ARTICLE

NEW COURTROOM STRATEGIES REGARDING FIREARMS: TORT LITIGATION AGAINST FIREARM MANUFACTURERS AND CONSTITUTIONAL CHALLENGES TO GUN LAWS

Jon S. Vernick[*] *and Stephen P. Teret*[**]

Table of Contents

---

[*] Assistant Professor of Health Policy and Management, Johns Hopkins School of Public Health; Associate Director, Johns Hopkins Center for Gun Policy and Research; Co-Director, JD/MPH Joint Degree Program at Johns Hopkins School of Public Health and Georgetown University Law Center; B.A., Johns Hopkins University; J.D., George Washington University; M.P.H., Johns Hopkins School of Public Health.

[**] Professor of Health Policy and Management, Johns Hopkins School of Public Health; Director, Johns Hopkins Center for Gun Policy and Research; Adjunct Professor of Law, Georgetown University Law Center; Co-Director, JD/MPH Joint Degree Program at Johns Hopkins School of Public Health and Georgetown University Law Center; B.A., St. Lawrence University; J.D., Brooklyn Law School; M.P.H., Johns Hopkins School of Public Health.

The authors wish to thank Amy Schofield, JD/MPH candidate at the Johns Hopkins School of Public Health and Georgetown University Law Center, for her research assistance, and Julie Dugan, J.D. Research Associate at the Johns Hopkins School of Public Health, for her helpful comments. We also wish to acknowledge the Joyce Foundation, of Chicago, Illinois, for its generous support of the Johns Hopkins Center for Gun Policy and Research.

I. INTRODUCTION

Guns are a part of American life. Approximately thirty-five percent of American homes contain firearms.[1] Guns appear ubiquitously on television and in the movies.[2] They are also discussed continually in the news and are now the subject of a substantial amount of litigation in the courts.

This Article discusses two types of gun litigation: proceedings in which courts have addressed the constitutionality of various gun laws passed by Congress, states, and cities; and

---

1. *See* PHILIP J. COOK & JENS LUDWIG, NATIONAL INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 1 (1997) (reporting data taken from a 1994 telephone survey (National Survey of Private Ownership of Firearms-NSPOF)).

2. *See generally* FRANKLIN E. ZIMRIG & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 124-37 (1997).

tort lawsuits against gun manufacturers, wholesalers, and dealers. The first type of litigation, generally brought by supporters of widespread availability of firearms, has challenged laws designed to limit the manufacture, sale, and possession of guns.[3] In the second type of litigation, rather than favoring the availability of guns, the plaintiffs have sought redress for the alleged consequences of the widespread availability of guns and manufacturers' failure to design safer guns.[4] Thus, both sides of the traditional gun debate have turned to the courts for protection of their interests.

The authors, as public health lawyers, view the law (whether legislation or litigation) as a potent tool for protecting the public's health. The effectiveness of legislation as a tool is dependent upon its ability to survive a lawsuit challenging its constitutionality. The value of litigating to protect the public's health[5] is dependent, in part, on the viability of the plaintiffs' theories of liability. Therefore, whether gun legislation and litigation will be successful in addressing the toll guns take on the health of this nation is dependent on judicial rulings. The courts' decisions in the types of cases discussed herein, in essence, affect critically important health risks for many.

Despite recent declines in violent crime rates in the United States,[6] there were more than 13,500 firearm-related homicides in the United States in 1997.[7] Homicide, however, does not represent the full societal impact of firearms. Coupled with an additional 17,566 suicides,[8] nearly 1000 unintentional deaths, and a smaller number of gun-related deaths for which intentionality was undetermined, there was a total of 32,436 firearm-related deaths in 1997.[9] In addition, from June 1994 to May 1995, an estimated 87,844 persons suffered non-fatal firearm injuries serious enough to require at least emergency care.[10]

---

3. Refer to Part II *infra*.

4. Refer to Part III *infra*.

5. *See* Stephen P. Teret, *Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027, 1027 (1986).

6. *See* FBI, 1997 UNIFORM CRIME REPORTS 13 (1998) (reporting that the violent crime rate in the United States has declined 18.2% from 1993 to 1997).

7. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORT 19 (1999).

8. *See id.* at 10 (indicating 17,566 firearm-related suicides and 981 unintentional deaths).

9. *See id.*

10. *See* Darci Cherry et al., *Trends in Nonfatal and Fatal Firearm-Related Injury Rates in the United States, 1985-1995*, 32 ANNS. EMERGENCY MED. 51, 53 (1998).

These deaths and injuries are associated with substantial health care and other costs.[11] The lifetime medical costs of firearm-related injuries occurring in 1994 has been estimated at $2.3 billion, of which nearly half (49%) was paid through public funds.[12] When costs associated with lost productivity are included, the estimated cost of firearm injuries occurring in 1990 exceeded $20 billion.[13]

The public health approach to preventing firearm violence often focuses on ameliorating the consequences of the hazardous product—firearms—rather than simply punishing those who misuse them.[14] This orientation is particularly prevalent within the field of injury control.[15] The successful effort to reduce the death toll associated with motor vehicle crashes is one example of this injury control approach.[16] For example, in 1968, there were more than 52,000 motor vehicle-related fatalities in the United States.[17] As a result of a comprehensive set of interventions, including an array of regulations designed to improve the safety of the vehicle itself,[18] fatalities have declined to about 42,000 per year, and the fatality rate per vehicle mile traveled has declined by about seventy percent.[19]

Laws are now beginning to address guns themselves, in addition to the behaviors of those using the guns.[20] Much of the litigation described in this Article deals with attempts to modify

---

11. *See* Wendy Max & Dorothy P. Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, 12 HEALTH AFF. 171, 176 (1993).

12. *See* Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447, 447 (1999) (averaging the medical costs for gunshot injuries at $17,000 per injury, with a total of 134,445 injuries in 1994).

13. *See* Max & Rice, *supra* note 11, at 171 (estimating the costs of firearm injuries at "$1.4 billion for direct expenditures for health care and related goods, $1.6 billion in lost productivity resulting from injury-related illness and disability, and $17.4 billion in lost productivity from premature death").

14. *See, e.g.*, James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12 HEALTH AFF., Winter 1993, at 7, 11 (noting that public health focuses on prevention of violence, whereas America's predominant approach has been through the criminal justice system).

15. *See* National Committee for Injury Prevention and Control, *Injury Prevention Meeting the Challenge*, 5 (1S) AM. J. PREVENTIVE MED. 1, 261 (1989).

16. *See* Leon S. Robertson, *Automobile Safety Regulations and Death Reductions in the United States*, 71 AM. J. PUB. HEALTH 818, 821 (1981).

17. *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS 1997, at 15 (1998) [hereinafter TRAFFIC SAFETY FACTS].

18. *See* Federal Motor Vehicle Safety Standards, 49 C.F.R. § 571 (1999) (illustrating occupant impact protection, head restraints, and driver impact protection as types of protective measures).

19. *See* TRAFFIC SAFETY FACTS, *supra* note 17, at 15.

20. *See* Stephen P. Teret & Garon J. Wintemute, *Policies to Prevent Firearm Injuries*, 12 HEALTH AFF., Winter 1993, at 96, 104.

the design, marketing, and distribution of firearms, ultimately for the protection of the public's health. Because our orientation is toward the practical goal of injury prevention rather than a theoretical goal of jurisprudential analysis, this Article will not engage in in-depth doctrinal analysis of the various interventions or constitutional challenges. We also make no claim to comprehensiveness; for example, constitutional challenges to individual police practices involving the seizure of firearms are generally excluded, as are challenges based exclusively upon state constitutional provisions. Emphasis is on recent cases or constitutional areas that we consider noteworthy.

Part II of this Article examines federal constitutional challenges to gun control laws and is organized by constitutional provision. Section II.A briefly discusses the approach courts have taken to challenges based upon the Second Amendment. As a result of courts' rejection of Second Amendment arguments in the past, litigants have relied upon numerous other constitutional provisions. Section II.B describes recent cases in these areas. Section II.C examines a recent case that may, or may not, signal a renewed interest by courts in the Second Amendment. Part III describes recent developments in tort litigation against firearm manufacturers, including both actions brought by individuals (Section II.A) and those brought by cities and counties (Section II.B).

II. FEDERAL CONSTITUTIONAL CHALLENGES TO LAWS REGULATING FIREARMS

A. The Second Amendment

The Second Amendment to the U.S. Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[21] No other constitutional provision refers specifically to firearms. Organizations such as the National Rifle Association (NRA) consider themselves to be a "guardian of the traditional American right to 'keep and bear arms.'"[22] As a result, the NRA as well as other pro-gun organizations and individuals have challenged numerous gun laws as violative of the Second

21. U.S. CONST. amend. II.

22. *See* National Rifle Association, 147 AM. RIFLEMAN, July 1999, at 2. This statement appears in every issue of *American Rifleman*, which is one of the NRA's official publications.

Amendment. These challenges have been almost uniformly unsuccessful in the federal courts.[23]

The Supreme Court has only rarely addressed the meaning and scope of the Second Amendment. In two nineteenth century cases, *United States v. Cruikshank*[24] and *Presser v. Illinois*,[25] the Court declined to extend the Second Amendment to acts of state or local governments. The Second Amendment, unlike other selected parts of the Bill of Rights, was never "incorporated" via the Fourteenth Amendment.[26] Although *Cruikshank* and *Presser* preceded the Court's use of the incorporation doctrine, they remain the Court's last word on this subject.[27] With regard to federal laws, in 1939 the Court decided *United States v. Miller*,[28] the last Supreme Court case to address the Second Amendment directly.[29] *Miller* involved a criminal conviction under the 1934 National Firearms Act,[30] which prohibited unregistered machine guns or sawed-off shotguns from being transported in interstate commerce. The Court held that:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[31]

The Court further indicated that the "obvious purpose" of the Second Amendment was to "assure the continuation and render possible the effectiveness of such forces," and that, therefore, the

---

23. *See generally* Keth A. Ehrman & Dennis Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 56 (1989); Jon S. Vernick & Stephen P. Teret, *Firearms and Health: The Right to Be Armed with Accurate Information About the Second Amendment*, 83 AM. J. PUB. HEALTH 1773, 1773 (1993) [hereinafter Vernick & Teret, *Firearms and Health*]. *See also* Quilici v. Village of Morton Grove, 695 F.2d 261, 269-270 (7th Cir. 1982) (finding no Second Amendment violation for a near-total ban on handguns within a city).

24. 92 U.S. 542 (1876).

25. 116 U.S. 252 (1886).

26. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 385-88 (4th ed. 1991).

27. *See Quilici*, 695 F.2d at 269 (stating that *Presser*, 116 U.S. 252 (1886), is still controlling).

28. 307 U.S. 174 (1939).

29. *See also* Lewis v. United States, 445 U.S. 55, 65 (1980) (scrutinizing legislative restrictions on firearms without directly considering the Second Amendment).

30. Act of June 26, 1934, ch. 757, 48 Stat. 1236 (codified at 26 U.S.C. § 5801 (1994)).

31. *Miller*, 307 U.S. at 178.

Amendment "must be interpreted and applied with that end in view."[32]

Despite what some might perceive as relatively little guidance from the Supreme Court, lower federal courts have had little trouble applying the Second Amendment to modern laws. Until recently,[33] no federal court had *ever* overturned a gun law on Second Amendment grounds.[34] In fact, the Court of Appeals for the Ninth Circuit recently ruled that an individual, as opposed to governmental entities, did not even have standing to raise Second Amendment objections to a gun law.[35]

Beginning in the 1980s, a number of articles have appeared in the legal literature arguing about the proper interpretation that should be given to the Second Amendment in light of an historical understanding of the intent of the Framers of the Constitution.[36] This debate is interesting, and may influence future cases.[37] From the more practical perspective of this Article, however, the courts have not found the Second Amendment to be an obstacle to even broad legislation regulating access to firearms.

B. Beyond the Second Amendment

As a result of these rulings, and in a likely effort to avoid making what (in their view) would be further "bad precedent,"[38]

---

32. *Id.*

33. *See* United States v. Emerson, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999) (striking down a gun control law as violative of the Second Amendment).

34. *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261, 269 (7th Cir. 1982) (conceding that the Second Amendment has no other effect than to restrict the powers of the national government and that Presser v. Illinois, 116 U.S. 252 (1886), is still controlling case law); *see also* NOWAK & ROTUNDA, *supra* note 26, at 385-88 (noting that the lower federal courts have found that the Second Amendment only applies to the federal government); Vernick & Teret, *Firearms and Health*, *supra* note 23, at 1773.

35. *See* Hickman v. Block, 81 F.3d 98, 99 (9th Cir. 1996) (declaring that the plaintiff lacked standing to bring an individual claim premised on a violation of the Second Amendment).

36. *See, e.g.*, William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1253 (1994) (commenting on the Supreme Court's lack of development of the Second Amendment's central premise); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 210-11 (1983) (recounting historical evidence and its impact on the limitations of the Second Amendment); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643 (1989) (detailing the meaning of the Second Amendment via textual, historical, structural, doctrinal, and prudential constitutional interpretations).

37. Refer to Part II.C *infra*.

38. *See, e.g.*, Don B. Kates, Jr., *Crazy Gun Laws*, HANDGUNS, Aug. 1999, at 18, 18. Mr. Kates is an attorney who has served as counsel in several cases challenging

opponents of gun regulation have sought other constitutional grounds on which to challenge laws that limit access to firearms. Cases relying upon the Commerce Clause and the First, Fifth, Tenth, and Fourteenth Amendments, among others, have proliferated in recent years.[39] Many of these cases have been remarkably successful for their proponents, revising constitutional doctrine in areas much broader than firearms law. In this section, what follows is a brief review of some of the more noteworthy or influential cases, organized by the primary constitutional challenge. Data from public health or other research that might influence future cases is also discussed.

1. Federalism and the Commerce Clause. Among the most well known of recent Supreme Court cases, certainly among those that involve firearms, are *Printz v. United States*[40] and *United States v. Lopez*.[41] Both cases are considered pivotal in the Supreme Court's evolving jurisprudence on the balance of power between the state and federal governments.

Printz involved the constitutionality of the Brady Handgun Violence Prevention Act, more commonly known as the Brady Act.[42] Under the federal Gun Control Act of 1968,[43] certain categories of persons, such as convicted felons, are forbidden to purchase or possess firearms.[44] Prior to passage of the Brady Act in 1993, however, an individual wishing to purchase a firearm from a licensed gun dealer was not required to undergo a background check to verify his or her status as a lawful purchaser.[45] The Brady Act required that licensed gun dealers

---

laws regulating guns. In a case involving a New Jersey gun law, he explained his choice of legal strategy, which did not include the Second Amendment, as follows: "Given the limited legal grounds available, and the hostile atmosphere of that time and place, the danger of creating bad precedent led to our raising only three aspects of the Act." *Id.*

39. Refer to text accompanying notes 74-158 *infra*.

40. 521 U.S. 898 (1997).

41. 514 U.S. 549 (1995).

42. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(g) (1995)). The Act was named for James Brady, former press secretary for President Ronald Reagan. Mr. Brady was injured in a 1981 assassination attempt on President Reagan's life. Mr. Brady and his wife Sarah have been active in Handgun Control Inc., an advocacy organization that was a strong supporter of the legislation (known prior to its enactment as the "Brady Bill"). *See* Kenneth J. Cooper, *Gun Control Backers Are Tuesday's Targets; NRA Shelling Out Big Bucks Across U.S.*, WASH. POST, Nov. 7, 1994, at A11.

43. *See* 18 U.S.C. §§ 921-930 (1994).

44. *See* 18 U.S.C. § 922(g).

45. *See* Brady Handgun Violence Prevention Act, 107 Stat. at 1536; *see also Printz*, 521 U.S. at 902 (noting the impact of the Brady Act on the Gun Control Act of 1968). Even today, under federal law and in most states, firearm purchases from

submit information about prospective handgun purchasers to the chief law enforcement officer (CLEO) of the buyer's residence.[46] The CLEO then had a maximum of five business days to make a "reasonable effort" to determine if the buyer was legally disqualified from purchasing a handgun.[47] After five days, if the gun dealer was not notified by the CLEO that sale of the firearm to the proposed buyer would be unlawful, then the transaction could proceed.[48] States with their own background check laws were exempted from these provisions of the Brady Act.[49] After five years these "interim" provisions of the Brady Act were replaced with a national instant background check system.[50]

Shortly after its enactment, several CLEOs, including Sheriff Jay Printz, challenged the Brady Act, arguing that "congressional action compelling state officers to execute federal laws is unconstitutional."[51] The Supreme Court, per Justice Scalia, agreed and struck down the Act's background check provisions but left the waiting period unaffected.[52] Justice Scalia first determined that "[b]ecause there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[53] Justice Scalia concluded that the principle of dual sovereignty embedded in the Constitution's structure, as evidenced by provisions such as the Tenth Amendment[54] and supported by historical and jurisprudential analysis, does not permit the federal government to "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[55]

Interestingly, from a public health perspective, Justice Scalia rejected the argument raised by the government that the

---

private individuals, rather than licensed gun dealers, are not subject to a waiting period or background check.

46. *See* 18 U.S.C. § 922(s)(1)(A) (1994).

47. *See id.* § 922(s)(2).

48. *See id.* § 922(s)(1)(A).

49. *See id.* § 922(s)(1)(D).

50. *See Printz*, 521 U.S. at 902 (noting that the Brady Act required the Attorney General to establish a national instant background check system within five years).

51. *Id.* at 905.

52. *See id.* at 935.

53. *Id.* at 905.

54. *See* U.S. CONST. amend. X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

55. *Printz*, 521 U.S. at 935.

"very important purposes"[56] of the Brady Act should weigh in its favor. In dissent, Justice Stevens noted that "[t]he Brady Act was passed in response to what Congress described as an 'epidemic of gun violence.'"[57] Although the Brady Act has not yet been the subject of a rigorous evaluation, there is evidence that background checks have prevented many felons from obtaining handguns from licensed dealers.[58] Justice Scalia, nevertheless, rejected a "balancing" of interests test as an appropriate way to judge the law's constitutionality.[59] Some view a balancing of individual versus societal interests as fundamental to much of public health law.[60]

Also noteworthy, despite protestations that they have not abandoned the Second Amendment,[61] the right to bear arms was not raised by the plaintiffs as a basis for their challenge. The plaintiff's lead attorney before the Supreme Court, Stephen Halbrook, has written voluminously in support of an individual rights view of the Second Amendment.[62]

Without the background check provision of the Brady Law, the United States might have returned to the era of self-reported criminal history information that had previously prevailed.

---

56. *See id.* at 931.

57. *Id.* at 940 (Stevens, J., dissenting).

58. *See* DONALD A. MANSON, BUREAU OF JUSTICE STATISTICS, PRESALE HANDGUN CHECKS, 1997, at 1 (1998) (reporting a felony indictment or conviction as the reason for an estimated 43,000 of 69,000 rejected handgun purchase applications in 1997 alone).

59. *See Printz*, 521 U.S. at 932 (quoting Justice Scalia: "But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate.").

60. *See* TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 33 (1993) (discussing the critical need for a balance between the needs of society and the autonomy of the individual citizens); LAWRENCE O. GOSTIN, AMERICAN PUBLIC HEALTH LAW 2 (forthcoming) (identifying "two themes in the text: the tradeoffs between public goods and private rights. . ." (citing Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905)). *Jacobson* involved the balancing of the individual desire to avoid compulsory vaccination and state public health interests and is generally considered a foundational case for public health law. *See id.*

61. *See* Arthur Hirsch, *Debating the Right to Bear Arms*, BALTIMORE SUN, Aug. 23, 1998, at 2A (reporting that then NRA chief lobbyist, Tanya Metaksa, "dismisses the notion that the organization has abandoned the Second Amendment as an argument before federal courts").

62. *See, e.g.*, Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 641 (1995) (arguing that certain legislative acts by Congress reinforced the Second Amendment right to bear arms as an individual right); *see also* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 318 (1998) (enumerating Halbrook's writings and characterizing them as supportive of an individual rights school of thought).

Public health has long been skeptical of the accuracy of self-reported data, particularly when incentives to report falsely exist.[63] After the *Printz* decision, however, most states continued to perform background checks voluntarily. In 1998, the national instant check system, operated by the FBI rather than state CLEOs, became operational. The new system is applicable to all firearms (not just handguns).

Applying the concept of federalism, the Supreme Court, in *United States v. Lopez*, decided the constitutionality of the Gun-Free School Zones Act of 1990.[64] The Act provided that "[i]t shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[65] In *Lopez*, the respondent, Alfonso Lopez Jr., was charged with violating the Act after he brought a .38 caliber handgun to his Texas high school.[66] At issue in the case was whether the federal government had the constitutional authority under the Commerce Clause[67] to enact the Gun-Free School Zones Act.

The Court, in an opinion written by Chief Justice Rehnquist, identified three general areas Congress may regulate pursuant to its Commerce Clause power.[68] Of these, the only category relevant to the Gun-Free School Zones Act was Congress's "power to regulate those activities having a substantial relation to interstate commerce, *i.e.* those activities that substantially affect interstate commerce."[69] In defending the Act, the Government argued that firearm possession in school zones leads to violent crime, substantially affecting the national economy through 1) direct costs associated with crime, 2) reducing an individual's willingness to travel to unsafe places, and 3) a harmful effect on the school learning environment.[70] In rejecting these arguments, Justice Rehnquist expressed concern that "if we were to accept

---

63. *See* LEON S. ROBERTSON, INJURY EPIDEMIOLOGY: RESEARCH AND CONTROL STRATEGIES 60-62 (2d ed. 1998) (citing comparisons between self-reported and observed behaviors, noting the former is not always predictive of the latter).

64. *See* U.S. v. Lopez, 514 U.S. 549, 551 (1995); *see also* 18 U.S.C. § 922(q) (1994) (amended to add a jurisdictional element at 18 U.S.C.A. 922(q) (West Supp 1999)).

65. 18 U.S.C. § 922(q)(2)(A). "School zone" is defined as in, on, or within 1,000 feet of public, private, or parochial school grounds. *See* 18 U.S.C.A. § 921(a)(25) (West Supp. 1999).

66. *See Lopez*, 514 U.S. at 551.

67. *See* U.S. CONST. art. I, § 8, cl. 3.

68. *See Lopez*, 514 U.S. at 558-59 (stating that Congress may regulate: 1) use of the channels of interstate commerce, 2) instrumentalities of interstate commerce, and 3) activities substantially affecting interstate commerce).

69. *Id.* (citations omitted).

70. *See id.* at 563-64.

the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[71] Although he resisted a more precise formulation of the outer limits of Congressional authority in this area, Justice Rehnquist concluded that Congress had exceeded its power here: "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[72] Although not dispositive, Justice Rehnquist also noted that the Act lacked a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[73] The lengthy discussion of adverse educational and public health effects of violence in schools and the concomitant effect on commerce, provided by Justice Breyer in dissent, ultimately proved unpersuasive.[74]

In 1996, Congress re-enacted the provisions of the Gun-Free School Zones Act.[75] This time, however, it included a requirement that the firearm must have "moved in or . . . otherwise affect[ed] interstate or foreign commerce."[76] This new legislation has not, unfortunately, prevented the recent and tragic series of shootings in U.S. schools.[77] In fact, some have even argued that trying to legislate that schools be gun free is counterproductive.[78] Instead, it is argued, that "[a]llowing teachers and other law-abiding adults to carry concealed handguns in schools would not only make it easier to stop shootings in progress, it could also help deter shootings from ever occurring."[79] The study said to be supportive of these contentions[80] has been sharply criticized by several other researchers.[81]

---

71. *Id.* at 564.

72. *Id.* at 567.

73. *Id.* at 561.

74. *See id.* at 618-31 (Breyer, J., dissenting) (citing literature regarding guns in schools and finding an inextricable tie between school-related violence and a declining quality of education that ultimately impacts both interstate and foreign commerce).

75. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3069-71 (1996) (amending 18 U.S.C. §922(q) to comport with the Supreme Court's decision in *Lopez*).

76. *Id.*

77. *See Beyond Columbine*, HARPER'S MAG., Aug. 1999, at 100 (reporting on the school shootings at Columbine High School in Littleton, Colorado).

78. *See* John R. Lott, Jr., *The Real Lesson of the School Shootings*, WALL ST. J., Mar. 27, 1998, at A14 (contending that prohibiting law-abiding adults from carrying guns in public schools prevents them from protecting students from potential on-campus violence).

79. *Id.*

80. *See* John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence and Right-to-*

Following the *Lopez* decision, a number of litigants have challenged the constitutionality of various gun laws as exceeding Congress's Commerce Clause authority. So far, however, *Lopez* has not represented an important obstacle to other laws regulating firearms.[82] For example, since the 1930s, fully automatic weapons,[83] or "machine guns," have been more closely regulated than other firearms.[84] In 1986, Congress enacted legislation banning the private possession or transfer of all machine guns, including existing machine guns not lawfully owned prior to May 19, 1986.[85] Criminal defendants relying upon *Lopez* to challenge their convictions for unlawfully possessing machine guns have been unsuccessful. Although their reasonings differ slightly, decisions in these cases distinguish *Lopez* and find that the regulation of machine guns substantially affects interstate commerce.[86]

Carry Concealed Handguns, 26 J. LEGAL STUD., Jan. 1997, at 1. In this study, the authors attempt to evaluate the effects of state laws that make it easier for law-abiding citizens to obtain permits to carry concealed weapons on violent crime. *See id.* They use a variety of statistical techniques in an effort to control for other factors likely to influence violent crime, and therefore to isolate the effects of these laws. *See id.* They conclude that these laws were associated with a substantial reduction in murders, rapes, and aggravated assaults. *See id.*

81. *See* Daniel W. Webster et al., *Flawed Gun Policy Research Could Endanger Public Safety*, 87 AM. J. PUB. HEALTH 918, 920 (1997) [hereinafter Webster et al., *Flawed Gun Policy Research*] (examining the data and statistical methods employed by Lott and Mustard and concluding that the flaws in methodology are substantial, and the findings are contrary to criminological theory and research); *see also* Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209, 210-19 (1998) (reanalyzing Lott and Mustard's data and demonstrating its sensitivity to minor changes in the model, and its failure to meet certain tests of a properly specified model); Jens Ludwig, *Concealed Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239, 241-43 (1998) (discussing sources of bias in Lott and Mustard's research and performing a new analysis, concluding that, if anything, shall-issue concealed carry laws have been associated with an increase in homicide rates).

82. *See* Navegar, Inc. v. United States, No. 95-550 (RCL), 1998 U.S. Dist. LEXIS 13848, at *2-4 (D.D.C. Aug. 31, 1998) (mem.) (finding that amending 18 U.S.C. § 922(v)(1) (1994) to make it unlawful to "manufacture, transfer, and possess a semiautomatic assault weapon" does not exceed Congress's Commerce Clause authority).

83. A fully automatic weapon will continue to fire its ammunition as long as the trigger is depressed and ammunition remains in the gun or in an attached feeder device. By comparison, a semiautomatic weapon will fire only one round each time the trigger is pulled. *See* TRUDY ANN KARLSON & STEPHEN W. HARGARTEN , REDUCING FIREARM INJURY AND DEATH: A PUBLIC HEALTH SOURCEBOOK ON GUNS 57 (1997).

84. *See* National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 18 U.S.C. § 922 (1994 & Supp. 1997) and at 26 U.S.C. § 5801 (1994)).

85. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 922-926, 929 and at 26 I.R.C. 5845 (1994)).

86. *See* United States v. Franklin, 157 F.3d 90, 93-95 (2d Cir. 1998); United

In addition, *Lopez*-based challenges by felons and juveniles convicted of unlawful firearm possession under the Gun Control Act[87] have been unavailing.[88] Each of these provisions contains a jurisdictional element requiring some nexus with interstate commerce, a missing factor mentioned by the *Lopez* Court.

In 1996, the Gun Control Act was amended to prohibit the purchase or possession of firearms by persons who have been "convicted in any court of a misdemeanor crime of domestic violence"—this is known as the Lautenberg Amendment.[89] Despite numerous challenges by those with prior misdemeanor convictions, to date, federal courts have not found that the amendment exceeds Congress's Commerce Clause authority.[90]

2. Equal Protection. The Lautenberg Amendment[91] also illustrates another fertile area for constitutional challenges to gun control laws: equal protection arguments arising under the Fifth or Fourteenth Amendments.[92] Although the Gun Control Act contained an exception for any firearm "issued for the use of the United States or any department or agency thereof or any

---

States v. Sellner, 166 F.3d 344, 347-48 (9th Cir. 1998); United States v. Wright, 117 F.3d 1265, 1268-70 (11th Cir. 1997); United States v. Knutson, 113 F.3d 27, 29 (5th Cir. 1997) (per curiam); United States v. Bailey, 123 F.3d 1381, 1392-93 (11th Cir. 1997); United States v. Rybar, 103 F.3d 273, 282-83 (3d Cir. 1996); United States v. Beuckelaere, 91 F.3d 781, 784-85 (6th Cir. 1996); United States v. Kenney, 91 F.3d 884, 891 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948, 952 (9th Cir. 1996); United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995), *aff'd en banc by an equally divided court*, 105 F.3d 997 (5th Cir. 1997) (per curiam); United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995).

87. 18 U.S.C. § 922(g) (1994) (pertaining to felons); *id.* § 922(x) (pertaining to juveniles).

88. *See Franklin*, 157 F.3d at 98 n.4, 99; United States v. Chisholm, 105 F.3d 1357, 1358 (11th Cir. 1997) (per curiam); *Nguyen*, 88 F.3d at 820-21; United States v. Michael R., 90 F.3d 340, 344 (9th Cir. 1996); United States v. Bell, 70 F.3d 495, 498 (7th Cir. 1995).

89. *See* 18 U.S.C.A. § 922(g)(9) (West Supp. 1999) (named for Sen. Frank Lautenberg (D-N.J.) who introduced the amendment).

90. See Fraternal Order of Police v. United States, 173 F.3d 898, 907 (D.C. Cir. 1999); United States v. Smith, 101 F.3d 202, 215 (1st Cir. 1996); United States v. Lewis, 100 F.3d 49, 53 (7th Cir. 1996); United States v. Wells, 98 F.3d 808, 811 (4th Cir. 1996); United States v. Barry, 98 F.3d 373, 378 (8th Cir. 1996); United States v. Nguyen, 88 F.3d 812, 820-21 (9th Cir. 1996); United States v. Rawls, 85 F.3d 240, 242-43 (5th Cir. 1996) (per curiam); United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996); United States v. McAllister, 77 F.3d 387, 389 (11th Cir. 1996); United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996; United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995); United States v. Bolton, 68 F.3d 396, 400 (10th Cir. 1995).

91. 18 U.S.C.A. § 922(g)(9).

92. The Supreme Court has held that the "due process" clause of the Fifth Amendment includes a guarantee of equal treatment under federal law identical to that provided by the Fourteenth Amendment's "equal protection" clause under state law. *See* NOWAK & ROTUNDA, *supra* note 26, at 568-69.

State or any department, agency, or political subdivision thereof,"[93] thereby allowing certain felons to own guns, the Lautenberg Amendment expressly declined to extend this exception to firearms possession by domestic violence-related misdemeanants.[94] Additionally, persons with prior felony convictions are able to own firearms if their civil rights have been restored under applicable state law.[95] Many states, however, do not provide for such a restoration of rights for misdemeanants.[96] It was argued that this provision had the effect of punishing misdemeanants more harshly than felons, in violation of the principles of equal protection.[97] It was also argued that it was unconstitutional to single out domestic violence without also including other, perhaps more violent, misdemeanors within the reach of the statute.[98] Each of these arguments has been rejected by the few courts that have addressed the issue. The courts have concluded that the standard of review required that Congress have only a rational basis for its distinction because domestic violence misdemeanants were not a suspect class nor was any fundamental right involved.[99] Each court found Congress's decision to focus on the special risks posed by domestic violence misdemeanants to meet the minimal standard of rationality.[100]

Although not ordinarily cited by courts, there is compelling evidence from public health literature that domestic violence-

---

93. 18 U.S.C.A § 925(a)(1) (West Supp. 1999).

94. *See* 18 U.S.C.A. § 922(g)(9).

95. *See* 18 U.S.C. § 921(a)(20) (1994).

96. *See* 18 U.S.C.A. § 921(a)(33) (West Supp. 1999) (providing that domestic violence misdemeanants may possess firearms if their conviction "has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)"). But in many states, misdemeanor convictions do not cause the loss of civil rights, so there is no mechanism to "restore" them. *See* National Ass'n. of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1573-75 (N.D. Ga. 1997) (finding an anomaly resulting from applying the Act to domestic violence misdemeanants as opposed to felons does not violate equal protection or due process because the Act is rationally related to keeping firearms away from potentially dangerous people).

97. *See* Fraternal Order of Police v. United States, 173 F.3d 898, 901 (D.C. Cir. 1999) (challenging 18 U.S.C. §§ 922(g)(9), 925(a)(1) as violating equal protection).

98. *See National Ass'n of Gov't Employees, Inc.*, 968 F. Supp. at 1572. (presenting plaintiffs' argument that distinguishing between domestic violence misdemeanants and other misdemeanants was irrational).

99. *See Fraternal Order of the Police*, 173 F.3d at 904; United States v. Smith, 171 F.3d 617, 624-25 (8th Cir. 1999); Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 824 (S.D. Ind. 1998), *aff'd*, 185 F.3d 693 (7th Cir. 1999); *National Ass'n of Gov't Employees, Inc.*, 968 F. Supp. at 1573.

100. *See Fraternal Order of Police*, 173 F.3d at 904; *Smith*, 171 F.3d at 624-25; *Gillespie*, 13 F. Supp. 2d at 824; *National Ass'n of Gov't Employees, Inc.*, 968 F. Supp. at 1573.

related assaults involving a firearm are much more likely to result in death of the victim than are those involving other weapons or those occasioned by bodily force alone.[101] A recent study also demonstrated that individuals with misdemeanor convictions (not necessarily limited to domestic violence) who purchase a handgun are at higher risk for subsequent criminal activity than handgun buyers without such convictions.[102] These facts might be used by courts in subsequent decisions to bolster a conclusion of rationality.

Equal protection challenges to other categories of persons prohibited from owning firearms by the Gun Control Act, including felons,[103] those committed to mental institutions,[104] and those dishonorably discharged from the Armed Forces[105] have been equally unsuccessful.

Laws banning a specific category of firearms frequently have been the subject of equal protection challenges. For example, in 1994, Congress enacted a law banning assault weapons.[106] The law banned nineteen specific assault weapons by name, and others based upon whether they possessed a combination of military-style characteristics such as a flash suppressor, folding stock, or bayonet mount.[107] Other firearms are specifically exempted from the ban.[108]

---

101. *See* Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3044 (1992) (reporting that in a series of assaults among family members or intimate partners, those involving firearms were three times more likely to result in death than those involving knives or other cutting instruments and 23 times more likely to involve death than those involving bodily force alone).

102. *See* Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 220 JAMA 2083, 2086 (1998) (reporting that from an analysis of legal purchases of handguns in California, handgun purchasers with a prior misdemeanor conviction were more than seven times as likely to be charged with a new offense as those with no criminal history).

103. *See, e.g.*, United States v. McKenzie, 99 F.3d 813, 819 (7th Cir. 1996); United States v. Andaverde, 64 F.3d 1305, 1310 (9th Cir. 1995); United States v. Wynde, 579 F.2d 1088, 1093 (8th Cir. 1978); United States v. Houston, 547 F.2d 104, 107 (9th Cir. 1977) (per curiam); United States v. Fauntleroy, 488 F.2d 79, 80 (4th Cir. 1973) (per curiam).

104. *See, e.g.*, United States v. Whiton, 48 F.3d 356, 358 (8th Cir. 1995); United States v. Jones, 569 F. Supp. 395, 398-99 (D.S.C. 1983).

105. *See, e.g.*, United States v. Karnes, 437 F.2d 284, 289 (9th Cir. 1971).

106. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 922(v) (1994)).

107. *See* 18 U.S.C. § 921(a)(30) (1994).

108. *See* 18 U.S.C. § 922(v)(3)(A). The exempted firearms are listed at 18 U.S.C. 922 app. A. *See id.*

In *National Rifle Association of America v. Magaw*,[109] a number of different plaintiffs challenged the assault weapons ban, raising several constitutional arguments, including equal protection.[110] The plaintiffs were firearm manufacturers, dealers, individual purchasers, and gun rights organizations, including the NRA.[111] The Court of Appeals for the Sixth Circuit, reversing in part a district court ruling, concluded that the firearm manufacturers and dealers, but not the other plaintiffs, had standing to bring their action, and that the portion of the challenge based upon equal protection—and the Commerce Clause—was ripe for review.[112] The court based its decision, in part, upon the plaintiffs' equal protection argument that the law specifically banned their products while leaving other similar products unaffected.[113] Accordingly, it remanded the case to the district court for proceedings on the merits of those claims.[114] A decision has not yet been reported.

A number of state or local laws also ban assault weapons. Many of these laws have also been challenged on equal protection grounds. Whether the courts upheld these laws[115] or invalidated them[116] has depended on the specific language of the statute at issue. However, some general evidence for the rationality of assault weapons bans may be provided by a recent study evaluating the federal ban.[117] Based upon tracing data of guns used in crimes between 1994 and 1995, the authors found twenty percent fewer requests for traces of assault weapons after the

---

109. 132 F.3d 272 (6th Cir. 1997).

110. *See id.* at 276-77. Again, the NRA and other plaintiffs chose not to include arguments based on the Second Amendment. *See id.*

111. *See id.* at 278 (dividing plaintiffs into categories in order to discern standing and ripeness).

112. *See id.* at 295.

113. *See id.* at 281.

114. *See id.* at 295.

115. *See, e.g.*, Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666, 684-86 (D.N.J. 1999) (concluding that classifications in the New Jersey assault weapons ban do not violate equal protection); Benjamin v. Bailey, 662 A.2d 1226, 1237-39 (Conn. 1995) (finding that a Connecticut statute regulating assault weapons does not violate equal protection).

116. *See, e.g.*, Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 531-32 (6th Cir. 1998) (finding that a grandfather clause excepting those who had registered their firearm pursuant to an earlier law, found to be unconstitutionally vague, violated the equal protection clause); Citizens for a Safer Community v. City of Rochester, 627 N.Y.S.2d 193, 206 (N.Y. Sup. Ct. 1994) (finding a local law banning certain assault weapons, but not other firearms, to be violative of equal protection).

117. *See* JEFFERY A. ROTH & CHRISTOPHER S. KOPER, THE URBAN INSTITUTE, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994, at 1 (1997) (studying the effects of the ban on violent and drug-related crimes within 30 months of the bans' effective dates).

law's implementation.[118] In addition, they concluded that the law was associated with a 6.7 percent decrease in total gun murders between 1994 and 1995.[119] Other bans of specific categories of firearms, such as handguns, have also generally survived equal protection challenges.[120]

3. The First Amendment. Recently, a number of localities have sought ways to limit firearm sales within their jurisdiction.[121] Most states, however, have some form of preemption of local gun laws.[122] Many public health advocates believe that allowing local governments to address firearm violence, rather than requiring regulation to originate only at the state level, provides needed flexibility, allowing localities to respond to the specific character of their violence problem.[123] State preemption of at least some local gun laws, however, has forced some localities to rely upon less traditional regulatory methods, such as zoning.[124]

These efforts have also been challenged on constitutional grounds. For example, several recent gun control cases rely, in part, upon the First Amendment's "freedom of speech" clause.[125] In *Nordyke v. Santa Clara County*,[126] the petitioner had previously conducted what are commonly called "gun shows" at the Santa Clara County, California Fairgrounds.[127] However, the

---

118. *See id.* at 7.

119. *See id.* at 6.

120. *See* Sklar v. Byrne, 727 F.2d 633, 638-43 (7th Cir. 1984); Fesjian v. Jefferson, 399 A.2d 861, 864 (D.C. Cir. 1979); McIntosh v. Washington, 395 A.2d 744, 755 (D.C. Cir. 1978); California Rifle & Pistol Ass'n v. City of West Hollywood, 78 Cal. Rptr. 2d 591, 609 (Cal. Ct. App. 1998); Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 277-78 (Ill. 1984); People v. Dean, 566 N.E.2d 340, 342 (Ill. App. Ct. 1990).

121. *See* Darwin Farrar, *In Defense of Home Rule: California's Preemption of Local Firearms Regulation*, 7 STAN. L. & POL'Y REV. 51, 56 (1995-96) (noting that local governments use zoning, business licensing, and conditional use permits to limit firearm sales); Eric Gorovitz, *Recent Developments in Local Gun Regulation in California*, 23 SAN FRANCISCO ATT'Y 47, 47 (1997).

122. *See* Eric Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. REV. 395, 397 (1996); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 150 n.423 (1995) (reporting that as of 1991, 41 states had some form of firearm preemption).

123. *See* Stephen P. Teret et al., *Gun Deaths and Home Rule: A Case for Local Regulation of a Local Public Health Problem*, 9(1S) AM. J. PREVENTIVE MED. 44, 44 (1993) [hereinafter Teret et al., *Gun Deaths and Home Rule*].

124. *See* Farrar, *supra* note 121, at 56.

125. Refer to notes 126-37 *infra* and accompanying text (reviewing cases in which commercial speech and regulating speech about gun sales was involved).

126. 110 F.3d 707 (9th Cir. 1997).

127. *See id.* at 708-09.

County then included an addendum in its lease with the corporation that managed the fairgrounds prohibiting "any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds."[123] Nordyke challenged the County's enforcement of its new lease provision as an unconstitutional infringement on commercial speech.[123] In its decision, the Court of Appeals for the Ninth Circuit began by considering whether the lease provision implicated "speech" at all.[130] Although the court understood that the simple "act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment," it also recognized that the lease provision covered more than just this simple act.[131] The lease also restricted "offering for sale," language which the court concluded placed the provision squarely within the Supreme Court's definition of commercial speech—speech that "does no more than propose a commercial transaction."[132] Although commercial speech enjoys only a limited form of First Amendment protection, the *Nordyke* court determined that the County could not uphold even the more modest burden established by the Supreme Court to defend its lease provision.[133]

The crucial difference between regulating gun sales and regulating speech about gun sales (or "offering for sale" as in *Nordyke*) was highlighted in a subsequent California case. At issue in *Suter v. City of Lafayette*[134] was a set of local ordinances that imposed zoning and other restrictions on where and how firearms could be sold.[135] Rejecting the plaintiff's First Amendment arguments, the California Court of Appeals concluded that the laws "do not regulate speech; they regulate

---

128. *Id.*

129. *See id.* at 709.

130. *See id.* at 710.

131. *Id.*

132. *Id.* (quoting Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

133. *See id.* at 711-13. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980), the Supreme Court established a four-part test for the validity of commercial speech regulation. To be accorded First Amendment protection at all, the speech must concern a lawful activity and not be misleading. If this threshold is met, the speech may be regulated only if the government can show a substantial interest that is directly advanced by the speech restrictions, and that the restriction is not more extensive than necessary. In *Nordyke*, the court concluded that parts three and four of the *Central Hudson* test were not met.

134. 67 Cal. Rptr. 2d 420 (Cal. Ct. App. 1997).

135. *See id.* at 423.

the activity of selling firearms."[136] Merely because the sale of guns will often involve speech of some kind does not give rise to commercial speech protection when, as with the Lafayette ordinances, speech itself is not the subject of the regulation.[137] This suggests that jurisdictions seeking to regulate firearm sales can avoid some First Amendment problems by confining their attention to aspects of the sale rather than the speech proposing it.

An additional area that may raise future First Amendment issues concerns firearm advertising.[138] Two petitions remain pending before the Federal Trade Commission (FTC), asking it to consider whether certain firearm advertisements, suggesting that a handgun is an effective means of home protection, are deceptive or unfair within the meaning of the FTC Act.[139] After the petitions were filed, some pro-gun organizations and individuals expressed concern about the constitutionality of regulating these advertisements.[140] However, although the Supreme Court has recently indicated a willingness to scrutinize more closely commercial speech regulation (even without fundamentally altering its basic test of the constitutionality of such regulation),[141] it has also consistently held that misleading commercial speech does not enjoy First Amendment protection.[142]

4. Other Challenges: Vagueness, the Fourth Amendment. Many gun control laws have been challenged on the ground that they are impermissibly vague, in violation of due process. It is difficult to discuss these cases in general terms, however, because courts address legislative draftsmanship issues and the specific facts of individual litigants in determining if the law at

---

136. *Id.* at 431.

137. *See id.* at 431.

138. *See* Jon S. Vernick et al., *Regulating Firearm Advertisements that Promise Home Protection: A Public Health Intervention*, 277 JAMA 1391, 1391 (1997) [hereinafter Vernick et al., *Regulating Firearm Advertisements*] (discussing firearm advertising, the epidemiologic evidence suggesting that homes with guns are less safe than homes without guns, the scope of the FTC's authority to regulate deceptive and unfair advertisements, and First Amendment issues).

139. *See id.* at 1396 (noting that the two petitions were filed by faculty of the Johns Hopkins Center for Gun Policy and Research and by The Center to Prevent Handgun Violence on February 14, 1996). To date, the FTC has not officially rendered a decision on these petitions.

140. *See* Robert Hausman, *Gun Advertising Under Attack!*, GUNS & AMMO, Aug. 1996, at 10, 10; Dave Kopel, *Gun Advertising Censorship*, AM. GUARDIAN, Jan. 1998, at 30, 30.

141. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 (1996) (finding unconstitutional a state law regulating certain off-site advertisements for alcoholic beverages).

142. *See id.* at 500.

issue "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[143] For example, some state or local laws banning assault weapons have been found unconstitutionally vague, often due to their definition of the proscribed weapons.[144] Other laws have been upheld.[145]

Fourth Amendment challenges to individual police searches for evidence supporting a criminal conviction are very common. A full description of the complex rules applicable to these searches is beyond the scope of this Article. However, two recent Supreme Court cases may affect police practices concerning searches for unlawfully concealed weapons.[146]

Police departments in several U.S. cities, including Baltimore, Kansas City, and Cincinnati, have identified certain high crime "hot spots" where special police units attempt to identify individuals who may be carrying firearms and to seize those guns.[147] An evaluation of Kansas City's program demonstrated a substantial reduction in gun crime in the targeted area, but no similar reduction in comparison areas lacking the intervention.[148] In addition, there was no evidence that crime had been simply displaced to neighboring communities.[149] Guns were seized by the officers through a combination of searches upon arrest, plain view searches, and "safety frisks"[150] (so-called "*Terry*[151] frisks").

In *Knowles v. Iowa*,[152] a unanimous Supreme Court held that a routine traffic stop for speeding, for which a traffic citation was issued but no arrest made, could not justify a full search of the defendant's car.[153] In *Wyoming v. Houghton*,[154] however, the Court held that after a traffic stop, when the police officers have

143. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (footnotes omitted).

144. *See, e.g.*, Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 531-32 (6th Cir. 1998); Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 254 (6th Cir. 1994).

145. *See, e.g.*, Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 684 (2d Cir. 1996); Benjamin v. Bailey, 662 A.2d 1226, 1228-29 (Conn. 1995).

146. *See* Wyoming v. Houghton, 119 S. Ct. 1297, 1299 (1999); Knowles v. Iowa, 525 U.S. 113, 114 (1998).

147. *See* LAWRENCE W. SHERMAN ET AL., NATIONAL INSTITUTE OF JUSTICE: THE KANSAS CITY GUN EXPERIMENT 3-4 (1995).

148. *See id.* at 1.

149. *See id.*

150. *See id.* at 5 (reporting the breakdown as 45% from searches upon arrest, 21% from plain view, and 34% through frisks for safety).

151. Terry v. Ohio, 392 U.S. 1 (1968).

152. 525 U.S. 113 (1998).

153. *See id.*

154. 119 S. Ct. 1297 (1999).

probable cause to search the car, they may also search the passengers' belongings located in the car, in this case a purse.[155] Taken together, these cases both expand and contract the ability of targeted police patrols to identify concealed weapons. *Knowles* provides a limit to the search incident to arrest exception to the warrant requirement—full-blown searches of vehicles for firearms, incident to simple traffic citations, require additional justification.[156] However, when that additional justification is present, as with the probable cause the police officers had in *Houghton*,[157] the search for firearms may include passengers' belongings in the car.[158]

C. The Second Amendment Revisited

In April 1999, a district court in Texas became the first federal court to strike down a gun control law as violative of the Second Amendment. In *United States v. Emerson*,[159] Timothy Joe Emerson challenged his indictment under federal law for possession of a firearm while subject to a temporary restraining order his wife had obtained pursuant to divorce proceedings.[160] Federal law prohibits gun ownership by persons subject to certain restraining orders that include, in part, "a finding that such person represents a credible threat to the physical safety of [an] intimate partner or child;" or "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child."[161] Emerson argued that the law was unconstitutional under the Commerce Clause and the Second, Fifth, and Tenth Amendments.[162]

Regarding the Commerce Clause and the Tenth Amendment, Judge Cummings did not deviate from more traditional analysis. Controlling precedent in the Fifth Circuit had found the law to be within Congress's Commerce Clause power,[163] and because the law did not commandeer state officials

---

155. *See id.* at 1304.

156. *See Knowles*, 525 U.S. at 116-17.

157. In *Houghton*, after stopping the vehicle, the police officer noticed a hypodermic needle in the driver's pocket. *See Houghton*, 119 S. Ct. at 1299. The driver admitted that he used the needle to take drugs, providing probable cause to search the passenger compartment for contraband. *See id.*

158. *See id.* at 1303-04.

159. 46 F. Supp. 2d 598 (N.D. Tex 1999).

160. *See id.* at 599.

161. 18 U.S.C. § 922(g)(8) (1994).

162. *See Emerson*, 46 F. Supp. 2d at 598.

163. *See id.* at 600 (citing United States v. Pierson, 139 F.3d 501, 503-04 (5th Cir. 1998)).

in its enforcement, as had the law at issue in *Printz*,[164] Judge Cummings found no Tenth Amendment violation.[165]

However, Judge Cummings noted that "whether the Second Amendment recognizes an individual right to keep and bear arms is an issue of first impression within the Fifth Circuit."[166] Although recognizing that other federal courts have held that the Second Amendment establishes only a collective right closely related to the preservation of state militias,[167] Judge Cummings proceeded to engage in a textual, historical, and structural analysis of the Second Amendment.[168] Relying heavily on recent literature supportive of an individual rights view, he concluded that the Second Amendment does indeed confer an individual right that "should be as zealously guarded as the other individual liberties enshrined in the Bill of Rights."[169]

Turning then to the law at issue, Judge Cummings noted that "the statute allows, but does not require, that the restraining order include a finding that the person under the order represents a credible threat to the physical safety of the intimate partner or child."[170] Without "particularized findings of the likelihood of violence," the statute lacks the "reasonable nexus between gun possession and the threat of violence," and was therefore unconstitutional within Judge Cummings' individual rights view of the Second Amendment.[171] Devoting considerably less space to his analysis, Judge Cummings also held that because the law "is an obscure, highly technical statute with no mens rea requirement, it violates Emerson's Fifth Amendment due process rights to be subject to prosecution without proof of knowledge that he was violating the statute."[172]

The case has been appealed to the Court of Appeals for the Fifth Circuit.[173] If the Fifth Circuit affirms, the resulting split among the circuits would probably increase the likelihood that the Supreme Court would agree to hear the case.

---

164. Refer to notes 51-63 *supra* and accompanying text.

165. *See Emerson*, 46 F. Supp. 2d at 613-14.

166. *Id.* at 600.

167. Refer to Part II.A *supra* (noting that Second Amendment challenges have been almost entirely rejected by federal courts).

168. *See Emerson*, 46 F. Supp. 2d at 600-07.

169. *Id.* at 610.

170. *Id.*

171. *Id.* at 610-11.

172. *Id.* at 613 (noting that some meaningful form of notice or fair warning is required under the Fifth Amendment's due process provisions).

173. *See Fifth Circuit Public Docket* (visited Nov. 18, 1999) <http://www.ca5.uscourts.gov/>.

At least one Supreme Court Justice has indicated a possible willingness to reconsider the Second Amendment.[174] In his concurring opinion in *Printz v. United States*, Justice Thomas, in dictum, stated his belief that "[i]f, however, the Second Amendment is read to confer a *personal* right to 'keep and bear arms,' a colorable argument exists that the Federal Government's regulatory scheme . . . runs afoul of that Amendment's protections."[175] In a footnote, Justice Thomas commented that "[m]arshalling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[176] Neither Justice Thomas in *Printz* nor Judge Cummings in *Emerson* cite contrary textual or historical analysis.[177]

It is important to recognize, however, that even if upheld by the Fifth Circuit, *Emerson* concerns a federal law and might not serve as a vehicle for reconsideration of the Supreme Court's early cases holding the Second Amendment inapplicable to state law.[178] In addition, even if an individual right under the Second Amendment is eventually recognized by the Supreme Court, that right would probably not be seen as an absolute one. Instead, as with laws affecting other rights, courts may be asked to balance the magnitude of the state (or federal government) interest in the law, against the degree of infringement on the "right."[179] They may also be asked to determine the availability and likely utility of alternatives with a lesser (or no) effect on the right.[180] Each of these inquiries can be informed by public health research.

III. TORT LITIGATION AGAINST MANUFACTURERS AND DEALERS

A. Private Lawsuits Against Firearm Manufacturers

There is a growing number of lawsuits being brought against gun makers[181] by individuals or the survivors of individuals who

---

174. *See* Printz v. United States, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

175. *Id.* (Thomas, J., concurring).

176. *Id.* at 939 n.2 (Thomas, J., concurring).

177. *See id.* at 936-39 (Thomas, J., concurring); *Emerson*, 46 F. Supp. 2d at 610-13.

178. Refer to Part II.A *supra* (reviewing Supreme Court decisions in which the Court declined to extend Second Amendment protection to acts of state or local governments).

179. For a discussion of courts' balancing of interests in cases involving other protected rights, see CHRISTOFFEL & TERET, *supra* note 60, at 33.

180. *See id.*

181. There are also lawsuits being brought exclusively against gun retailers and

have been injured by gunfire, with the theory of liability that the design of the gun contributed in some way to the injury. This section first briefly explores the design of handguns in particular; handguns, as opposed to rifles or shotguns, are disproportionately involved in gun-related deaths.[182]

1. Changes over Time in the Design of Handguns. The major change that has occurred in the manufacture of handguns in the latter portion of the twentieth century has been the shift from revolvers to semi-automatic pistols as the most prevalent type of newly manufactured handgun.[183] A revolver is a handgun that holds its ammunition in a revolving cylinder; a pistol's ammunition is generally contained in the magazine or clip of the gun, which is a container that fits into the gun's handle or grip.[184] Typically, the latter allows pistols to carry a greater number of bullets than revolvers.[185]

The shift to manufacturing more pistols than revolvers has resulted in the pool of handguns having an increased capacity for ammunition. In addition, manufacturers have increased the caliber of that ammunition for much of their product line. Higher caliber ammunition is directly related to greater kinetic energy imparted by the bullet when it strikes an object.[186] The higher the kinetic energy transferred to a human target, other things being equal, the greater the physical damage that is done to that target.[187] Also, while handguns have increased their ammunition capacity and caliber, they have been generally reduced in size, so that they may be carried more easily in a concealed fashion.[188] Commentators have summed up the effects of these changes as

---

gun owners by persons injured by gunfire. These cases are excluded from the scope of this Article.

182. Of all firearm homicides in 1997 for which the type of gun was known, 86% were committed with a handgun. *See* U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1997, at 20 (1998). In a Sacramento, California study, handguns were used in 69% of firearm-related suicides. *See* Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78 AM. J. PUB. HEALTH 824, 825 (1988).

183. *See* Garen J. Wintemute, *The Relationship Between Firearm Design and Firearm Violence: Handguns in the 1990s*, 275 JAMA 1749, 1750 (1996) [hereinafter Wintemute, *Handguns in the 1990s*] ("In the early 1980s, US firearm manufacturers produced more than twice as many revolvers as pistols; by 1994, pistols outnumbered revolvers by more than 3:1.").

184. *See id.* at 1749.

185. *See id.* at 1759-62 (noting that revolvers usually carry only five or six rounds, whereas pistols can carry many more rounds).

186. KARLSON & HARGARTEN, *supra* note 83, at 29.

187. *See id.*

188. *See* Wintemute, *Handguns in the 1990s*, *supra* note 183, at 1750.

resulting in an increased lethality of handguns.[189] One aspect of the evidence for this increase in lethality is research showing that patients seen with gunshot wounds in hospital emergency departments now have a greater number of wounds than in the past.[190]

2. Magazine Safety Devices and Loaded Chamber Indicators. There are, however, changes that can be made to the design of handguns that will increase their safety rather than their lethality. Some of these changes would employ safety devices that were designed long ago, but are not now in routine use on handguns.[191] One of these devices is the magazine safety, sometimes called a magazine disconnect device.[192] In pistols, when the magazine containing the ammunition is removed, there may still be a cartridge remaining in the firing position, the so-called "round in the chamber."[193] Deaths have occurred when the user of the gun mistakenly believed the gun was unloaded because the magazine had been removed, and the trigger was then pulled while the gun was pointed at another.[194] These deaths are preventable by a device that disables the gun from discharging when the magazine is not in the gun, even if there is still an ammunition round in the chamber.[195] Interestingly, patents for magazine safeties were first issued around the turn of the twentieth century.[196]

A loaded chamber indicator is a device that tells the user of the gun whether there is an ammunition cartridge in the gun.[197] Much the same way that cameras indicate whether there is film in the camera, or gas gauges tell the driver how much gas is left in a car's tank, loaded chamber indicators will warn the holder of the gun that the gun contains ammunition.[198] As is the case with magazine safeties, loaded chamber indicators have existed for

---

189. *See id.* at 1753 (citing higher caliber and increased availability of concealed weapons as factors leading to a possible increase in the case-fatality rate).

190. *See* Daniel W. Webster et al., *Epidemiologic Changes in Gunshot Wounds in Washington, DC, 1983-1990*, 127 ARCHIVES OF SURGERY 694, 696 (1992) (noting the increase in gunshot wounds per patient from about 1.3 in 1983 to 2.2 in 1990).

191. *See* KARLSON & HARGARTEN, *supra* note 83, at 130.

192. *See id.* at 71-72.

193. *See id.* at 72.

194. *See id.* at 134.

195. *See id.* at 133.

196. *See* Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices that Can Reduce the Risk of Unintentional Firearm Injuries*, 20 J. PUB. HEALTH POL'Y 427, 428 (1999) [hereinafter Vernick et al., *Two Safety Devices*].

197. *See id.* at 428.

198. *See id.*

about a century, but they are not found on most handguns.[199] Notwithstanding the common refrain of "I didn't know the gun was loaded," after an unintended shooting takes place, this potentially life-saving device[200] can be found on some models of the guns of a given manufacturer, but not its other models.[201]

3. Personalized Guns. Although handguns have been marketed as necessary for the protection of a household,[202] the best epidemiologic evidence suggests that having a handgun in the home is, on balance, perilous for those residing in the home.[203] One way to reduce this risk is to design handguns so that they can be discharged only by authorized users.[204] This product-related intervention could prevent many of the unintended deaths and injuries that occur when young children find loaded guns in the home.[205] Also, teenage gun-related suicides would likely be diminished, as well as gun crimes committed with guns stolen in home burglaries, if handguns were made personalized.[206] The technology to make personalized guns presently exists in the form of combination locks, magnetic devices, and personal identification numbers.[207] More advanced technologies, such as

---

199. *See id.*

200. A 1991 study by the General Accounting Office (GAO) concluded that 23% of the unintentional firearm-related deaths that it examined might have been prevented by a loaded chamber indicator. *See* U.S. GEN. ACCOUNTING OFF., ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 34 (1991).

201. *See* Vernick et al., *Two Safety Devices*, *supra* note 196, at 428.

202. *See* Vernick et al., *Regulating Firearm Advertisements*, *supra* note 138, at 1391 (questioning whether handgun advertisements promising safety, in spite of epidemiologic evidence demonstrating the risks of having a gun in the home, constitute unfair and deceptive advertising).

203. *See* Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1087 (1993) [hereinafter Kellerman et al., *Gun Ownership as a Risk Factor*] (finding that in homes with guns, the homicide of a household member was 2.7 times more likely than in homes without guns); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992) [hereinafter Kellerman et al., *Suicide in the Home*] (describing a 4.8 fold increased risk of suicide for those living in a home in which there is a gun).

204. *See* KRISTA D. ROBINSON ET AL., JOHNS HOPKINS CENTER FOR GUN POLICY AND RESEARCH, PERSONALIZED GUNS: REDUCING GUN DEATHS THROUGH DESIGN CHANGES 1 (1996) (describing these guns as "personalized guns").

205. *See id.* at 2.

206. *See id.* at 4 (explaining that when a personalized handgun is stolen, it cannot readily be used because only the authorized user can fire the gun).

207. *See id.* at 2 (describing the different applications of these safety devices to handguns).

electronic touch memory systems and fingerprint reading computer chips, are in use in other products.[208]

4. Private Lawsuits Based upon Safe Design Theories. Handguns, as consumer products, have been the subject of considerable litigation.[209] Much of this litigation has been based upon defects that occurred at the time of manufacture, and in this respect, handgun product liability litigation is not very different from litigation involving any other product.[210] In the mid-1980s, however, lawsuits began to appear which alleged that guns were more inherently hazardous than most other products, and therefore courts were asked to find gun manufacturers liable for any injuries that were produced by gunfire. These cases, generally, were not successful for the plaintiffs; most courts refused to impose such a broad-based liability on the makers of guns.[211] One exception to this general rule is *Kelley v. R.G. Industries, Inc.*,[212] in which the highest court of Maryland found the maker and distributor of a "Saturday Night Special" (a poorly-made handgun that was believed to contribute disproportionately to crime) liable for injuries sustained by a grocery store clerk when the gun was used in a hold-up.[213] The reasoning in *Kelley*, however, was later legislatively disallowed in Maryland.[214]

Newer cases allege negligence on the part of gun makers based upon their failure to build a safer product.[215] Lawsuits have been filed that allege misconduct for failure to provide magazine safeties and loaded chamber indicators, and for failure to make handguns personalized. To date, most of the reported magazine safety cases have resulted in judgments for the defendants.[216] The

---

208. *See id.* at 6-7.

209. *See generally* WINDLE TURLEY & JAMES E. ROOKS, JR., FIREARMS LITIGATION: LAW, SCIENCE, AND PRACTICE (1988 & Supp.).

210. *See id.* at 147-226.

211. *See id.*

212. 497 A.2d 1143 (Md. 1985).

213. *Id.* at 1444-45, 1153-54, 1159-62.

214. *See* MD. CODE ANN., CRIMES AND PUNISHMENTS § 36-I(h) (1988). Three years after *Kelley*, this law established that a

> person or entity may not be held strictly liable for damages from injuries sustained as a result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

Id.

215. Refer to notes 216-31 *infra* and accompanying text.

216. *See* Bolduc v. Colt's Mfg. Co., 968 F. Supp. 16, 17 (D. Mass. 1997); Wasylow v. Gock, Inc., 975 F. Supp. 370, 379, 382 (D. Mass. 1996); Crawford v. Navegar, Inc., 554 N.W.2d 311, 311 (Mich. 1996); Raines v. Colt Indus., Inc., 757 F. Supp. 819, 821, 823 (E.D. Mich. 1991). *But see* Hurst v. Glock, Inc., 684 A.2d 970, 971, 974 (N.J.

basis for many of these judgments has been the "open and obvious" rule in some states' tort law, providing that manufacturers are under no duty to provide protection from dangers that are patent.[217]

However, in *Hurst v. Glock, Inc.*,[218] a New Jersey appellate court reversed a trial court's summary judgment granted in favor of a defendant gun manufacturer and remanded the case for further proceedings.[219] In *Hurst*, two teenagers were playing with a semi-automatic Glock pistol belonging to the boyfriend of the mother of one of them.[220] The magazine of the pistol had been removed, but when one child pointed the gun at the head of the other and pulled the trigger, the gun discharged.[221]

Dix v. Beretta[222] also involved two teenagers, Michael and Kenzo, who played with a pistol belonging to Michael's father.[223] Michael removed the magazine containing ammunition from the pistol and replaced it with an empty magazine, believing that the gun would therefore not fire.[224] When the pistol was pointed at Kenzo and the trigger was pulled, the round remaining in the chamber was discharged, killing Kenzo.[225] The suit alleged that Beretta could have prevented the death by placing a more informative loaded chamber indicator on the handgun than existed on that model at that time.[226] At the close of trial, the jury returned a verdict in favor of the gun manufacturer, but the plaintiffs have appealed.

Mathieu v. Fabbrica D'Armi Pietro Beretta SPA[227] is a pending case involving two boys playing with a Beretta handgun.

Super. Ct. App. Div. 1996).

217. *See Bolduc*, 968 F. Supp. at 17 (stating that an obviously dangerous gun is not defective simply because careless misuse causes an injury); *Crawford*, 554 N.W.2d at 311 (acknowledging the lower court's ruling that because the danger from the pistol was open and obvious, the design was not defective); *Raines*, 757 F. Supp. at 821, 824 (defining the "open and obvious" rule in Michigan by stating that a manufacturer has no duty to render a product more safe if the danger to be avoided is obvious and patent).

218. 684 A.2d 970 (N.J. Super. Ct. App. Div. 1996).

219. *See id.* at 971, 974 (specifically remanding to determine whether the incorporation of a magazine disconnect safety feature would have significantly diminished the product's intended use).

220. *See id.* at 971.

221. *See id.*

222. Dix v. Beretta, No. 750681-9 (Cal. Super. Ct. filed Apr. 15, 1998).

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.* The Beretta pistol did contain what the manufacturer described as a loaded chamber indicator. When a round was chambered in the pistol, a small, red raised indicator appeared. *See id.*

227. Mathieu v. Fabbrica D'Armi Pietro Beretta SPA, No. 97-CV-12818-NG (D.

Once again, the boys incorrectly believed that the gun was unloaded and incapable of firing because the magazine was removed.[228] Ross Matthieu, age 12, died when his friend pulled the trigger and the gun discharged.[229] This case alleges that the death would have been prevented if Beretta had equipped the pistol with a magazine safety and a loaded chamber indicator—both of which were absent from this gun, but present on other Beretta models.[230] *Mathieu* is currently scheduled for trial in May 2000.

Although at least one case is currently on appeal,[231] to date no lawsuit has proceeded to trial with the primary theory that the firearm should have been personalized.

5. Private Lawsuits Based upon Marketing Theories. Recently, some cases against firearm makers have not focused on how the firearm was designed or manufactured, but how it was marketed, advertised, and distributed. One early example of a case employing a "negligent marketing" legal theory arose out of shootings that took place at a San Francisco law firm.[232] On July 1, 1993, Gian Luigi Ferri entered law offices on the 34th floor of 101 California Street in San Francisco and opened fire with two military-style TEC-9 semiautomatic assault pistols manufactured by Navegar, Inc., killing eight persons and injuring six.[233] In *Merrill v. Navegar, Inc.*, several of the injured victims and survivors of the deceased sued Navegar in California Superior Court, arguing in part that the manner in which the manufacturer and distributor had marketed the TEC-9 should give rise to liability.[234] The TEC-9 had been advertised using the following slogans: "Tough as your toughest customer," "paramilitary," and "excellent resistance to fingerprints."[235] The plaintiffs argued that these advertisements targeted criminals or others likely to cause harm with the TEC-9.[236]

Mass. filed Dec. 1997).

228. *See id.*

229. *See id.*

230. *See id.*

231. *See* Halliday v. Sturm, Ruger & Co., Inc., No. 24-C-99-003188 (Md. Cir. Ct. filed July 1, 1999).

232. *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 152, 185, 189 (Cal. Ct. App. 1999).

233. *See id.* at 152, 154.

234. *See id.* at 152, 162.

235. *Id.* at 156-57.

236. *See id.* at 162 (claiming that Navegar marketed the weapon to a "criminal clientele," which further increased the risk of harm from the distribution of the military-style assault weapons).

The defendant's demurrer was initially denied by Judge James Warren, allowing the case to proceed to discovery.[237] After discovery was completed, however, Navegar's summary judgment motion was granted, dismissing the case.[238] In assessing the plaintiffs' negligence theory, Judge Warren concluded that the plaintiffs were unable to demonstrate: (1) that Mr. Ferri had seen the Navegar advertisements, (2) that the advertisements induced him to purchase an assault weapon, and (3) that the advertisements "were a legal cause, i.e. a substantial factor, in bringing about plaintiff's injuries."[239] The court also concluded that because the TEC-9 was lawfully manufactured and sold to Mr. Ferri outside of California, Navegar had no duty under California common law not to manufacture or sell assault weapons elsewhere.[240] The plaintiffs appealed the trial court's decision to grant summary judgment in favor of the gun manufacturer and marketer.

The California appeals court affirmed in part and reversed in part the decision of the *Merrill* trial court.[241] Judge Kline affirmed Navegar's summary judgment motion regarding appellants' strict liability cause of action alleging an ultrahazardous activity, concluding that "[w]hat is truly ultrahazardous or 'abnormally dangerous' is not the activity of manufacturing, distributing, marketing, or selling the TEC-DC9, but the use of the weapon itself."[242] In reversing the grant of summary judgment as to the ordinary negligence cause of action, the appellate court found that factual issues existed as to whether the assailant would have committed the crimes and caused the same level of injuries if the assault weapon had not been marketed and sold in such a way by Navegar.[243] The California Supreme Court has agreed to hear Navegar's appeal.[244]

The private lawsuit against gun manufacturers that has received the greatest amount of attention recently, *Hamilton v. Accu-Tek*,[245] also employs a marketing theory.[246] In *Hamilton*,

---

237. *See* Merrill v. Navegar, Inc., No. 959-316 (Cal. Super. Ct. Apr. 10, 1995) (Order Denying Demurrer).

238. *See* Merrill v. Navegar, Inc., No. 959-316 (Cal. Super. Ct. Apr. 10, 1995) (Order Granting Motion for Summary Judgment).

239. *See id.*

240. *See id.*

241. *See Merrill*, 89 Cal. Rptr. 2d at 192.

242. *Id.*

243. *See id.* at 189.

244. *See* Maura Dolan, *Justices to Review Landmark Gun Ruling*, L.A. TIMES, Jan. 21, 2000, at A3.

245. No. CV-95-0049 (JBW), 1999 U.S. Dist. LEXIS 8264 (E.D.N.Y. June 3, 1999).

seven separate plaintiffs, six of whom were shot as the result of the criminal use of a firearm, collectively sued twenty-five different gun manufacturers in a Brooklyn, New York federal court.[247] The specific manufacturer of the guns used in most of the shootings was never identified; as a result, the plaintiffs sued all of the major manufacturers together.[248] The plaintiffs' primary theory of liability was negligent marketing, alleging that the firearm manufacturers' marketing and distribution practices contributed to the ease with which their guns might make their way to New York City despite its restrictive gun control laws.[249] These marketing and distribution practices allegedly included oversupplying the lawful market in states with relatively weak gun control laws.[250] The jury reached a complex verdict by finding that fifteen of the twenty-five manufacturers were negligent, but awarded damages of approximately $4 million to only one plaintiff.[251] The damage award was then reduced to approximately $500,000, reflecting certain calculations regarding the market share of only three manufacturers.[252] This jury's decision represented the first time that a handgun manufacturer—much less a group of manufacturers—had been found negligent as a result of its marketing or distribution practices.

In an opinion denying the defendants' motions to dismiss and for judgment as a matter of law, and granting judgment in favor of a plaintiff against some defendants, Judge Jack B. Weinstein wrote:

> To the extent manufacturers' negligent marketing or distribution practices allow them to profit from the acquisition of handguns by those likely to misuse them, they must be deemed to have benefited wrongfully at the expense of those injured or killed. Fairness mandates restoration of the balance through the imposition of a duty to market and distribute handguns responsibly.[253]

Judge Weinstein's decision is now on appeal.

---

246. *See id.* at *9-10, *55.
247. *See id.* at *3-9.
248. *See id.* at *3-12.
249. *See id.* at *3-4, *9-11.
250. *See id.* at *77-78.
251. *See id.* at *3, *12-14.
252. *See id.* at *128-31, *135.
253. *Id.* at *63, *133-35.

B. *Litigation Against Gun Manufacturers and Dealers by Cities and Counties*

By now, the story of individual states suing cigarette manufacturers to recover the costs of tobacco-related illnesses is well known. That process has culminated in a $206 billion settlement by the tobacco industry with forty-six states and separate settlements with four others.[254] One issue raised by some commentators regarding the tobacco litigation has been whether other lawful products might be susceptible to a similar strategy.[255]

Like health problems associated with cigarettes, firearm-related deaths and injuries have been recognized as an important public health problem.[256] Firearm-related deaths and injuries, particularly homicides and assaults, are not evenly distributed throughout the country. Urban areas experience higher rates of these intentional firearm injuries compared with rural or suburban areas.[257] As a result, city mayors have implemented many different strategies to combat gun violence, including legislation, new police initiatives, and recently, litigation.[258]

On October 30, 1998, the city of New Orleans became the first municipality to sue gun manufacturers, dealers, and their trade associations to recover the costs of firearm violence incurred by the city.[259] The New Orleans suit, filed in a Louisiana state court, named thirteen gun manufacturers, seven gun sellers, and three firearm trade associations.[260] Only two weeks later, Chicago, Illinois became the second city to bring such an action.[261] Since then more than twenty other cities and counties,

---

254. *See Forty-Six States Sign on to Tobacco Settlement*, NATION'S HEALTH, Dec. 1998/Jan. 1999, at 1,17.

255. *See* George F. Will, *Handguns and Hired Guns*, WASH. POST, Jan. 24, 1999, at B7 (discussing how the rationale in firearm litigation is an extension of the tobacco suits, and opining that the gambling industry may be the next target in which policymaking will be subcontracted to trial lawyers).

256. Refer to text accompanying notes 6-10 *supra* (examining trends in violent crime and firearm use in the United States).

257. *See generally* Lois A. Fingerhut et al., *Homicide Rates Among US Teenagers and Young Adults*, 280 JAMA 423, 423-26 (1998) (examining differences in homicide rates by level of urbanization).

258. Refer to notes 259-97 *infra* and accompanying text (examining two recent lawsuits against the gun industry filed by municipalities).

259. *See* Morial v. Smith & Wesson Corp., No. 98-18578 (La. Dist. Ct. filed Oct. 30, 1998); *see also* Paul M. Barrett, *Other Cities May Follow New Orleans in Antigun Suit, but Fight Will be Hard*, WALL ST. J., Nov. 2, 1998, at A16 (describing how New Orleans is seeking reimbursement for millions of dollars in expenditures on police, medical, and other city services due to such criminal activity).

260. *See Morial*, No. 98-18578, at 8-12.

261. *See* City of Chicago v. Beretta USA Corp., No. 98 CH 014496 (Ill. Cir. Ct.

including Miami-Dade County, Atlanta, Cleveland, Detroit, San Francisco, and Los Angeles, have brought separate actions.[262] The States of New York and Connecticut are also considering filing lawsuits against the firearm industry.

As of December 1999, three of the lawsuits have been dismissed and are pending appeal;[263] one other has survived a motion to dismiss.[264] None have yet proceeded to trial.[265]

The Chicago and New Orleans lawsuits employ different legal theories and strategies as the bases for their claims against firearm manufacturers and dealers. Other cities have largely followed one of these two main approaches, or have combined them in their litigation strategy.[266] Each theory also has its counterpart in recent lawsuits brought by private individuals against firearm manufacturers, and the success or failure of the city lawsuits may be influenced in part by these private suits.

---

filed Nov. 12, 1998); *see also* David Segal, *After Tobacco Success, Lawyers Pick Gun Fight; Same Tactics Aimed at Firearms Industry*, WASH. POST, Jan. 5, 1999, at A1.

262. *See Firearms Litigation*, 19 STOP GUN VIOLENCE NEWS, July 1999, at 3-4. The following is a complete list of cities and counties as of August 1, 1999: Alameda County, CA; Atlanta, GA; Berkeley, CA; Boston, MA; Bridgeport, CT; Camden City, NJ; Camden County, NJ; Chicago, IL; Cincinnati, OH; Cleveland, OH; Compton, CA; Cook County, IL; Detroit, MI; Los Angeles, CA; Miami-Dade County, FL; Newark, NJ; New Orleans, LA; Sacramento, CA; San Francisco, CA; San Mateo County, CA; St Louis, MO; Wayne County, MI; West Hollywood, CA. *See id.* Because some of the cities and counties have filed jointly, there were a total of 16 separate pending actions as of August 1999.

263. The Cincinnati, Miami-Dade County, and Bridgeport lawsuits have been dismissed.

264. Atlanta's lawsuit has survived, in part, a motion to dismiss. *See* City of Atlanta v. Smith & Wesson Corp., Civ. Action File No. 99VS01492175 (Ct. of Fulton County Oct. 27, 1999).

265. Some of these dismissals have been based, in part, upon the "remoteness doctrine." The remoteness doctrine holds that a plaintiff cannot recover derivative damages for injuries suffered by a third party. In the City of Cincinnati's lawsuit, for example, the court stated in support of its order granting the motion to dismiss that, "[t]he claims of the City are premised on injuries which have occurred to its citizens, and as such are barred by the doctrine of remoteness." City of Cincinnati v. Beretta U.S.A. Corp., No. A9902369, 1999 WL 809838, at *1 (Ct. of Comm. Pls. filed Oct. 7, 1999). Likewise, the court, in dismissing the suit filed by Miami-Dade County, held that "the County is without standing to proceed in this lawsuit because [the] damages it seeks are purely derivative of damages suffered by third parties and are therefore too remote to be recoverable by the County." Penelas v. Arms Tech., Inc., No. 99-01941 (11th Cir. Ct., Miami-Dade County filed Dec. 13, 1999); *see also* Ganim (City of Bridgeport) v. Smith & Wesson Corp., No. CV 99-01531988, 1999 WL 1241909, at *2 (Sup. Ct. Conn. filed Dec. 10, 1999) (stating that "[i]ndeed, it is recognized at common law that a plaintiff who complains of harm resulting from misfortune visited upon a third person is generally held to stand at too remote a distance to recover").

266. *See Firearms Litigation*, *supra* note 262, at 3-4.

1. Legal Theories: New Orleans and Chicago. The primary cause of action in the New Orleans lawsuit is based upon products liability, alleging that firearms are in some way defective.[267] In its complaint, New Orleans asserts that the defendant manufacturers could have made changes in the design and manufacture of their guns to make them safer.[268] Specifically, the city alleges that guns can be made personalized so that unauthorized users, such as juveniles and criminals, are unable to operate them.[269] The city argues that unintentional gun deaths, suicides, and even deaths associated with stolen guns might have been prevented if the guns employed these technologies.[270] The complaint also asserts that the absence of other safety devices, such as those intended to prevent shootings caused by erroneously believing a handgun is unloaded, has contributed to unintentional deaths and injuries in the city.[271]

In addition, the New Orleans complaint states that the firearm manufacturers have failed to adequately warn of the risks associated with their products or provide appropriate instructions regarding their safe use and storage.[272] In fact, the city alleges that some firearm advertisements encourage consumers to purchase guns to protect their homes without revealing the attendant risks.[273] The complaint argues that firearm dealers are also liable because they knew, or should have known, that the guns they sold were unreasonably dangerous.[274] An unspecified amount of damages is requested to compensate New Orleans for various costs associated with firearm violence including police, emergency services, and medical care costs.[275]

By comparison, the legal theories in Chicago's lawsuit are more similar to the private lawsuits that rely on allegations of negligent marketing.[276] Chicago relies primarily upon a legal

---

267. *See* Morial v. Smith & Wesson Corp., No. 98-18578, at 1-2 (La. Dist. Ct. filed Oct. 30, 1998).

268. *See id.* at 2.

269. *See id.* at 1-2.

270. *See id.* at 1-2, 13.

271. *See id.* at 3. The gun safety devices referenced in the New Orleans case include loaded chamber indicators and magazine safeties. Refer to Part III.A.4 *supra* and accompanying text (explaining the practical significance and case law regarding such safety devices).

272. *See Morial*, No. 98-18578, at 6.

273. *See id.* at 2-3; *see also* Vernick et al., *Regulating Firearm Advertisements*, *supra* note 138, at 1393-94 (describing the inconsistencies between the message that a gun in the home provides protection, contained in some firearm advertisements, and the scientific evidence about the risks of gun ownership in the home).

274. *See Morial*, No. 98-18578, at 5.

275. *See id.* at 16-17.

276. *See* City of Chicago v. Beretta USA Corp., No. 98 CH 015596, at 1-3 (Ill.

theory known as "public nuisance."[277] A public nuisance is one that affects interests shared by the general public, rather than any one individual.[278] Unlike a product liability claim, public nuisance is a cause of action that is traditionally brought by a city or state, rather than by an individual, to vindicate rights held in common by the general public.[279] For example, a city might bring a public nuisance action against a company that was polluting a local water source, to protect its citizens' public health interest in safe drinking water.[280] By analogy, Chicago argues that firearm manufacturers and dealers interfere with residents' "right to be free from conduct that creates an unreasonable jeopardy to the public's health, welfare and safety, and to be free from conduct that creates a disturbance and reasonable apprehension of danger to person and property."[281]

Chicago's complaint alleges three major forms of manufacturer conduct that create a public nuisance. First, manufacturers "knowingly oversupply or 'saturate the market' with their products in areas where gun control laws are less restrictive."[282] In 1982, Chicago passed a local ordinance that virtually bans handguns.[283] No handgun may be possessed by Chicago residents unless the gun was both owned and registered prior to 1982.[284] Most cities or states in the United States, and even some municipalities in Illinois just outside Chicago, regulate handgun purchase and possession much less strictly than Chicago. The city argues that by oversupplying the market in these other areas manufacturers know or foresee "that many of these guns will be purchased by Chicagoans who will take them back into Chicago, where they will possess them illegally."[285] In this way, the city claims, firearm manufacturers' practices circumvent Chicago's more restrictive laws.[286]

Chicago's complaint also argues that firearm manufacturers do not adequately "supervise, regulate, or impose standards" on firearm dealers—retailers who sell the manufacturers' guns

---

Cir. Ct. filed Nov. 12, 1998); *Morial*, No. 98-18578, at 2-3, 53-54.

277. *See City of Chicago*, No. 98 CH 015596, at 2.

278. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643 (5th ed. 1984).

279. *See* David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1, 14 (1998).

280. *See* KEETON ET AL., *supra* note 278, at 643-44.

281. *City of Chicago*, No. 98 CH 015596, at 66.

282. *Id.* at 54.

283. *See* CHICAGO, ILL., CODE § 8-20-050(c)(1) (1982).

284. *See id.*

285. *City of Chicago*, No. 98 CH 015596, at 54.

286. *See id.* at 55.

directly to the public.[287] Prior to bringing the lawsuit, Chicago police officers conducted undercover "sting" investigations of several firearm dealers located outside Chicago.[288] In each case, the police officers posed as civilian residents of Chicago and sought to purchase handguns that would be illegal to own in the city.[289] The complaint asserts that "[i]n no case did any defendant dealer take any action to prevent a violation of Chicago's gun control ordinance."[290] In fact, in a number of cases, the dealers allegedly provided information to assist the buyer to circumvent the law.[291] In addition to faulting the manufacturers for their failure to provide oversight, the complaint also names the dealers themselves as defendants.[292]

Finally, Chicago argues that firearm manufacturers design and market some of their products specifically to appeal to criminals, as was argued in the *Merrill* case.[293] The city also identifies a number of firearm models whose small size and easy concealability, it believes, make them particularly attractive to criminals.[294]

For the costs associated with police, fire, prosecutorial, health care, and emergency services incurred by Chicago and Cook County, the lawsuit seeks $433.1 million.[295] Punitive damages, designed to punish the defendants for their conduct, are sought in an unspecified amount.[296] Chicago also seeks certain injunctive relief from the court that would compel manufacturers and dealers "to abate the public nuisance" caused by them, including supervision and training of firearm dealers, ceasing the shipment to dealers near Chicago of firearms that are particularly attractive to criminals, and the manufacture of personalized guns.[297]

2. Causation and Data Availability. As with the tobacco litigation, lawsuits by municipalities against firearm manufacturers may enjoy certain advantages over those brought by individual plaintiffs. One of the most important advantages

---

287. *See id.* at 56.
288. *See id.* at 3-8, 20.
289. *See id.* at 20.
290. *Id.*
291. *See id.* at 20, 22, 28, 31-33, 35-38, 40.
292. *See id.* at 3-8, 66.
293. Refer to notes 234-44 *supra* and accompanying text (discussing the relevance of *Merrill v. Navegar*).
294. *See City of Chicago*, No. 98 CH 015596, at 58-65.
295. *See id.* at 70-71.
296. *See id.* at 71.
297. *See id.* at 71-72.

may be that when a lawsuit is brought by a municipality, rather than an individual, it is more difficult for the manufacturer to argue that any fault is more properly attributable to the injured party or to the criminal use of the gun. Just as states were able to argue that they didn't smoke the cigarettes that were associated with unreimbursed health costs, governmental entities similarly will be able to argue that they did not purchase or use the guns involved in accidental or intentional shootings. This may help to persuade judges and juries to support a different outcome than in most of the magazine safety and loaded chamber indicator cases brought thus far by individuals.

The city and county lawsuits also face formidable challenges in court. Unlike the tobacco litigation, in one sense the question of causation in the gun cases is a trivial concern. It is generally clear when damage to a specific human body is caused by gunfire. In other ways, however, the causation issues in the gun cases may be more complex. Although public health research suggests that the availability of firearms, particularly handguns, in homes[298] or communities[299] is associated with an increased risk of homicide and suicide, this research is not yet as complete as in the tobacco area. In addition, some researchers have argued that the availability and use of firearms is, on balance, socially beneficial, actually preventing violent crime.[300] Although the

---

298. *See* David A. Brent et al., *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides*, 266 JAMA 2989, 2995 (1991) (reporting that guns were more than twice as likely to be present in the homes of adolescent suicide victims than in the homes of suicide attemptors); Kellermann et al., *Gun Ownership as a Risk Factor*, *supra* note 203, at 1090 (reporting that homes with guns, after controlling for other factors, were 2.7 times more likely to experience a homicide than homes without guns); Kellermann et al., *Suicide in the Home*, *supra* note 203, at 471-72 (reporting that homes with guns, after controlling for other factors, were 4.8 times more likely to experience a suicide than homes without guns).

299. *See* Peter Cummings et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974, 978 (1997) (determining that obtaining a handgun is associated with an increased risk of violent death); Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615, 1615, 1617 (1991) (evaluating the effects of a 1976 Washington, D.C. law banning most private ownership of handguns and concluding that the law was associated with an approximately 25% decline in firearm homicides and suicides); David McDowall, *Firearm Availability and Homicide Rates in Detroit, 1951-1986*, 69 SOC. FORCES 1085, 1096 (1991) (concluding that increased gun density resulted in higher murder rates in Detroit).

300. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 180 (1995) (reporting an estimated 2.5 million incidents of guns used by civilians to prevent crimes each year in the United States); Lott & Mustard, *supra* note 80, at 64-65 (reporting that permitting citizens to carry concealed handguns deters violent crime without increasing accidental deaths).

methodology employed by these studies has been criticized,[301] these theories nevertheless represent the sort of challenge to the gun cases not squarely faced in the tobacco litigation. While some theorists may have argued that tobacco provides important economic or other intangible benefits, no credible scholars have argued that smoking is good for you. Some of the gun cases may see a battle of expert witnesses in this area.

An even larger data challenge for the gun cases may be the absence of important information. Unlike research available for other products such as motor vehicles, detailed information about the firearms involved in homicides, suicides, and unintentional deaths is generally lacking.[302] Precise evaluation of firearm safety devices, or of the contribution of specific guns to firearm deaths and injuries, is therefore very difficult. Additionally, detailed marketing data such as that obtained in the tobacco cases has been unavailable. New marketing data, however, may emerge during the pre-trial discovery process from the cases brought by individuals or municipalities

3. Public Opinion. In addition to the research and conclusions of experts, public opinion regarding the appropriateness of the lawsuits may also be important. Some prominent commentators have criticized the lawsuits as both anti-democratic and likely to produce, in slippery-slope fashion, inappropriate claims against other industries.[303] Other products

---

301. *See* COOK & LUDWIG, *supra* note 1, at 8-10 (concluding that self-reported data from telephone surveys of the incidence of civilian defensive gun use are likely to produce overestimates); Black & Nagin, *supra* note 81, at 218-19 (concluding that the results from the Lott and Mustard study "cannot be used responsibly to formulate public policy" because their data provides no basis for confident conclusions regarding the impact of right-to-carry laws on violent crimes); David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1443-44 (1997) (criticizing the methodology and results of the Kleck and Gertz survey); Ludwig, *supra* note 81, at 252-53 (concluding that shall-issue concealed carry laws do not reduce homicide rates and that the Lott and Mustard study does not provide reliable information regarding the effects of these laws on crime); Webster et al., *Flawed Gun Policy Research*, *supra* note 81, at 920-21 (stating that the study conducted by Lott and Mustard contains serious flaws that bias the results toward finding crime-reducing effects of liberalized gun-carrying laws, opining that their conclusions are unsupportable and noting other research, which suggests that increased gun carrying may indeed lead to more deaths).

302. *See* Stephen P. Teret et al., *The Firearm Fatality Reporting System: A Proposal*, 267 JAMA 3073, 3073-74 (1992) (noting a number of important unanswered questions regarding firearm use and arguing for the necessity of a Firearm Fatality Reporting System modeled after the federal Fatal Accident Reporting System (now called the Fatality Analysis Reporting System)).

303. *See When Lawsuits Make Policy*, THE ECONOMIST, Nov. 21, 1998, at 17 (opining that the use of "the courts to bully industries in this way is an abuse of the

that some commentators fear may be the next targets for municipal litigation include alcohol and motor vehicles.[304] The contention that these lawsuits are anti-democratic is based on the belief that the costs of defending against them, or ultimately paying any damage awards, will bankrupt the firearm industry. The result, it is argued, would be to ban guns—an outcome that is more properly within the purview of the democratically elected legislature rather than the judiciary.

In our view, arguments regarding the allegedly anti-democratic nature of these lawsuits are overstated. Litigation is fundamentally different from legislation, and there is no evidence that the real goal of the lawsuits is to put the firearm manufacturers out of business, rather than to force them to change the way they do business. The mayors (and governors) bringing or considering firearm litigation are democratically elected and therefore must be responsive to the voters. It is too early to assess the merits of the slippery slope argument. Nevertheless, it is important to recognize that, unlike early strict liability cases, these firearm lawsuits do not claim that simply manufacturing and selling a lawful product justifies liability.[305] Instead, plaintiffs argue that the failure to safely design and/or appropriately market firearms supports their cases.[306] Other lawful products may be less susceptible to these arguments.

Of course, if the cases proceed to trial, the opinions of a few jurors and judges will matter most. Their opinions, however, may be influenced by the views of commentators and others.

4. Legislation. Far from being absent from the process, some state legislatures have begun to play an active role in the gun litigation. In February 1999, the Georgia State Legislature passed, and the Governor signed, a first-in-the-nation law that forbids local governments from bringing tort actions against any firearms or ammunition manufacturer, trade association, or dealer, subject to limited exeptions.[307] Instead, the authority to

---

legal process and an evasion of democratic accountability" and that if this type of legal extortion successfully continues, public officials will look for new industries to target); Will, *supra* note 255, at B7 (noting that tobacco and firearm suits are antidemocratic by attempting social change through litigation, and that other lawsuits will likely follow).

304. *See When Lawsuits Make Policy*, *supra* note 303, at 17; Will, *supra* note 255, at B7.

305. Refer to Parts III.A and III.B.1 *supra* and accompanying text.

306. Refer to Parts III.A and III.B.1 *supra* and accompanying text.

307. *See* H.B. 189, 145th Gen. Assembly, Reg. Sess. (Ga. 1999).

sue is reserved to the state.[308] Atlanta, which had already filed its complaint prior to the enactment of the legislation, announced that it would proceed with the litigation and allow a court to resolve the conflict.[309]

Since then, laws restricting the ability of cities to sue gun manufacturers have also been enacted in thirteen other states,[310] including Louisiana,[311] in which a suit brought by a municipality is pending. In March 1999, Congressman Bob Barr (R-Ga.) introduced similar federal legislation.[312]

The legislative influence of one organization, the NRA, whose members are citizens rather than manufacturers, is another important difference from the tobacco litigation. The NRA has indicated that it will seek legislation barring city lawsuits against gun manufacturers in "as many as 25 or 30 states."[313] This legislative strategy mirrors the NRA's largely successful effort in the 1980s and 1990s to convince state legislatures to enact preemption laws that forbid localities from enacting their own gun control laws.[314] Today, more than forty states have some form of firearm preemption law.[315] Most cities, therefore, have been forbidden to enact their own gun control laws as an alternative to lawsuits.

The question of whether state legislatures have the authority to forbid localities from bringing lawsuits against firearm manufacturers is still unanswered by the courts. The enacted and pending bills, however, make it even more difficult to argue that the lawsuits have completely evaded the democratic process.

---

308. *See id.*

309. Atlanta's lawsuit has survived, in part, a motion to dismiss. *See* City of Atlanta v. Smith & Wesson Corp., Civ. Action File No. 99VS0149217J (Ct. of Fulton County Oct. 27, 1999) (order regarding motion to dismiss).

310. As of December 1999, the 13 states where legislation has been enacted are as follows: Alaska, Arizona, Arkansas, Georgia, Louisiana, Maine, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Texas. Legislation has been introduced but not yet enacted in a number of other states: Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, South Carolina, Vermont, and Wisconsin. *See Firearms Litigation*, 20 STOP GUN VIOLENCE NEWS, Oct. 1999, at 2-3.

311. *See* H.B. 204, Reg. Sess. (La. 1999).

312. *See* Firearms Heritage Protection Act of 1999, H.R. 1032, 106th Cong. § 2 (1999).

313. *See* Sharon Walsh, *NRA Moves to Block Gun Suits*, WASH. POST., Feb. 26, 1999, at A1.

314. *See* Teret et al., *Gun Deaths and Home Rule*, *supra* note 123, at 44.

315. *See* Herz, *supra* note 122, at 150 n.423.

IV. CONCLUSION

Laws regulating access to firearms remain an important component of the public health approach to preventing firearm-related deaths and injuries. A variety of constitutional provisions have been employed to challenge these laws. Although opponents of firearm regulation have enjoyed sporadic success in persuading courts to invalidate specific gun control laws, these rulings have not jeopardized the majority of these laws. However, recent developments in Second Amendment scholarship and related court rulings represent a potentially greater threat to firearm laws.

Tort litigation can be a useful tool for improving the public's health. Predicting the outcome of litigation, however, is notoriously difficult. And because the applicable law varies from state to state, the same argument may be successful in one state and unsuccessful in another. Some firearm manufacturers, without the vast resources of tobacco companies to defend against litigation, may instead choose to settle the cases before trial. To bolster those resources, however, manufacturers have pledged to create a joint defense fund with each member pledging to contribute one percent of its sales.[316]

Future developments might also influence the success or importance of the litigation. For example, the NAACP has also brought a lawsuit against firearm manufacturers.[317] Like many of the lawsuits filed by municipalities, the *NAACP* suit relies upon both design and marketing theories.[318] Unlike the city and county litigation, however, it seeks only injunctive and equitable relief designed to change the distribution practices of firearm manufacturers.[319]

If as a result of both private and municipal lawsuits, firearms are designed to be safer and new marketing practices make it more difficult for criminals to obtain guns, some firearm-related deaths and injuries may be prevented. While no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to play, complementing other interventions available to cities and states.

---

316. *See* Paul M. Barrett & Vanessa O'Connell, *It's War: Gun Industry Signals Harder Line, Firing Head of Trade Group*, WALL ST. J., Mar. 2, 1999, at A6.

317. *See* NAACP v. A.A. Arms., Inc., No. 99 C.V. 3999 (E.D.N.Y. filed July 16, 1999).

318. *See id.* at 3.

319. *See id.* at 6.