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Robert A. Levy

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PISTOL WHIPPED: BASELESS LAWSUITS, FOOLISH LAWS*

*Robert A. Levy***

INTRODUCTION

Although Congress and the majority of state legislatures have resisted enacting draconian gun control laws, courts are the final bulwark in safeguarding our constitutional right to keep and bear arms. Yet the courtroom has become the scene of unprecedented attacks as gun control advocates have used the judiciary to make an end-run around the legislative process. Meritless litigation brought by government plaintiffs in multiple jurisdictions are just part of a scheme to force gun makers to adopt policies that legislatures have wisely rejected. Moreover, the politicians use these suits to reward their allies—private attorneys who are often major

* For an earlier version of this article, see Robert A. Levy, *Pistol Whipped: Baseless Lawsuits, Foolish Laws*, CATO POL'Y ANALYSIS, NO. 2, May 9, 2001. This article raises several issues addressed by the author in previously published material that has been adapted for inclusion here. See Robert A. Levy, *Blackmail of Gun Makers*, NAT'L. LAW J., Jan. 31, 2000, at A20; Robert A. Levy, *Clinton, Gore and a Million More*, WASH. TIMES, May 12, 2000, at A20; Robert A. Levy, *The Great Tobacco Robbery*, LEGAL TIMES, Feb. 1, 1999, at 27; Robert A. Levy, *Turning Lead into Gold*, LEGAL TIMES, Aug. 23, 1999, at 21; Robert A. Levy, *When Theft Masquerades as Law*, 22(2) CATO POL'Y REP. 1 (2000); Michael I. Krauss & Robert A. Levy, *So Sue Them, Sue Them: Cities Look to Squeeze Gun Makers*, WKLY. STANDARD, May 24, 1999, at 19.

** Senior fellow in constitutional studies at the Cato Institute; Adjunct Professor at the Georgetown University Law Center; Director for the Institute for Justice, and Trustee of The Objectivist Center; Ph.D. in Business from American University; J.D. from George Mason University.

campaign contributors.

Meanwhile, many of the same politicians have exploited a few recent tragedies to promote their anti-gun agenda. Those politicians advocate gun control measures that have not been and will not be effective. In fact, many of the recommended regulations will make matters worse by stripping law-abiding citizens of their most effective means of self-defense. Violence in America is not due to the availability of guns, but instead to social pathologies, such as illegitimacy, dysfunctional schools, and substance abuse.¹ Historically, more gun laws have gone hand-in-hand with an explosion of violent crime. Over the past decade—because of vigorous law enforcement, a booming economy, and an older population—there has been a dramatic reduction in violence, coupled with a record number of guns in circulation.

Despite those convincing statistics, during the summer of 1999 the Clinton administration threatened gun makers—already engulfed by a torrent of litigation from dozens of cities—with additional claims from more than 3000 public housing authorities coordinated by the U.S. Department of Housing and Urban Development (“HUD”).² While under President Bush, further action by HUD will almost certainly be shelved,³ the ongoing city- and

¹ NAACP head Kweisi Mfume acknowledges that there are “pathologies in any society that contribute to violence,” for example, teenage pregnancy, dysfunctional schools, drug and alcohol abuse, and a welfare system that subsidizes illegitimacy and unemployment. Draft of an Open Letter from John R. Lott, Jr., Senior Research Scholar, Yale University Law School, to Members of Congress (June 3, 1999) (on file with author).

² See Paul M. Barrett, *HUD May Join Assault on Gun Makers*, WALL ST. J., July 28, 1999, at A3 [hereinafter Barrett, *HUD May Join Assault*]. HUD was “established in 1965 to coordinate and administer programs that provide assistance for housing and community development.” COLUMBIA ENCYCLOPEDIA (6th ed. 2001), available at <http://www.bartleby.com>. The department assists in funding solutions to the problems of housing and urban development through state, local, or private action. *Id.*

³ See James Dao, *The Nation: Over a Barrel; New Gun Control Politics: A Whimper, Not a Bang*, N.Y. TIMES, Mar. 11, 2001, at 4. “[T]he election of President Bush, a long-time ally of the N.R.A., put a towering obstacle to gun control legislation in the White House. As governor of Texas, he signed laws making it legal to carry concealed weapons and difficult for cities to sue gun

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state-sponsored lawsuits could destroy the firearms industry, with profound implications for the rule of law and the Constitution. The government's resort to litigation as a tactic of intimidation and extortion will have destructive consequences extending far beyond a single industry.

The current avalanche of lawsuits against gun makers began unfolding in June of 1997.⁴ At that time, the giant tobacco com-

manufacturers." *Id.*

⁴ The city, county and state lawsuits include, in chronological order by filing date: New Orleans, LA (*Morial v. Smith & Wesson Corp.*, No. 98-18578 Div. M (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998)); Chicago/Cook County, IL (*Chicago v. Beretta U.S.A. Corp.*, No. 98-CHI15596 (Cook County Cir. Ct. filed Nov. 12, 1998)); Bridgeport, CT (*Ganim v. Smith & Wesson Corp.*, No. 06-CV-99-01531988 (Conn. Super. Ct. filed Jan. 27, 1999)); Miami-Dade County, FL (*Penelas v. Arms Tech, Inc.*, No. 99-01941-CA-06 (11th Cir. Ct. Miami-Dade County filed Jan. 27, 1999)); Atlanta, GA (*Atlanta v. Smith & Wesson Corp.*, No. 99-VS-0149217J (Fulton County Ct. filed Feb. 5, 1999)); Cleveland, OH (*White v. Hi-Points Firearms*, No. CV-99-381897 (Cuyahoga County C.P. filed Apr. 8, 1999)); Detroit, MI (*Archer v. Arms Tech., Inc.*, No. 99-912-658-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999)); Wayne County, MI (*McNamara v. Arms Tech., Inc.*, No. 99-912-662-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999)); Cincinnati, OH (*Cincinnati v. Beretta U.S. A. Corp.*, No. A-99023169 (Ohio Ct. C.P. filed Apr. 28, 1999)); St. Louis, MO (*St. Louis v. Cernicek*, No. CV-992-01209 (St. Louis Cir. Ct. filed Apr. 30, 1999)); Alameda County, Berkeley, East Palo Alto, Oakland, Sacramento, San Francisco and San Mateo County, CA (*People v. Arcadia Mach. & Tool, Inc.*, No. 303753 (S.F. Super Ct. filed May 25, 1999)); Compton, Englewood, Los Angeles and West Hollywood, CA (*People v. Arcadia Mach. & Tool, Inc.*, No. BC-210894 (L.A. Super Ct. filed May 25, 1999)); Camden County, NJ (*Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, No. 99-CV-2518 (D.N.J. filed June 1, 1999)); Boston, MA (*Boston v. Smith & Wesson Corp.*, No. 99-VS-0149217J (Suffolk County Super. Ct. filed June 3, 1999)); Newark, NJ (*James v. Arcadia Mach. & Tool, Inc.*, No. ESX-L-6059-99 (Essex County Super. Ct. filed June 21, 1999)); Camden, NJ (*Camden v. Beretta U.S.A. Corp.*, No. 451099 (Camden County Super. Ct. filed June 21, 1999)); Los Angeles County, CA (*People v. Arcadia Mach. & Tool, Inc.*, No. BC-214794 (L.A. Super. Ct. filed Aug. 6, 1999)); Gary, IN (*Gary v. Smith & Wesson Corp.*, No. 45D029908-CT-355 (Lake Super. Ct. filed Aug. 27, 1999)); Wilmington, DE (*Sills v. Smith & Wesson Corp.*, No. 99-C-09283 (New Castle County Super. Ct. filed Sept. 29, 1999)); Washington, D.C. (*D.C. v. Beretta U.S.A. Corp.*, No. 00-0000428 (D.C. Super. Ct. Jan. 20, 2000)); New York, NY (*New York City v.*

panies first caved in to the state Medicaid recovery suits.⁵ Cigarette manufacturers, besieged by claims in dozens of states and sued under perverted rules of tort law that eliminated any opportunity for an adequate defense,⁶ decided to settle. In other words, the companies decided to bribe the politicians instead of going to war against a punitive money grab. That capitulation—the surrender of the industry’s right to market a perfectly legal product—predictably spawned a new round of litigation. This time, gun makers were pitted against the combined resources of billionaire trial lawyers, city mayors, county executives, a state attorney general, and the Clinton administration.

In bullying gun makers, the plaintiffs have included three corrosive ingredients carried over from the tobacco wars in their litigation formula: First, they have sued in multiple jurisdictions, thereby escalating the industry’s legal costs. Second, they have employed contingency fee lawyers, many of whom were major political donors. Third, they have tried to use the judicial branch in order to bypass the legislature. Contrary to the plaintiffs’ arguments that those efforts will reduce gun violence, compelling statistics suggest otherwise—that fewer guns in our society would leave Americans more, not less vulnerable to gun violence.

In Part I of this article, I examine that new litigation para-

Arms Tech., Inc., No. 00 CV (E.D.N.Y. filed June 20, 2000); *New York State v. Sturm, Ruger & Co.*, No. 402586 (Sup. Ct. N.Y. County filed June 26, 2000)).

⁵ “[G]iven the perverse legal rules under which the state Medicaid recovery suits were unfolding, the cigarette giants were effectively bludgeoned into negotiating with the states and the trial lawyers.” See Robert A. Levy, *Joel Klein’s Legacy: The Mother of All Antitrust Violations*, CATO: TODAY’S COMMENTARY, Oct. 7, 2000. A Master Settlement Agreement, signed in November 1998 by the major tobacco companies and forty-six state attorneys general, includes a provision requiring non-signing cigarette manufacturers to post pro-rata damages on sales in escrow for twenty-five years to offset any potential liability. *Id.*

⁶ See Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing out the Rule of Law*, CATO POL’Y ANALYSIS, NO. 275, June 20, 1997 [hereinafter, Levy, *Tobacco Medicaid Litigation*] (noting that in the thirty-nine suits brought against the tobacco industry, the states have circumvented the rules of subrogation and have sued the manufacturers directly).

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digm. In Part II, I digress briefly to explore Second Amendment concerns. In Part III, I analyze the suits threatened by public housing authorities, the claims by some cities that gun makers are responsible for “negligent marketing,” the allegation by other cities that guns are an “unreasonably dangerous” and “defective” product, and the fallout from the Smith & Wesson settlement. Finally, in Part IV, I assess the data that allegedly links gun injuries and crime to gun ownership, and I conclude that the data in fact shows an inverse correlation—i.e., high gun ownership leads to fewer gun injuries and crimes—lending further support to the notion that these lawsuits are entirely meritless.

I. STATE-SPONSORED TORT SUITS: THE NEW PARADIGM

When public officials prosecute lawbreakers, those officials are fulfilling a legitimate role of government. Most of the time, that prosecutorial role is unobjectionable, often commendable. But the latest rounds of litigation dealing with tobacco and then guns are different in three respects, each of which threatens the rule of law.

First, coordinated actions by multiple government entities can impose enormous legal fees on defendants.⁷ As a result, those actions have been used to extort money notwithstanding that the underlying case is without merit.⁸ For example, former Philadel-

⁷ See Robert A. Levy, *Spoils of the Tobacco Shakedown: Contingent-Fee Contracts Between State and Private Attorneys Should Be Illegal*, TX. LAW, Feb. 15, 1999, at 23 [hereinafter Levy, *Spoils of the Tobacco Shakedown*]. “The private attorneys who represented Florida, Texas, and Mississippi in litigation against the tobacco industry have made out like bandits, fleecing tobacco companies, smokers, and taxpayers. In December, arbitration panels awarded the lawyers \$8.2 billion in legal fees.” *Id.*; see also *All Things Considered: Tobacco Settlement Attorneys’ Fees* (NPR radio broadcast, Sept. 25, 2001) (reporting that the “law firms who helped secure Michigan’s share of the settlement are due \$450 million”).

⁸ Legal commentators, newspaper columnists, and editors alike have used the term “extortion” when discussing and describing suits initiated by cities, states, and the federal government in an effort to target socially unpopular defendants. See, e.g., Robert A. Levy, *The New Business of Government Sponsored Litigation*, 9 KAN. J.L. & PUB. POL’Y 592, 593 (2000) [hereinafter

phia Mayor Edward G. Rendell (D) called for dozens of cities to file concurrent suits against gun makers.⁹ Gun manufacturers “don’t have the deep pockets of the tobacco industry,” Rendell explained, and multiple lawsuits “could bring them to the negotiating table a lot sooner.”¹⁰ Never mind that the suits are baseless. We are not dealing with law, but with extortion parading as law.

One effective way to stop that thievery is to implement a “government pays” rule granting a defendant’s legal fees when a governmental unit is the losing plaintiff in a civil case. In the criminal sphere, defendants are already entitled to court-appointed counsel if needed;¹¹ they are also protected by the requirement for proof beyond reasonable doubt and by the Fifth and Sixth Amendments to the Constitution.¹² No corresponding safeguards against abusive public sector litigation exist in civil cases. By limiting the rule to cases involving government plaintiffs, access to the courts is preserved for less affluent, private plaintiffs seeking redress of legitimate grievances. As a result, defendants in government suits will be able to resist meritless cases brought by the state solely to ratchet up the pressure for a large financial settlement.

“Government pays” becomes ever more urgent with the recent emergence of an insidious relationship between the plaintiffs’ bar and some government officials. That relationship com-

Levy, *The New Business*]; James Bandler, *Under the Gun*, BOSTON GLOBE, May 9, 1999 (Magazine), at 10; Christopher Gillott, *Federal Tobacco Lawsuit Ploy to Steal Companies’ Money*, DAILY COLLEGIAN, Oct. 4, 1999; George Will, *Extortion Holds a Nation Hostage*, CHI. SUN-TIMES, Feb. 26, 2000, at 21.

⁹ See, e.g., Fox Butterfield, *New Orleans Seeks Millions in Gun Suit*, N.Y. TIMES, Nov. 4, 1998, at A16; *New Legal Target: Cities Plan to Sue Gun Makers over Cost of Crimes*, WASH. POST, Dec. 27, 1998, at A07; Peter Nicholas, *Philadelphia Mayor Has New Plan for Battle Against Gun Industry*, THE PHILA. INQUIRER, Dec. 31, 1998; Roberto Suro, *Cities Plan Legal Assault on Makers of Handguns; Tobacco Lawsuits Viewed as Model*, WASH. POST, Dec. 23, 1998, at A01.

¹⁰ See Butterfield, *supra* note 9, at A16.

¹¹ See U.S. CONST. amend. VI.

¹² See U.S. CONST. amend. V; U.S. CONST. amend. VI.

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mon to tobacco and gun litigation is a second major threat to the rule of law.

The rounds of litigation against both the tobacco and gun industries were concocted by a handful of private attorneys who entered into contingency fee contracts with the government.¹³ In effect, members of the private bar were hired as government subcontractors with a huge financial share in the outcome. Rendell—not believing this to be a problem—announced that cities were suing gun makers for the purposes of improving safety features and changing distribution practices, not for the purpose of receiving monetary damages.¹⁴ Yet one day after Rendell's disclaimer, Miami and Bridgeport filed their suits, seeking hundreds of millions of dollars in damages.¹⁵ New Orleans asked for damages,¹⁶ as did Chicago to the tune of \$433 million.¹⁷ The claims included not only medical costs associated with gun violence, but also the costs of police protection, emergency services, police overtime and pensions, courts, prisons, loss of population, cleaning the streets of blood, lower property values, even lost tax revenue from reduced worker productivity¹⁸—plus punitive damages. And nearly all of the cities have solicited private lawyers to

¹³ See Levy, *Spoils of the Tobacco Shakedown*, *supra* note 7, at 23; Levy, *Tobacco Medicaid Litigation*, *supra* note 7 (stating that attorneys involved in the tobacco litigations in Florida, Texas, and Mississippi were awarded \$8.2 billion in legal fees).

¹⁴ See Nicholas, *supra* note 9 (asserting that lawsuits filed against gun manufacturers sought to recover costs from gun violence).

¹⁵ See Gail Appleson, *Two More Cities Sue Gun Makers*, WASH. POST, Jan. 28, 1999, at A6.

¹⁶ See Butterfield, *supra* note 9, at A16.

¹⁷ Chicago Mayor Richard M. Daley, Remarks at Press Conference (Nov. 12, 1998).

¹⁸ See, e.g., Appleson, *supra* note 15, at A6; Susan Kimmelman, *Stick 'Em Up: Suing Gunmakers for the Cost of Urban Violence*, IN THESE TIMES, July 26, 1998, at 13. In 1996 David Kairys, a law professor at Temple University, worked with civic leaders in Philadelphia to craft a lawsuit basing damages on gun cost in terms of police, emergency personnel, public health, courts and prisons. *Id.* “Kairys writes, ‘A city’s potential damages can begin with a 911 call, cleaning blood from the street, and emergency medical care, and continue through support of an orphaned child.’” *Id.*

work for a contingency fee based on those damages.¹⁹

If money is not the primary goal of such litigation, a number of attorneys will have worked for free. Maybe that is fitting. After all, the gun suits are not intended to go to trial. HUD's threat—on top of the city and county claims—was meant to promote a settlement, not a trial.²⁰ No doubt, with a piddling \$1.5 billion in annual revenues,²¹ gun makers are not going to yield the same treasure trove as the tobacco behemoths whose worldwide sales are \$300 billion.²² A comparatively small payoff is not fatal, however. The real goal of the trial lawyers is to chalk up one more victory, thus demonstrating to future fatter-cat defendants that groundless legal theories are good enough when the coercive power of multiple government entities is arrayed against an unpopular industry.

When a private lawyer subcontracts his services to the government, he bears the same responsibility as a government lawyer.²³ He is a public servant beholden to all citizens, including the defendant, and his overriding objective is to seek justice. Imagine a state attorney paid a contingency fee for each indict-

¹⁹ See, e.g., Kimmelman, *supra* note 18, at 13 (stating that Kairys, among others, was urged by civic leaders and Philadelphia's mayor to develop a lawsuit against gun manufactures on behalf of the city); Stuart Taylor, Jr., *Guns and Tobacco: Government by Litigation*, NAT'L J., Mar. 25, 2000, available at 2000 WL 6436955 (stating gun lawsuits were bankrolled by contingent-fee lawyers).

²⁰ See John Riley, *Cuomo's Stepping-stone/ HUD Position Was a Platform for His Political Career*, NEWSDAY, Aug. 23, 2001, available at 2001 WL 9246991 (stating that HUD secretary Cuomo used the threat of a federal class-action lawsuit against gun makers in order to influence them to settle cases with states and cities).

²¹ See Paul M. Barrett, *Jumping the Gun? Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1.

²² *Lung Association Calls on the Bush Administration to Strengthen Global Tobacco Control Treaty*, U.S. NEWSWIRE, Mar. 7, 2001 (“[W]orldwide sales of cigarettes reach[ed] \$295.8 billion in 1996.”).

²³ See John M. Burman, *Special Ethical Duties of Government Lawyers*, 23 OCT. WYO. LAW. 14, 14 (2000) (arguing that government lawyers, including those contracted to represent the government, are bound by the same ethical standards as lawyers in private practice).

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ment that he secures, or a state trooper paid per speeding ticket. The potential for corruption is enormous. Still, the states doled out multi-billion dollar contracts to private counsel in their tobacco suits.²⁴ Those contracts did not call for per-hour fees, which might occasionally be justified to acquire unique outside competence or experience, but contingency fees, a sure-fire catalyst for abuse of power.²⁵ Moreover, the contracts were awarded without competitive bidding to lawyers who often bankrolled state political campaigns.²⁶ Put bluntly, contingency fee contracts between government and a private attorney should be illegal. We cannot in a free society condone private lawyers enforcing public law with an incentive kicker to increase the penalties.

Government is the single entity authorized, in narrowly defined circumstances, to wield coercive power against private citizens. When that government functions as prosecutor or plaintiff in a legal proceeding in which it also dispenses punishment, adequate safeguards against state misbehavior are essential. For that reason, we rely primarily on private remedies with redress sought by and for the benefit of the injured party and not the state in civil litigation. As the Supreme Court cautioned more than sixty years ago, an attorney for the state “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its ob-

²⁴ See *supra* notes 25-26 and accompanying text (discussing these multi-billion dollar contracts to private counsel).

²⁵ Plaintiffs’ lawyers hired by the state have an inherent conflict. Because they represent the state, their goal should be to seek justice. Because they may potentially receive a huge payoff due to the contingency arrangement, plaintiffs’ attorneys cannot impartially evaluate a settlement agreement. Additionally, there is little justification for states to pay large contingency fees to those attorneys when states have salaried attorneys on staff. See Levy, *Tobacco Medicaid Litigation*, *supra* note 6; see also Carolyn Lochhead, *The Growing Power of Trial Lawyers*, WKLY. STANDARD, Sept. 23, 1996, at 21 (arguing that, because trial lawyers are “bankrolling politicians at a level unmatched by any profession,” there exists a “blatant conflict of interest [inasmuch as] a number of state prosecutors are handing out these multibillion-dollar contracts . . . to the same lawyers who donate money to their campaigns”).

²⁶ See Lochhead, *supra* note 25, at 21.

ligation to govern at all.”²⁷

Third, and perhaps most important, laws are supposed to be enacted by legislatures, not by the executive or judicial branches.²⁸ In too many instances, government-sponsored litigation has been a substitute for failed legislation. That process violates the principle of separation of powers—a centerpiece of the federal constitution and no less important at the state level.²⁹ Evidently, some attorneys general, mayors, and their allies in the private bar are not concerned with that violation. In an attempt to circumvent the legislative process, they intend to pursue through litigation what was rejected by the legislature.

An interesting contrast can be drawn between legal perspectives on product prohibition prevailing in 1919 and those prevailing now. In 1919, because Congress did not have the power to prohibit the sale of alcohol,³⁰ prohibition was accomplished by a constitutional amendment.³¹ Today, the drug war is entirely statutory³² with little thought of its constitutional implications. When

²⁷ *Berger v. United States*, 295 U.S. 78, 88 (1935).

²⁸ *See* U.S. CONST. art. I, § 1; art. II, § 3; *see also* *Taylor v. Johnson*, 961 P.2d 768 (N.M. 1998) (holding that the state Constitution grants exclusively to the legislative branch the power to enact new laws and amend existing laws).

²⁹ *See* U.S. CONST. art. I, § 1; art. II, § 3; *see also* *Wayman v. Southard*, 23 U.S. 1 (1825) (determining that the law is made by the legislative branch, executed by the executive branch, and construed by the judicial branch).

³⁰ 48 C.J.S. *Intoxicating Liquors* §§ 21-22 (1984) (noting that the right to regulate or prohibit the sale or manufacture of alcoholic beverages rested exclusively in the states prior to the adoption of the Eighteenth Amendment to the Constitution).

³¹ U.S. CONST. amend. XVIII, § 1, repealed by U.S. CONST. amend. XXI. “[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.” *Id.*

³² *See, e.g.*, 21 U.S.C. § 844 (making simple possession of controlled substances unlawful and establishing penalties); 21 U.S.C. § 841 (making manufacture, distribution and dispensing controlled substances or intent to do so unlawful and establishing penalties); 21 U.S.C. § 878 (giving Drug Enforcement Administration personnel and certain state and local law enforcement officers power to conduct searches, seize controlled substances, and

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it came to tobacco, the Clinton administration argued not only do we not need a constitutional amendment, we also do not need a statute.³³ Instead, according to the administration, we only need a delegation of some sort to an unelected administrative agency, the Food and Drug Administration, with authority to ban nicotine.³⁴ And in the case of guns, some feel that we do not need a constitutional amendment, a statute, or a delegation. Instead, we only need multiple lawsuits as a means for the executive branch to bypass the legislature and effectuate a variety of gun prohibitions.³⁵ So much for limited government and separation of powers. We are left with the executive state—a modern-day return of the king.

Under that regime, dozens of cities, aided by the Clinton administration, took the gun battle to the courts—suing gun makers for “negligently marketing” a “defective product.”³⁶ Before further discussing those lawsuits, however, a quick but important detour—an examination of the debate surrounding the Second Amendment—is warranted.

II. TO KEEP AND BEAR ARMS

At the same time that cities were suing the gun industry, a Texas appeals court was reviewing a lower court decision that

make arrests).

³³ See Cable News Network, *President Declares Nicotine Addictive* (Aug. 23, 1996), at <http://www.cnn.com/US/9608/23/clinton.tobacco.update>. Clinton, instead of supporting a constitutional amendment or a federal statute, attempted to bring nicotine under the control of the Food and Drug Administration in approving federal regulations that declared nicotine an addictive drug. *Id.*

³⁴ *Id.*

³⁵ See, e.g., David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000) (considering public nuisance litigation claims by local government executives against gun manufacturers as an effective means to curb proliferation of gun sales).

³⁶ See *supra* note 4 (listing the suits brought against gun manufacturers by various cities).

invalidated a federal statute on Second Amendment grounds.³⁷ It examined the questions of whether the Second Amendment secures an individual right to keep and bear arms and, if it does, what restrictions governments can place on its exercise. The court's answers to those questions could determine future legislation directed at stricter gun control.

The text of the Second Amendment reads as follows: "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."³⁸ The question that seems to have perplexed the Supreme Court for more than two-hundred years is whether the right to keep and bear arms, as laid out in the Second Amendment, belongs to each of us as individuals or to us collectively as members of the militia. One approach to resolving that question is to compare the text of the Second Amendment with the texts of the First and Fourth Amendments.

The Second Amendment, like the First and Fourth Amendments, refers explicitly to "the right of the people." No reasonable person can doubt that First Amendment rights—speech, religion, assembly, and redress of grievances³⁹—belong to us as individuals. Similarly, Fourth Amendment protections against unreasonable searches and seizures are individual rights.⁴⁰ We secure "the right of the people" by guaranteeing the right of each person. In the context of the Second Amendment, it does not pro-

³⁷ United States v. Emerson, No. 99-10331, 2001 WL 1230757, at *7 (5th Cir. Oct. 16, 2001).

³⁸ U.S. CONST. amend. II.

³⁹ U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

⁴⁰ U.S. CONST. AMEND. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

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tect the state, but each individual *against* the state—that is, the amendment is a deterrent to government tyranny.⁴¹

Some would insist that although the threat of tyrannical government has not disappeared, it is less today than when our republic was experiencing its birth pangs.⁴² Perhaps so. Tyranny may be a lesser threat now, but incompetence by the state in defending its citizens against criminals is a greater threat. The demand for police to defend us increases in proportion to our inability to defend ourselves. For that reason, disarmed societies tend to become police states. Witness law abiding inner city residents, many of whom have been disarmed by gun control, begging for police protection against drug gangs despite the terrible violations of civil liberties that such protection entails, such as curfews, anti-loitering laws, civil asset forfeiture, even non-consensual searches of public housing.

Even if a reduced threat of government tyranny were to no longer require an armed citizenry, an unarmed citizenry could well create the conditions that lead to tyranny. The right to bear arms is thus prophylactic rather than remedial. It reduces the demand for a police state. George Washington University law professor Robert Cottrol puts it this way: “A people incapable of protecting themselves will lose their rights as a free people, becoming either servile dependents of the state or of the criminal predators who are their *de facto* masters.”⁴³ Indeed, after the atrocities of September 11, 2001, we learned that the state cannot

⁴¹ Government tyranny occurs when a government attempts to tell its people how to think, write, and pray. See John W. Bissel, *Bench Opinion on the Second Amendment*, 10 SETON HALL CONST. L.J. 807, 810 (2000).

⁴² See Bissel, *supra* note 41, at 810-11.

The protection of the States' freedom and security from central government tyranny was a critical consideration for the drafters of the Constitution and the Bill of Rights. . . . we have had our modern counterparts . . . [however, the] critical underpinning of the Second Amendment permits legislatures [t]o preserve the security of a State and its citizens.

Bissel, *supra* note 41.

⁴³ Robert J. Cottrol, *Gun Control is Racist, Sexist, & Classist*, AM. ENTER., Sept. 1, 1999, at 60.

defend its citizens against all acts of terror. It is imperative, therefore, that we are able to defend ourselves.

More than sixty years ago the Supreme Court looked at the question of an individual right or collective right in *United States v. Miller*.⁴⁴ *Miller* involved the 1934 National Firearms Act, which required registration of machine guns, sawed off rifles, sawed off shotguns, and silencers.⁴⁵ In addressing the text of the Second Amendment, the Court viewed “militia” as a term of art meaning “the body of the people capable of bearing arms.”⁴⁶ That suggests a right belonging to all of us as individuals. The Court also held, however, that the right to bear arms extended only to weapons rationally related to the militia and not the sawed off shotgun at issue in *Miller*.⁴⁷

That mixed ruling has puzzled legal scholars for six decades.⁴⁸ If military use is the decisive test, one would think that today’s citizens can possess rocket launchers, missiles, even nuclear arms. Obviously, that is not what the Court had in mind. Because the Court’s opinion in *Miller* is so murky, argues George Mason University law professor Nelson Lund, maybe the only lesson we can draw is that the case must be interpreted narrowly, allowing restrictions on those types of weapons covered

⁴⁴ *United States v. Miller*, 307 U.S. 174 (1939). In that case, defendants Jack Miller and Frank Layton were charged with unlawfully transporting a double barrel 12-gauge shotgun across state lines from Oklahoma to Arkansas in violation of the National Firearms Act, 26 U.S.C. § 1132 (1934). *Id.* at 175.

⁴⁵ 26 U.S.C. § 1132 (1934).

⁴⁶ *Miller*, 307 U.S. at 179.

⁴⁷ *Id.* at 178.

⁴⁸ *See, e.g.*, Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 441 (2001) (considering the meaning of *U.S. v. Miller* to be “less than clear”); Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMMENT. 701, 703 (2000) (arguing that the Supreme Court’s decision was “lazy and ambiguous”). Kevin T. Streit, *Can Congress Regulate Firearms?: Printz v. United States and the Intersection of the Commerce Clause, the Tenth Amendment, and the Second Amendment*, 7 WM. & MARY BILL RTS. J. 645, 662 (1999) (“*United States v. Miller*, which, like the Second Amendment itself, was far from a model of clarity.”).

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by the 1934 Act—weapons like machine guns and silencers, which have slight value to law abiding citizens, and high value to criminals.⁴⁹

Apparently, a few renowned, liberal law professors are now taking that position. In a famous 1989 article, “The Embarrassing Second Amendment,” Professor Sanford Levinson became the first prominent liberal to acknowledge that the Second Amendment should be treated as something more than an inkblot.⁵⁰ Evidently, the liberal apostasy has caught on. Harvard professor Laurence Tribe and Yale professor Akhil Amar concede that there is an individual right to keep and bear arms, albeit limited as in *Miller* by “reasonable regulation in the interest of public safety.”⁵¹

In effect, those scholars argue that the Second Amendment, like the First Amendment, is not absolute.⁵² “Reasonable” restrictions—for example, on the types of weapons that can be purchased—may be justified on cost-benefit grounds. On the other hand, Tribe and Amar imply that the Fourteenth Amendment binds the states, not just the federal government, to honor the Second Amendment.⁵³ In that respect, the two professors go farther than our federal appellate courts, which have taken a states rights approach to the Second Amendment, rubber-stamping state gun prohibitions without subjecting them to rigorous constitu-

⁴⁹ See Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 171 (1999) [hereinafter Lund, *The Ends of Second Amendment Jurisprudence*].

⁵⁰ See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 658 (1989) (arguing that the Second Amendment should “enter full scale into the consciousness of the legal academy” and be taken seriously in constitutional discussions).

⁵¹ Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31.

⁵² *Id.* at 31 (“[I]t has been a terrible mistake for both sides in the gun control controversy to insist that the Second Amendment bans virtually everything or virtually nothing.”).

⁵³ *Id.* (stating that the Fourth Amendment, “which makes part of the Bill of Rights applicable to the states, reflect[s] a broad agreement that bearing arms was a ‘privilege’ of each citizen”).

tional scrutiny.⁵⁴

That difference between federal and state treatment is important in repudiating an argument frequently raised by anti-gun advocates—that the framers did not intend the Second Amendment to bestow individual rights. For example, the Center to Prevent Handgun Violence argues that when our nation was founded, many states had communal storage of guns and restricted their use to white males only.⁵⁵ Pointing to the facts that Maryland actually seized guns that were not used in the militia and Pennsylvania denied firearms to 40% of its citizens for lack of virtue, the Center concludes that the framers could not have intended an individual right to keep and bear arms.⁵⁶ That argument, however, has a missing link. Until 1868 when the Fourteenth Amendment was ratified, the Bill of Rights constrained only the federal government. What the states did prior to that time is not directly relevant from a constitutional perspective.

With that background in mind, let us turn to an important case in Lubbock, Texas, *United States v. Emerson*,⁵⁷ recently decided by the U.S. Court of Appeals for the Fifth Circuit. In affirming the lower court's "individual rights" model of the Second Amendment, the Fifth Circuit became the only federal appellate court to reject unequivocally all varieties of the "collective rights" model.⁵⁸ Judge William L. Garwood's comprehensive and

⁵⁴ See, e.g., *Hickman v. Block*, 81 F.3d 98, 103 (9th Cir. 1996) (dismissing plaintiff's Second Amendment challenge to California's concealed firearm statute for lack of standing and declining to discuss the merits of the underlying case); *Quilici v. Martin Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (holding that any restriction the Second Amendment may place on the federal government does not apply to the states).

⁵⁵ For a specific analysis of the Center's approach to the framer's intent of a "well-regulated militia," see Center for Prevention of Handgun Violence, *The Myth of the Second Amendment*, at <http://www.bradycampaign.org/facts/issuebriefs/second.asp> (last visited Nov. 10, 2001).

⁵⁶ See Rachana Bhowmik, *Our Second Amendment Rights Are Not Eroded: Our Understanding of Them, However, Is*, CHURCH & SOC'Y, May/June 2000, at 49.

⁵⁷ No. 99-10331, 2001 WL 1230757, at *7 (5th Cir. Oct. 16, 2001).

⁵⁸ *Id.* at 601-02. Here, the court rejects the notion that the framers had a "collective rights" purpose in mind when drafting the Second Amendment.

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scholarly opinion said that the Constitution “protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess or bear their own firearms . . . that are suitable as personal individual weapons.”⁵⁹

In Texas, like many other states, spouses involved in divorce proceedings can be placed under a court order restraining them from harassing, stalking, or threatening their partner.⁶⁰ A federal statute makes it illegal for anyone under that type of restraining order to possess a gun.⁶¹ Mr. Emerson was indicted under the federal statute, and he contested his indictment on Second Amendment grounds.⁶² In April 1999 a federal judge dismissed the indictment, agreeing with Emerson that the statute violated the Second Amendment.⁶³

Specifically, in observing the “plain language” of the amendment, the court finds that textually, “if the amendment truly meant what collective rights advocates propose, then the text would read, ‘a well regulated militia, being necessary to the security of a free state and the right of the *States* to keep and bear Arms, shall not be infringed.’” *Id.* at 601 (alteration in original). Further, in its historical analysis of the Second Amendment, the court states that the individual right to bear arms was “a right recognized in both England and the colonies,” and was a “crucial factor in the colonists’ victory over the British army in the Revolutionary War.” *Id.* at 603. After declaring independence and establishing a new government through the Constitution, the “American founders sought to codify the individual right to bear arms, as did their forbears one hundred years earlier in the English Bill of rights.” *Id.*

⁵⁹ *Id.* at 37.

⁶⁰ TEX. FAM. CODE ANN. § 6.501 (2000).

⁶¹ 18 U.S.C. § 922(g)(8)(B), (9) (2001). The statute provides that it is unlawful for any person who is subject to a court order restraining “such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child” to possess any firearm or ammunition. *Id.*

⁶² *United States v. Emerson*, 46 F. Supp. 2d 598, 599 (1999). Mr. Emerson claimed a personal right to bear arms under the Second Amendment, and also challenged his indictment on other constitutional grounds, including the Commerce Clause, the Fifth Amendment, and the Tenth Amendment. *Id.* at 599.

⁶³ *Id.* at 614.

The trial judge, Samuel Cummings, did not equivocate. He said, "If the amendment truly meant what the collective rights advocates propose, then the text would read, 'A well regulated Militia being necessary to the security of a free State, the right of the *states* [or the militia] to keep and bear arms shall not be infringed.'"⁶⁴ Cummings might have added that a collective right, if conferred on the states, would permit "state governments [to] maintain military organizations independent from the federal military, and to arm those organizations with nuclear weapons or whatever else the state may choose."⁶⁵ A states' rights approach would also suggest that "Supreme Court decisions recognizing that the federal government has final authority over the deployment and use of the National Guard must be incorrect."⁶⁶

When Cummings parsed the two clauses of the Second Amendment, he concluded that "[t]he function of the subordinate clause was not to qualify the right, but instead to show why it must be protected. . . . If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized."⁶⁷ In other words, the second clause ("the right of the people to keep and bear Arms, shall not be infringed") is operational; it secures the right. The first clause ("A well regulated Militia, being necessary to the security of a free State") is explanatory; it justifies the right. That syntax was not unusual for the times. For example, the free press clause of the 1842 Rhode Island Constitution states: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments of any subject."⁶⁸ That provision surely does not mean that the right to publish protects only the press. It protects "any person," and *one* reason that it protects any person is that a free press is essential to a free society.

⁶⁴ *Id.* at 601.

⁶⁵ David B. Kopel & Richard E. Gardiner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 739 (1995) (indicating that this is the logical conclusion of the "states' rights only" argument).

⁶⁶ *Id.* at 739.

⁶⁷ *Emerson*, 46 F. Supp. at 601.

⁶⁸ R.I. CONST. art. I, § 20 (1842).

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In a similar vein, Article I, section 8 of the U.S. Constitution gives Congress the power to grant copyrights in order to “Promote progress of Science and useful Arts.”⁶⁹ Yet copyrights are also granted to *Hustler* magazine, to racist publications, even to literature that expressly seeks to retard science and the useful arts.⁷⁰ The proper understanding of the copyright provision is that promoting science and the arts is but one justification for the copyright power.⁷¹ Analogously, the militia clause helps explain why we have a right to bear arms, but it is not necessary to the exercise of that right.⁷²

As one might guess, the Clinton administration took a different position as illustrated in the following exchange at the oral argument before the Fifth Circuit in the *Emerson* case:

Judge William L. Garwood: You are saying that the Second Amendment is consistent with a position that you can take guns away from the public? You restrict ownership of rifles, pistols and shotguns from all people? Is that the position of the United States?

Deputy U.S. Attorney General William Meteja: Yes.

Garwood: Is it the position of the United States that persons who are not in the National Guard are afforded no protections under the Second Amendment?

⁶⁹ U.S. CONST. art. I, § 8, cl. 9.

⁷⁰ See Lund, *The Ends of Second Amendment Jurisprudence*, *supra* note 49, at 176 (arguing that this clause also protects racists and others who seek to retard the progress of science and useful arts).

⁷¹ See *Mazer v. Stein*, 347 U.S. 201, 219 (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”); see also Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 86 (2001).

⁷² See Lund *The Ends of Second Amendment Jurisprudence*, *supra* note 49, at 176 (arguing, *inter alia*, that prefatory phrases found in the Second Amendment, “[a] well regulated Militia,” and Article One, § 8, cl. 9, “[t]o promote the Progress of Science and useful Arts,” work neither to “limit [n]or qualify the operative clause”).

Meteja: Exactly.⁷³

Meteja later explained that even Guard members are only protected by the Second Amendment when and to the extent that their weapon is used for Guard business.⁷⁴

That view cannot be reconciled with the text of the Second Amendment, construed strictly in accordance with its original meaning. The term “well-regulated,” in its eighteenth century context, does not mean *heavily* regulated, but *properly* regulated. Looked at in that manner, the Second Amendment ensures that the militia would not be improperly regulated, even weakened, by disarming the citizens who would be its soldiers.⁷⁵

Bear in mind that Article I, section 8 gives Congress, not the states, the power to call forth and “provide for organizing, arming . . . disciplining . . . and for governing” the militia.⁷⁶ State powers are limited to appointing officers and training. The framers feared and distrusted standing armies; so they provided for a federal militia—all able-bodied males over the age of seventeen—as a counterweight against potential tyranny.⁷⁷ But the framers also realized, in granting Congress near-plenary power over the militia, that a select, armed militia subset like today’s National Guard could be equivalent to a standing army.⁷⁸ So they wisely crafted the Second Amendment to forbid Congress from disarming other citizens, thereby certifying that the militia would be

⁷³ Raymond N. Haynes, *Second Amendment at Stake in Appellate Case*, L.A. METRO. NEWS-ENTER., June 27, 2000, at 9.

⁷⁴ *Id.*

⁷⁵ See Lund, *The Ends of Second Amendment Jurisprudence*, *supra* note 49, at 175 (asserting that the purpose of the Second Amendment is to prevent Congress from using its “necessary and proper” Article I authority to disarm the citizenry).

⁷⁶ U.S. CONST. art. I, § 8, cl. 16.

⁷⁷ See Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 924 (“Indeed, ‘there was not a member of the federal convention who did not feel indignation’ at the idea of a standing army.” (quoting 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (1901) (remarks of Randolph at Virginia convention))).

⁷⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 330-31, 380-81, 384-88 (Max Ferrand ed. 1966).

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“well-regulated.”

Consider also these three changes made by the 1789 Congress when it drafted the amendment. First, Congress eliminated a provision excusing conscientious objectors from military service, making it clear that the Second Amendment is about firearms, not about military service.⁷⁹ Second, it stripped the term “well-armed” as a modifier of “militia,” again clarifying that the arms belonged to the people, not the military.⁸⁰ Third, it dropped the phrase “for the common defense” after the words “to keep and bear arms.”⁸¹ Here there is no ambiguity; the intent was to provide an individual right of defense, not common defense.

Finally, consider three other constitutional arguments against gun control, apart from the Second Amendment. First, many gun regulations are too vague and thus do not provide citizens with adequate notice of the particular acts that are illegal.⁸² In that

⁷⁹ See THE FEDERALIST NO. 47 (James Madison), reprinted in 15 THE DOCUMENTED HISTORY OF THE RATIFICATION OF THE CONSTITUTION 346 (J. Kaminski and G. Saladino, eds. 1984); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 81 (Liberty Press 1994); Symposium, *Fresh Looks: The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT L. REV. 103, 120-121 (2000) [hereinafter *Fresh Looks*].

⁸⁰ See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-98, 623-24 (Merrill Jensen ed., 1976); *Fresh Looks*, supra note 79, at 120-21 (noting that Madison’s first draft of the amendment reading “a well armed, and well regulated militia” was changed by the committee of the House to read, “[a] well regulated militia, composed of the body of the people,” and later to its present form).

⁸¹ See *United States v. Emerson*, No. 99-10331, 2001 WL 1230757, at *25 (5th Cir. Oct. 16, 2001) (“[T]he Senate rejected a proposed amendment to add the words ‘for the common defense’ just after ‘the right of the people to keep and bear arms.’”); *Fresh Looks*, supra note 79, at 122.

⁸² See, e.g., Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1, 65 (1997) (acknowledging that gun statutes have recently been attacked for vagueness and the circuit courts have differed in their interpretations of firearms legislation); Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufactures and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1733 (1999) (recognizing “that many gun control laws have been challenged on the ground that they are impermissibly vague, in violation of due process”).

way, the regulations offend the Due Process Clause.⁸³ Second, some federal controls may intrude on matters traditionally subject to state supervision, or may exceed the powers of Congress enumerated in Article I, section 8. As such, those controls would violate the Tenth Amendment.⁸⁴ Finally, an individual right to keep and bear arms could well be among the unenumerated rights secured by the Ninth Amendment.⁸⁵

III. LITIGATION TYRANNY

Switching gears from constitutional law to tort law, we next turn to the deluge of lawsuits against the gun industry. First, we

⁸³ U.S. CONST. amend. XIV, § 1. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.” *Id.*

⁸⁴ U.S. CONST. amend. X. “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.* See also Vernick & Teret, *supra* note 82, at 1720 (recognizing “that opponents to gun regulation statutes have raised Tenth Amendment arguments”); Symposium, *Triggering Liability: Should Manufacturers, Distributors, and Dealers Be Held Accountable for the Harm Caused by Guns?: The Brady Handgun Violence Prevention Act: Does It Have a Shot at Success?*, 19 SETON HALL LEGIS. J. 894, 916 (1995) (acknowledging “that a number of the circuit courts have held that some federal gun regulatory acts are unconstitutional because they violate the Tenth Amendment”).

⁸⁵ U.S. CONST. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.*; see also Nicolas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 7-12 (1992). Johnson observes that the Supreme Court has acknowledged the existence of unenumerated rights, derived by manipulating enumerated guarantees. *Id.* at 7 (citing Randy E. Barnett, *The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988)). He discusses a natural rights view of the Ninth Amendment as a method of manipulation and suggests that an individual’s right to arms is a fundamental, natural right. *Id.* at 20. For further discussion of Ninth Amendment interpretation, see Lawrence E. Mitchell, *The Ninth Amendment and the “Jurisprudence of Original Intention*,” 74 GEO. L.J. 1719 (1986).

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examine the federal government claims, which the Bush administration will probably not pursue. Next, we consider litigation by more than thirty cities and counties as well as New York State.

A. Federal Claims

At the federal level, Clinton's HUD secretary, Andrew Cuomo, had a plan to change the way the nation's gun makers do business.⁸⁶ He advocated legal action by each of 3400 housing authorities in an attempt to hold gun makers responsible for defraying the cost of security guards and alarm systems installed to curb violence in public housing.⁸⁷ Like the cities, HUD said it was not interested in money damages.⁸⁸ While that may have been the case, Cuomo and his acolytes understood very well that the small gun industry could not afford to defend itself—even against unfounded suits—in the face of such overwhelming firepower. Already smothered by litigation from dozens of cities and counties, the gun industry would have been crushed under the weight of such action. A *Wall Street Journal* story emphasized that very point:

As with the municipal suits, one filed on behalf of housing authorities would be groundbreaking and certainly not a sure bet to succeed in court. But a suit by a large group of housing authorities could [exhaust] gun companies' resources in pretrial maneuvering—by making demands for documents concerning industry distribution practices in

⁸⁶ See, e.g., Matt Bai, *Guns: The Feds Fire a Round: Washington's New Tactic: Target Gunmakers with Litigation*, NEWSWEEK INT'L, Dec. 20, 1999 (commenting that failures in gun war negotiations led to the Clinton White House's plan to initiate a suit on behalf of public housing authorities); Martin Kasindorf & Wendy Koch, *Industries Try to Build Defenses Against Lawsuits*, USA TODAY, Dec. 28, 1999, at 11A; Shailagh Murray, *HUD's Cuomo Is Drawing Flak for His Stances, Critics Say Ambition Drives Homeless, Gun Policies, Not the Agency's Needs*, WALL ST. J., Dec. 23, 1999, at A20.

⁸⁷ See Barrett, *HUD May Join the Assault*, *supra* note 2, at A3.

⁸⁸ See Daniel Mitchell, *Trampling the Rule of Law*, WASH. TIMES, Dec. 17, 1999, at A16 (stating that HUD was primarily "seeking to stop irresponsible marketing practices on the part of gun makers").

hundreds or thousands of localities.⁸⁹

Cuomo's efforts, in essence, were no better than thinly veiled blackmail.

In justifying HUD's litigation plans, Cuomo contended that "only one percent of the dealers are selling over 50 percent of the guns used in crimes."⁹⁰ If, however, crimes were linked to guns sold by particular dealers, there is no reason why the underlying data was not turned over to authorities. It is, in fact, the authorities' duty to shut down dealers who break laws on the books in all fifty states.⁹¹ Instead, Cuomo sought to compel gun makers to become police, judge, and jury. He expected such makers to ferret out "bad" dealers—some of whom were entirely innocent—and to deny those dealers, without due process of law, the merchandise that they sell for a living.

In addition, Cuomo also demanded safer guns.⁹² "We have safety caps on aspirin," he has stated, so why not safety locks on guns?⁹³ That flawed logic, however, overlooks relevant differences between guns and aspirin. First, the requirement for safety caps on aspirin arose out of legislation, not judicial mandate.⁹⁴ Second, aspirin is legally accessible to kids, guns are not. Third, guns and not aspirin are used to protect human lives; not many

⁸⁹ Barrett, *HUD May Join the Assault*, *supra* note 2, at A3.

⁹⁰ Anne Gearan, *Threat of Suit Aimed at Putting Pressure on Gun Makers*, DAYTON DAILY NEWS, Dec. 9, 1999, at A13.

⁹¹ *See generally* CAL. PENAL CODE § 12290 (West 2001); MD. CODE ANN. art. 27, § 442C (2001); OR. REV. STAT. § 166.418 (1999); TENN. CODE ANN. § 39-17-1316 (2001); VA. CODE ANN. § 18.2-308.2:3 (Michie 2001).

⁹² *See* Gearan, *supra* note 90, at A13 (summarizing that "[t]he White House and Department of Housing and Urban Development [Cuomo] want gun makers to agree to a code of conduct that includes cracking down on disreputable gun dealers and making guns safer"); Eric Rosenberg, *U.S. Readies Suit Against Gun Manufacturers*, Dec. 15, 1999, at A12 (noting that the aim of HUD Secretary Andrew Cuomo and Bruce Reed, President Clinton's point man on gun policy, "would be to force manufacturers to produce safer guns and new business practices to guard against shady dealers").

⁹³ Press Release, A Statement by Secretary Cuomo on School Shooting in Michigan (Mar. 1, 2001) (on file with author).

⁹⁴ *See* Poison Prevention Packaging Act, 15 U.S.C. §§ 1471-1476 (1970).

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people when confronted with an emergency will turn to a bottle of aspirin for protection. Use of a gun for self-defense could be dangerously compromised if the gun is locked. Sammy “The Bull” Gravano, the Mafia turncoat, aptly stated, “Safety locks? You . . . pull the trigger with a lock on, and I’ll pull the trigger [without one]. We’ll see who wins.”⁹⁵

If Cuomo was so concerned about unsafe public housing, he should have sued his own agency. HUD is responsible for housing authorities—including their location, selection of tenants, eviction policies, even inadequate policing. But rather than admit to the abject failure of public housing,⁹⁶ Cuomo instructed his minions to plan lawsuits, modeled after those filed by cities and counties from coast to coast. Those baseless lawsuits embody two principal legal theories: negligent marketing and defective products.

B. Negligent Marketing

The city of Chicago, and other cities following its example, accused gun makers of “negligent marketing”—flooding the suburbs where gun laws are relaxed with more guns than suburban residents will buy, knowing that the excess will find its way to the inner city, where gun laws are more restrictive.⁹⁷

Simple economic logic reveals the flaw in Chicago’s negligent marketing claim. If gun makers reduce the supply of firearms sold to suburban dealers, the market price of guns will rise. Consumers with the most “elastic” demand—that is, consumers who are most sensitive to price changes—will reduce or eliminate their purchases. The evidence is clear that those price-sensitive

⁹⁵ Howard Blum, *Reluctant Don*, VANITY FAIR, Sept. 1999, at 165.

⁹⁶ HUD, under Cuomo’s command, failed to screen tenants, fix elevators, and provide policing. See Richard A. Epstein, *Lawsuits Aimed at Guns Probably Won’t Hit Crime*, WALL ST. J., Dec. 9, 1999, at A26. Considering guns to be the major problem, HUD focused on suits against manufacturers, and, as a result, overlooked vital steps leading to a severe decline in the state of housing projects. *Id.*

⁹⁷ See *supra* note 4 (listing suits filed by counties).

consumers are typically law-abiding citizens.⁹⁸ By contrast, criminals' demand for guns is highly "inelastic." They operate in a "survival at any price" environment, which is why crooks are willing to pay inflated black-market prices for firearms. Perversely, by restricting the legal supply of guns and raising prices, manufacturers will put relatively more weapons in criminals' hands and relatively fewer in the hands of honest citizens.

Besides, any coordinated industry response to a negligent marketing claim would run afoul of the antitrust laws. Manufacturers that supposedly overproduce would have to collude in order to reduce production jointly. Although Smith & Wesson is aware of how many of its guns are going to, for instance, Maryland, those guns, by themselves, do not saturate the Maryland market. Smith & Wesson has no idea how many Maryland guns are shipped by Colt, Beretta, Glock, Ruger, or any other manufacturer. Because brands are more or less interchangeable, no single gun maker would agree to cut back production for fear that other manufacturers would simply take up the slack. Yet if the companies were to collude, an antitrust lawsuit would surely ensue.

An obvious solution to Chicago's problem, said the judge who dismissed the city's case this past September, would be for the police to enforce laws that already prohibit sales to minors, felons, the mentally incompetent, and anyone else without a state-issued firearm owners ID card.⁹⁹ Instead, Chicago sued gun makers lawfully selling to wholesalers, who, in turn, sell to licensed retailers. The city wanted to hold gun makers liable for the violent acts of criminals; however, most of these criminals—over whom the manufacturer has no control—did not buy from licensed retailers.¹⁰⁰ As the Seventh Circuit held in *Bloomington v.*

⁹⁸ See Michael I. Krauss & Robert A. Levy, *So Sue Them, Sue Them: Cities Look to Squeeze Gun Makers*, WKLY. STANDARD, May 24, 1999, at 19; Levy, *The New Business*, *supra* note 8, at 599.

⁹⁹ See *Beretta U.S.A. Corp.*, No. 98-CHI15596, at 18 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998); see also Andrew Stern, *Judge Dismisses Chicago Suit Against Gun Industry*, REUTERS, Sept. 15, 2000.

¹⁰⁰ See *Beretta U.S.A. Corp.*, No. 98-CHI15596, at 51 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998).

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Westinghouse,¹⁰¹ a manufacturer cannot be held liable for creation of a nuisance by the buyer unless the manufacturer participated in the conduct.

The chain of causation is broken when a criminal act intervenes between a gun maker's original sale and an injury arising out of the gun's violent use. That time-honored principle of law, by itself, is sufficient to dismiss these cases.¹⁰² A gun maker is liable only if the injury was foreseeable. An intervening criminal act is foreseeable if it is the natural and probable outcome of the gun maker's sale. Although Americans own roughly 240 million guns and commit about 450,000 gun-related crimes each year,¹⁰³ only two-tenths of one percent of all guns is involved in criminal activity in any given year, even if a different gun is used in each of those crimes.¹⁰⁴ That negligible chance of criminal conduct surely does not cross the "natural and probable outcome" threshold.

The manufacture, sale, and ownership of handguns are highly regulated. If a gun dealer knowingly condones so-called straw purchases—those made by legal buyers on behalf of criminals—

¹⁰¹ *Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (finding that a manufacturer and seller of chemicals did not commit nuisance under Indiana law by selling chemicals that contaminated the city's landfill, sewer system, and sewage treatment plant because the chemicals were no longer under the defendant's control).

¹⁰² *See, e.g., Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 259 (D.N.J. 2000) (finding that the causal connection was weak, amounting to scarcely more than "an assertion that because the gun manufacturers distribute their products, they eventually fall into the wrong hands, are used to commit crimes against persons and property, causing the County to expend money for law enforcement"); *Bennet v. Cincinnati Checker Cab Co.*, 353 F. Supp. 1206, 1210 (E.D. Ky. 1975) (holding that the criminal act on the part of the shooter acted as a superseding cause, thereby breaking the chain of causation); *see also* Shaun R. Bonney, *Using the Courts to Target Firearm Manufacturers*, 37 IDAHO L. REV. 167, 191-92 (2000) (arguing that gun manufacturers are unlikely to be held liable under traditional tort law in which causation is an essential element).

¹⁰³ *See* John R. Lott, Jr., *Suits Targeting Gun Makers Are Off the Mark*, WALL ST. J., Mar. 2, 1999, at A18.

¹⁰⁴ *Id.*

the dealer can be prosecuted under current law.¹⁰⁵ As of April 2000, seventeen months after Chicago filed its lawsuit, only four of the retailers targeted by the city's undercover "stings" had been charged.¹⁰⁶ In the only case to go to trial, the jury took but ten minutes to find the defendant not guilty.¹⁰⁷ If the behavior of those dealers was as egregious as the city's complaint suggests, why were there only four indictments and zero convictions?

Nationwide, thousands of laws regulate everything from who can own a gun and how it can be purchased to where one can possess or use it.¹⁰⁸ Nonetheless, in 1998 there were only eight federal prosecutions for the thousands of instances that guns were brought illegally onto school grounds.¹⁰⁹ According to a Syracuse University study, from 1992 to 1999, federal gun prosecutions declined by 43%.¹¹⁰ Over the two years ended mid-1999, the Bureau of Alcohol, Tobacco and Firearms ("BATF") traced half of the guns used in crimes to 389 dealers, but only nineteen had

¹⁰⁵ See 18 U.S.C. § 922(a)(2) (making it illegal for a dealer to ship or transport to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector).

¹⁰⁶ Devon Spurgeon & Paul M. Barrett, *Operation Gunsmoke, Touted as a Big Deal, Makes a Small Mark*, WALL ST. J., Apr. 6, 2000, at A1.

¹⁰⁷ *Id.*

¹⁰⁸ See John R. Lott, Jr., *Gun Laws Can Be Dangerous, Too*, WALL ST. J., May 12, 1999, at A22; see also Kopel & Gardiner, *supra* note 65, at 762-63.

Handguns are the only consumer product that an American consumer is forbidden to purchase outside his state of residence. They are the only mass consumer product for which retailers, wholesalers, and manufacturers all require federal licenses. They are among a tiny handful of consumer products for which the federal government regulates simple possession, and further regulates the terms of retail transactions, going so far as to require (for handguns) that police be notified and given an opportunity to disapprove the sale before being allowed to consummate the transaction.

Kopel & Gardiner, *supra* note 65, at 762-63.

¹⁰⁹ See Peter J. Boyer, *Big Guns*, NEW YORKER, May 17, 1999, at 62.

¹¹⁰ See Edward Walsh, *Clinton Plans Gun Initiative*, WASH. POST, Jan. 18, 2000, at A2.

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their licenses revoked.¹¹¹ Moreover, a BATF study released in June 2000 documented 1,700 federal and state gun-law prosecutions and 1,000 verdicts from July 1996 through December 1998.¹¹² On a per-year basis, that equals 680 prosecutions and 400 guilty pleas—trivial numbers when contrasted with roughly 500,000 gun crimes committed in the United States each year.

The effect of more rigorous law enforcement and stiffer penalties is apparent from Richmond's experience with Project Exile¹¹³—a federal program that, in part, mandates a five-year minimum sentence in federal prison for any felon caught carrying or trying to buy a gun.¹¹⁴ As a result of the program, Richmond reported a 36% decline in gun homicides and 37% drop in armed robberies for the 1997 calendar year.¹¹⁵ When the National Rifle Association (“NRA”) sought to expand Project Exile, it received little support from the Clinton administration until September 1999, at which time the president requested an inconsequential budget increase of \$5 million.¹¹⁶ Congressional Republicans had wanted \$27 million, albeit targeted at cities in states where the

¹¹¹ BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 180795, FEDERAL FIREARMS OFFENDERS, 1992-98 (2000); see also Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1. Julius Wachtel, retired after twenty-three years as a BATF agent, remarked that he and his co-workers had a saying: “No cases, no waves. Little cases, little waves. Big cases, big waves.” *Id.*

¹¹² *Treasury Makes Case for Gun Show Clampdown*, REUTERS, June 21, 2000.

¹¹³ Developed in 1997 by the U.S. Attorney's Office in Richmond, “Project Exile” facilitated the prosecution of illegal gun offenses in federal court, created stiffer bond rules and sentencing guidelines, expedited the reporting system, and decreased processing time for felons with gun charges associated with domestic violence. In addition, the program improved police officer training on federal firearms statutes and search and seizure issues. See Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 378-80 (2001).

¹¹⁴ *Id.* at 380.

¹¹⁵ See generally Michael Janofsky, *Fighting Crime by Making Federal Case About Guns*, N.Y. TIMES, Feb. 10, 1999, at A12.

¹¹⁶ See Sandra Torry, *Federal-Local Gun Control Venture Stymied by Success*, WASH. POST, Sept. 11, 1999, at A1.

senators on the Appropriations Committee served, not at cities where crime rates were highest.¹¹⁷

To be sure, the states, not the federal government, exercise general police power. Why should federal courts be turned into what one federal judge in Richmond characterized as “police courts”?¹¹⁸ It would be far better for the states to stiffen their own penalties than to federalize yet more crimes.¹¹⁹ Indeed, the federalization of most gun crimes cannot be squared with the Tenth Amendment, which permits the federal government to exercise only those powers that are enumerated in the Constitution and delegated by it to the United States.¹²⁰ Still, many federal criminal laws would qualify as a legitimate exercise of state police power. In any event, non-enforcement—whether state or federal—cannot be laid at the doorstep of gun makers.

Naturally, if existing laws are not being enforced, the best bet, according to the politicians, is to pass more laws. In the Chicago suburbs, for example, the Cook County legislature could have enacted more restrictive gun laws. For whatever reasons, it chose not to do so. Instead, Cook County signed on as co-plaintiff in Chicago’s lawsuit to do what the county elected not to. In effect, Cook County’s complaint to the court, quite literally, is that the county has itself failed to pass appropriate legislation.

C. Defective Product

Apart from negligent marketing, the second major claim among cities suing the gun industry is that firearms are “defective and unreasonably dangerous” as they are currently manufactured.¹²¹ In order to hold gun makers liable for selling an unsafe

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Richmond’s program, renamed Virginia Exile, is now under state control. See *160 Arrested as a Result of Virginia Exile*, A.P., July 2, 2001.

¹²⁰ U.S. CONST. amend. X.

¹²¹ See Ray Delgado, *S.F. Joins Suit Against Gun Makers; Plaintiff Cities Ask Restitution, Saying Firms Knowingly Get Weapons to Criminals*, S.F. EXAM’R., May 25, 1999, at A3 (“Cities have gone after the gun industry in a

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product, tort law requires a true *defect*, not merely that a product is dangerous when it does what it is designed to do.¹²² The *Washington Post* has editorialized: “As a legal matter, it is hard to see how companies making lawful products can be held liable when those products perform precisely as intended.”¹²³ With that in mind, what then is the true defect of a firearm? Does it misfire, or fire inaccurately? Not at all. Yet New Orleans and other cities have insisted that guns are defective if sold without devices that prevent discharge by unauthorized users. On that ground, the cities hope to drag gun makers to the settlement table—turning the law of product liability on its head.

Legislatures across the nation have regulated virtually every aspect of gun design and distribution. If a determination is to be made that guns are unreasonably dangerous, the legislature, constrained by the Constitution, must make that determination, not the courts. A federal judge in Massachusetts aptly captured this sentiment in *Wasylow v. Glock*: “Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.”¹²⁴

Even Brooklyn’s Jack Weinstein, the favorite federal judge of the plaintiff’s bar, had this comment about the safety of guns:

Whether or not . . . products liability law would require

variety of ways, filing products liability suits that charge manufacturers with turning out poorly made guns or guns that lack safety measures.”); Mark Long, *Judge Dismisses Miami’s Lawsuit Against Gun Makers*, LEGAL INTELLIGENCER, Dec. 15, 1999, at 4 (discussing Miami’s lawsuit, whereby the city alleged that “[gun] manufacturers negligently design their guns”); George Will, *New Orleans Takes Aim at Gun Makers*, AUSTIN AM. STATESMAN, Jan. 24, 1999, at H3 (discussing New Orleans’ suit against fifteen gun manufacturers, whereby the city sought damages based on the sales of guns that were unreasonably dangerous because “they did not incorporate recognition technologies that would prevent their use by children or by anyone other than the owner”).

¹²² See generally RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998) (“[P]roducts are not generically defective merely because they are dangerous.”).

¹²³ Editorial, *Guns in Court*, WASH. POST, Oct. 12, 1999, at A18.

¹²⁴ 975 F. Supp. 370, 381 (D. Mass. 1996).

an anti-theft safety mechanism as part of the design of handguns requires a balancing of the risk and utility. . . . Plaintiffs have not shown that such a device is available, nor have they asserted the possibility of showing at trial that such a device would satisfy the . . . risk-utility test.¹²⁵

Weinstein added that “[t]he mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacture or design of the product itself.”¹²⁶

If guns are inherently defective, then New Orleans and other cities that have swap programs bring their suits under a cloud of hypocrisy. In 1998 the New Orleans Police Department traded more than 8,000 confiscated weapons—40% of which were semi-automatic—to a commercial dealer in return for Glockes.¹²⁷ Nearly half of the traded guns would have been characterized as “unsafe” in the city’s own lawsuit against gun makers—including TEC9s,¹²⁸ AK47s,¹²⁹ and Uzis,¹³⁰ banned since 1994. Only one-fourth of the guns had safety locks. Still, Mayor Marc Morial signed and approved the deal, paving the way for resale of those

¹²⁵ See *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1323 (E.D.N.Y. 1996).

¹²⁶ *Id.*

¹²⁷ See Matt Labash, *Lawyers, Guns, and Money*, WEEKLY STANDARD, Feb. 1, 1999, at 25-29.

¹²⁸ A TEC9 is an inexpensive auto-loaded assault pistol manufactured by Intratec Firearms. See *Firearm Information by Type*, at <http://recguns.com/IIC2jl.html>. Although not a fully automatic firearm, it looks like a miniature submachine gun and features a threaded barrel and a thirty-round magazine. *Id.*

¹²⁹ An AK47 is a military assault rifle designed in 1947 by Russian General Mikhail Kalashnikov. See *The AK47 Page*, at <http://members.tripod.com/sa93/ak47.html>. It is a cheaply manufactured lightweight automatic weapon. *Id.* The AK-47 was the weapon of choice for the former Soviet Union and Eastern European countries. *Id.*

¹³⁰ The Uzi is a compact automatic weapon designed by Uziel Gal, an officer in the Israeli Army. *Uzi Submachine Gun*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com>. Law enforcement personnel and members of the Special Forces use it widely. *Id.* The weapon’s design is based on earlier Czech designs, “in which bullets were fed into the gun’s chamber from a box shaped magazine inserted into the pistol. . . .” *Id.*

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guns across the nation.¹³¹ Ironically, New Orleans could end up as defendant in other cities' suits.

Under pressure, Morial suspended the swap program.¹³² But New Orleans was not the only hypocritical plaintiff. Police departments in Boston, Detroit, Oakland, Miami, St. Louis, and Bridgeport have also traded-in "unsafe" guns, which are now back on the street, even while suing gun makers for marketing a defective product.¹³³ Undoubtedly sensitive to the bad publicity, several police departments announced they that would explore lease programs, rather than trade-in programs, with Glock.¹³⁴ While such a policy might relieve the city of direct responsibility for providing unsafe guns for commercial resale, the revised contractual arrangement merely camouflages the same deal, the recycling of "defective" products for use by private citizens.

Whether the claim is a defective product or negligent marketing, these lawsuits are baseless. Only five of them have reached final judgment and all five were fully or partially dismissed.¹³⁵ For example in October 1999, an Ohio state judge threw out Cincinnati's claims, holding that gun makers are not responsible for the criminal misconduct of customers. "The city's complaint is an improper attempt to have this court substitute its judgment for that of the legislature," the judge explained.¹³⁶ The suits in

¹³¹ See Labash, *supra* note 127, at 25-29.

¹³² See Jake Tapper, *City Slickers*, SALON NEWS, July 13, 1999 at 25-29.

¹³³ *Id.*; see also Vanessa O'Connell & Paul M. Barrett, *Unloading Old Police Guns: More Cities Ban Trade-Ins and Resales*, WALL ST. J., Nov. 10, 1999, at A1.

¹³⁴ See Vanessa O'Connell & Paul M. Barrett, *Cities Suing Gun Firms Have a Weak Spot: They're Suppliers, Too*, WALL ST. J., Aug. 16, 1999, at A1.

¹³⁵ Other suits have been allowed to proceed in part, but none has prevailed on final judgment. See *Supreme Court: State Can Block New Orleans from Suing Gun Makers*, A.P., Apr. 3, 2001. In 1999, Atlanta survived a motion to dismiss its design defect claim. *Id.* The following year, New Orleans also survived full dismissal, as did Cleveland, Wayne County, and San Diego. *Id.* In April 2001, however, the Louisiana Supreme Court threw out the New Orleans claim, citing state law that bans litigation by cities against the gun industry. *Id.*

¹³⁶ *Court Rejects Cincinnati Suit Against Gun Industry*, REUTERS, Oct. 7,

Bridgeport and Miami were also dismissed in December 1999. Miami's judge observed that the city could not use the courts to regulate because that is the job of the legislature.¹³⁷ A Florida appeals court upheld the Miami ruling, calling the lawsuit "an attempt to regulate firearms . . . through the . . . judiciary."¹³⁸ "Clearly this round-about attempt is being made because of the County's frustration at its inability to regulate firearms," the appeals court wrote. "The County's frustration cannot be alleviated through litigation."¹³⁹

On September 15, 2000, a judge threw out Chicago's negligent marketing claim saying that statistical evidence of causation was insufficient, and that individual instances of illegal sales were a matter for the police to counter.¹⁴⁰ Most recently, on December 21, 2000, a federal judge dismissed Philadelphia's claims, describing the city's charge of public nuisance as "a theory in search of a case," and rejecting the negligence claim "for lack of proximate cause."¹⁴¹

Nevertheless, the trial lawyers press forward. Sooner or later they will likely find a sympathetic judge who is willing to ignore the law in order to effectuate his personal policy preferences. Such forum shopping is a favorite tactic of the plaintiffs' bar. In fact, the major reason each city has sued its local dealers as well as gun manufacturers is so that a plaintiff and at least one defendant reside in the same jurisdiction. In that way, the case cannot be removed to federal court, where the rule of law generally prevails—outweighing provincial prejudices.

While the search for friendly forums moves ahead, pending lawsuits are having predictable effects. Smaller gun makers are going out of business. For example, two California dealers have declared bankruptcy. Colt announced a layoff of 300 workers and

1999.

¹³⁷ See Paul M. Barrett, *Florida Judge Dismisses County's Suit Filed Against Handgun Manufacturers*, WALL ST. J., Dec. 14, 1999, at B15.

¹³⁸ *Id.*

¹³⁹ *Florida Appeals Court Rejects Gun Suit*, REUTERS, Feb. 23, 2001.

¹⁴⁰ See Andrew Stern, *supra* note 99.

¹⁴¹ Shannon P. Duffy, *Philly Loses Its Gun Maker Suit*, NAT'L L.J., Jan. 8, 2001, at A4.

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said it would withdraw from the consumer handgun business, focusing instead on military weapons and collectibles.¹⁴² Prospective litigation costs are showing up in higher gun prices. Top quality handguns are now priced in the \$350 to \$550 range, and fewer guns are available for less than \$100. Those higher prices have less impact on criminal demand than on the demand from price-sensitive, law-abiding, especially inner-city citizens.

D. Smith & Wesson Settlement

On a parallel track, threatened litigation by the federal government and actual litigation by dozens of cities were used as a bludgeon to force the industry's largest manufacturer, Smith & Wesson, into a settlement. Despite countervailing pressure from its customers and other gun makers, Smith & Wesson threw in the towel—explaining that \$100 million or more in damages, sought by several of the larger cities, exceeded the company's profits for the entire past decade.¹⁴³ Moreover, the company protested, it cost \$1 million to defend against each government-sponsored claim.¹⁴⁴ Smith & Wesson simply didn't have the resources to fight multiple lawsuits across the country. Accordingly, on March 17, 2000, it surrendered.¹⁴⁵

Essentially, the Smith & Wesson deal is no better than a shakedown. Various government entities—HUD at the federal level, New York and Connecticut at the state level, and thirteen cities—agreed not to pursue their baseless but costly suits against the company.¹⁴⁶ Other cities and counties offered to review their

¹⁴² See *Colt Said to Be Cutting Handgun Sales*, L.A. TIMES, Oct. 11, 1999, at A1.

¹⁴³ See Gary Fields, *For Smith & Wesson, Blanks Instead of a Magic Bullet*, WALL ST. J., Aug. 24, 2000, at A24 [hereinafter Fields, *For Smith & Wesson*].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* “[T]he \$100 million sought in the suit brought by the city of Boston eclipsed [the] company's combined profit for the past decade.” *Id.*

¹⁴⁶ See Paul M. Barrett, *Smith & Wesson Rivals Face Antitrust Probe*, WALL ST. J., Mar. 3, 2000, at B18 [hereinafter Barrett, *Smith & Wesson Rivals*]; Edward Walsh & David A. Vise, *U.S., Gunmaker Strike a Deal: Smith*

suits, but made no formal commitment to exclude Smith & Wesson.¹⁴⁷ In return, the gun maker pledged, first, to impose a number of restrictions on its dealers and distributors: (a) No sales of any manufacturer's guns unless the buyer has passed a safety course and cleared a background check—even if the check takes longer than the three-day period required by law; (b) no sales at any gun shows unless all sales at the show are subject to a background check;¹⁴⁸ (c) no sales of Smith & Wesson guns if “a disproportionate number of crimes” is traced to guns sold by a dealer or distributor;¹⁴⁹ and (d) no purchase by one person of more than one gun at a time unless the buyer is willing to wait fourteen days before picking up the remaining guns.¹⁵⁰

Second, Smith & Wesson agreed to childproof all of its handguns within a year, presumably by using features like a heavier trigger pull or a magazine disconnect, which prevent a gun from firing once the magazine is removed. Under terms of the settlement, every Smith & Wesson handgun would also be equipped with an external lock within sixty days and an internal lock within twenty-four months.¹⁵¹

Third, the settlement required that each gun have a hidden se-

& Wesson Plans Safety, Sales Steps Suit Threats Dropped, WASH. POST, Mar. 18, 2000, at A1.

¹⁴⁷ See Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000, at A10; Steven Wilmsen, *Smith & Wesson, City Settle Lawsuit*, BOSTON GLOBE, Dec. 12, 2000, at B4.

¹⁴⁸ On April 13, 2000, Smith & Wesson issued a clarification—disputed by lawyers for the settling cities—regarding the scope of background checks. Smith & Wesson insisted that checks were required only for its weapons, not those of other manufacturers, and that checks at gun shows applied only to licensed dealers, not private citizens. See *Smith & Wesson, Government Reaffirm Settlement*, WASH. POST, Apr. 14, 2000, at A7.

¹⁴⁹ Susan Milligan, *Gun Maker to Add Safety Measures, Clinton Hails Smith & Wesson Act*, BOSTON GLOBE, Mar. 18, 2000, at A1.

¹⁵⁰ See Walsh & Vise, *supra* note 146, at A1.

¹⁵¹ See DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AGREEMENT BETWEEN SMITH & WESSON AND THE DEPARTMENTS OF TREASURY AND HOUSING AND URBAN DEVELOPMENT, LOCAL GOVERNMENTS AND STATES (2000), available at <http://www.hud.gov>.

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rial number to facilitate tracing a weapon used in a crime.¹⁵² Fourth (reminiscent of the tobacco settlement that forced manufacturers to fund anti-smoking programs), Smith & Wesson promised to “work together to support legislative efforts to reduce firearm misuse” and contribute 1% of its revenue toward an “education trust fund” to inform the public about the risk of firearms.¹⁵³ An Oversight Committee in each settling city—comprised of one Smith & Wesson official and one representative each from the city, county, state, and federal government—was set to monitor and supervise all provisions of the settlement.¹⁵⁴

Those terms and conditions obscure what is actually driving the settlement. From the government’s perspective, the settlement was a means to bypass state and federal legislatures that had been singularly unresponsive to a variety of gun control proposals. Moreover, the settlement circumvents court review in many jurisdictions. Judicial approval would be required only in jurisdictions where lawsuits had already been filed and were to be dismissed as a condition of the settlement. That excludes the suits threatened but not filed by HUD and various cities and states.

To sweeten the deal further, President Clinton sought to assemble the Communities for Safer Guns Coalition, an alliance of local governments, along with HUD, that would refrain from buying police firearms manufactured by any company that did not sign the settlement.¹⁵⁵ That commitment to favor Smith & Wesson was not embedded in the text of the settlement agreement, but communicated informally by Clinton.¹⁵⁶ Perhaps Clinton

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ The Communities for Safer Guns Coalition was announced formally on March 22, 2000 by HUD Secretary Andrew Cuomo. *See generally* Ed Somers, *Communities for Safer Guns Coalition Doubles to 411*, CRIME AND DRUGS, May 22, 2000, available at http://www.usmayors.org/uscm/wash_update/crime/coalition052200.htm; Ed Somers, *Mayors, Counties, State AG’s Form “Communities for Safer Guns Coalition,”* CRIME AND DRUGS, Mar. 31, 2000, available at http://www.usmaors.org/uscm/wash_update/crime/0033100a.htm.

¹⁵⁶ *See* Edward Walsh & Helen Dewar, *Government Coalition to Try to*

knew that such an arrangement might violate local and federal procurement regulations, discriminate against law abiding gun makers, and deny disfavored companies the right to pursue a legitimate business.

In June 2000, the House of Representatives attempted, unsuccessfully, to pass a bill prohibiting enforcement of the Smith & Wesson settlement.¹⁵⁷ It did, however, approve a provision that would prevent spending in support of Clinton's coalition, which ultimately comprised 600 localities that agreed, first, not to sue Smith & Wesson and, second, to favor the company in police gun buys.¹⁵⁸ Shortly thereafter, the Senate approved of a bill barring federal procurement preferences for Smith & Wesson.¹⁵⁹ With a change in administration, the settlement probably will not attract other gun makers as co-signers, nor is the settlement likely to benefit Smith & Wesson, which announced this past June that it was closing two of its plants for a month, partly due to adverse customer reaction.¹⁶⁰

As the real terms of the settlement (including preferential contracting) became clear, seven gun makers and their trade association, the National Shooting Sports Foundation ("NSSF"), filed suit against HUD Secretary Cuomo, New York attorney general Eliot Spitzer, Connecticut attorney general Richard Blumenthal, and fourteen mayors for conspiring to violate the consti-

Pressure Gunmakers, WASH. POST, Mar. 23, 2000, at A8.

Seeking to keep pressure on the gun industry, Housing and Urban Development Secretary Andrew M. Cuomo and representatives of the [Communities for Safer Guns Coalition] said the combined purchasing power of federal, state and local law enforcement should be brought to bear on gun manufacturers to pressure them into adopting the Smith & Wesson agreement or risk the economic consequences.

Id.

¹⁵⁷ H. AMDT. 863, 106th Cong. (2000), available at <http://thomas.loc.gov>.

¹⁵⁸ See Fields, *For Smith & Wesson*, *supra* note 143, at A24; Alan Fram, *House Votes Affect Gun Agreement*, A.P., June 21, 2000.

¹⁵⁹ See Fields, *For Smith & Wesson*, *supra* note 143, at A24.

¹⁶⁰ *Gun Maker to Suspend Factory Lines*, A.P., June 13, 2000.

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tutional right of the gun makers to engage in trade.¹⁶¹ The plaintiffs asked a federal court to forbid new gun regulations that were not authorized by Congress.¹⁶² By August 2000, however, it was apparent that the buying preferences had not materialized. Police departments, for obvious reasons, wanted the best weapons available. Even HUD bought guns from Glock,¹⁶³ which did not sign the settlement yet continued to supply roughly two-thirds of police weapons nationally.¹⁶⁴ In January 2001, NSSF and the seven gun makers dropped their suit.¹⁶⁵

On another front, to intensify the pressure for a settlement, Cuomo, Spitzer, and Blumenthal threatened an antitrust suit against Smith & Wesson's rivals for organizing a boycott against that company's products. Blumenthal issued subpoenas for documents, despite no "solid evidence" other than a post-settlement industry meeting attended by a number of gun makers, who expressed criticism of Smith & Wesson and the settlement.¹⁶⁶ Spitzer pulled no punches. The goal, he gloated, was to "squeeze [gun] manufacturers like a pincers,"¹⁶⁷ proving once again that unprincipled politicians are more than willing to use the antitrust laws as a club to force conformity by companies that refuse to play ball.

IV. GUNS, CRIME AND ACCIDENTS

"Rome remained free for four hundred years and Sparta for eight hundred" with an armed populace, while other countries who disarmed their citizens "lost their liberties

¹⁶¹ National Shooting Sports Found. v. Cuomo, No. 00-CV-1063 (N.D. Ga. filed Jan. 5, 2001).

¹⁶² See Lisa Richwine, *Gunmakers File Suit Against U.S., States, Mayors*, REUTERS, Apr. 26, 2000.

¹⁶³ See Fields, *For Smith & Wesson*, *supra* note 143, at A24.

¹⁶⁴ See Walsh & Dewar, *supra* note 156, at A8.

¹⁶⁵ See *Gunmakers Drop Suit Against HUD*, WASH. POST, Jan. 6, 2001, at A12.

¹⁶⁶ See Barrett, *Smith & Wesson Rivals*, *supra* note 146, at B18.

¹⁶⁷ See Peter Slevin & Sharon Walsh, *Connecticut Subpoenas Firms in Gun Antitrust Probe*, WASH. POST, Mar. 31, 2000, at A2.

in less than forty years."¹⁶⁸

Paradoxically, politicians who are busily abusing the rule of law, and zealots so eager to put gun makers out of business, overlook compelling statistics suggesting that the anti-gun crusade, if successful, would leave Americans more, not less, susceptible to gun violence. Three thousand criminals are lawfully killed each year by armed civilians.¹⁶⁹ By comparison, police kill fewer than 1,000 criminals annually.¹⁷⁰ Guns are used defensively over two million times per year, and are often merely brandished, not fired.¹⁷¹ That number is far greater than the 483,000 gun-related crimes reported to police in 1996.¹⁷²

Nationwide, as Yale scholar John Lott has demonstrated, the higher the number of carry permits in a state, the larger the drop in violent crime.¹⁷³ Our country's most permissive gun carry laws are in Vermont, which has a very low crime rate.¹⁷⁴ Half of our population lives in thirty-one states that have "shall issue" laws.¹⁷⁵ Such laws mandate that a permit be granted to anyone

¹⁶⁸ STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* 22 (Liberty Press 1994) (quoting NICCOLO MACHIAVELLI, *THE ART OF WAR* 18 (Ellis Farnsworth ed. 2001)).

¹⁶⁹ See H. Sterling Burnett, *Making Guns Safe for Lawyers*, WASH. TIMES, Jan. 25, 1999, at A19.

¹⁷⁰ See *id.*

¹⁷¹ John R. Lott Jr., *Will Suing Gunmakers Endanger Lives?* CHI. TRIB., Nov. 17, 1998, at 19 [hereinafter Lott, *Suing Gunmakers*].

¹⁷² See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1997, at 274 Table 3.116, in H. Sterling Burnett, *Suing Gun Manufacturers: Hazardous to Our Health*, 5 TEX. REV. L. & POL. 433, 446 (2001).

¹⁷³ Lott, *Suing Gunmakers*, *supra* note 171, at 19.

¹⁷⁴ See *Concealed Weapons*, LAS VEGAS REV.-J., June 6, 1997, at 16B, available at 1997 WL 4545759. "The state of Vermont has long allowed concealed carry with no permit whatsoever—and Vermont has the lowest violent crime rate in the United States." *Id.* Vermont's violent crime rate was 120 violent crimes per 100,000 people in 1997. In comparison, the national violent crime rate was 611 violent crimes per 100,000 people. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, 250 (2000).

¹⁷⁵ See, e.g., IDAHO CODE § 18-3302 (Michie 2000); IND. CODE § 35-47-

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above the age of twenty-one who is mentally competent, has no criminal record, pays the requisite fee, and passes a gun safety course.¹⁷⁶ Those states have not turned into Dodge City, writes columnist Jonathan Rauch, “with fender-benders becoming hailstorms of lead.”¹⁷⁷

Data shows that Dodge City was actually safer than today’s Washington, D.C., which has the highest gun murder rate in the United States, accompanied by the strictest gun control.¹⁷⁸ Is that because guns are readily available in nearby Virginia? Why then is the D.C. murder rate fifty-seven per 100,000 while the murder rate in Arlington, Virginia, an urban community just across the river, is only 1.6 per 100,000?¹⁷⁹ In D.C., social pathologies—like illegitimacy, unemployment, dysfunctional schools, and substance abuse—promote crime while in Virginia guns deter crime.

In reality, less than 5% of the population takes out concealed handgun permits.¹⁸⁰ The rest of us benefit because the criminals do not know which 5% are armed. Laws permitting the carrying of concealed handguns reduce murder by about 8% and rape by about 5%.¹⁸¹ Police carry guns; mayors and bodyguards carry guns; why not law-abiding residents of high crime areas?

In May 1998, the House of Representatives passed—by voice vote with almost no debate—a bill permitting federal judges (including bankruptcy judges and even some retired judges) to carry

2 (2000); R.I. GEN. LAWS § 11-47-8 (2000).

¹⁷⁶ See, e.g., IDAHO CODE § 18-3302 (Michie 2000) (stating that “[t]he sheriff of a county shall, within ninety (90) days after filing of an application by any person who is not disqualified from possessing or receiving a firearm under state or federal law, issue a license to carry a weapon concealed on his person within this state for four (4) years from the date of issue”).

¹⁷⁷ Jonathan Rauch, *And Don’t Forget Your Gun*, NAT’L J., Mar. 20, 1999, available at 1999 WL 8102265.

¹⁷⁸ *Id.*

¹⁷⁹ *Firearms Fact-Sheet*, Gun Owners Foundation, at <http://www.gun-owners.org>.

¹⁸⁰ See Rauch, *supra* note 177.

¹⁸¹ JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 51 (1998).

concealed guns in any state, despite state laws to the contrary.¹⁸² A Florida federal district judge, Harvey Schlesinger, had this to say: "If a judge is in danger, the fact that he or she is in one state or the other does not eliminate the danger."¹⁸³ He might have made the same statement about any person at risk.

That high gun ownership is the cause of the high murder rate in the United States is a myth. Comparable statistics from other countries demonstrate that there is no correlation between high gun ownership and high murder rates. In Switzerland, Finland, and New Zealand, roughly the same percentage of the population owns guns as in the U.S., but we have a far higher murder rate.¹⁸⁴ In Israel, moreover, gun ownership is 40% above the U.S. rate, but the murder rate is far lower.¹⁸⁵ Further foreign statistics demonstrate that disarming a population leads to increased crime rates. In Australia, for example, the population was disarmed in 1998.¹⁸⁶ Since then, homicides are up 3.2%, assaults up 8.6%, and armed robberies up 44%.¹⁸⁷ For twenty-five years prior, armed robberies and homicides committed with firearms had declined.¹⁸⁸

As that and other evidence suggests, armed civilians in fact deter crime. Examples abound of instances when armed citizens

¹⁸² Federal Courts Protection Act of 1998, H.R. 2294, 105th Cong. § 304 (1998).

¹⁸³ Elizabeth A. Palmer, *House Votes to Expand Federal Judges' Gun Rights, Use of Cameras in Court*, CQ WEEKLY, May 27, 2000, at 1277.

¹⁸⁴ John R. Lott, Jr., *Gun Control Advocates Purvey Deadly Myths*, WALL ST. J., Nov. 11, 1998, at A22 [hereinafter Lott, *Gun Control Advocates*]. Interestingly, in Israel, armed teachers are common. See Massad Ayoob, *Arm Teachers to Stop School Shootings*, WALL ST. J., May 21, 1999, at A12. The terrorist threat is pervasive; but there are few terrorist attacks at schools. *Id.*

¹⁸⁵ Lott, *Gun Control Advocates*, *supra* note 184, at A22.

¹⁸⁶ See Ayoob, *supra* note 184, at A12.

¹⁸⁷ Ann Coulter, *Massacres Don't Occur When Intended Victims Are Armed*, UNIVERSAL PRESS SYNDICATE, July 30, 1999, available at <http://www.uepress.com/anncoulter>.

¹⁸⁸ *Gun Control: Less Protection, More Crime*, FLA. TIMES UNION, Apr. 7, 1999, at B6; see also DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* 193-232 (1992).

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have prevented horrific crimes through the use of firearms. An armed gun-store employee in Santa Clara, California shot a customer who had threatened to kill three others.¹⁸⁹ Armed citizens prevented massacres in Anniston, Alabama, Pearl, Mississippi, and Edinboro, Pennsylvania.¹⁹⁰ Yet the response of some politicians is to disarm those very same citizens.

Gun control advocates reject the well-supported argument that guns deter crime. Instead, they point to a study by Arthur Kellerman, who concluded that families possessing a gun are twenty-two times more likely to kill other family members or acquaintances than to kill in self-defense.¹⁹¹ But what is not factored into the Kellerman equation is the fact that a gun is rarely fired in a self-defense scenario; the value of the gun in such an instance is to deter, not kill.¹⁹² Moreover, 85% of the deaths that Kellerman cites are suicides.¹⁹³ He explains that suicides are five times more likely if there is a gun in the home.¹⁹⁴ Kellerman, however, has the causal relationship exactly backwards. Gun possession does not lead someone to commit suicide; instead, emotionally disturbed people acquire guns precisely because they intend, or may be psychologically prone, to commit suicide.¹⁹⁵

Again conflating cause and effect, Kellerman notes that a handgun in the home raises the risk of death by 3.4 times.¹⁹⁶ Yet he misses the obvious link. People at risk buy guns; the risk motivates the purchase, not vice versa.¹⁹⁷ By analogy, a storeowner

¹⁸⁹ See Vin Suprynowicz, *No Serial Killings This Week in Santa Clara*, LAS VEGAS REV.-J., July 11, 1999, at 2E.

¹⁹⁰ See Coulter, *supra* note 187.

¹⁹¹ See Paul M. Barrett, *In Gun Debate, Both Sides Simplify Data to Make a Case*, WALL ST. J., May 27, 1999, at B1 [hereinafter Barrett, *In Gun Debate*].

¹⁹² See *id.*

¹⁹³ DAN POLSBY, FIREARMS AND CRIME, INDEP. INST. (1997), available at http://www.independent.org/tii/catalog_pr/policy_FirarmsAndCrime.html.

¹⁹⁴ See Barrett, *In Gun Debate*, *supra* note 191, at B1.

¹⁹⁵ See Barrett, *In Gun Debate*, *supra* note 191, at B1.

¹⁹⁶ See David B. Kopel, *Guns, Germs, and Science: Public Health Approaches to Gun Control*, 84 J. MED. ASS'N GA. 269, 271 (June 1995).

¹⁹⁷ See Don B. Kates, et al., *Guns and Public Health: Epidemic of Vio-*

might decide to put iron bars on his store windows if the store was located in a high crime area. Surely, no one would suggest that the store would be safer if it removed the bars. Nor would a family in a high risk inner city environment be safer if it relinquished its handgun. The gun, like the bars, serves to safeguard lives and property.

The important point to remember is that each individual could well be the sole means of his own defense. Kopel and Gardiner make the point as follows:

Governments are immune from suit for failure—even grossly negligent or deliberate failure—to protect citizens from crime. Similarly, governments are immune from suit for injuries inflicted by criminals who were given early release on parole. Accordingly, it would be highly inappropriate for the government, through the courts, to make it . . . impossible for persons to own handguns for self-defense because, supposedly, ordinary Americans are too stupid and clumsy to use them effectively. If the Judiciary will not question the government's civil immunity for failure to protect people, the courts certainly should not let themselves become a vehicle that deprives people of the tools they need to protect themselves.¹⁹⁸

Ask yourself whether you would be willing to put a sign on your house stating, "This home is a gun-free zone"¹⁹⁹—especially if you lived in the inner city.

Several African-American leaders recognize, moreover, the need for inner city communities to arm themselves. Professor Cottrol reminds us that late-nineteenth to early-twentieth century state gun control laws were aimed specifically at keeping guns away from ex-slaves, other blacks, and recent immigrants.²⁰⁰

lence or Pandemic of Propaganda?, 62 TENN. L. REV. 513, 584-96; see generally David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345 (2001).

¹⁹⁸ Kopel and Gardiner, *supra* note 65, at 747-48.

¹⁹⁹ John R. Lott, Jr., draft of an open letter to members of Congress, June 3, 1999.

²⁰⁰ *Id.*

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Cottrol, a self-described Hubert Humphrey Democrat, also writes that “[b]ans on firearms ownership in public housing, the constant effort to ban pistols poor people can afford—scornfully labeled ‘Saturday Night Specials’ and more recently ‘junk guns’—are denying the means of self-defense to entire communities in a failed attempt to disarm criminal predators.”²⁰¹

Similarly, Gregory Kane, an African-American columnist for the *Baltimore Sun* further acknowledges that “[t]he NAACP should be assuring that every law-abiding citizen in America’s black communities has a safe, affordable handgun. . . . These young men are smart enough to know that the combined forces of city and state governments, Bill Clinton, the police, the NAACP, and the outrage of gun controllers won’t protect them.”²⁰² Civil rights activist Charles Evers was even more blunt: “I put my trust in God and my .45 . . . and not always in that order.”²⁰³

One would have thought that, before filing their lawsuits, federal, state and local governments would have examined the historical record. In 1967, a thirteen-year-old could buy a rifle from most hardware stores or even through the mail. Very few states had retail age restrictions for handguns. Until 1969, most New York City high schools had shooting clubs; students regularly competed in shooting contests, and the federal government paid for rifles and ammunition.²⁰⁴ Federal and state gun laws today are far more restrictive than they were three decades ago.²⁰⁵

²⁰¹ Robert L. Cottrol, *A Liberal Democrat’s Lament: Gun Control Is Racist, Sexist & Classist*, AM. ENTER., Sept.-Oct. 1999, at 58-60.

²⁰² Gregory P. Kane, *NAACP Gets Good, Bad Marks*, RICH. TIMES-DISPATCH, Aug. 15, 1999, at F3.

²⁰³ *Id.*

²⁰⁴ See John R. Lott, Jr., *More Gun Controls? They Haven’t Worked in the Past*, WALL ST. J., June 17, 1999, at A26 [hereinafter Lott, *More Gun Controls?*].

²⁰⁵ See Alana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN’S L.J. 351, 361 (1997) (chronicling federal gun control since 1934); Philip J. Cook & James A. Leitzel, *Perversity, Futility, Jeopardy: An Economic Analysis on Gun Control*, 59 LAW & CONTEMP. PROBS. 91, 93-94 (1996) (describing how the Brady Law substantially increased federal regulation of guns since the Gun Control Act of 1968).

Yet, until the 1990s, the creation of laws went hand in hand with an explosion of violent crime.

While gun ownership rates were constant through the 1960s and 1970s, the rate of violent crime skyrocketed. With ownership rates growing during the 1990s, we have seen dramatic reductions in crime.²⁰⁶ Recent statistics from the U.S. Bureau of Justice show that gun deaths and injuries declined by 33% from 1993 through 1997, with the decline continuing in 1998.²⁰⁷ During the same period of time, the number of circulating guns in the U.S. grew by 10%.²⁰⁸ In short, despite misleading reports from the media, there is no evidence to suggest that gun ownership and violent crime are directly linked.

For the five years ended 1997, the Centers for Disease Control and Prevention ("CDC") reported a 21% decrease in violent crime, 21% decrease in gun-related deaths, and 41% decrease in non-fatal gun injuries.²⁰⁹ Gun deaths and overall homicides reached their lowest level in more than thirty years.²¹⁰ Some experts cite tougher gun control and safety courses, but that does not explain why all violent crime decreased by the same percentage as gun-related crime.²¹¹ The likely reasons for the parallel decline are more vigorous enforcement, a booming economy, a waning crack trade, and an aging population.

The CDC also reports that violent behavior by adolescents is on the wane, despite Columbine and other high-profile school in-

²⁰⁶ See Lott, *More Gun Controls?*, *supra* note 204, at A26.

²⁰⁷ See Gary Fields, *Gun Conundrum: More on Streets, Fewer Incidents*, WALL ST. J., Dec. 11, 2000, at B1 [hereinafter Fields, *Gun Conundrum*].

²⁰⁸ See Fields, *Gun Conundrum*, *supra* note 207, at B1.

²⁰⁹ See Vanessa O'Connell & Paul M. Barrett, *Bill to Ban Police from Gun Trade-Ins for Discounts Is Introduced in Congress*, WALL ST. J., Nov. 19, 1999, at A10.

²¹⁰ See James Pilcher, *Gun-Related Death Rate Plummets*, A.P., Nov. 19, 1999.

²¹¹ See John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. LEGAL STUDIES 221, 233-34 (1998) (finding that "[i]n general, the states with the largest decreases in any one category tended to have relatively large decreases across all the violent crime categories, although the 'leader' in each category varied across all the violent crime categories").

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cidents.²¹² That decline has been confirmed by data from the U.S. Department of Education indicating that expulsions for bringing firearms to school during the academic year 1997-98 were one-third less than the prior year.²¹³ Out of more than 32,000 gun-related deaths, only 630 were kids under fifteen. Of those, 142 were accidental.²¹⁴ Predictably, that good news was met by an outcry from the *Washington Post*: Safety locks will “reduce this country’s horrifying accidental-gun-death rate of children under 15.”²¹⁵

While some may find those statistics horrifying, more kids under fifteen are killed by bikes, swimming pools and cigarette lighters than by gun accidents.²¹⁶ Will our city mayors be pursuing each of those industries? If gun manufacturers are responsible for violence, why not the makers of the steel used in the guns? Indeed, when an Ohio appellate judge upheld the dismissal of Cincinnati’s gun suit in August 2000, he wrote the following: “Were we to decide otherwise, we would open a Pandora’s box. The city could sue the manufacturers of matches for arson, or automobile manufacturers for traffic accidents, or breweries for drunken driving.”²¹⁷

If anything, the case for holding car makers liable for drunk driving accidents is stronger than the case for charging gun makers for gun-related injuries. “In contrast to gun dealers, automobile [manufacturers] make no effort at all to ensure that the buyer is not a criminal. Nor do automobile manufacturers require that their dealers take even minimal steps to check if a prospective

²¹² See June Kronholz, *School Firearm Expulsions Dropped in ‘97-‘98*, WALL ST. J., Aug. 11, 1999, at A4.

²¹³ Kronholz, *supra* note 212, at A4.

²¹⁴ See INDEPENDENCE INSTITUTE, SOME FREQUENTLY OVERLOOKED FACTS IN GUN POLICY DISCUSSIONS, ISSUE BACKGROUNDER 99-V (1999).

²¹⁵ Editorial, *The President’s Shift on Guns*, WASH. POST, Jan. 31, 2000, at A18.

²¹⁶ See George Will, *Handguns and Hired Guns*, WASH. POST, Jan. 24, 1999, at B7.

²¹⁷ See Dan Horn, *City Gun Suit Shot Down on Appeal*, CIN. ENQUIRER, Aug. 12, 2000, available at http://enquirer.com/editions/2000/08/12/loc_city_gun_suit_shot.html.

automobile purchaser has recent convictions for drunk or reckless driving, or even for vehicular homicide.”²¹⁸ Moreover, “automobile manufacturers have much more ability than gun manufacturers to control dealer behavior, since most automobile manufacturers have exclusive, direct relationships with dealers. In contrast, the majority of gun dealers purchase inventory from wholesalers” without any reliable means to track retail purchases.²¹⁹

CONCLUSION

Before we compromise the Constitution, undermining the principles of federalism and separation of powers, and violating rights recognized expressly in the Second Amendment and implicitly in the Ninth, we ought to be sure of three things: First, that we’ve identified the real problem; second, that we have pinpointed its cause; and third, that our fix is less intrusive than alternative fixes. The spreading litigation against gun makers fails all three tests. Guns do not increase violence—they reduce violence. Banning or regulating firearms will not eliminate the underlying social pathologies that cause violence. Moreover, a less intrusive remedy already exists—the enforcement of existing laws.

There is a lesson to be learned from all of this. If nothing is done to rein in baseless, government-sponsored lawsuits, private attorneys and their accomplices in the public sector will continue to invent legal theories to exact tribute from friendless industries. In the latest rounds of litigation, law-abiding gun manufacturers may be forced to pay for the actions of criminals. That outcome will likely entice politicians unwilling to make tough choices and will enrich trial lawyers. There can be no pretense, however, that litigation of that sort has any basis at all in the rule of law.

The American public—especially voters and jurors—must be warned that our tort system is rapidly becoming a tool for extortion by a coterie of politicians and trial lawyers. Sometimes they

²¹⁸ Kopel & Gardiner, *supra* note 65, at 763.

²¹⁹ *Id.*

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seek money; sometimes they pursue policy goals; often they abuse their power. Take it from former labor secretary, Robert Reich, certainly not renowned for his opposition to imperious government. Reich tells us that his ex-boss in the White House, President Clinton, launched “lawsuits to succeed where legislation failed.”²²⁰ “The strategy may work,” Reich adds, “but at the cost of making our frail democracy even weaker. . . . This is nothing short of faux legislation, which sacrifices democracy to the discretion of administration officials operating in utter secrecy.”²²¹

Reich has it just about right. But the problem outlives the Clinton White House. It infests many of the state houses and city halls. Like most infestations, this one can be fumigated. When we condone the selective and retroactive application of extraordinary legal principles—intended specifically to transfer resources from disfavored defendants to favored plaintiffs, or even worse, to the public sector—we substitute political cronyism for fundamental fairness, profane the rule of law and debase personal freedom.

²²⁰ Robert B. Reich, *Smoking Guns*, AM. PROSPECT, Jan. 17, 2000, at 64.

²²¹ Reich, *supra* note 220, at 64.