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PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

OCTOBER 8, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2037]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2037) to amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, under the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of nondefective firearms, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States is heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, marketing, distribution, manufacture, importation, or sale to the public of firearms or ammunition that have been shipped or transported in interstate or foreign commerce are not, and should not be, liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products.

(5) The possibility of imposing liability on an entire industry for harm that is the sole responsibility of others is an abuse of the legal system, erodes public confidence our Nation's laws, threatens the diminution of a basic constitutional right, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in America's free enterprise system, and constitutes an unreasonable burden on interstate and foreign commerce.

(6) The liability actions commenced or contemplated by municipalities and cities are based on theories without foundation in hundreds of years of the common law and American jurisprudence. The possible sustaining of these actions by a maverick judicial officer would expand civil liability in a manner never contemplated by the Framers of the Constitution. The Congress further finds that such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section five of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code, including any antique firearm (as defined in section 921(a)(16) of such title)), or ammunition (as defined in section 921(a)(17) of such title), or a compo-

nent part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action where a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

(B) NEGLIGENT ENTRUSTMENT.—In subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product.

Amend the title so as to read:

A bill to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

PURPOSE AND SUMMARY

H.R. 2037, the "Protection of Lawful Commerce in Arms Act," provides that a "qualified civil liability action" cannot be brought in any State or Federal court, and that such actions that are pending on the date of enactment shall be dismissed immediately by the court in which the action was brought. "Qualified civil liability action" is defined in Sec. 4(5)(A) as:

a civil action brought by any person [1] against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . .''

This term, however, does not include:

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code,[2] or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment [3] or negligence per se;[4] (iii) an action where a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought; (iv) an action for breach of contract or warranty in connection with the purchase of the product; or (v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

Manufacturers and sellers of qualified products are defined as those who federally licensed to manufacture, import, or deal in firearms and ammunition, as defined by Federal law.

BACKGROUND AND NEED FOR THE LEGISLATION

Congress, by passing H.R. 2037, can protect the separation of powers and uphold democratic procedures by exercising its authority under the Commerce Clause to prevent state courts from bankrupting the national firearms industry and setting precedents that will further undermine American industries and the U.S. economy.

THE COMMON-SENSE TRADITIONAL RULE IS THAT MANUFACTURERS SHOULD NOT BE HELD LIABLE FOR THE CRIMINAL OR WILLFULLY TORTIOUS MISUSE OF THEIR PRODUCTS

Historically, American courts have not held firearms manufacturers liable for the injuries caused by the negligent or criminal action of third parties.[5] Individual plaintiffs attempting to establish fire-

[1] "Person" is defined in Sec. 4(3) as including "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity."

[2] 18 U.S.C. 924(h) provides that it is a criminal offense to "knowingly transfer[] a firearm, knowing that such firearm will be used to commit a crime of violence . . . or drug trafficking crime . . .".

[3] "Negligent entrustment" is defined in Sec. 4(5)(B) of the bill as "the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others."

[4] Negligence per se is negligence established as a matter of law. Negligence per se usually arises from a statutory violation, and it is a question for the court, not the jury. *See* Black's Law Dictionary (7th ed. 1999).

[5] *See First Commercial Trust Co.* v. *Colt's Mfg. Co.*, 77 F.3d 1081 (8th Cir. 1996); *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Bubalo* v. *Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998); *Rodriguez* v. *Glock*, Inc., 28 F. Supp. 2d 1064 (N.D. Ill. 1998); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Delahanty* v. *Hinckley*, 686 F. Supp. 920 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Patterson* v. *Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *First Commercial Trust Co.* v. *Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Merrill* v. *Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001); *Coulson* v. *DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App.

arm manufacturer liability have advanced various theories and the courts have overwhelmingly rejected them. For example, in *First Community Trust Co.* v. *Colt's Manufacturing Co.*, the plaintiffs advanced a negligence theory of liability based upon Colt's "merchandising and promoting cheap handguns," failure to establish a "safe-sales" policy, and "fail[ure] to properly warn retailers regarding 'probable misusers' of handguns."[6] Relying upon earlier cases from the same state,[7] the Eighth Circuit ruled that "handgun manufacturers owe no duty to victims of illegal shootings."[8] In other cases, individual plaintiffs have attempted but failed to recover under theories including defective design,[9] failure to warn,[10] public nuisance,[11] negligence,[12] strict product liability,[13] and abnormally dangerous or ultra-hazardous activity liability.[14] As one court observed of slingshots, "ever since David slew Goliath, young and old alike have known that slingshots can be dangerous and deadly."[15] The same could be said for firearms.

In states that permit a negligence cause of action in a product liability suit, plaintiffs have begun to claim that the manufacturer

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1986); *Addison* v. *Williams*, 546 So. 2d 220 (La. Ct. App. 1989); *King* v. *R.G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990); *Knott* v. *Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

[6] *Colt's Mfg.*, 77 F.3d at 1083 (relying on *Lorcin Eng'g*, 900 S.W.2d at 205).

[7] *See Lorcin Eng'g*, 900 S.W.2d at 202.

[8] *Colt's Mfg.*, 77 F.3d at 1083.

[9] *See Keene* v. *Sturm, Ruger & Co.*, 121 F. Supp. 2d 1063 (E.D. Tex. 2000); *Patterson*, 608 F. Supp. at 1206; *see also Prentis* v. *Yale Mfg. Co.*, 365 N.W.2d 176, 183, 189 (Mich. 1984) (adopting a pure negligence risk-utility test to determine liability in defective design cases; noting that the other method of determining defective design focused on consumer expectations, which the court deemed too subjective a test).

[10] *See Keene*, 121 F. Supp. at 1069–70 (holding that handgun manufacturers have no duty to warn of the obvious dangers of handguns); *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250, 1270 (5th Cir. 1985), reh'g denied, 768 F.2d 1350 (5th Cir. 1985) (warning on handguns not likely to change buying patterns or reduce violence); *Martin* v. *Harrington and Richardson Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984) (no strict liability when non-defective product presents danger recognizable to average consumer); *Bookout* v. *Victor Comptometer Corp.*, 576 P.2d 197 (Colo. Ct. App. 1978)("potential for danger inherent in a BB gun is readily apparent and a warning for the obvious is not a requirement of the doctrine of products liability").

[11] *See Bubalo* v. *Navegar*, Inc., No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998). *See also* Restatement (Second) of Torts §821B (1979) ("(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and as the actor knows or has reason to know, has a significant effect upon the public right." *Id.*

[12] *See Rodriguez* v. *Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998); *Merrill* v. *Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001); *see also* Restatement (Second) of Torts §282 (1965) ("Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; (i)t does not include conduct recklessly disregardful of an interest of others.").

[13] *See Merrill*, 2001 Cal. LEXIS 4945; *Halliday* v. *Sturm, Ruger & Co.*, 770 A.2d 1072 (Md. Ct. Spec. App. 2001); *Richman* v. *Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), rev'd on other grounds sub nom. *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). *See also* Restatement (Second) of Torts §519 (1977) ("(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person; land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *Id.*

[14] *See Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988). *See also* Restatement (Second) of Torts §520 (1977). ("In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes."). This section was changed by substituting abnormally dangerous activity for ultra-hazardous activity. *Id.*

[15] *Bojorquez* v. *House of Toys Inc.*, 62 Cal. App. 3d 930, 934 (Cal. Ct. App. 4th Dist. 1976).

breached its duty of reasonable care by marketing products that carry a risk of criminal misuse. In the case of firearms, courts have, for the most part, refused to impose such a duty to the victim because the manufacture and distribution of firearms is not per se unlawful.[16] It has also been held that the open and obvious dangers associated with the use of guns obviates any duty owed by the manufacturer. A gun, by its very nature, must be dangerous and have the capacity to discharge a bullet with deadly force,[17] and courts have generally held that a gun manufacturer is not an insurer that the product is completely safe,[18] nor is it under any duty to design a product incapable of causing injury.[19] A gun manufacturer who produces and markets a weapon that performs as intended and designed is not liable,[20] since members of the general public can presumably recognize the dangers involved in using firearms and assume the responsibility for their own actions.[21] A victim is not entitled to damages simply because he or she was injured through the use of the manufacturer's product.[22]

The sale of a firearm merely furnishes the condition for a crime and, as a matter of law, there can be no finding of proximate cause in an action brought on behalf of a victim against the seller of the firearm used in the crime.[23] In addition, any criminal misuse of a firearm that is not reasonably foreseeable is an intervening,[24] or an independent superseding cause,[25] which the manufacturer of a nondefective weapon has no duty to anticipate[26] or prevent.[27] Courts have also held that the risk of intentional criminal misuse of "Saturday Night Specials" generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability,[28] does not

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[16] *See Armijo* v. *Ex Cam Inc.*, 843 F.2d 406 (10th Cir. 1988) (affirming holding of no duty not to sell firearms simply because of potential for criminal misuse and stating "mere fact that a product is capable of being misused to criminal ends does not render the product defective"); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, 533 (S.D. Ohio 1987) ("difficult to conceive of a method of distribution by which handgun manufacturers could avoid the sale of its product to all potential misusers").

[17] *See Patterson* v. *Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

[18] *See Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Patterson* v. *Rohm Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

[19] *See Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985), reh'g denied, 768 F.2d 1350 (5th Cir. 1985) (fact that handgun was small and, therefore, concealable is not something that is wrong with the product that would trigger liability, since the product functioned precisely as it was designed to); *McCarthy* v. *Sturm, Ruger & Co., Inc.*, 916 F. Supp. at 371 (risk associated with hollowpoint bullets arises from the function of the product, not any defect; thus, risk/utility analysis is inappropriate); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987) (risk/utility standard not applicable when product functioned properly).

[20] *See California. Moore* v. *R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law); *Florida. Trespalacios* v. *Valor Corp. of Florida*, 486 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1986); *Georgia. Rhodes* v. *R.G. Industries, Inc.*, 325 S.E.2d 465 (1984); *Massachusetts. Bolduc* v. *Colt's Mfg. Co., Inc.*, 968 F. Supp. 16 (D.Mass. 1997) (applying Massachusetts law; the decedent had deliberately pointed the pistol at his own head and pulled the trigger).

[21] *See Rhodes* v. *R.G. Industries, Inc.*, 325 S.E.2d 465 (1984); *Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986).

[22] *See Martin* v. *Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law).

[23] *See Quiroz* v. *Leslie Edelman of N.Y., Inc.*, 638 N.Y.S.2d 154 (2d Dep't 1996).

[24] *See Martin* v. *Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law); *Eichstedt* v. *Lakefield Arms Ltd.*, 849 F. Supp. 1287 (E.D. Wis. 1994) (applying Wisconsin law).

[25] *See Rodriguez* v. *Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998) (applying Illinois law); *Davis* v. *McCourt*, 226 F.3d 506 (6th Cir. 2000) (applying Michigan law).

[26] *See Bennet* v. *Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (applying Kentucky law).

[27] *See Trespalacios* v. *Valor Corp. of Florida*, 486 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1986).

[28] *See Kelley* v. *R.G. Industries, Inc.*, 497 A.2d 1143 (1985).

give rise to liability,[29] as this risk is not great enough to outweigh any potential societal benefit of the product.[30]

Handgun manufacturers historically have been found, and generally continue to be found, to have no duty to third-party victims of firearm misuse,[31] such as criminal or accidental misuse.[32] The court in *City of Philadelphia* v. *Beretta* held that the question of whether the handgun manufacturers were the appropriate defendants, as well as their remoteness from the harm, weighed against the imposition of a duty.[33] In *First Commercial Trust Co.* v. *Lorcin Engineering, Inc.*, the Arkansas Supreme Court held that handgun manufacturers "owed no legal duty" to shooting victims.[34] In *Armijo* v. *Ex Cam, Inc.*, a case arising out of the criminal misuse of a handgun, the Tenth Circuit held that because the state legislature had not made distribution of handguns illegal, the manufacturer had no "duty" to refrain from selling its product.[35] In *Leslie* v. *United States*, the United States District Court for the District of New Jersey held, in a lawsuit against an ammunition manufacturer, that handgun and ammunition manufacturers "owe no duty to . . . prevent their misuse by criminals."[36] Furthermore, a Louisiana court also held that gun manufacturers have no duty to abstain from the legal manufacturing and selling of guns.[37] *Hamilton* v. *Accu-Tek* is the only case where a jury has found the manufacturers liable for negligence,[38] and the New York Court of Appeals, in responding to a certified question from the Second Circuit has concluded that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of handguns.[39] As these cases demonstrate, the absence of a special relationship between criminal third parties and manufacturers means that negligence claims should be dismissed. Gun manufacturers have no duty to control the conduct of third parties.[40] The judge in *Ganim* v. *Smith & Wesson*, a case brought by the City of Bridgeport against the firearms industry, explained that "calculating the impact of gun marketing on teen suicide and diminution of property values in Bridgeport would create insurmountable difficulties in damage calculation."[41] The judge asserted that Bridgeport "cannot

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[29] *See King* v. *R.G. Industries, Inc.*, 451 N.W.2d 874 (1990).

[30] *See Moore* v. *R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law); *Armijo* v. *Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), decision aff'd on other grounds, 843 F.2d 406 (10th Cir. 1988) (applying New Mexico law).

[31] *See Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Caveny* v. *Raven Arms Co.*, 665 F.Supp. 530, 536 (S.D. Ohio 1987); *First Commercial Trust* v. *Lorcin Eng'g*, Inc., 900 S.W.2d 202, 205 (Ark. 1995); *Addison* v. *Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

[32] Randy R. Koenders, Annotation, Products Liability: Sufficiency of Evidence to Support Product Misuse Defense in Actions Concerning Weapons and Ammunition, 59 A.L.R. 4th 102 (2000).

[33] *See City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 902 (E.D. Pa. 2000).

[34] *Lorcin*, 900 S.W.2d at 203.

[35] *Armijo*, 843 F.2d at 407.

[36] *Leslie* v. *United States*, 986 F. Supp. 900, 911 (D.N.J. 1997).

[37] *See Addison* v. *Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

[38] *See Hamilton* v. *Accu-Tek*, 62 F. Supp. 2d 802, 811 (E.D.N.Y. 1999).

[39] *See Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y. 2d 222, 230–31 (2001), answering certified questions *Hamilton* v. *Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Hamilton* v. *Beretta U.S.A. Corp.*, 222 F.3d 36, 43 (2d Cir. 2000), certifying questions to state court *Hamilton* v. *Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

[40] *See City of Cincinnati* v. *Beretta U.S.A. Corp.*, No. C–990729, 2000 Ohio App. LEXIS 3601, at *15 (Ohio Ct. App. Aug. 11, 2000); *see also* Order on Pending Motion to Dismiss at 6, *Penelas* v. *Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99–01941 CA06) (holding that under Florida law, no duty is imposed on handgun manufacturers to protect others).

[41] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *29 (Conn. Super. Ct. Dec. 10, 1999) (dismissed for lack of subject matter jurisdiction).

seriously maintain that reasonable certainty in calculating their damage claims is within the realm of possibility."[42]

Every test for product defect, from ancient negligence theory to the most recent formulation contained in the Restatement (Third) of Torts: Products Liability, rests upon a moral foundation which presupposes that a product may not be defined as defective unless there is something "wrong" with it. No less a scholar than Oliver Wendell Holmes as early as 1894 posed the question of firearms manufacturers' liability: "[I]f notice so determined is the general ground [upon which liability may rest], why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully . . ."[43] Thus, Holmes rejected the notion of gun sellers' liability because of the intervening criminal act of another; the "wrong" that he saw was that of the assailant, not the gun dealer.[44] As the Supreme Court stated, quoting James Madison, in *New York Times Co.* v. *Sullivan*, "As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing . . .'"[45]

Finally, the remoteness doctrine has been widely accepted by the courts as a bar to claims brought by public entities, and courts have dismissed complaints by public entities based on this thresh-

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[42] *Id.* at *30.

[43] Oliver Wendell Holmes, "Privilege, Malice, and Intent," 1894 Harv.L. Rev. 1, 10 (1894).

[44] *See id.* Indeed, very few offenders obtain their guns from legitimate gun dealers. According to the 1997 Survey of State Prison Inmates, for 80% of those possessing a gun, the source of the gun was family, friends, a street buy, or an illegal source. *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report. "Firearms Use by Offenders" (November 2001, NCJ 189369) at 1. *See also* U.S. Department of Justice, Bureau of Justice Statistics, Firearms and Crime Statistics, http://www.ojp.usdoj.gov/bjs/guns.htm.

[45] 376 U.S. 254, 271 (1964). Essentially the same point was made by the Seventh Circuit, in a frequently-cited patent law case. *See Fuller* v. *Berger*, 120 F. 274 (7th Cir.1903), cert. denied 193 U.S. 668 (citing *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U.S. 405, 426 (1908); *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U.S. 24, 34 (1923)). Discussing "utility," for patent law purposes, the Court explained how the occasional misuse of a product does not negate its utility. To begin with, the court noted that the existence of a patent grant was "prima facie proof of utility." *Fuller*, 120 F. at 275. The court then asked whether evidence that the patented device "has been used for pernicious purposes" could prove that the device "is incapable of serving any beneficial end?" Id. To answer the question, the court adopted a conclusion from a leading patent treatise, which the court then quoted at length:

> An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of the Colt's revolver was injurious to the morals, and injurious to the health, and injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersman. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore, is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is designed and adopted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one? Or is the utility negatived by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypothesis cannot stand, because it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. The first hypothesis cannot stand, because if it could, it would make the validity of patents to depend on a question of fact to which it would often be impossible to give a reliable answer. The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirement of utility.
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> *Fuller*, 120 F. at 275–76 (quoting Walker Section 82, 3d ed.).

old consideration. For example, in *United States* v. *Standard Oil Co.*,[46] the United States government sought to recover the cost of hospitalization and support of a soldier injured by Standard Oil's negligence. The Court determined that the government was not entitled to recover at common law because its injury was remote and indirect.[47] The Court further noted that while Congress could enact a statute permitting the government to recover for remote injuries, it had chosen not to do so despite the fact that it was aware that "the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with Federal funds, property and relationships."[48] Similarly, courts have dismissed city and county complaints seeking recovery at common law for injuries to remote third parties.[49]

VARIOUS PUBLIC ENTITIES HAVE RECENTLY PRESSED COURTS TO REJECT THE COMMON-SENSE MAJORITY RULE, TO BREACH THE SEPARATION OF POWERS, AND TO HURDLE SOCIETY DOWN A SLIPPERY SLOPE

Recent litigation against the tobacco industry has encouraged public entities to bring suit against the firearms industry.[50] Such lawsuits are based on novel claims that invite courts to dramatically break from bedrock principles of tort law and expose firearm manufacturers to unprecedented and unlimited liability exposure. The following are among the municipalities that have filed suit: Atlanta, Boston, Bridgeport, City of Camden, County of Camden, Chicago, Cincinnati, Cleveland, Detroit, Wayne County, Michigan, Gary, Indiana, City of Los Angeles, County of Los Angeles, Miami-Dade County, Newark, New Orleans, Philadelphia, San Francisco, St. Louis, and Wilmington.[51] However, gun manufacturers do not

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[46] 332 U.S. 301 (1947).

[47] *See id.* at 304.

[48] *Id.* at 315.

[49] *See City of Birmingham* v. *American Tobacco Co.*, 10 F. Supp.2d 1257, 1259–62 (N.D. Ala. 1998) (holding that City has no right to recover the costs of medical care for smoking-related illnesses from third-party tortfeasors); *County of Los Angeles* v. *R.J. Reynolds Tobacco Co.*, No. 707651 (Cal. Super. Dec. 23, 1997) (County's health care expenses for treatment of smoking-related illnesses was "purely derivative" of injuries to smokers).

[50] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999). The judge in the lawsuit brought by the City of Bridgeport, Connecticut, observed that the cities "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures . . ." *Id.* at *14.

[51] Complaint, *City of Atlanta* v. *Smith & Wesson Corp.*, 543 S.E.2d 16 (Ga. 2001) (No. 99VS0149217J); Complaint, *City of Boston* v. *Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000) (No. 1999–02590); Complaint, *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 333 (Conn. Super. Ct. 1999); Complaint, *City of Camden* v. *Beretta U.S.A. Corp.*, No. L–451099 (N.J. Super. Ct. filed June 21, 1999); Complaint, *Camden County Bd. of Chosen Freeholders* v. *Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (No. 99 CV 2518); Complaint, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. filed Apr. 7, 1999); Complaint, *City of Cincinnati* v. *Beretta U.S.A. Corp.*, No. C–990729, 2000 Ohio App. LEXIS 3601 (Ohio Ct. App. Aug. 11, 2000); Complaint, *White* v. *Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (No. 99 CV 1134); Complaint, *Archer* v. *Arms Tech., Inc.*, 72 F. Supp. 2d 784 (E.D. Mich. 1999) (No.99–912658 NZ); Complaint, *McNamara* v. *Arms Tech., Inc.*, 71 F. Supp. 2d 720 (E.D. Mich. 1999) (No. 99 912 662); Complaint, *City of Gary* v. *Smith & Wesson Corp.*, No. 45D05–005–CT–243 (formerly No. 4502–9908–CT–0355) (Ind. Super. Ct. filed Aug. 27, 1999); Complaint, *California* v. *Arcadia Mach. & Tool, Inc.*, No. BC210894 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs City of Los Angeles, Compton, Inglewood, and West Hollywood); Complaint, *California* v. *Arcadia Mach. & Tool, Inc.*, No. BC214794 (Cal. Super. Ct. filed Aug. 6, 1999); Complaint, *Penelas* v. *Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99–01941 CA–06); Complaint, *Sharpe* v. *Arcadia Mach. & Tool, Inc.*, No. ESX–L–6059–99 (N.J. Super. Ct. filed June 9, 1999); Complaint, *Morial* v. *Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (No. 98–18578 Div. M); Complaint, *City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (2000–CV–2463); Com-

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have the financial capacity of the cigarette companies whose sales average $45 billion annually.[52] In contrast, the gun industry grosses only $1.5 billion a year.[53] It has been estimated that tobacco companies spend approximately $600 million a year defending against suits brought by the states.[54] Gun companies are incapable of financing a similar defense.[55] If the manufacturers are forced into bankruptcy, potential plaintiffs asserting traditional claims concerning a product with a manufacturing defect will have no recourse and will be unable to recover more than pennies on the dollar in Federal bankruptcy court.[56] Further, firearms have a significant impact on the economy in the United States. More than twenty million Americans participate in various shooting sports each year, accounting for more than $30 billion in economic activity as well as 986,000 jobs.[57] Because the gun industry has very narrow profit margins, it is in danger of being overwhelmed by the cost of defending itself against these suits.[58]

One industry that was forced to the brink of extinction by excessive liability awards and virtually unlimited retroactive liability is the general aviation industry.[59] The United States had developed a leading position in general aviation. However, during the 1980's and early 1990's, the American general aviation industry deteriorated rapidly.[60] General aviation aircraft production plummeted between 1978 and 1991 from 18,000 planes to less than 900.[61] The

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plaint, *California* v. *Arcadia Mach. & Tool, Inc.*, No. 303753 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs San Francisco, Berkeley, Sacramento, San Mateo County, Oakland, East Palo Alto, County of Alameda); Complaint, *City of St. Louis* v. *Cernicek*, No. CV–992–01209 (Mo. Cir. Ct. filed Apr. 30, 1999); Complaint, *Sills* v. *Smith & Wesson Corp.*, No. 99C–09–283–FSS, 2000 Del. Super. LEXIS 444 (Del. Super. Ct. Dec. 1, 2000). The Georgia legislature, in response to Atlanta's lawsuit, became the first state to pass a statute preempting handgun manufacturer liability lawsuits by cities. *See* Ga. Code Ann. § 16–11–184 (2000). At least seventeen states have since followed Georgia's lead with statutes to prohibit municipalities from suing handgun manufactures. Those states that have passed municipal lawsuit bans are: Arizona, Arkansas, Colorado, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Virginia. *See* Ariz. Rev. Stat. § 12–714 (2000); Ark. Code Ann. § 14–16–504(b)(2) (Michie Supp. 1999); Colo. Rev. Stat. §§ 13–21–501 to–505 (2000); Ga. Code Ann. § 16–11–184 (2000); 2000 Ky. Acts 213; La. Rev. Stat. Ann. § 40:1799 (West 2000); Me. Rev. Stat. Ann. tit. 30–A, § 2005 (West 1999); Mich. Comp. Laws § 600.294 (2000); Mont. Code Ann. § 7–1–115 (1999); Nev. Rev. Stat. § 12.107 (2000); Okla. Stat. tit. 21 § 1289.24a (1999); Tenn. Code Ann. § 39–17–1314 (1999); Tex. Civ. Prac. & Rem. Code S128.001 (2000); Utah Code Ann. § 78–27–64 (2000); Va. Code Ann. § 15.2–915.1 (Michie 2000). In addition, the states of Alaska and South Dakota have exempted gun manufacturers from all lawsuits. Alaska Stat. § 09.65.155 (Michie 2000); S.D. Codified Laws § 21–58–1 (Michie 2000). The South Dakota statute "finds that the unlawful use of firearms, rather than their lawful manufacture, distribution, or sale, is the proximate cause of any injury arising from their unlawful use." S.D. Codified Laws § 21–58–1 (Michie 2000).

[52] *See* David Rosenbaum, Echoes of Tobacco Battle in Gun Suits, *The New York Times* (March 21, 1999) at A32.

[53] *See* William C. Symonds et al., "Under Fire," *Business Week* (August 16, 1999) at 63.

[54] *See* Fox Butterfield, "Lawsuits Lead Gun Maker to File for Bankruptcy," *The New York Times* (June 24, 1999) at A14.

[55] *Id.*

[56] *Id.*

[57] *See* SAAMI: Sporting Arms and Ammunition Manufacturers' Institute, Inc., Market Size and Economic Impact <http:// www.saami.org/publications.html> (relying on a compilation of data provided by the U.S. Fish and Wildlife Agencies, the National Shooting Sports Foundation and The National Sporting Goods Association). SAAMI is a firearms trade association that was founded in 1926 and participates in establishing industry standards. *See id.*

[58] *See* Bill Sammon, "Gun Makers Halt Settlement Talks with Cities; Blame White House's 'Politically Motivated' Intervention," *The Washington Times* (January 20, 2000), at A1. The Clinton Administration's filing of a similar lawsuit spurred Smith & Wesson to settle the case with eighteen of those cities. *See* "Philadelphia Joins Cities That Dropped Smith & Wesson Suits," *The Wall Street Journal* (June 5, 2000), at B18.

[59] *See generally* Patrick J. Shea, Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform, 80 Cornell L. Rev. 747 (1995).

[60] Patrick J. Shea, "Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform," 80 Cornell L. Rev. 747 (1995) at 748.

[61] *See id.*

manufacture of single engine piston aircraft fell to only 555 by 1993.[62] Only when Congress passed Federal tort statute of repose reform directed at saving the aviation industry was the industry rescued from the effect of excessive retroactive liability.[63]

The various public entities that have brought suit against the gun industry in recent years have raised novel claims that seek reimbursement of government expenses—including costs for police protection, emergency and medical services, and pension benefits—associated with gun-related crimes. These claims are based on extremely tenuous claims of causality in which gun and ammunition manufacturers are many steps removed from the harm alleged: the manufacturers produce the firearms; they sell them to federally licensed distributors; the distributors sell them to federally licensed dealers; some of the firearms are diverted by third parties into an illegal gun market; these firearms are obtained by people who are not licensed to have them; the firearms are then used in criminal acts that do harm; and the city or county must spend resources combating or responding to those criminal and unlawful acts.

Of the negligence actions against firearms manufacturers by municipalities nationwide, approximately half have been allowed to proceed. They include suits by Boston;[64] Cleveland; Detroit; Newark, New Jersey; Wilmington, Delaware; and a consortium of California cities including Los Angeles, San Francisco, Sacramento and Oakland. Among the dismissed cases, some of which remain active on appeal, are those by the state of New York; New Orleans; Bridgeport, Connecticut; Gary, Indiana; Miami; and Camden County, New Jersey. The suit in Cincinnati, while dismissed by lower courts, was recently reinstated by the Ohio Supreme Court.[65]

However, the relationship between a tortious act and actual injury historically must be direct, not remote.[66] The earliest American example of this concept occurred in *Anthony* v. *Slaid*.[67] In that case, the plaintiff Anthony contracted to assist the poor by funding medical care and other assistance.[68] The defendant Slaid's wife assaulted and beat one of the town paupers, resulting in expenses for his medical care and financial support, for which Anthony became responsible under his contract.[69] Just as various public entities have alleged with reference to firearm manufacturers, Anthony charged that because of the criminal acts of Slaid's wife, he "was put to increased expense for [the poor person's] cure and support."[70] Anthony sued Mrs. Slaid's husband as the then-legally-liable party, seeking reimbursement of his increased costs.[71] The Massachusetts Supreme Court rejected Anthony's claim, holding "[t]hat the damage is too remote and indirect," because it arose "not by means of any natural or legal relation between the plaintiff and the party injured . . . but by means of the special contract by

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[62] *See id.*
[63] *See* 49 U.S.C. §§ 40101–40120.
[64] In March, 2002, the City of Boston dropped its suit against firearms manufacturers. *See* Editorial, "Mayor was Right to Drop Gun Case," *The Boston Herald* (March 29, 2002).
[65] *See* "Nation in Brief: Ohio Supreme Court Reinstates Lawsuit Against Gunmakers," *The Washington Post* (June 13, 2002) at A8.
[66] *See Holmes* v. *Securities Investor Protection Corporation*, 503 U.S. 258, 269 (1992).
[67] 52 Mass. 290 (1 Met. 1846).
[68] *See id.* at 290–91.
[69] *See id.* at 291.
[70] *Id.*
[71] *See id.*

which he had undertaken to support the town paupers."[72] The court reasoned that if Anthony were permitted to recover, a town might always seek recovery whenever "an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper."[73] The court then sustained dismissal of Anthony's complaint.[74] Soon thereafter, the United States Supreme Court applied the remoteness doctrine to bar a plaintiff's claims in *Insurance Co.* v. *Brame*.[75] In that case, Craven McLemore died after the defendant Brame did "wilfully shoot . . . and inflict upon him a mortal wound," causing Mobile Life Insurance Company to pay out the proceeds of a life insurance policy.[76] Mobile then sued Brame for reimbursement of the insurance proceeds. Brame defended this claim on the grounds that because the "loss is the remote and indirect result merely of the act charged," the insurance company had no claim against him.[77] Finding that the relevant cases were "substantially uniform against the right of recovery,"[78] the Supreme Court held that "The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing."[79]

Much more recently, the United States Supreme Court reaffirmed this principle in *Holmes* v. *Securities Investor Protection Corp*.[80] In *Holmes*, an inside trader engaged in stock manipulation, which led to the liquidation of two stockbrokers whose customers the Securities Investor Protection Corp. ("SIPC ") was required to compensate.[81] SIPC filed Racketeer Influenced and Corrupt Organizations ("RICO") claims to recoup from the inside trader those amounts it had paid to the brokers' clients.[82] The Court found that while the inside trader's tortious acts had caused cognizable injury to the brokers, the link between the insider's acts and the brokers' customers' alleged losses was too remote to permit SIPC to recover from the insider.[83] Although a direct connection could be drawn from the insider's acts to the SIPC's expense, considerations of proximate cause prevented the assignment of endless layers of liability.[84] As the Supreme Court stated, "complaints of harm flowing merely from misfortunes visited upon a third person by defendant's acts . . . stand at too remote a distance to recover."[85] As Justice Scalia noted, "'[F]or want of a nail, a kingdom was lost' is a

[72] *Id.*
[73] *Id.*
[74] *See id.*
[75] 95 U.S. 754, 759 (1877).
[76] *Id.* at 754.
[77] *Id.* at 756.
[78] *Id.* at 758.
[79] *Id. See also Rockingham Ins. Co.* v. *Bosher*, 39 Me. 253, 257 (1855) (barring insurer from recovering, from arsonist, the burned building's loss of value because the dimunition in value was an "indirect consequence" of the fire).
[80] 503 U.S. 258 (1992).
[81] *See id.* at 261–62.
[82] *See id.* at 263.
[83] *See id.* at 271.
[84] *See id.* at 276.
[85] *See id.* at 268.

commentary on fate, not the statement of a major cause of action against a blacksmith." [86]

To assist courts in assessing whether a claim is too remote to permit a suit to proceed, the *Holmes* Court developed a three-pronged test to address whether: (1) there are more direct victims of the alleged wrongdoing who can be expected to act as "private attorneys general;" (2) because it will be difficult to apportion damages, the court will be forced to "adopt complicated apportionment rules" to avoid multiple recoveries; and (3) because the causal connection is attenuated, it will be difficult to define what proportion of the plaintiff's damages are attributable to the defendant's conduct.[87] These principles cut sharply against the public entities' firearm lawsuits. First, where the public entities' alleged injuries flow from physical injury, there are many more directly affected plaintiffs to pursue putative claims. The fact that these individuals may not be able to seek recovery for the costs of certain public services borne by the city does not contradict the fact that they are the more directly injured parties. Second, the public entities' firearm lawsuits would force the same type of complicated damages apportionment that *Holmes* rejects. If cities may sue to recover the costs of providing services to individuals injured by firearm use, so can insurers, benefit funds, direct service providers such as hospitals, the injured parties' employers, and all who rely upon the injured party financially. In order to avoid multiple recoveries for a single injury, courts would have to require the intervention of multiple layers of parties into every suit. The resulting effort to apportion damages would inevitably result in arbitrary and unfair results. Finally, the circumstances in which some cities now seek to recover costs would pose significant apportionment difficulties of a different kind. In seeking to recover the costs of public services used responding to criminal, tortious, and accidental shootings, the cities bringing such lawsuits raise significant issues over apportionment of liability not just between firearm manufacturers, distributors, retailers, and resellers, but also between the shooter, the injured party for contributory negligence, and the public entities themselves. Clearly, the cause of violent crime is a complex, multifaceted problem that includes economic, social, political, geographic, demographic, and cultural components. Cities which have failed to provide an adequate level of law enforcement, or counties which have failed to provide adequate correctional programs could find themselves held accountable for a portion of the very damages they seek. There are many other potentially parties who could be alleged to be at "fault," including inadequate school systems, drug dealers, overburdened courts, parents, and violent offenders themselves. It would be an insupportable burden on the courts to handle the apportionment of liability in this unmanageably complex context.

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[86] *Id.** at 287 (Scalia, J., concurring) (quoting *Associated Gen. Contractors* v. *Carpenters*, 459 U.S. 519, 536 (1983)).

[87] *Id.* at 268.

The remoteness doctrine articulated in *Anthony*, *Brame*, and *Holmes* has been embraced by the Second,[88] Third,[89] Fifth,[90] Sixth,[91] Seventh,[92] and Ninth[93] Circuit Courts of Appeals, as well as by multiple district courts,[94] to bar claims brought by union health and welfare funds to recover medical expenses incurred on behalf of beneficiaries of the funds due to tobacco-related illnesses. Since April 1999 alone, six Federal courts of appeals[95] and multiple Federal district courts[96] have held—in cost-recovery cases nearly identical in theory to those brought by cities and municipalities against firearm manufacturers—that the remoteness doctrine bars damage claims by health benefits funds and other remote third-party payors of medical or other costs, as a matter of law. A small number of district court opinions have disagreed.[97] However, subsequent decisions have effectively rejected or limited these minority opinions and have reasserted the importance of the remoteness doctrine in those jurisdictions.[98]

These Federal decisions flow, in turn, from a large body of state common law dismissing remote and derivative claims as a matter of law. For example, the Connecticut Supreme Court followed this rule more than one hundred years ago in the case of *Connecticut*

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[88] *See Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, passim (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (January 10, 2000).

[89] *See Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999), cert. denied, 120 S. Ct. 844 (2000).

[90] *See Texas Carpenters Health Benefit Fund* v. *Philip Morris, Inc.*, 199 F.3d 788, 789 (5th Cir. 2000).

[91] *See Coyne* v. *American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999).

[92] *See International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 196 F.3d 818, 822, 825 (7th Cir. 1999), reh'g denied sub nom. *Arkansas Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, No. 98–02612, 1999 WL 592671 (N.D. Ill. Aug. 3, 1999), appeal filed sub nom. *Health Care Serv.* v. *Brown & Williamson Tobacco Corp.*, No. 00–1468, 2000 WL 326505 (7th Cir. Mar. 28, 2000).

[93] *See Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 185 F.3d 957, 963, 964 (9th Cir. 1999), cert. denied, 120 S. Ct. 789 (2000).

[94] *See, e.g., Laborers & Operating Eng'rs Util. Agreement Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 42 F. Supp.2d 943, 947 (D. Ariz. 1999) (dismissing claims because "'the plaintiff's injuries are entirely dependent upon injuries sustained by their participants and beneficiaries, making them at least one step removed from the challenged harmful conduct'") (quoting *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 17 F. Supp.2d 1170, 1179 (D. Or. 1999)); *Seafarers' Welfare Plan* v. *Philip Morris, Inc.*, 27 F. Supp.2d 623, 628 (D. Md. 1998) (dismissing claims because "plaintiff's injuries are too remotely caused by the defendants").

[95] *See Texas Carpenters Health Benefit Fund*, 199 F.3d at 789; *International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund*, 196 F.3d at 825–26; *Oregon Laborers-Employers Health & Welfare Trust Fund*, 185 F.3d at 964; *Coyne*, 183 F.3d at 496; *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999); *Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (Jan. 10, 2000).

[96] *See, e.g., Seibels Bruce Group, Inc.* v. *R.J. Reynolds Tobacco Co.*, 1999 WL 760527, at *6 (N.D. Cal. Sept. 21, 1999); *Rhode Island Laborers' Health & Welfare Fund* v. *Philip Morris, Inc.*, 1999 WL 619064, at *6–7 (D.R.I. Aug. 11, 1999); *Arkansas Carpenters' Health & Welfare Fund* v. *Philip Morris, Inc.*, 75 F. Supp.2d 936 (E.D. Ark. 1999); *Hawaii Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 52 F. Supp.2d 1196, 1199 (D. Haw. 1999); *Association of Wash. Pub. Hosp. Dists.* v. *Philip Morris, Inc.*, 79 F. Supp.2d 1219, 1230 (W.D. Wash. 1999).

[97] *See, e.g., Iron Workers Local Union* v. *Philip Morris, Inc.*, 23 F. Supp.2d 771, 784 (N.D. Ohio 1998) (denying defendant's motion to dismiss based on remoteness doctrine); *Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, 36 F. Supp.2d 560, 579 (E.D.N.Y. 1999); *City of St. Louis* v. *American Tobacco Co.*, 70 F. Supp.2d 1008, 1014 (E.D. Mo. 1999); *SEIU Health & Welfare Fund* v. *Philip Morris, Inc.*, 83 F. Supp. 2d 70, 88–89 (D.D.C. 1999).

[98] For example, *Iron Workers Local Union*, 23 F. Supp. 2d at 784, did not survive the Sixth Circuit's subsequent affirmation of the remoteness doctrine in *Coyne* v. *American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999). The Blue Cross & Blue Shield case also runs contrary to the Second Circuit's subsequent ruling in *Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), and *Tobacco/Governmental Healthcare Costs Litigation*, 83 F. Supp.2d 125, 135 (D.D.C. 1999), conflicts with *SEIU Health & Welfare Fund*, 83 F. Supp. 2d at 88–89.

Mutual Life Insuance Co. v. *New York & New Haven Railway Co.*,[99] in which an insurer brought a negligence action against a tortfeasor responsible for the death of its insured.[100] The court, relying on Anthony, held that "the loss of the plaintiffs [i.e. the value of the life insurance proceeds], although due to the acts of [the defendants] . . . was a remote and indirect consequence of the misconduct of the defendants, and not actionable" as a matter of law."[101] Thereafter, Connecticut courts have consistently held that a plaintiff must possess a "colorable claim of direct injury [which the complainant] has suffered or is likely to suffer, in an individual or representative capacity."[102] Likewise, the common law of other states bars such remote claims.[103]

Several states have enacted statutes giving special protection to gun manufacturers and sellers after cities and other government entities began filing lawsuits against the gun industry in late 1998. Many immunity statutes only limit the ability of cities, counties, and other local governments to sue.[104] Some immunity statutes are broader in scope and affect the legal rights of private individuals.[105] But none do or can address the national problem addressed by H.R. 2037.

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[99] 25 Conn. 265 (1856).

[100] *See id.* at 271.

[101] *Id.* at 276–77; *see also Fidelity & Cas. Ins. Co.* v. *Sears, Roebuck & Co.*, 199 A. 93, 95–96, 124 Conn. 227 (1938) (insurer could not recover for injuries sustained by insured's employee as a result of defendant's negligence).

[102] *Unisys Corp.* v. *Department of Labor*, 600 A.2d 1019, 1022, 220 Conn. 689 (1991).

[103] *See, e.g., Byrd* v. *English*, 43 S.E. 419 (Ga. 1903); *Kraft Chem. Co.* v. *Illinois Bell Telephone Co.*, 608 N.E.2d 243 (Ill. App. Ct. 1992); *Forcum-James Co.* v. *Duke Transp. Co.*, 93 So. 2d 228 (La. 1957); *Brink* v. *Wabash R.R. Co.*, 60 S.W. 1058 (Mo. 1901); *Holloway* v. *State*, 593 A.2d 716, 719 (N.J. 1991); *Cincinnati Bell Tel.* v. *Straley*, 533 N.E.2d 764 (Ohio 1988).

[104] *See* Ala. Code § 11–80–11 (enacted 2000); Ariz. Rev. Stat. § 12–714 (enacted 1999); Ark. Code § 14–16–504 (enacted 1999); Fla. Stat. § 790.331 (enacted 2001); Ga. Code § 16–11–184 (enacted 1999); Idaho Code § 5–247 (enacted 2000); Ky. Rev. Stat. § 65.045 (enacted 2000); La. Stat. § 1799 (enacted 1999); Maine Rev. Stat. § 2005 (enacted 1999); Mont. Code § 7–1–115 (enacted 1999); Nev. Rev. Stat. § 12.107 (enacted 1999); Okla. Stat. § 1289.24a (enacted 1999); Pa. Cons. Stat. § 6120 (enacted 1999); Tenn. Code § 39–17–1314 (enacted 1999); Texas Civil Practice & Remedies Code § 128.001 (enacted 1999); Utah Code § 78–17–64 (enacted 2000); Va. Code § 15.2–915.1 (enacted 2000).

[105] *See* Alaska Stat. § 09.65.155 (enacted 1999) (precluding civil actions against gun manufacturers and sellers if based on the lawful sale, manufacture, or design of the gun, but with exceptions for claims based on a negligent design or manufacturing defect); Cal. Civ. Code § 1714.4 (enacted 1983) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Colo. Rev. Stat. §§ 13–21–501, 13–21–504.5 (enacted 2000) (precluding tort actions against gun manufacturers and sellers for any remedy arising from injury or death caused by discharge of a firearm, but with exceptions for product liability claims and damages proximately caused by an action in violation of a statute or regulation); Idaho Code § 6–1410 (enacted 1986) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Indiana Code §§ 34–12–3–1 to –5 (enacted 2001) (barring all actions based on lawful design, manufacture, marketing, or sale of firearm and any recovery of damages resulting from criminal or unlawful misuse of firearm); Ky. Rev. Stat. § 411.155 (enacted 1988) (providing that no defendant is liable for damages resulting from criminal use of firearm by third party, unless defendant conspired with or willfully aided, abetted, or caused the commission of the criminal act, but not limiting doctrines of negligence or strict liability relating to abnormally dangerous products or activities or defective products); La. Rev. Stat. § 2800.60 (enacted 2000) (declaring that gun manufacturers and sellers are not liable for shooting injuries unless proximately caused by the unreasonably dangerous construction or composition of the product, are not liable for unlawful or negligent use of a gun that was lawfully sold, are not liable for failing to equip guns with magazine disconnect safeties, loaded chamber indicators, or personalization devices to prevent unauthorized use, and are not liable for failing to provide warnings about unauthorized use of firearms or the fact that a semi-automatic gun may be loaded even when the ammunition magazine is empty or removed); Md. Code § 36–I (enacted 1988) (providing that defendant cannot be held strictly liable for damages resulting from criminal use of firearm by third person unless defendant conspired with or aided, abetted, or caused commission of criminal act); Michigan Compiled Laws Annotated § 28.435(7) (enacted 2000) (providing that a gun dealer is not liable for damages arising from use or misuse of a gun if the dealer provides a trigger lock or gun case with each gun sold and complies with all other state and Federal statutory requirements); Nev. Rev. Stat.

Continued

Various Public Entities' Attempts to Breach the Separation of Powers

In lawsuits brought by public entities that have been completely dismissed, the courts found that the plaintiffs were attempting to regulate firearms and that only the state had the power to regulate in this area.[106] These courts saw clearly that advocates of controlling or banning firearms or ammunition are attempting to accomplish through litigation that which they have been unable to achieve by legislation. Calling the suit a misdirected attempt to "regulate firearms and ammunition through the medium of the judiciary," a Florida district court of appeal affirmed the dismissal of Miami-Dade County's actions against more than two dozen gun makers, trade groups and retailers.[107] The three-member Florida Third District Court of Appeal ruled unanimously that the suit was simply a "round-about attempt" to have the courts use their injunctive powers to "mandate the redesign of firearms and declare that the appellees' business methods create a public nuisance." The suit filed by the City of Cincinnati is also typical.[108] The city sought "injunctive relief which would require [the] defendants to change the methods by which they design, distribute[,] and advertise their products nationally."[109] This was deemed "an improper attempt to have [the] court substitute its judgment for that of the legislature, something which [the] court is neither inclined nor empowered to do."[110] Furthermore, the court held that the injunctive relief sought by the city constituted a regulation of commercial conduct lawful in and affecting other states and, as such, was a violation of the Commerce Clause of the Constitution.[111] The court in *City*

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§ 41.131 (enacted 1985) (stating that no cause of action exists merely because firearm was capable of causing serious injury); N.C. Stat. § 99B–11 (enacted 1987) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); N.D. Code § 32–03–54 (enacted 2001) (providing that defendant cannot be held liable for lawful manufacture or sale of firearm, except in action for deceit, unlawful sale, or where transferor knew or should have known recipient would engage in lawful sale or transfer or use or purposely allow use in unlawful, negligent, or improper fashion); Ohio Rev. Code § 2305.401 (enacted 2001) (providing that no member of firearm industry is liable for harm sustained as result of operation or discharge of firearm, unless firearm is sold illegally or plaintiff states product liability claim authorized by Chapter 2307 of Ohio Code); S.C. Code § 15–73–40 (enacted 2000) (providing that plaintiff in products liability action involving firearm has burden to prove actual design of firearm was defective, causing it not to function in a manner reasonably expected by an ordinary consumer); S.D. Codified Laws § 21–58–2 (enacted 2000) (providing that no one who lawfully manufactures or sells a firearm can be held liable because of the use of such firearm by another, but with exceptions including actions for negligent entrustment, for unlawful sales, or for injuries resulting from failure of firearms to operate in a normal or usual manner due to defects or negligence in design or manufacture); Section 82.006, Texas Civil Practice and Remedies Code (enacted 1993) (providing that plaintiff in products liability action must prove that actual design was defective, causing firearm not to function in manner reasonably expected by ordinary consumer); Wash. Rev. Code § 7.72.030 (enacted 1988) (precluding firearm from being found defective in design on ground that its benefits do not outweigh its risks).

[106] *See Ganim* v. *Smith & Wesson Corp.* No. CV–99–0153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), at *6–7; *Penelas* v. *Arms Tech., Inc.* (order), No. 99–01941–CA–06 (11th Cir. Ct. Dec. 13, 1999) at 4–5, located at http://www.firearmslitigation.org; *Cincinnati* v. *Beretta U.S.A. Corp.*, No. A99–02369, 1999 WL 809838 (Ohio C.P. Oct 7, 1999) at *3. Judge Ruehlman found, in ruling on Cincinnati's claims, that the plaintiff was trying to get the court "to substitute its judgment for that of the legislature." *Cincinnati*, 1999 WL 809838 at *1.

[107] *Penelas* v. *Arms Technology Inc. et al.*, No. 3D00–113, dismissal affirmed (Fla. Dist. Ct. App., 3d Dist., Feb. 14, 2001).

[108] *See Cincinnati* v. *Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999).

[109] *Id.* at *1.

[110] *Id.*

[111] *See id.* Thus far, Federal district courts that have faced the "Commerce Clause" issue have generally remanded the cases back to state courts, absent diversity of citizenship, holding that the municipal suits do not present a Federal question involving interstate commerce. *See Boston* v. *Smith & Wesson*, 66 F. Supp. 2d 246 (D. Mass. 1999); *Archer* v. *Arms Tech., Inc.*, No. CIV. 99–40254, 1999 WL 993306 (E.D. Mich. Oct. 14, 1999).

of Chicago v. *Beretta* similarly found that the facts alleged by the city "in terms of immediacy and proximity" of the harm and its causation, were the kind of facts that the legislature could take heed of and contemplate and a court could not.[112] In *Philadelphia* v. *Beretta*, the judge dismissed the lawsuit as an unauthorized attempt by the city to regulate firearms using its parens patriae powers granted to the Commonwealth.[113] In *Morial* v. *Smith & Wesson Corp.*, the Supreme Court of Louisiana held that the legislature did not intend a scheme allowing various cities to file suits against handgun manufacturers, and thereby effectively regulate the handgun industry in different ways.[114]

Through traditional tort suits, public entities are using both extraordinary compensatory and punitive damage requests and injunctive relief in an attempt to impose broad new regulations on the design, manufacture, and interstate distribution of firearms, outside of the appropriate legislative context. As explained by United States District Court Judge Buchmeyer, "the plaintiff's attorney's simply want to eliminate hanguns." [115]

However, as the United States Supreme Court has repeatedly recognized, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief . . . [W]e have recognized the phrase 'state law' to include common law as well as statutes and regulations." [116] More recently, the Court reiterated that regulatory "power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." [117] Plaintiffs seeking bankrupting sums in compensation for the costs of public services provided to their citizen taxpayers, as well as punitive damages to "punish the Defendants for their conduct and prevent a repetition of such conduct in the future." [118] If successful, these damage claims can only result in an alteration

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[112] Order granting defendants' motion to dismiss, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. Sept. 15, 2000).

[113] *See City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (relying on *Ortiz* v. *Commonwealth*, 681 A.2d 152 (Pa. 1996)).

[114] *See Morial* v. *Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001).

[115] *Patterson*, 608 F.Supp. at 1212. Judge Buchmeyer closed with the statement: "As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law—and that this is a matter for the legislatures, not the courts. Id. at 1216. Advocates for the lawsuits have also expressed a desire to bypass legislatures. Editorializing in favor of strict liability for gun companies, the *Chicago Tribune* asked, "Why should a court take this step? Why not a legislature? Because it's so highly unlikely." *See* "Courts Must Lead Fight Against Guns," *The Chicago Tribune* (May 3, 1994). *See also* Bruce Rosen, "Gun-control Weapon: Product Liability Suit," *Record* (Bergen Cty.N.J.) (February 17, 1985) ("[A]ntigun activists around the country, backed by a cadre of lawyers who specialize in such suits, have been trying to do in courts what they haven't been able to do in the state legislatures"); David Lauter, "Suits Target Handgun Makers," *National Law Journal* (November 29, 1982) at 12 ("Gun control advocates, who have organized a research program to assist the plaintiffs' attorneys, are hoping that plaintiffs' victories in court would force handgun manufacturers to adopt controls that nearly all legislatures have so far been unwilling to mandate."). Another lawsuit proponent suggested the plaintiffs "bring the great power of our civil courts to bear on a problem that our legislatures . . . have not been able to solve." Speiser, "Disarming the Handgun Problem by Directly Suing Arms Makers," *National Law Journal* (June 8, 1981) at 29.

[116] *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521–22 (1992).

[117] *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996); *see also San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

[118] Complaint at ¶161(c), *James* v. *Arcadia Mach. & Tool*, No. L–6059–99 (N.J. Super. Ct. Essex County filed June 9, 1999).

of the lawful commercial practices of every firearm manufacturer, domestic or foreign, which sells its products in the United States.

Public entities are seeking to achieve through the courts what they have been unwilling or unable to obtain legislatively, namely limits on the numbers, locations, and types of firearms sold, and a shift in the responsibility for violence response costs to the private sector. One consequence of this is an erosion of the separation of powers of the various branches of government.[119] The separation of powers doctrine is "implicitly embedded" in the constitutions and laws of every state, and helps to define the scope of powers residing in the three branches of government.[120] "The doctrine of separation of powers prohibits courts from exercising a legislative function by engaging in policy decisions and making or revising rules or regulations." [121] Just as large damage awards have a regulatory effect, requests for injunctive relief tend to force the judiciary to intrude into the decision-making process properly within the sphere of another branch of government.[122]

Many courts have respected the separation of powers. For example, in *Forni* v. *Ferguson*,[123] plaintiffs sought damages from the manufacturer of a firearm used by Colin Ferguson in the Long Island Rail Road shootings. Plaintiffs alleged, among other things, that the firearm was defective; that the "omission of an alternative design rendered the product unsafe;" and that the "defendants were negligent in marketing, distributing and selling the weapon and bullets to the general public." [124] Plaintiffs asked the court to hold the firearm manufacturer liable for criminally–inflicted injuries. Rejecting this proposal, the trial court noted that "At oral argument of this motion, I told counsel that I personally hated guns and that if I were a member of the legislature, I would lead a charge to ban them. However, I do not hold that office. Rather, I am a member of the Judiciary, and must respect the separation of function." [125]

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[119] *See* Jeffery Abramson, "Where Do The Suits Stop?," *The Washington Post* (January 31, 1999) at B3; Editorial, "Guns and the Court," *Pittsburgh Post-Gazette* (December 9, 1999) at A30; Knight, "Misfiring Through the Courts," *Denver Post* (October 21, 1999) at B11; Bill Pryor, "Trial Lawyers Target Rule of Law," *The Atlanta Constitution* (January 13, 1999); P. Waldmeir, "Trigger-happy Justice," *Financial Times* (January 16, 1999) at 17; Richard Epstein, "Lawsuits Aimed At Guns Probably Won't Hit Crime," *The Wall Street Journal* (December 9, 1999) at A26.

[120] *See City of South Euclid* v. *Jemison*, 503 N.E.2d 136, 138 (1986).

[121] *Route 20 Bowling Alley, Inc.* v. *City of Mentor*, No. 94–L–141, 1995 WL 869959, at *3 (Ohio Ct. App. Dec. 22, 1995) (citing *Zangerle* v. *Evatt*, 41 N.E.2d 369 (Ohio 1942)).

[122] *See Gordon* v. *Texas*, 153 F.3d 190, 194 (5th Cir. 1998) (citing *Koohi* v. *United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision–making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.").

[123] No. 132994/94 (N.Y. Sup. Ct. Aug. 2, 1995), aff'd, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996).

[124] *Id.* at 2.

[125] *Id.* at 14; *accord Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) ("To recognize such a cause of action in New Mexico would require an abrogation of the common law in a way bordering on judicial legislation."); *Delahanty* v. *Hinckley*, 686 F. Supp. 920, 930 (D.D.C. 1986) ("All of the above suggests to this Court that what is really being suggested by plaintiffs, and indeed by many citizens, is for this Court, or courts, to indirectly engage in legislating some form of gun control. The pitfalls noted above seem to be ample evidence, however, that such legislation should be left to the Federal and state legislatures which are in the best position to hold hearings and enact legislation which can address all of the issues and concerns as well as reflect the will of the citizens."); *Patterson* v. *Gesellschaft*, 608 F. Supp. 1206, 1216 (D. Tex. 1985) ("[T]he question of whether handguns can be sold is a political one, not an issue of products liability law—and that . . . is a matter for the legislatures, not the courts.") (emphasis omitted); *Mavilia* v. *Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Knott* v. *Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

Litigation by Public Entities and Others Should Not Restrict Interstate Commerce by Limiting the Sale and Distribution of Firearms Beyond a State's Borders

In many of the complaints filed against firearm manufacturers, the plaintiffs seek to obtain through the courts—either through equitable remedies, the burden or threat of monetary damages, or both—stringent limits on the sale and distribution of firearms beyond the plaintiffs' jurisdictional boundaries. By virtue of the enormous compensatory and punitive damages sought, and because of the types of injunctive relief requested, these complaints in practical effect would require manufacturers of lawful firearms to curtail or cease all lawful commercial trade in those firearms in the jurisdictions in which they reside—almost always outside of the states in which these complaints are brought—to avoid potentially limitless liability. Insofar as these complaints have the practical effect of stopping or burdening interstate commerce in firearms, they seek remedies in violation of the United States Constitution.

For example, in Chicago, the city alleges that it has enacted "gun control ordinances that are among the strictest of any municipality in the country."[126] Further, the city alleges that these ordinances will reduce homicides, suicides, and accidental shootings with firearms "as long as residents of the jurisdiction imposing the restriction cannot legally purchase those firearms elsewhere."[127] The city seeks to force dealers outside of its jurisdiction to stop selling firearms to Chicago residents who may lawfully purchase them pursuant to the Chicago Municipal Code, and to force manufacturers to stop lawfully supplying products to those dealers, directly or indirectly.[128] Similarly, in the complaint filed by the District of Columbia, that city seeks to hold manufacturers liable for their lawful sales outside the District of firearms which "subsequently are brought unlawfully [by others] into the District."[129] Other cities seek injunctive relief aimed at "prohibiting the sale of [firearms] in a manner which causes such firearms to inappropriately enter the State"[130] or at forcing fundamental changes in the methods by which manufacturers distribute firearms. In one case, a county specifically sought an injunction whereby the court would order firearms manufacturers "to terminate shipments of firearms to dealers who do not enforce and abide by" the county's notions for doing business and "to cease shipments to dealers in proximity to [the] County of firearms" that the county deemed "unreasonably attractive to criminals."[131] Similarly, other complaints seek to preclude, limit, restrain or otherwise impact lawful commerce beyond its borders.

Such efforts at extraterritorial regulation aim to reduce interstate commerce in a manner barred by the Commerce Clause[132]

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[126] Complaint at ¶15, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15595 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998).

[127] *Id.*

[128] *See id.* at ¶25.

[129] Complaint at ¶51, *District of Columbia* v. *Beretta U.S.A. Corp.*, No. 00–0000428 (D.C. Super. Ct. filed Jan 20, 2000).

[130] Complaint at ¶4(a), *Wherefore Clause, Camden County Bd.* v. *Beretta U.S.A. Corp.*, No. 99cv2518(JBS) (D.N.J. filed June 1, 1999).

[131] Amended Complaint at ¶64(e)(1), (2), *Penelas* v. *Arms Tech., Inc.*, No. 99–01941 CA 06 (Fla. Cir. Ct. Miami-Dade County filed June 4, 1999).

[132] U.S. Const. art. I, § 8.

and the Due Process Clause of the Fourteenth Amendment.[133] Plaintiffs' claims directly implicate core federalism principles articulated by the United States Supreme Court in *BMW of North America, Inc.* v. *Gore*.[134] *Gore* makes clear that "[O]ne State's power to impose burdens on the interstate market . . . is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States . . ." [135] Further, "the Constitution has a 'special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate [and international] commerce and with the autonomy of the individual States within their respective spheres.'" [136] *Healy* v. *Beer Institute* [137] in turn relied on *Edgar* v. *MITE Corp.*,[138] which held that "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." [139] *Healy* elaborated these principles concerning the extraterritorial effects of state regulations:

> The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one State regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.[140]

The Commerce Clause is thus not only a provision that allocates power between Federal and state governments. It is also a "substantive 'restriction on permissible state regulation' of interstate commerce . . . 'recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.'" [141] This limitation precludes the national regulatory programs sought in many complaints filed against the firearms industry.

Beyond its Commerce Clause analysis, *Gore* further holds that:

> it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States[,] . . . [n]or may

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[133] U.S. Const. amend. XIV, § 1.
[134] 517 U.S. 559, 571 (1996).
[135] *Id.* at 571 (citations and footnote omitted).
[136] *Id.* at 571–72 (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 335–36 (1989)).
[137] 491 U.S. 324 (1989).
[138] 457 U.S. 624 (1982).
[139] *Id.* at 642–43.
[140] *Healy*, 491 U.S. at 336–37 (citations omitted).
[141] *Dennis* v. *Higgins*, 498 U.S. 439 (1991) (citations omitted) (quoting *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984)).

> [a state] impose sanctions on [a defendant] in order to deter conduct that is lawful in other jurisdictions.[142]

Central to Gore's due process holding is the principle that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." [143]

Hurdling Down the Slippery Slope

Once it is established, in the context of firearms, that product manufacturers are responsible for "socializing" the cost of criminal product misuse, then it may be hard to avoid the slippery slope of making automobile dealers liable for drunk drivers, knife manufacturers liable for knife wounds, or food manufacturers liable for the harm caused by the fat content of snacks.

If a company manufactures a legitimate product that is widely and lawfully distributed, and the product is criminally or unlawfully misused to injure a person, and the product is functioning properly, without any defect in its design or manufacture, a manufacturer should not be held liable for that injury. Yet unfortunately, the unpopular nature of firearms in some quarters has led to disastrous precedents that will weaken the moral foundation of tort law generally and the separation of powers if left unchecked by Congress. If the judicial system is allowed to bankrupt the firearms industry based on legal theories holding manufacturers liable for the criminal or unlawful misuse of their products, it is likely that similar liability will soon be applied to other industries whose products are statistically associated with misuse, such as the knife and automobile industries.

Like firearms manufacturers, knife and automobile manufacturers, for example, are aware that a small percentage of their products will be misused by criminals or drunks, and knives and automobiles cannot currently be designed to prevent such misuse. The essential concept of the misuse doctrine is that products are necessarily designed to do certain limited tasks, within certain limited environments of use, and that no product can be made safe for every purpose, manner, or extent of use. Considerations of cost and practicality limit every product's range of effective and safe use, which is a fundamental fact of life that consumers readily understand. As Dean Prosser explained, "Knives and axes would be quite useless if they did not cut." [144] Likewise, as a Federal district court noted, "Although a knife qualifies as an obviously dangerous instrumentality, a manufacturer need not guard against the danger it presents." [145] Knives are mostly used for nonviolent purposes, such as cooking, but hundreds of thousands of violent crimes every year are perpetrated with knives. Thirty-five percent of homicides are committed with weapons other than guns.[146] Further, 40% of aggravated assaults involving strangers are committed with knives or blunt objects, and 49% of aggravated assaults involving non-

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[142] *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572–73 (1996).
[143] *Id.* at 573 n.19 (quoting *Bordernkircher* v. *Hayes*, 434 U.S. 357, 363 (1978)).
[144] William Prosser, Handbook of the Law of Torts § 99.
[145] *Dorsey* v. *Yoder Co.*, 331 F.Supp. 753, 759 (E.D.Pa.1971), aff'd, 474 F.2d 1339 (3d. Cir.1973).
[146] *See* U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cvict—c.htm.

strangers are committed with knives or blunt objects.[147] Alcohol, too, exacts a toll on society.[148] For example, in 1996, motor vehicle accidents involving intoxicated motorists accounted for over 13,000 fatalities.[149] On an average day during the same year, it was determined that just under two million offenders under the jurisdiction of the criminal justice system consumed alcohol at the time they committed their offense.[150] Further, two-thirds of victims who suffered violence by an intimate—a current or former spouse, boyfriend, or girlfriend—reported that alcohol had been a factor.[151] Of all victims of violence, 26% involve the use of alcohol by the offender, and these victimizations result in estimated annual losses of $402 million.[152] Alcohol use by offenders is also involved in 22% of rapes.[153] Further, of inmates who possessed a firearm during their current offense, 17% of those in Federal prison had parents that abused alcohol, and 18% of those in state prison had parents that abused alcohol.[154]

Back in 1985, a Federal judge in *Patterson* v. *Rohm Gesellschaft*[155] stated that plaintiff's unconventional application of tort law in the case would also apply to automobiles, knives, axes and even high-calorie food "for an ensuing heart attack" and that it would be "nonsensical" to claim that a product can be defective under the law when it has no defect. In 1999, the judge in the lawsuit brought by the City of Bridgeport, Connecticut, similarly observed that cities suing the firearms industry "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures. . . ."[156] Only a few years later, this "new age" of litigation is already upon us. Whereas lawsuits brought against BB gun manufacturers[157] and slingshot dealers[158] were at one time viewed as dangerous ju-

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[147] *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Crime Victimization in United States, 1999 Statistical Tables" at Table 66 (January 2001, NCJ 184938).

[148] *See* Bureau of the Census, U.S. Dep't of Com., Statistical Abstract of the United States 1998, 110 (1998) (indicating that 20,231 people died from alcohol induced causes in 1995).

[149] *See* Lawrence A. Greenfield, U.S. Dep't of Just., Alcohol and Crime 11 (1998) (providing an analysis of national data by the Bureau of Justice Statistics regarding the prevalence of alcohol in criminal activity).

[150] *See id.* at 20.

[151] *See* U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cvict—c.htm. ("Two-thirds of victims who suffered violence by an intimate (a current or former spouse, boyfriend, or girlfriend) reported that alcohol had been a factor. Among spouse victims, 3 out of 4 incidents were reported to have involved an offender who had been drinking. By contrast, an estimated 31% of stranger victimizations where the victim could determine the absence or presence of alcohol were perceived to be alcohol-related."). Much higher percentage of violent crimes result in injuries when they involve an intimate partner (48%) or a family member (32%) than when involving a stranger (20%). *See* Thomas Simon, James Mercy, and Craig Perkins, Bureau of Justice Statistics Special Report, "Injuries from Violent Crime, 1992–98" (June 2001, NCJ 168633).

[152] *See* Lawrence A. Greenfeld and Maureen A. Henneberg, "Victim and Offender Self-Reports of Alcohol Involvement in Crime," 25 Alcohol Research and Health 1 at 22, 24 (2001).

[153] *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Crime Victimization in United States, 1999 Statistical Tables" at Table 32 (January 2001, NCJ 184938).

[154] *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report. "Firearms Use by Offenders" (November 2001, NCJ 189369) at 5.

[155] 608 F. Supp. 1206, 1211–12 (N.D. Tex. 1985).

[156] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *14 (Conn. Super. Ct. Dec. 10, 1999).

[157] *Koepke* v. *Crossman Arms Co.*, 582 N.E.2d 1000 (Ohio Ct.App., 1989).

[158] *Bojorquez* v. *House of Toys, Inc.*, 133 Cal.Rptr. 483, 484 (Cal.Ct.App.1976) (stating plaintiffs "ask us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.").

dicial incursions into legislative roles, today such lawsuits against even fast food companies are proliferating.[159]

Additional lawsuits against the firearms industry for the criminal or unlawful misuse of their products will only tend to establish legal precedents that will invite continued litigation against legal, national industries such as the fast food industry, and additional waves of litigation against such industries as the knife and alcohol industries, further undermining the moral basis of tort law, the separation of powers, and the American economy. According to one recent report:

> In the next few years, predicts insurance consultancy Tillinghast-Towers Perrin, tort costs could increase twice as fast as the economy, going from $200 billion last year to $298 billion, or 2.4% of GDP, by 2005. Since 1994 the average jury award in tort cases as a whole has tripled to $1.2 million, in medical malpractice it has tripled to $3.5 million and in product liability cases it has quadrupled to $6.8 million, according to just released data from Jury Verdict Research." [160]

And according to a recent report by the Council of Economic Advisers:

> [T]he United States tort system is the most expensive in the world, more than double the average cost of other industrialized nations . . . To the extent that tort claims are economically excessive, they act like a tax on individuals and firms . . . With estimated annual direct costs of nearly $180 billion, or 1.8 percent of GDP, the U.S. tort liability system is the most expensive in the world, more than double the average cost of other industrialized nations that have been studied. This cost has grown steadily over time, up from only 1.3 percent of GDP in 1970, and only 0.6 percent in 1950.[161]

Manufacturers, of course, often stand out as deep pockets worth pursuing and trial lawyers, faced with a judgment proof assailant and an uncompensated victim, may well pursue remote corporate targets. But there is an endless list of products that can be criminally misused to cause personal injury that may expose the manufacturer or seller to a lawsuit and, if left unchecked, the infinite flexibility of the "foreseeability" doctrine would allow for the crippling or destruction of entire industries and the usurpation of the legislative role by the judicial system, which in some instances has found that a manufacturer reasonably should foresee that a teenage girl will scent a candle by pouring cologne upon it below the

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[159] *See* "Fat-suit lawyer files new class action for children," *Nation's Restaurant News* (September 16, 2002) ("The lawyer who sued McDonald's, Burger King, KFC and Wendy's in July over their alleged roles in contributing to a man's obesity and health problems has filed a similar class-action lawsuit here against those same chains on behalf of overweight children.").

[160] *See* Michael Freedman, "The Tort Mess" *Forbes* (May 13, 2002).

[161] Council of Economic Advisers, "Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System" (April 2002) at 1–2.

flame;[162] a person will insist on sitting in a chair[163] or an exercise bicycle[164] too frail for one's weight (300 and 500 pounds, respectively); or a child will tilt or rock a soft-drink vending machine to drop out a can without paying, causing the machine to fall on and kill him.[165]

INCREASED REGULATION THROUGH THE JUDICIARY THREATENS THE SECOND AMENDMENT'S PROTECTION OF INDIVIDUAL RIGHTS

Governments are immune from suit for failure, even grossly negligent or deliberate failure, to protect citizens from crime.[166] Governments are similarly immune from suit by victims who were injured by criminals who were given early release on parole.[167] Accordingly, it is inappropriate for the government, through the courts, to make it economically impossible for persons to own handguns for self-defense. Less than 1 percent of the firearms in circulation in the United States are ever involved in violence,[168] yet over a dozen studies have estimated that citizens use firearms in self-defense between 764,000 and 3.6 million times annually.[169] Research has also demonstrated that nondiscretionary concealed gun laws—which require law-enforcement officials or a licensing agency to issue, without subjective discretion, concealed-weapon permits to all qualified applicants—reduce the incidence of violent crime, murder, rape, robbery, and aggravated assault.[170] If the judiciary will not question the government's civil immunity for failure to protect

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[162] *See Moran* v. *Faberge*, Inc., 273 Md. 538, 332 A.2d 11 (1975) (foreseeable—jury could properly so find).

[163] *See Horne* v. *Liberty Furniture Co.*, 452 So. 2d 204 (La. Ct. App. 5th Cir. 1984), writ denied, 456 So. 2d 166 (La. 1984) and writ denied, 456 So. 2d 171 (La. 1984) (foreseeable—by implication).

[164] *See Dunne* v. *Wal-Mart Stores, Inc.*, 679 So. 2d 1034 (La. Ct. App. 1st Cir. 1996) (foreseeable).

[165] *Compare Oden* v. *Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953 (Ala. 1993) (unforeseeable—person may not impose liability on another for consequences of person's own act of moral turpitude), with *Morgan* v. *Cavalier Acquisition Corp.*, 432 S.E.2d 915 (1993) (foreseeable—jury could properly so find); *Ridenour* v. *Bat Em Out*, 707 A.2d 1093 (App. Div. 1998) (change machine: foreseeable).

[166] For example, in *Warren* v. *District of Columbia*, 444 A.2d 1 (D.C. 1981), the plaintiffs sustained injuries as a result of the criminal conduct of third parties. Their injuries were exacerbated and their recovery impeded because of malfeasance on the part of the police. The court held that there was no special relationship between the public and law enforcement; thus, the police were under no duty to provide protection or other services to the general public. See id. at 2–4. *See also Bowers* v. *DeVito* 686 F.2d 616 (7th Cir.1982) (no Federal Constitutional requirement that police provide protection); *Calogrides* v. *Mobile*, 475 So.2d 560 (Ala.1985); Cal.Govt.Code §§ 845 (no liability for failure to provide police protection) and 846 (no liability for failure to arrest or to retain arrested person in custody); *Davidson* v. *Westminster*, 32 Cal.3d 197, 185 Cal.Rptr. 252; 649 P.2d 894 (1982); *Stone* v. *State* 106 Cal.App.3d 924, 165 Cal.Rptr. 339 (1980); *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C.App.1983); *Sapp* v. *Tallahassee*, 348 So.2d 363 (Fla.Dist.Ct.App.), cert. denied 354 So.2d 985 (Fla.1977); Ill.Rev.Stat. 4–102; *Keane* v. *Chicago*, 98 Ill.App.2d 460, 240 N.E.2d 321 (1st Dist.1968); *Jamison* v. *Chicago*, 48 Ill.App.3d 567 (1st Dist.1977); *Simpson's Food Fair* v. *Evansville*, 272 N.E.2d 871 (Ind.App.); *Silver* v. *Minneapolis* 170 N.W.2d 206 (Minn.1969); N.J.Stat,Ann. §§ 59:2–1, 59:5–4 (1972); *Wuetrich* v. *Delia*, 155 N.J.Super. 324, 326, 382 A.2d 929, 930, cert. denied, 77 N.J. 486, 391 A.2d 500 (1978), aff'g 134 N.J.Super. 400, 341 A.2d 365 (N.J.Super.Ct., Law Div., 1975); *Chapman* v. *Philadelphia*, 290 Pa.Super. 281, 434 A.2d 753 (Penn.1981); *Morris* v. *Musser*, 84 Pa.Commw. 170, 478 A.2d 937 (1984).

[167] Dennis Hevesi, "New York is Not Liable for Murders," *The New York Times* (July 10, 1987).

[168] *See* H. Sterling Burnett, Nat'l Center for Pol'y Analysis, Suing Gun Manufacturers: Hazardous to Our Health (1999).

[169] *See* Gary Kleck, Targeting Guns: Firearms and Their Control 150–89 (1997). *See, e.g.*, Dave Birkland, "Woman Shoots, Kills Armed Intruder in West Seattle," *The Seattle Times* (April 25, 2002).

[170] *See* John R. Lott, Jr. More Guns Less Crime: Understanding Crime and Gun Control Laws (2d. ed. 2000) at 77–79 (Figures 4.5, 4.6, 4.7, 4.8, and 4.9).

people, the government's courts should not become a means of depriving the people of the tools with which they protect themselves.

Researchers have estimated that Americans use guns for self-protection as often as 2.1 to 2.5 million times a year. The estimate may seem remarkable in comparison to expectations based on conventional wisdom, but it is has been noted that it is not implausibly large in comparison to various gun-related phenomena. There are probably over 220 million guns in private hands in the United States, indicating that only about 1% of them are used for defensive purposes in any 1 year.[171] Only 24% of the gun defenders in the study reported firing the gun, and only 8% reported wounding an adversary.[172] Guns were most commonly used for defense against burglary, assault, and robbery.[173] Also, a disproportionate share of defensive gun users are African-American or Hispanic compared to the general population.[174]

Research also indicates that women and blacks benefit most from being able to have a gun for protection:

> Murder rates decline when either more women or more men carry concealed handguns, but the effect is especially pronounced for women. One additional woman carrying a concealed handgun reduces the murder rate for women by about 3–4 times more than one additional man carrying concealed handgun reduces the murder rate for men. This occurs because allowing a women to defend herself with a concealed handgun produces a much larger change in her ability to defend herself than the change created by providing a man with a handgun . . . [B]lacks benefit more than other groups from concealed-handgun laws. Allowing potential victims a means for self-defense is more important in crime-prone [inner city] neighborhoods.[175]

The benefits to women and blacks, and others, from being able to have a gun for protection will be reduced if unrestrained gun industry liability is allowed to add hundreds of dollars to the price of guns such that people are priced out of the market.

Proponents of lawsuits aimed at driving gun manufacturers out of business generally deny that people have any right at all to keep and bear arms. They argue that the Second Amendment "right of the people to keep and bear arms" is a right which is "granted" solely to state government to maintain uniformed, select militias, not individuals. However, the most recent and comprehensive scholarship supports the proposition that the Second Amendment to the Constitution protects an individual right to keep and bear arms.[176]

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[171] *See* Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun," 86 *Journal of Crim. Law & Criminology* (1995) at 167.

[172] *Id.* at 173.

[173] *Id.* at 175.

[174] *Id.* at 178.

[175] *See* John R. Lott, Jr. More Guns Less Crime: Understanding Crime and Gun Control Laws (2d. ed. 2000) at 20.

[176] *See* Laurence Tribe, I American Constitutional Law 902 n.221 (Foundation Press 2000) (stating Second Amendment confers an individual right of U.S. citizens to "possess and use firearms in the defense of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by §1 of the

Continued

The Fifth Circuit Court of Appeals recently issued a decision that relied on the most recent and comprehensive scholarship on the history and purpose of the Second Amendment to hold that the Second Amendment protects an individual's right to keep and bear arms. In *United States* v. *Emerson*,[177] the Fifth Circuit stated that:

> In sum, to give the Second Amendment's preamble its full and proper due there is no need to torture the meaning of its substantive guarantee into the collective rights or sophisticated collective rights model [both of which deny that the Second Amendment recognizes an individual right] which is so plainly inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole.[178]

The court then concluded that "We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with [United States v.] Miller [, 307 U.S. 174 (1939)], that it 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 and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by Miller." [179]

The term "militia" in the Constitution was understood by the Founders to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large.[180] James Madison also plainly shared these views, as is reflected in his Federalist No. 46 where he argued that power of Congress under the proposed constitution "[t]o raise and support Armies" in art. 1, § 8, cl. 12 posed no threat to liberty because any such army, if misused, "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands" and then noting "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "the several kingdoms of Europe" where "the governments are afraid to trust the people with arms."[181]

As stated by one commentator quoted by the Fifth Circuit, "the [second] amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary

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Fourteenth Amendment against state or local government action."); Akhil Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L.J. 1193, 1265 ("The Second Amendment, however, illustrates that states' rights and individual rights, 'private' rights of discrete citizens and 'public' rights of the citizenry generally, were sometimes marbled together into a single clause.").

[177] 270 F.3d 203 (5th Cir. 2001).

[178] *Id.* at 236.

[179] *Id.* at 260.

[180] *See, e.g.*, Debates in the Convention of the Commonwealth of Virginia, reprinted in 3 J. Elliot, Debates in the Several State Conventions 425 (3d ed.1937) (statement of George Mason, June 14, 1788) ("Who are the militia? They consist now of the whole people . . ."); Letters from the Federal Farmer to the Republican 123 (W. Bennett ed.1978) (ascribed to Richard Henry Lee) ("[a] militia, when properly formed, are in fact the people themselves . . ."); Letter from Tench Coxe to the Pennsylvania Gazette (Feb. 20, 1778), reprinted in The Documentary History of the Ratification of the Constitution (Mfm.Supp.1976) ("Who are these militia? Are they not ourselves.").

[181] The Federalist Papers at 299 (Rossiter, New American Library).

for the protection of a free state, they guaranteed the people's right to possess those arms." [182]

The Supreme Court's decision in *United States* v. *Miller*,[183] is not to the contrary of the holding in *Emerson*. In *Miller*, the Supreme Court held that the National Firearms Act's prohibition of certain weapons that tended to be uniquely used by criminals, such as sawed-off rifles and guns designed to fit silencers, did not violate the Second Amendment as such weapons were not those considered to be employed by a militia composed of regular, law-abiding citizens.[184]

HEARINGS

No hearings were held on H.R. 2037.

COMMITTEE CONSIDERATION

On October 2, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 2037, with amendment by a recorded vote of 18 to 7, a quorum being present.

VOTE OF THE COMMITTEE

1. An amendment in the nature of a substitute was offered by Chairman Sensenbrenner. The amendment in the nature of a substitute provides that a "qualified civil liability action" cannot be brought in any State or Federal court, and that such actions that are pending on the date of enactment shall be dismissed immediately by the court in which the action was brought. "Qualified civil liability action" is defined as a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. This term, however, does not include (i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment or negligence per se; (iii) an action where a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought; (iv) an action for breach of contract or warranty in connection with the purchase of the product; or (v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended. The amendment in the nature of a substitute defines manufacturers and sellers of qualified products as those who

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[182] Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich.L.Rev. 204, 217–18 (1983) (quoted in *Emerson*, 270 F.3d at 235).

[183] 307 U.S. 174 (1939).

[184] *See Cases* v. *United States*, 131 F.2d 916, 922 (1st Cir. 1942) (interpreting *Miller* as resting entirely on the type of weapon involved not having any reasonable relationship to preservation or efficiency of a well regulated militia); *United States* v. *Warin*, 530 F.2d 103, 105–06 (6th Cir.1976) (rejecting a Second Amendment challenge to a conviction for possessing an unregistered 7 1/2 inch barrel submachine gun contrary to the National Firearms Act and stating that Miller "did not reach the question of the extent to which a weapon which is 'part of the ordinary military equipment' or whose 'use could contribute to the common defense' may be regulated" and agreeing with Cases "that the Supreme Court did not lay down a general rule in Miller.").

those who are federally licensed to manufacture, import, or deal in firearms and ammunition, as defined by Federal law. The amendment in the nature of a substitute offered by Chairman Sensenbrenner was agreed to by a rollcall vote of 18 yeas to 5 nays.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Graham	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green			
Mr. Keller	X		
Mr. Issa	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence			
Mr. Forbes	X		
Mr. Conyers			
Mr. Frank		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff			
Mr. Sensenbrenner, Chairman	X		
Total	18	5	

2. Final Passage. The motion to report favorably the bill H.R. 2037, as amended, was agreed to by a rollcall vote of 18 yeas to 7 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Cannon	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Graham	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green			
Mr. Keller	X		
Mr. Issa	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence			
Mr. Forbes	X		
Mr. Conyers			
Mr. Frank		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler		X	
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff			
Mr. Sensenbrenner, Chairman	X		
Total	18	7	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 2037 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2037, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 4, 2002.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2037, the Protection of Lawful Commerce in Arms Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for Federal costs), who can be reached at 226–2860, Angela Seitz (for State and local impact), who can be reached at 226–3220, and Cecil McPherson (for private-sector impact), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2037—Protection of Lawful Commerce in Arms Act.

H.R. 2037 would require courts to dismiss certain lawsuits filed against manufacturers and sellers of guns and ammunition, as well as the trade associations that represent them. Specifically, the bill would affect lawsuits seeking damages for gun-related crimes committed by consumers of these products. CBO estimates that implementing H.R. 2037 would not have a significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues.

H.R. 2037 would impose both an intergovernmental mandate and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting State, local, and tribal governments and the private sector from entering into lawsuits against certain manufacturers or sellers of firearms and ammunition products, and related trade associations, when such products are used unlawfully to do harm.

Depending on how lawsuits would be resolved under current law, plaintiffs could stand to receive significant amounts in damage awards. Because few lawsuits have been completed, CBO has no basis for predicting the level of potential damage awards, if any. Therefore, we cannot determine the cost of these mandates (forgone net revenues from damage awards) or whether they would exceed the annual thresholds established in UMRA for intergovernmental mandates ($58 million in 2002, adjusted annually for inflation) and for private-sector mandates ($115 million in 2002, adjusted annually for inflation).

On October 3, 2002, CBO transmitted a cost estimate for H.R. 2037 as ordered reported by the House Committee on Energy and Commerce on September 25, 2002. Neither version of the bill would have a significant effect on the Federal budget. Both versions of the bill contain intergovernmental and private-sector mandates, but CBO has no basis for estimating the aggregate costs of these mandates.

The CBO staff contacts for this estimate are Ken Johnson (for Federal costs), who can be reached at 226–2860, Angela Seitz (for the State and local impact), who can be reached at 226–3220, and Cecil McPherson (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title.

This sections provides that this Act may be cited as the "Protection of Lawful Commerce in Arms Act."

Sec. 2. Findings; Purposes.

This sections sets out the findings and purposes of the Act.

Sec. 3. Prohibition on Bringing of Qualified Civil Liability Actions in Federal or State Court.

This section provides that a "qualified civil liability action" may not be brought in any Federal or state court, and that any such qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought.

Sec. 4. Definitions.

This sections defines "qualified civil liability action" as a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. Excluded from this definition are (i) actions brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) actions brought against a seller for negligent entrustment or negligence per se; (iii) actions in which a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought; (iv) actions for breach of contract or warranty in connection with the purchase of the product; and (v) actions for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

This sections also defines manufacturers and sellers of qualified products as those who are federally licensed to manufacture, import, or deal in firearms and ammunition, as defined by Federal law.

This section also defines "negligent entrustment" as the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the

product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, OCTOBER 2, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:57 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

* * * * * * *

The next item on the agenda, and pursuant to notice, I now call up the bill H.R. 2037, the "Protection of Lawful Commerce in Arms Act," for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 2037, follows:]

I

107TH CONGRESS
1ST SESSION

H. R. 2037

To amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.

IN THE HOUSE OF REPRESENTATIVES

MAY 25, 2001

Mr. STEARNS (for himself, Mr. ADERHOLT, Mr. BACA, Mr. BACHUS, Mr. BALLENGER, Mr. BARCIA, Mr. BARR of Georgia, Mr. BARTLETT of Maryland, Mr. BARTON of Texas, Mr. BASS, Mr. BISHOP, Mr. BLUNT, Mr. BOUCHER, Mr. BROWN of South Carolina, Mr. BRYANT, Mr. BURR of North Carolina, Mr. BURTON of Indiana, Mr. BUYER, Mr. CALVERT, Mr. CANNON, Mr. CANTOR, Mr. CARSON of Oklahoma, Mr. CHABOT, Mr. CRAMER, Mr. CRANE, Mrs. CUBIN, Mr. CULBERSON, Mr. CUNNINGHAM, Mrs. JO ANN DAVIS of Virginia, Mr. DELAY, Mr. DEMINT, Mr. DINGELL, Mr. DOOLITTLE, Mr. FLAKE, Mr. LUCAS of Oklahoma, Mr. GIBBONS, Mr. GOODE, Mr. GOODLATTE, Mr. GRAHAM, Mr. GRAVES, Mr. HALL of Texas, Mr. HANSEN, Ms. HART, Mr. HAYES, Mr. HEFLEY, Mr. HERGER, Mr. HILLEARY, Mr. HOLDEN, Mr. HUNTER, Mr. ISSA, Mr. ISTOOK, Mr. JENKINS, Mr. JOHN, Mr. JOHNSON of Illinois, Mr. KELLER, Mr. KERNS, Mr. LARGENT, Mr. LUCAS of Kentucky, Mr. MANZULLO, Mr. MATHESON, Mr. GARY G. MILLER of California, Mr. NEY, Mr. NORWOOD, Mr. OBERSTAR, Mr. OTTER, Mr. PENCE, Mr. PETERSON of Pennsylvania, Mr. PICKERING, Mr. PITTS, Mr. RADANOVICH, Mr. RAHALL, Mr. REHBERG, Mr. ROGERS of Michigan, Mr. ROSS, Mr. RYAN of Wisconsin, Mr. RYUN of Kansas, Mr. SANDLIN, Mr. SCHAFFER, Mr. SCHROCK, Mr. SENSENBRENNER, Mr. SESSIONS, Mr. SHADEGG, Mr. SHIMKUS, Mr. SHOWS, Mr. SHUSTER, Mr. SIMMONS, Mr. SIMPSON, Mr. SKEEN, Mr. SMITH of Texas, Mr. SOUDER, Mr. STENHOLM, Mr. STRICKLAND, Mr. SUNUNU, Mr. TAYLOR of Mississippi, Mr. TERRY, Mr. TIAHRT, Mr. TRAFICANT, Mr. WALDEN, Mr. JONES of North Carolina, Mr. WHITFIELD, Mr. WICKER, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC 2. AMENDMENT TO ORGANIC ACT.

The Act entitled "An Act to establish the Department of Commerce and Labor", approved February 14, 1903 (15 U.S.C. 1501 et seq.), is amended by redesignating section 13 as section 14 and by inserting after section 12 the following:

"SEC. 13. RESTRICTION ON COMMERCE.

"(a) SECRETARY OF COMMERCE LIST.—The Secretary of Commerce shall establish and maintain a list consisting of each person that notifies the Secretary under subsection (b) that it is a manufacturer or seller in interstate or foreign commerce of a firearm or ammunition product or is a trade association representing such manufacturers or sellers. The list shall contain the name of the person, the chief executive officer of the person, and the address and location of the headquarters of the person.

The Secretary shall maintain and update the list and may publish the list in the Federal Register.

"(b) NOTIFICATION.—Each person that—

"(1) is a manufacturer in interstate or foreign commerce of a firearm or ammunition product, and is licensed to engage in business as such manufacturer to the extent required under chapter 44 of title 18, United States Code,

"(2) is a seller in interstate or foreign commerce of a firearm or ammunition product, and is licensed to engage in business as such seller to the extent required under chapter 44 of title 18, United States Code, or

"(3) is a trade association representing such manufacturers or sellers,

may notify the Secretary of its existence and provide to the Secretary the information described in subsection (a).

"(c) FREEDOM FROM RESTRICTION.—Conduct that—

"(1) is carried out by a manufacturer in interstate or foreign commerce of a firearm or ammunition product, involves such firearm or ammunition product, and is described in paragraph (4) of subsection (d),

"(2) is carried out by a seller in interstate or foreign commerce of a firearm or ammunition product, involves a firearm or ammunition product, and is described in paragraph (6) of subsection (d), or

"(3) is carried out by a trade association in the course of organizing, advising, or representing its members who are manufacturers in interstate or foreign commerce of a firearm or ammunition product, or who are sellers in interstate or foreign commerce of a firearm or ammunition product, with respect to conduct of such manufacturers or sellers described in paragraph (4) or (6) of subsection (d), as the case may be,

and that is lawful under chapter 44 of title 18, United States Code, or under applicable State law, shall not be a basis for imposing a restriction on interstate or foreign commerce on a person on the list described in subsection (a) as a result of harm caused by the criminal or other unlawful misuse of such firearm or ammunition product by any other person.

"(d) DEFINITIONS.—In this section:

"(1) AMMUNITION PRODUCT.—The term 'ammunition product' means 'ammunition' as defined in section 921(a)(17) of title 18, United States Code, and includes a component part of such ammunition

product that has been shipped or transported in interstate or foreign commerce.

"(2) FIREARM PRODUCT.—The term 'firearm product' means 'firearm' as defined in section 921(a)(3) of title 18, United States Code, and includes a component part of such a firearm that has been shipped or transported in interstate or foreign commerce.

"(3) INTERSTATE OR FOREIGN COMMERCE.—The term 'interstate or foreign commerce' has the meaning given that term in section 921(a)(2) of title 18, United States Code.

"(4) MANUFACTURER.—The term 'manufacturer in interstate or foreign commerce of a firearm or ammunition product' means—

"(A) a person who, in the course of a business in interstate or foreign commerce to import, make, produce, create, assemble, design, or formulate a firearm or ammunition product, imports, makes, produces, creates, assembles, designs, or formulates a firearm or ammunition product, or engages another person to import, make, produce, create, assemble, design, or formulate a firearm or ammunition product;

"(B) a seller in interstate or foreign commerce of a firearm or ammunition product made by another person, but only with respect to an aspect of the firearm or ammunition product that the seller makes, produces, creates, assembles, designs, or formulates; and

"(C) any seller in interstate or foreign commerce of a firearm or ammunition product on which, or on the packaging of which, the seller is also represented as the manufacturer of the firearm or ammunition product.

"(5) RESTRICTION ON INTERSTATE OR FOREIGN COMMERCE.—The term 'restriction on interstate or foreign commerce'—

"(A) means—

"(i) civil damages or equitable relief, or

"(ii) any other limitation or condition, awarded or ordered by a Federal, State, or local court, that restricts the ability of a person listed under subsection (a) to freely engage in interstate or foreign commerce with respect to firearm or ammunition products, or of a trade association listed under subsection (a) to freely

engage in lawful activities on behalf of its membership; and

"(B) does not include any damages, equitable relief, or other limitation or condition arising from—

"(i) breach of contract or warranty in connection with the purchase of a firearm or ammunition product; or

"(ii) physical injuries or property damage resulting directly from the failure to function or improper functioning of a firearm or ammunition product, when used as intended, due to a defect in design or manufacture.

"(6) SELLER.—The term 'seller in interstate or foreign commerce of a firearm or ammunition product' means a person who—

"(A) in the course of a business conducted in interstate or foreign commerce for such purpose, sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a firearm or ammunition product in the stream of commerce; or

"(B) in the course of a business conducted in interstate or foreign commerce for such pur-

pose, installs, repairs, refurbishes, reconditions, or maintains an aspect of a firearm or ammunition product.

"(7) STATE.—The term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory of possession of the United States.

"(8) TRADE ASSOCIATION.—The term 'trade association' means any association or business organization (whether or not incorporated under the laws of any State), 2 or more members of which are manufacturers or sellers in interstate or foreign commerce of a firearm or ammunition product.".

○

Chairman SENSENBRENNER. Without objection, the amendment in the nature of a substitute before all Members shall be considered the original text for purposes of amendment, shall be considered as read and open for amendment at any point.

[The amendment in the nature of a substitute follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. SENSENBRENNER

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protection of Lawful Commerce in Arms Act''.

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, under the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of nondefective firearms, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States is heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, marketing, distribution, manufacture, importation, or sale to the public of firearms or ammunition that have been shipped or transported in interstate or foreign commerce are not, and should not be, liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products.

(5) The possibility of imposing liability on an entire industry for harm that is the sole responsibility of others is an abuse of the legal system, erodes public confidence our Nation's laws, threatens the diminution of a basic constitutional right, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in America's free enterprise system, and constitutes an unreasonable burden on interstate and foreign commerce.

(6) The liability actions commenced or contemplated by municipalities and cities are based on theories without foundation in hundreds of years of the common law and American jurisprudence. The possible sustaining of these actions by a maverick judicial officer would expand civil liability in a man-

ner never contemplated by the Framers of the Constitution. The Congress further finds that such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section five of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term ''engaged in the business'' has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term ''manufacturer'' means, with respect to a qualified product, a

person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term ''person'' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term ''qualified product'' means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code, including any antique firearm (as defined in section 921(a)(16) of such title)), or ammunition (as defined in section 921(a)(17) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term ''qualified civil liability action'' means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal

or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action where a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

(B) NEGLIGENT ENTRUSTMENT.—In subparagraph (A)(ii), the term ''negligent entrustment'' means the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

(6) SELLER.—The term ''seller'' means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

(7) STATE.—The term ''State'' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term ''trade association'' means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product.

Amend the title so as to read as follows: ''A Bill to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.''.

Chairman SENSENBRENNER. And the Chair recognizes himself for 5 minutes.

This bill provides protection for those in the firearms industry from lawsuits arising out of the criminal or unlawful acts of those who misuse their products. The substitute text we will consider today is based on the text of H.R. 123, the "Firearms Heritage Protection Act," introduced by Mr. Barr, and H.R. 1966, the "Interstate Commerce Freedom Act," introduced by Mr. Hostettler.

Although the intent of H.R. 2037 and the substitute is the same, the substitute is a more clearly drafted piece of legislation than H.R. 2037, which appears to be a bureaucratic Rube Goldberg device designed primarily for jurisdictional purposes.

The substitute provides that a qualified civil liability action cannot be brought in any State or Federal court and that such actions that are pending on the date of enactment shall be dismissed immediately by the court in which the action was brought.

Qualified civil liability action is defined as a civil action brought by any person against a manufacturer or seller of firearms or ammunition in interstate commerce for damages resulting from the criminal or unlawful misuse of such products. However, this term does not include an action against a person who transfers a firearm or ammunition knowing that it will be used to commit a crime of violence or a drug-trafficking crime or a comparable or identical State felony law. It also does not include an action brought against the seller for negligent entrustment or negligence per se.

The substitute includes some modifications to the text of H.R. 123 and H.R. 1966 as introduced. The substitute includes several additional exceptions to the jurisdictional provision: an exception for actions for breach of contract or warranty in connection with the purchase of a firearm or ammunition and an exception for actions for damages resulting directly from a defect in design or manufacture of a firearm or ammunition when used as intended.

The substitute also makes clear that only licensed manufacturers and sellers are covered by the bill. Recent litigation against the tobacco industry has inspired lawsuits against the firearms industry on theories of liability that would hold firearms manufacturers and sellers liable for actions of those who use their products in a criminal or unlawful manner. Such lawsuits threaten to rip tort law from its moorings in personal responsibility and force firearms manufacturers into bankruptcy, leaving potential plaintiffs asserting traditional claims of product manufacturing defects unable to recover more than pennies on the dollar in a Federal bankruptcy court.

Lawsuits seeking to hold the firearms industry responsible for criminal or unlawful use of its products are attempts to accomplish through litigation what has not been achieved by legislation in the democratic process. Various courts have correctly described such suits as "improper attempts to have the court substitute its judgment for that of the legislature." As explained by another Federal judge, "Plaintiffs' attorneys simply want to eliminate handguns."

The unpopular nature of firearms in some quarters threatens to weaken the moral foundation of tort law generally, as well as the separation of powers, if left unchecked by the Congress. If the judicial system is allowed to eliminate the firearms industry based on legal theories holding manufacturers liable for the misuse of their

products, it is also likely that similar liability will be applied to an infinitely long list of other industries whose products are statistically associated with misuse.

In 1985, one Federal judge said it would be nonsensical to claim that a product can be defective under the law when it has no defect. He predicted that plaintiffs' unconventional application of tort law against such product would apply also to automobiles, knives, and even high-calorie food.

A few years later, to the detriment of the American economy and consumers everywhere, this new age of litigation is already upon us. As we are all well aware by now, even once fanciful lawsuits against fast-food companies are rapidly proliferating. It is time for Congress to fulfill its constitutional duty and exercise its authority under the Commerce Clause to prevent a few State courts from bankrupting the national firearms industry and denying all Americans their fundamental rights to keep and bear arms.

Who would like to give an opening statement on the Democratic side?

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that a statement of the Ranking Member, Mr. Conyers, be entered in the record at this time.

Chairman SENSENBRENNER. Without objection.

[The statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

It is truly a sad day, when cities and communities, all across America, are plagued with random acts of gun violence and this is our solution. There is no doubt that some bad apple members of the gun industry bear some responsibility because they have failed to incorporate safety devices and have marketed guns to criminals as being fingerprint-proof or easily concealed. Is this really the best proposal we have to offer to deal with this problem, granting immunity to the very culprits responsible for imposing the harm?

First, it discourages gun manufacturers from adopting reasonable design safety enhancements such as "gun locks" or gun safety triggers by substantially limiting the type of permissible product liability actions that plaintiffs can bring against gun manufacturers. Section 4 of the bill specifically leaves unprotected those individuals that sustain foreseeable injuries resulting from design defects. This loophole is unbelievable considering the increasingly high number of accidents being reported involving innocent children.

Second, the bill irresponsibly protects dealers who recklessly sell to gun traffickers knowing (or with reason to know) that the trafficker intends to resell the guns to criminals. This loophole is achieved as a result of the bill's narrow definition of "negligent entrustment." The bill defines "negligent entrustment" to include only initials transfers completed between the original seller and purchaser of a gun. It does not include secondary transfers even when the original seller is aware of the purchaser's intent to resell to a particular individual.

Finally, the bill continues to perpetrate what former Supreme Court Chief Justice Warren Burger said was "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American people by special interest groups that I have ever seen in my lifetime." In its findings, it contains language conferring an individual right to keep and bear arms, without qualifying this right as the Court has repeatedly done. Over the past sixty years, the Supreme Court has gone to great lengths to explain that the right conferred by the Second Amendment only exists in relationship "to the preservation or efficiency of a well regulated militia."

Some might say this bill is nothing more than an attempt at the 11th hour of the Congress to solidify the Republican base by throwing a bone to gun owners.

HR 2037 sends the wrong message to manufacturers, dealers and other members of the gun industry. It says to these various groups that even when you act irre-

sponsibly, you will not be held accountable for your actions. I strongly urge my colleagues to oppose this measure.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minute.

Mr. SCOTT. I yield the balance of my time to the gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Scott.

I will not use all of the time yielded to me, and I realize that on this Committee there are differences of opinion relative to the use of guns and the amount of regulation that should or should not be in place relative to gun usage and gun purchases by people who are felons or mentally ill and the like.

But I don't think this bill really is about that fight. I think this bill is about California. And as a Californian, I really feel the need to stand up for the State government of California that has recently made a decision relative to tort law in California. And I think it is obvious that this—California being such a large State and deciding that why should gun manufacturers—of all the people who make products, why should they be singled out not to be held accountable for harm that they do under the tort system?

Having made that decision, I think it is improper for the Federal Government to go in and second-guess the California Assembly, State Senate, and Governor, who were lawfully elected by the voters of that State to make the determination relative to tort law.

On a personal level, I must say I agree with the decision made by California legislators. You know, some of these cases have to do with negligence in the distribution and the like, but there are more traditional issues as well. One of the things we found recently is that the trigger locks put in place on handguns fail to protect and actually preclude the use of the weapons more than half the time.

Now, if I'm a parent and I have a handgun and I put a trigger lock—I purchase a handgun with a trigger lock to protect my child and the trigger lock doesn't work and my child is harmed, why should the manufacturer be exempt from liability in that circumstance? I just don't think there's a good rationale for saying of all the things that we're going to pre-empt, of all the industries we're going to protect, that we are going to single out gun manufacturers and say that they cannot be held accountable as any other manufacturer of a product would be under the traditional tort law.

I recognize that, in addition to the substance of this issue, that the Chairman has once again clarified the jurisdiction of the Committee, and for that we're always grateful. But I would like to say—I don't plan to offer amendments to the bill because I don't think it can be fixed. I plan to vote no. I believe that it will not become law, and I think it is improper to try and overrule the State of California.

And I yield back to Mr. Scott the time and thank him for yielding.

Mr. SCOTT. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, all Members will have 5 days to put opening statements in the record.

[The prepared statement of Mr. Hostettler follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN N. HOSTETTLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Thank you, Mr. Chairman, for yielding.

I support this bill and the Constitutional principles that it embraces, and I thank the Chairman for considering this important piece of legislation today.

Manufacturers, dealers, and importers of firearms should not be subjected to frivolous lawsuits solely because they design, manufacture, and sell these products.

These frivolous lawsuits threaten to slowly erode our 2nd Amendment rights.

This bill, as amended with language from H.R. 123 and H.R. 1966, will ensure that manufacturers and dealers will not be held liable when harm is inflicted by a third party's misuse of the product.

Using a firearm to engage in criminal activity is an intervening, superceding cause of harm for which the criminal should be punished instead of frivolously punishing the manufacturer of the firearm.

This bill reaffirms our 2nd Amendment rights and restores freedom to this area of civil liability actions.

I urge my colleagues to also support this bill and the important rights it protects.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

For the life of me, I cannot figure out why of all of the important pieces of legislation before the committee, why it is so urgent, with the short time that we have left before the session ends, to consider this bill that would grant extensive immunity to gun dealers and manufacturers, even if they engage in reckless or negligent behavior.

It seems to me that this is another bone that the majority is throwing to another industry. This time the gun industry—perhaps a bone is the wrong analogy—this may be more appropriately characterized as a juicy steak. You would think that we would be leery of considering legislation like this, that gives undue benefits to the gun industry in light of the public perceptions that congress is in the hands of corporate interests. In a year where we have witnessed the fall of Enron, MCI Worldcomm, Tyco and Adelphia you would think that we would tighten up regulation on potential abuses and threats available to corporations. This legislation proves otherwise.

Section 4 of this legislation effectively eliminates protection for individuals that sustain foreseeable injuries resulting from design defects. I don't know how this can be. This basically suggest that where there is an obvious risk based on the design of the gun and the gun manufacturer with his eyes closed could see the risk, the gun manufacturer will not be liable for the injury. This result is amazing in light of the number of innocent children who die from gun injuries. Surely gun manufactures should be responsible for correcting foreseeable risks.

Another problem is the bill's definition of Negligent entrustment. The bill defines this to include only initial transfers completed between the seller and purchaser of a gun even where the seller has knowledge that the original purchaser plans to transfer the gun to high risk individuals. In this time of terrorism, and in a nation where our communities are ripped with gun violence, it seems to me that we would want to hold manufacturers liable for their knowledge a seller's intent to transfer a gun to a high risk individual. This bill chooses to do the opposite and give these manufactures cover.

Again, Mr. Chairman, this is the wrong message for us to send at the wrong time. There are other issues of great importance pending this committee and we should be addressing those measures as opposed to addressing handouts to the gun lobby.

Thank you Mr. Chairman.

Our current law protects our nation's citizens from The protection of our society rests on two judicial pillars—criminal and civil law. Under criminal law, gun dealers and manufacturers are prohibited from selling to a certain narrowly defined class of people—people who already have convictions, people who are fugitives from justice, and people in a number of other categories.

But these criminal gun laws are not sufficient by themselves. We rely on the civil justice system to impose on gun dealers and manufacturers a duty to act reasonably and responsibly when selling their products.

Like other businesses, and like everyone else in America, if gun dealers and manufacturers do not act reasonably—if they act negligently, or if they blatantly disregard the obvious consequences of their actions—they may be held liable. This is important, because they are society's last checkpoint before deadly weapons are placed directly into the hands of dangerous individuals.

If we ever wanted to give gun dealers and manufacturers an incentive to act carelessly and recklessly, H.R. 2037 is the way to do it.

The bill says to gun manufacturers and gun dealers: go ahead and ignore common sense, disregard the consequences of your actions, and we will let you off the hook. As long as you meet the technical letter of the criminal statutes, you are no longer responsible for irresponsible and reckless actions. You, unlike any other industry, are no longer required to act reasonably.

This proposed bill is even more outrageous considering the numerous examples of gun dealers and manufacturers who bury their heads in the sand and try to avoid responsibility for the damage they cause. Why are we choosing this industry, which has such a poor record, to single out for special exemptions?

At my request, undercover investigators from the U.S. General Accounting Office posed as gun buyers who wanted to acquire armor piercing ammunition. The GAO investigators approached numerous dealers and openly discussed whether the ammunition would be able to "take down" an airplane or pierce an armored limousine.

Despite these incredible reg flags, every single ammunition dealer that GAO spoke with was willing to make the sale. Not one dealer even reported these suspicious activities to law enforcement authorities. None of these dealers took any actions that a "reasonable" person in their shoes would have taken under the same circumstances.

I have a copy of several excerpts from GAO's undercover tape recordings, which I would like to make part of the record.

My point is not that dealers who act like the ones recorded on the GAO tapes should be held liable per se. Each case should be considered on the basis of the specific facts surrounding it. But what is important is preserving the civil justice system as a way of holding people accountable if they do act irresponsibly.

Gun dealers and gun manufacturers are not the only ones who should have a duty to act responsibly. We in Congress should act responsibly as well. But this is not responsible legislation, and it should be rejected by the Committee.

[The prepared statement of Mr. Wexler follows:]

PREPARED STATEMENT OF THE HONORABLE ROBERT WEXLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Thank you, Mr. Chairman.

The basis of product liability law is grounded in common sense; product manufacturers and sellers must take reasonable precautions to prevent injury. This legislation would exempt the gun industry from much of the liability for actions of which they hold a level of responsibility. As a result, gun manufacturers who refuse to build safety features into their products could simply release their wares into the marketplace without a care. Gun sellers who refuse to take reasonable precautions to prevent criminals from obtaining firearms would be equally as carefree.

It is not unreasonable to have gun manufacturers provide safety devices to prevent accidental injury. It is not unreasonable to require gun sellers to take steps to prevent criminals from obtaining firearms. We only ask that those in the gun industry do what people in every industry do—use common sense. So being presented with this legislation, I must ask why the bill's proponents think it is unreasonable to believe that gun manufacturers and sellers are unable to exercise common sense. My fear is not that they are unable, but that they are unwilling.

It is more than irresponsible to exempt gun manufacturers and sellers from these laws; it is unconscionable. The House majority leadership should be ashamed of themselves for trying to send a legislative gift basket to the gun industry at the expense of victims of firearm injury. In the waning days of this Congress, when meaningful legislation to improve the lives of all Americans is left waiting to be considered, it is especially insulting to the families of these victims that their right to seek redress in court would be preempted by lawmakers seeking only to serve the needs of the gun industry.

I ask that my colleagues exercise common sense and vote down this legislation.

Thank you, Mr. Chairman.

[Intervening business.]

We will now return to H.R. 2037. Are there amendments?

Mr. FRANK. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

Mr. FRANK. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. FRANK. I got in trouble last time and caused some confusion when I moved to change the title, so I won't do that now, but it does seem to me this is inappropriately titled. Instead of the Protection of Lawful Commerce in Arms Act, it ought to be the Decent Burial for the Doctrine of States Rights Act, because it is now very clear that the notion that there is some general boundary between Federal and State concerns has been dissolved in a bath of right-wing ideology in this Committee and elsewhere.

Whenever States, either through their legislature or through their courts or through any other duly constituted State entity, threaten to engage in public policies which have historically and constitutionally been the prerogative of the States, but which a majority of this Committee and this House does not like, States rights goes out the window.

This is an argument that says we, the Federal Government, will pre-empt anytime, anywhere, anyplace, what States are doing that we don't like.

Now, I must say that from what I have seen, I have not yet been persuaded on the merits of any lawsuit against the gun manufacturers. I believe that if I were the official in a local government or a State government, if I were involved in this, I would not bring such suits. I think they are a mistake. But I do not understand when it became out job to be the supervisory board for the State courts.

And let's be very clear. There is no principle left, there is no rule that says, well, these are State matters and these are Federal matters. Federal matters are whatever this Congress wants them to be.

Now, as constitutional doctrine, that's perfectly legitimate. The people who wrote the Constitution 200-and-whatever years ago didn't know a great deal about modern times. And it is valid to say that, in effect, things have gotten nationalized.

My objection is not to the assertion of national supremacy. It is to the inconsistency with which it is asserted and the fact that it is governed by ideology.

If people want to say straightforwardly that they are for the issue being decided at whichever level of government they are likely to favor the outcome, that's a perfectly reasonable position. But let's understand what we are saying. We are saying that modern technology and a whole range of other things have outdated that part of the Constitution, and the Constitution really no longer has the distinction between Federal and State jurisdictions. Because if this is a Federal issue, then so is virtually everything else. There is hardly a tort law that's left—we've done medical malpractice. We're doing this. I cannot think of anything that would be excluded from this rationale.

So on that basis, I am voting against it. I must say that I do not myself hold to a strict constitutional States rights view. I do believe that there is a problem when we assert jurisdiction and impose uniformity in those matters which are best left to the individual discretion of the States. And so—and as was made clear by the Chairman—this is a negative judgment on the capacity, perhaps good faith but certainly capacity of the State courts correctly to decide important measures. I do not think that adverse judgment on State courts is warranted. I do not think we ought to allow ideology to drive constitutional views. And I think we also ought to be clear

that given whatever else we have done this year, this puts the final nail in the coffin of the doctrine that there are things which are constitutionally committed to the States and that we shouldn't have.

Now, I realize this is the Congress and not the court. At the same time that Congress is pre-empting these various State decisions, we have a United States Supreme Court majority, generally cheered on by many of the Members of this Committee, that is systematically dismantling Federal laws with a scope beyond what I've generally seen. And so there are States rights. They shouldn't, I guess, overstate it.

According to the prevailing conservative theory in America, the States have a right to discriminate against almost anybody except on racial grounds. States cannot be forbidden by the Federal Government to discriminate against people with handicaps or people because of their age or almost anything else. States cannot be compelled to respect the rights of certain citizens. That's a violation of States rights. But if the State courts decide to handle tort suits, medical malpractice here, matters that have traditionally been within the entire compass of the States, right-wing ideology will pre-empt that. I think that is very bad public policy.

Mr. BARR. Mr. Chairman?

Chairman SENSENBRENNER. Are there amendments? The gentleman from Georgia?

Mr. BARR. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognize for 5 minutes.

Mr. BARR. Thank you.

Mr. Chairman, I commend you for bringing up the legislation and offering the substitute. Even though this debate this morning is just getting started, we've already heard two Alice-in-Wonderland propositions through the looking glass.

On the one hand, we have been accused through the proposal before us today of carving out an exemption or an immunity from a particular industry when, in fact, what we're doing is not carving anything out; we are preventing courts from doing precisely that. Lawful, legitimate manufacturers and sellers of lawful, legitimate products have, through the entire course of our Nation's commercial history pre-dating the Constitution, have enjoyed immunity from being liable, held liable for a subsequent unforeseen misuse, including criminal misuse, of their products.

These lawsuits that have been cropping up over the last few years are attempting to change all of that through the court system by bringing specious lawsuits, making one particular category of manufactured item or sold item, that is, firearms, liable when nobody else is. And all we're doing here is—we're not carving them out for an exemption from liability. We're simply saying that they ought to be treated like everybody else always has been and, in fact, is. So that is the most specious of specious arguments to say that we're carving out immunity from liability.

The other one is what we've just heard, and that is that it is not a proper role for the Congress to step in and reassert an explicit constitutional right. The first amendment to the Constitution, the "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

dom of speech, or of the press," et cetera, I'll guarantee you that those that just rant and rail and rave against this particular bill as somehow not an exercise in proper federalism or federalist theory would be the first in line to propose that the Congress would step—should step in, would have to step in if any State or municipality dared to try and bring a lawsuit or pass a local ordinance or a piece of legislation that somehow infringed on free speech or infringed on freedom of the press or infringed on the establishment of religion clause. Yet when it comes to the second amendment, which is just as explicit as the first amendment in its recited guarantees of a right, an inherent right of the people, in this case the right to keep and bear arms, those on the other side that favor gun control step in and say, Ah, how dare you try and reassert, reaffirm that constitutionally protected right, and step in and tell jurisdictions such as municipalities that they cannot move to infringe that right.

What we're doing here today, Mr. Chairman, in this piece of legislation, this proposal, both the underlying bill as well as the substitute, is to simply reaffirm that this is, in fact, a constitutionally guaranteed right and to make the statement that municipalities, for example, cannot just step in with impunity and try and derogate that right through these specious lawsuits. No other industry is subject to this, and here, again, we're not carving out the firearms industry or those who legitimately sell or retail firearms for special protection. We're simply saying that they shall not be subject to special punishment, unequal protection of the law, which is what these lawsuits would do and have tried to do.

So this is a very sound piece of legislation. It is very carefully crafted, H.R. 123 and the substitute. It is not overly broad. It simply reaffirms a constitutionally guaranteed right and rights the ship of state in the proper context. We're not carving out anything special. We are simply saying that local courts, local municipalities cannot provide unequal protection of the law in carving out for punitive treatment a legitimate, lawful industry, which is, in fact, the firearms industry in this country.

I yield back.

Chairman SENSENBRENNER. Are there amendments? If there are—the gentlewoman from California have an amendment?

Ms. WATERS. No. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman's recognized for 5 minutes.

Ms. WATERS. I'd like to add my voice in opposition to this legislation and to in many ways reiterate our support of what my colleague has said. And I'd like to basically say to my friends who are always poised to support whatever the NRA would like to have done in this Congress that this in no way would lessen your support for what you believe is the letter of the law and the fourth amendment.

For those of you who support the NRA and most of its activities, I think this is asking you to go a bit far. And I'd like for you to just consider it. What you're doing is carving out special exemption here from liability when, in fact, there are many other industries and manufacturers of many other products that have the responsibility for making sure those products are as safe as they can be, for making sure that they are utilized properly, to make sure that

they know and understand everything about their product so as to ensure the safe use of that product.

Here what we're simply doing is creating a very, very special exemption and saying under no circumstances, under no conditions should the manufacturers of guns have to assume liability for the unlawful use of that product.

I think that's extraordinary, and I think that it's going a bit far. And I certainly would not want to think that the Congress of the United States would bring its heavy hand to try and turn around a law that has been produced in the State of California in an attempt to make sure that these products are not misused.

So I would just ask you to think about this, to think about all that you have done to give comfort and protection to the right of people to manufacture guns, to the NRA to be able to promote and organize its efforts around the ability for people to own and maintain guns. You have done all of that. How much more do you need to do? I think this is asking you to go a bit far to give special exemption from liability protection to manufacturers, and I would ask you to reconsider. And I yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? If there are no amendments, the question is on adoption of the amendment in the nature of a substitute. Those in favor will say aye? Those opposed, no?

The ayes appear to have it.

Ms. WATERS. rollcall.

Chairman SENSENBRENNER. rollcall is ordered. The question is on adoption of the amendment in the nature of a substitute. Those in favor will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. Aye.

The CLERK. Mr. Gekas, aye. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Barr?

Mr. BARR. Aye.

The CLERK. Mr. Barr, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Graham?

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Mr. Issa?
[No response.]
The CLERK. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
Mr. FRANK. No.
The CLERK. Mr. Frank, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members who wish to cast or change their vote, the gentleman from North Carolina, Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly, aye.
Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye.
Chairman SENSENBRENNER. Further Members who wish—the gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye.
Chairman SENSENBRENNER. Further Members who wish to record or change their votes? If not, the clerk will report.
The CLERK. There are 18 ayes and 5 nays.
Chairman SENSENBRENNER. And the amendment in the nature of a substitute is agreed to.
The Chair notes the presence of a reporting quorum. The question is on reporting the bill favorably. Those in favor will say aye. Opposed, no.
The ayes appear to have it. The ayes have it and the——
Mr. BARR. Recorded vote.
Chairman SENSENBRENNER. A recorded vote is requested. Those in favor of reporting the bill favorably will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Gekas?
Mr. GEKAS. Aye.
The CLERK. Mr. Gekas, aye. Mr. Coble?
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
[No response.]
The CLERK. Mr. Barr?
Mr. BARR. Aye.
The CLERK. Mr. Barr, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Graham?
[No response.]
The CLERK. Mr. Bachus?
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye. Mr. Green?

[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Mr. Issa?
[No response.]
The CLERK. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. Conyers?
[No response.]
The CLERK. Mr. Frank?
Mr. FRANK. No.
The CLERK. Mr. Frank, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No. Thank you.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote. The gentleman from California, Mr. Gallegly?
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly, aye.
Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Graham.

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye.

Chairman SENSENBRENNER. Other Members who—the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Chairman SENSENBRENNER. Other Members who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes and 6 nays.

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. Aye.

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. No.

Chairman SENSENBRENNER. Any other stragglers?

[No response.]

The CLERK. Mr. Chairman, there are 18 ayes and 7 nays.

Chairman SENSENBRENNER. And that includes the votes of Messrs. Issa and Meehan?

The CLERK. Yes, sir.

Chairman SENSENBRENNER. Okay. And the motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendment adopted here today. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the rules in which to submit additional, dissenting, supplemental, or minority views.

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