amusement parks, casinos or gambling facilities, and concerts. States can also make certain zones gun-free by default, unless the location opts in; for example, making all bars or places of worship gun-free *unless* the place posts a sign stating that guns are permitted. Such default rules are the opposite of the carry laws in certain states, which require gun carry to be permitted in many public places.

Local governments might also use zoning to limit where guns are sold, the distance between gun stores, the proximity of gun stores to sensitive areas (e.g., schools), and the number of gun store permits to issue. The town of Piscataway, New Jersey, enacted a zoning ordinance with such steep requirements that effectively no gun stores can open in the town — any gun store would have to be 1,000 feet away from any sensitive location, including schools, parks, and health care facilities.³⁶ Alameda County, in California, has enacted a zoning ordinance requiring that any new firearm retailer not be within 500 feet of certain sensitive areas, including schools, and not within 500 feet of other firearm retailers. The Ninth Circuit upheld the constitutionality of the Alameda County require-

ments.³⁷ Some zoning laws, however, may go too far; the Seventh Circuit struck down a Chicago law that restricted available locations for a shooting range to 2.2% of the city as unconstitutionally burdening the Second Amendment.³⁸

The NRA contends that gun-free zones contribute to mass shootings (*i.e.*, if more people were armed, perhaps the shooter might be stopped). The NRA estimates that the vast majority of mass shootings occur in gun free zones; however, Everytown for Gun Safety estimates only 10% of mass shootings occur in gun-free zones. Currently, there is little evidence that gun-free zones increase the probability of a mass shooting.³⁹

Conclusion

At one time, the centrality of tobacco to American culture was equal to — or even exceeded — the centrality that guns hold today. However, through public health advocacy, sustained campaigns to change public opinion about cigarettes, and a focus on youth specifically, historic tobacco regulations were achieved. These regulations were ultimately both politically feasible and effective in promoting public health. Tobacco’s regulatory history provides a valuable blueprint for gun regulation, as both products cause health harm to self and other, despite Constitutional differences.

Where political will to make federal change on firearms is lacking, state and local governments can act in the absence of federal action. Adopting an explicitly youth-focused frame and targeting regulations to restricting youth access to firearms is likely the most politically feasible approach, as it was for tobacco.

Note

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