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Must Courts Recalibrate Tort Law Governing Firearms in Light of the Second Amendment?

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MUST COURTS RECALIBRATE TORT LAW GOVERNING FIREARMS IN LIGHT OF THE SECOND AMENDMENT?

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Homer: *I'd like to buy your deadliest gun, please.*
Raphael: *Aisle 6, next to the sympathy cards. . . .*
Woah, careful there, Annie Oakley.
Homer: *I don't have to be careful. I got a gun.*
–The Cartridge Family,
The Simpsons (1997)†

I. INTRODUCTION

When it enacted the Protection of Lawful Commerce in Arms Act ("PLCAA") in 2005,[1] Congress viewed the prospect of at least some forms of civil liability as a threat to the rights secured by the Second Amendment.[2] In treating the right to keep and bear arms as extending to individuals, and one that would operate as a constraint on the exercise of state authority, our national legislature jumped the gun on the U.S. Supreme Court by a few years.[3] Over the last fifteen years, that latter tribunal has explicated an increasingly protective right of individuals to own and carry firearms. So far, however, courts have not suggested that the Second Amendment might limit the operation of state tort law, even though in other cases it has become well settled that judges engage in state action when resolving private disputes and announcing doctrinal choices. In fact, the issue has received no serious judicial attention to date and surprisingly little in the way of sustained scholarly analysis.

This Article aims to fill that lacuna in the literature. As a prelude, Section II explains the Court's growing acceptance of the proposition that

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† Episode #183 (season 9, episode 5). The hilarity continued back home:

> Homer: *But I have to have a gun. It's in the Constitution.*
>
> Lisa: *Dad, the Second Amendment is just a remnant from revolutionary days. It has no meaning today.*
>
> Homer: *You couldn't be more wrong Lisa. If I didn't have this gun, the King of England could just walk in here any time he wants and start shoving you around. Do you want that? Huh? Do ya!?*

Id. Evidently the network with broadcast rights in England, which was owned by Rupert Murdoch at the time, refused to air this episode after government censors raised objections, so fans across the pond had to wait for an edited version to appear in syndication. *See* Brandon Zachary, *How a Controversial Episode of the Simpsons Was Briefly Banned in the UK*, COMIC BOOK RES., https://www.cbr.com/the-simpsons-episode-banned-in-the-uk/ (Jan. 31, 2022).

1. Pub. L. No. 109-92, §§ 2-4, 119 Stat. 2095, 2095-99 (2005) (codified at 15 U.S.C. §§ 7901-7903).

2. Congress found, in part, that "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others . . . threatens the diminution of a basic constitutional right and civil liberty." 15 U.S.C. § 7901(a)(6).

3. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008); *see also infra* Section IV (discussing *Heller* and its progeny); *cf.* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 641 (1995) (identifying three earlier instances).

the U.S. Constitution constrains state common law, first in the context of defamation claims and then in other respects as well. Section III summarizes the range of contexts where tort law impacts the possession and sale of firearms, ranging from intentional torts such as battery, various forms of negligence including negligent entrustment, strict products liability, and public nuisance claims. Section IV summarizes the U.S. Supreme Court's recently expanded interpretation of the Second Amendment before evaluating in Section V how that might operate to limit tort doctrines governing the resolution of injury claims linked to the use of guns.

II. PLACES WHERE THE U.S. CONSTITUTION CONSTRAINS TORT DOCTRINE

Until the mid-twentieth century, tort litigation operated in a domain largely unaffected by federal constitutional law.[4] Now classic decisions of the U.S. Supreme Court gradually eroded this separation: almost sixty years ago, protections for free speech began to intrude on common law standards for defamation and related claims.[5] In 1964, the Court held that public officials could recover for defamation only upon a showing of actual malice.[6] It soon expanded the category of plaintiffs made subject to this heightened standard to include public figures as well,[7] and it later superimposed the actual malice standard on intentional infliction of emotional distress claims.[8]

Moreover, public figures would have to prove actual malice by clear

4. *Cf.* John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1162 (2005) ("The current generation of state constitutional decisions reviewing tort reform legislation is merely the latest incarnation of what has been almost one and a half centuries of interaction between American constitutions at the state and *sometimes federal* levels, on one hand, and the law of torts, on the other." (emphasis added)).

5. *See* David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 71 (1990) ("The one tort that has been fully subjected to this [First Amendment] scrutiny, libel, has been transformed into a half-tort, half-constitutional hybrid that is almost universally viewed as unsatisfactory."); *id.* at 101 ("One of the unfortunate consequences of prescribing constitutional rules is that it stunts the growth of state law. This has happened in defamation, where constitutional requirements have left the states little room or incentive to experiment with their own solutions to the speech-tort conflict."); *see also* Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) ("The First Amendment limits California's libel law in various respects.").

6. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also* St. Amant v. Thompson, 390 U.S. 727, 730-33 (1968) (elaborating on the actual malice standard); Rosenblatt v. Baer, 383 U.S. 75, 82-83 (1966) (explaining that the challenged statement must be "of and concerning"—i.e., make "specific reference" to—the plaintiff).

7. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion); *cf.* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 492 & n.8, 513-14 (1984) (assuming without deciding that the actual malice standard should apply to a product disparagement claim brought by a manufacturer of loudspeakers, treated as a public figure, against the publisher of *Consumer Reports*).

8. *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988).

and convincing evidence,[9] and reviewing courts could not show their typical deference to the fact finder on these issues.[10] Entirely private figures also have to surmount this heightened pleading requirement when the allegedly tortious speech affects a matter of public concern,[11] at least when they seek to recover presumed or punitive damages.[12] Even for speech not rising to such a vaunted level, the Court has demanded that private figures prove some negligence by each of the named defendants, rejecting the common law's willingness to hold publishers strictly liable for disseminating injurious falsehoods authored by someone else.[13]

If nothing else, this constitutional makeover of the common law as it related to tortious speech demonstrates that judicial pronouncements about doctrine used to resolve private disputes qualify as state action.[14] In defamation and related claims, however, state common law had not singled out speech targeting public figures for enhanced exposure to liability.[15] Instead, the Supreme Court worried that generally applicable

9. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-57 (1986) (holding that, when ruling on a motion for summary judgment in a public figure defamation case, the trial judge must overlay this more demanding evidentiary standard).

10. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688-93 (1989); Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1771-74, 1776-79, 1791-92 (1998); *see also id.* at 1755-56, 1761-66, 1770-71 (discussing other procedural accommodations).

11. *See* Snyder v. Phelps, 562 U.S. 443, 454-61 (2011) (affirming the reversal of a $5 million judgment for the father of a deceased soldier for intentional infliction of emotional distress and intrusion upon seclusion claims against several members of the Westboro Baptist Church for an outrageous protest in the vicinity of his son's funeral); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-78 (1986) (holding that private plaintiffs also must carry the burden of proving falsity of speech when it involves a matter of public concern); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979) (struggling to define the line between public and private figures).

12. *See Gertz*, 418 U.S. at 349-50 (holding that a non-public figure could recover such damages only upon a showing of actual malice); *cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-63 (1985) (plurality opinion) (holding that presumed and punitive damages for errors in a credit report would not require proof of actual malice because it did not involve a matter of public concern).

13. *See Gertz*, 418 U.S. at 347 (holding that the Constitution forbids imposing "liability without fault" on a publisher in a defamation action brought even by a private figure); *id.* at 340 ("[A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."); *id.* at 347 n.10 (calling this "[o]ur caveat against strict liability").

14. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); *id.* at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."); *see also Hepps*, 475 U.S. at 777 (reiterating this point, though recognizing that "a suit by a private party is obviously quite different from the government's direct enforcement of its own laws"); Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1139-43, 1180-81 (2015) (criticizing this aspect of *Sullivan*).

15. *Cf.* Anderson, *supra* note 5, at 95 ("Nothing in the common law of privacy distinguishes between media publicity and nonmedia disclosures; if it did it almost certainly would be unconstitutional for discriminating against the press."). The defamation torts do, of course, broadly target speech, and the First Amendment has limited the common law's reach even in claims brought by non-public figures. In contrast, intentional infliction of emotional distress and other types of claims do not spring solely from speech, but the Court has carved out protection in those contexts as well.

doctrine may allow judges and jurors to act on their prejudices,[16] which might well chill persons wishing to engage in core speech—in short, the First and Fourteenth Amendments dictated an exemption from the operation of tort rules having general application.[17] Although some commentators have questioned the Court's tendency to treat verdicts as exercising some regulatory effect,[18] particularly in the course of limiting speech torts,[19] this central premise has become fairly well established.[20]

16. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011); *see also* Tilley, *supra* note 14, at 1120 ("[T]he Court identified as state action not just the specific verdict against the *Times* but the entirety of Alabama libel law as it was applied to litigants generally."); *id.* at 1139-43 (elaborating); *id.* at 1152 ("[B]y ignoring the prudential practice of defining state action modestly, the Court reached horizontally into the legislative prerogative to devise rules that balance public welfare and speech rights, and reached vertically into the states' prerogative to develop tort law in accord with their unique cultures."); *cf. id.* at 1124 ("[T]he Court has followed what appears to be a prudential rule that the relevant state action should be defined at the most granular level possible. As a result, the Court generally considers the actual verdict in the case as the state action, and does not examine the abstract private law rules that produced the verdict.").

17. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 668-69 (1991) (conceding that state action existed but allowing a promissory estoppel claim against a newspaper for revealing a confidential source, explaining that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). This test for whether or not recognition of liability might run afoul of the First Amendment has attracted a good deal of criticism. *See, e.g.*, Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1673-75 (2009); *id.* at 1675 ("Since the level of generality drives the outcomes under the generally applicable law approach, and there is no coherent explanation for how to define the level of generality, the generally applicable law approach ultimately tells us nothing.").

18. This distinction between judges and juries (or doctrinal commands and individual verdicts) occasionally has arisen in federal preemption cases. *See, e.g.*, Bates v. Dow AgroSciences LLC, 544 U.S. 431, 443 (2005); *id.* at 445 ("A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement."); *see also* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he jury verdict established only that Phenergan's warning was insufficient. It did not mandate a particular replacement warning . . . ."). Whatever the impact of individual jury verdicts applying obligations and standards framed in broad (or vague) terms, when judges announce in their opinions particular duties owed under a state's common law, and in ways that conflict with federal law, little doubt should remain about the proper operation of the Supremacy Clause.

19. *See* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 768 n.67 (2004) ("Sometimes [in applying the First Amendment to speech torts] the Court doesn't seem to distinguish between the state rule of law and its application by the courts to the case at hand."); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1165 (2013) (pointing out "the twice-removed-from-the-sovereign (plaintiff brings action, jury enforces) posture of *Snyder*" *v. Phelps*, 562 U.S. 443 (2011)); *id.* at 1141 ("The state of Maryland, not just a particular jury deputized by it, wants to protect its citizens from emotional harm, the argument goes, by suppressing speech. Attributing this goal to the state, however, is problematic in many respects."); Solove & Richards, *supra* note 17, at 1686-90 (advocating a test that asked instead whether the government had defined a duty rather than simply acted to enforce private ordering undertaken by the parties); *id.* at 1695-97 (explaining that this represented a narrower inquiry than whether state action existed).

20. *See* Anderson, *supra* note 19, at 758 ("The constitutional limitations on defamation are so entrenched that it is hard to imagine the Court abandoning them."); *id.* at 776 (explaining that, "after twenty-five years and twenty-seven Supreme Court decisions, defamation law was effectively disabled, at least in the sphere of public affairs"); Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 403-04 (2003) (arguing that *N.Y. Times v. Sullivan* "open[ed] the doors wide to judicial inspection of the common law for consistency with the Bill of Rights . . . and there is no way logically—conceptually—to push them shut"); *id.* at 417 (suggesting "that

Indeed, while the 1964 decision that inaugurated the constitutionalization of the law of defamation has attracted a growing chorus of criticism,[21] its point of departure has so spread into adjacent areas that calls to revisit the state action question seem destined to fail.

Some commentators have viewed the U.S. Supreme Court's intrusion on the speech torts as a narrow and peculiar willingness to use the First Amendment to limit the reach of the common law,[22] while others saw generalizable lessons and imagined that other subjects governed by the law of torts could become constitutionalized.[23] More recently, the Court has deployed the Due Process Clause to constrain punitive damages,[24] which juries may award in all manner of civil cases, as well as the Supremacy Clause in recognizing a preemption defense to tort claims in limited areas,[25] but these incursions would hardly necessitate any

common law ought to be no less subject than statute law to judicial inspection for consonance with the requirements of a constitutional bill of rights").

21. *See, e.g.*, Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454-55 (2022) (Thomas, J., dissenting from the denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 2428-29 (2021) (Gorsuch, J., dissenting from the denial of certiorari); *see also* Ken Bensinger, *DeSantis Calls for Justices to Revisit Ruling on Defamation Suits*, N.Y. TIMES, Feb. 11, 2023, at A13; David Enrich, *Assaults Are Likely to Continue on a Landmark Supreme Court Ruling That Protects the Media*, N.Y. TIMES, Apr. 20, 2023, at B1; Paul Farhi et al., *Fox News Documents Stun Legal Experts*, WASH. POST, Feb. 24, 2023, at C1 (referencing "efforts by some prominent conservatives to undo the ruling"); Adam Liptak, *Thomas Calls for Justices to Reconsider Libel Ruling*, N.Y. TIMES, Oct. 11, 2023, at A16.

22. *See* Thomas B. Colby, *The Constitutionalization of Torts?*, 65 DEPAUL L. REV. 357, 358 n.7 (2016) (The defamation cases "represent a much more narrow phenomenon: the imposition of constitutional limits on the substantive content of a particular branch of tort law, in the name of a particular substantive constitutional right.").

23. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 437 (2016) ("The modern Supreme Court's deepest and most widely accepted foray into tort law began in 1964 with *Sullivan*."); *id.* at 437-43 (elaborating); *id.* at 435 ("[B]y the mid-1960s, the Court was actively making tort law, both directly and indirectly. In American tort law today, the Supreme Court is a major player."); *id.* at 442 ("Regardless of whether the Supreme Court was correct to extend *Sullivan* as far as it did, . . . [i]t stands as an extraordinary example of how, notwithstanding *Erie* [*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)], the Court can become so deeply involved in tort cases that constitutional law displaces tort law.").

24. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (holding that procedural due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"); State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 418-29 (2003) (invalidating an award as grossly excessive); *see also* Colby, *supra* note 22, at 358 ("[E]xisting constitutional doctrine provides ample opportunities for the U.S. Supreme Court to make massive forays into the traditional territory of state tort law—virtually all of them through the operation of the Due Process Clause . . . . [But,] outside of the punitive damages arena, the Court has barely constitutionalized tort law at all."); *id.* at 380 ("[T]he Court has taken virtually no steps to constitutionalize tort law beyond the realm of punitive damages—despite the ample opportunities and clearly illuminated doctrinal avenues to do so."); Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1112 (2005) ("The constitutional concerns the Court has relied upon to justify due process constraints on punitive damages also justify constraining other areas of tort law . . . .").

25. *See, e.g.*, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1679-80 (2019); Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 490-93 (2013); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 633-38 (2012); *see also* Goldberg & Zipursky, *supra* note 23, at 448 (calling it "an elaborate and, indeed,

alterations in substantive doctrine.[26] Section V will circle back to this broader question, focusing on the potential impact of the Second Amendment, but first let us consider the many different forms of tort liability involving firearms.

III. PLACES WHERE TORT LAW CONSTRAINS ACCESS TO AND USE OF FIREARMS

Personal injury litigation involving guns and ammunition has arisen with some frequency. When the users of firearms intentionally shoot another person, they will face the prospect of liability for battery unless able to successfully invoke a self-defense privilege. When the users of firearms unintentionally shoot another person, they may have to defend against a lawsuit alleging negligence. Victims also might assert tort claims against owners of firearms (including retailers) when the latter negligently allow weapons to fall into the wrong hands. In the event of some defect in a firearm that causes injury, victims may pursue products liability claims against manufacturers and other entities in the commercial chain of distribution. Lastly, and most controversially, the criminal misuse of weapons has prompted efforts to pursue novel theories of negligent marketing and public nuisance, whether brought by the direct victims of gun violence or public entities that have to pick up the tab.

Tort reform legislation has impacted the availability of various potential claims for injuries caused by firearms.[27] In 2005, Congress acted to displace certain theories of liability asserted against individuals and the industry. Most prominently, the PLCAA terminated fairly novel types of lawsuits against commercial suppliers, but it preserved many traditional tort claims against sellers and had no impact whatsoever on noncommercial tortfeasors.[28] Notably, Congress premised this action in

transformative use by the Court of the doctrine of federal preemption"); *id.* at 451 ("[T]he Court now understands itself as commissioned by the Supremacy Clause to search out and eliminate tort liability that it regards as too greatly interfering with the operation of federal regulations."); *see also* Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 904-25, 968-70, 978 (1996) (explaining that, before 1992, the Court consistently had rejected the notion that preemption would operate to limit liability).

26. In some contexts, increasingly creative efforts to evade preemption have sometimes met with judicial approval. *See* LARS NOAH, LAW, MEDICINE, AND MEDICAL TECHNOLOGY 748 (5th ed. 2022) ("The utterly inane contortions seemingly necessitated by the steady expansion of the preemption defense never cease to amaze me.").

27. *See* Elizabeth T. Crouse, Note, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1357-59 (2004) (summarizing several state statutes).

28. *See* 15 U.S.C. §§ 7902, 7903(5); *see also* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 392-98 (2d Cir. 2008) (rejecting various constitutional objections to this statute); Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 388-92 (Alaska 2013) (same); Adames v. Sheahan, 909 N.E.2d 742, 764-65 (Ill. 2009) (same). *But see* Gustafson v. Springfield, Inc., 282 A.3d 739, 745-57 (Pa. Super.

no small part on what it understood as the command of the Second Amendment.[29] At the same time, when it required that makers and sellers of handguns provide purchasers with secure storage or other child safety devices such as trigger locks, Congress had incentivized their use by owners of this class of firearms with a promise of tort immunity.[30]

A. Duties of Owners and Other Users

Depending on the circumstances, individuals who possess, brandish, or discharge a firearm in a manner that injures someone else may confront claims for an intentional tort or some form of negligence. For a variety of doctrinal and practical reasons, however, the plaintiffs in these sorts of cases may struggle to recover damages.

1. Intentional Torts

When one person attacks another, the assailant typically has committed an assault and battery, which would entitle the victim to assert claims for an intentional tort. Although the use of a firearm or other weapon would add credence to an assault claim,[31] which depends on the victim having a reasonable apprehension of an imminent battery—as well as causing a more grievous injury if fired, which would enhance the prospect of

Ct. 2022) (en banc) (per curiam) (finding merit to some of the constitutional objections), *app. granted*, 296 A.3d 560 (Pa. 2023).

29. *See* 15 U.S.C. § 7901(a)(1)-(2); *see also id*. § 7901(a)(6) ("The possibility of imposing liability on an entire industry for harm that is solely caused by others . . . threatens the diminution of a basic constitutional right . . . ."); Travieso v. Glock Inc., 526 F. Supp. 3d 533, 538 (D. Ariz. 2021) ("The PLCAA guards against infringement of Second Amendment rights by ensuring a citizen's continued ability to 'acquire arms.'" (citation omitted)).

30. *See* Child Safety Lock Act of 2005, Pub. L. No. 109-92, § 5, 119 Stat. 2095, 2099-101 (codified as amended at 18 U.S.C. § 922(z)) (providing that "a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action" (namely, "for damages resulting from the criminal or unlawful misuse of the handgun by a third party," apart from any "negligent entrustment or negligence per se" claims)); *see also* Estate of Arrington v. Michael, 738 F.3d 599, 605-06 (3d Cir. 2013) (holding that this immunity applied even though an unauthorized user had found the key to a gun-lock nearby). Two decades earlier, when it created the National Instant Criminal Background Check System (NICS), Congress included an immunity for certain government actors in the event of mistakes when supplying information to the database. *See* 18 U.S.C. § 922(t)(6); *cf.* Von Lossberg v. State, 506 P.3d 251, 256-58 (Idaho 2022) (holding that this provision did not bar a wrongful death claim, brought by the estate of a person who committed suicide with a gun he had purchased, against a state agency for failing to report the decedent's prior mental health commitment).

31. *See, e.g.*, Jordan v. Wilson, 5 So. 3d 442, 448-50 (Miss. Ct. App. 2008); Castiglione v. Galpin, 325 So. 2d 725, 726 (La. Ct. App. 1976); *cf.* Joseph Blocher et al., *Pointing Guns*, 99 TEX. L. REV. 1173, 1183-84 (2021) ("[P]ointing a firearm at another person and at a range that could inflict injury would satisfy these [criminal law] definitions of assault—as long as something about the circumstances, including but not limited to the words or behavior of the person doing the pointing, would cause a reasonable person to fear that the gun might imminently be fired.").

recovering sizeable compensatory and punitive damages[32]—the involvement of a gun would not invariably impact the availability of such claims. Nonetheless, the fact that any applicable liability insurance policy typically would exclude coverage for intentionally caused injuries—and that most defendants lack attachable personal assets to satisfy a judgment against them—helps to account for the relative dearth of such lawsuits.[33]

Establishing a privilege of self-defense will defeat an assault and battery claim unless the defendant met an alleged threat with unreasonable force. Cases involving firearms arise with some frequency, and the courts have tolerated the use of wounding force only in limited circumstances: discharging a weapon to repel a simple trespass or prevent theft qualifies as excessive unless the shooter also had a reasonable apprehension of a threat to personal safety, especially in the home.[34] One common variant involves the setting of unmanned "spring guns" that fire when an intruder trips a wire or other triggering device, and courts reject assertions of self-defense in such cases unless those defendants would have enjoyed a justification to fire the gun manually if they had personally confronted like circumstances.[35] The recent proliferation of "stand your

32. *See, e.g.*, Carter v. Carter, No. LACV095809, 2017 WL 7313233 (Iowa D. Ct. Dec. 18, 2017) (entering a judgment of over $10.25 million in such a case), *aff'd*, 957 N.W.2d 623, 635-37 (Iowa 2021); Harris v. Jungerman, 560 S.W.3d 549, 553-55, 562-63 (Mo. Ct. App. 2018) (affirming a judgment of $5.75 million); Badall v. Durgapersad, 454 S.W.3d 626, 634-36 (Tex. Ct. App. 2014) (affirming a judgment of over $750,0000). When the attorney for the plaintiff in the cited Missouri case sought to execute on the judgment, he got shot as well by the original defendant, which led to the filing of a wrongful death lawsuit! *See* Riegel v. Jungerman, 597 S.W.3d 695, 698-99, 707-08 (Mo. Ct. App. 2019) (rejecting objections to the appointment of a receiver pending resolution of the second battery claim).

33. *See, e.g.*, State Farm Fire & Cas. Co. v. Morgan, 64 F. App'x 537, 540 (7th Cir. 2003) (The policyholder's "volitional acts of aiming the gun at Morgan and pulling the trigger were not accidents, and therefore are not covered under the Policy. That she may not have intended to kill Morgan . . . is irrelevant."); *see also* Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1431-32 & n.90 (2013) (explaining why "few gun injury claims are actually brought"); Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, 1269 (2014) ("[I]f most firearm injuries are intentionally caused and result from illegal actions, then the standard liability policy excludes coverage for the policyholder."); *id.* at 1275-86 (elaborating). In contrast, homeowners' policies typically encompass negligence claims against any owners or users of firearms in the household, but often such defendants do not carry this form of liability coverage. *See id.* at 1271 ("[M]any tortfeasors injuring others with firearms may not have homeowners or renters insurance and . . . specific provisions in their liability policies are likely to exclude coverage for those that do."); *id.* at 1295 ("Those most likely to shoot and injure others are not likely to be insured or otherwise have homeowners or renters insurance . . . ."). *See generally* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006).

34. *See, e.g.*, Goldfuss v. Davidson, 679 N.E.2d 1099, 1104-05 (Ohio 1997); *see also* RESTATEMENT (SECOND) OF TORTS §§ 65, 70-71, 79, 81-82 (AM. L. INST. 1965). *See generally* W.C. Crais, III, Annotation, *Civil Liability for Use of Firearm in Defense of Habitation or Property*, 100 A.L.R.2d 1021 (1965 & 2023 Supp.).

35. *See, e.g.*, Katko v. Briney, 183 N.W.2d 657, 660-62 (Iowa 1971); *see also* United Zinc & Chem. Co. v. Britt, 258 U.S. 268, 275 (1922) ("The liability for spring guns and mantraps arises from the fact that the defendant . . . expected the trespasser, and prepared an injury that is no more justified than if he had held the gun and fired it."); Geoffrey W.R. Palmer, *The Iowa Spring Gun Case: A Study in*

ground" laws has expanded the scope of the self-defense privilege against both criminal and civil liability,[36] though seemingly without affecting the rule governing spring guns.

2. Negligence

Nowadays, personal injury litigation occupies itself with alleged breaches of the general duty to act with ordinary care and to avoid creating an unreasonable risk of injury to others. Tort law routinely characterizes firearms as inherently dangerous instrumentalities,[37] which may have consequences for users' standard of care and owners' obligations when entrusting them to others. Although the negligent entrustment theory does not apply exclusively to weapons,[38] in the context of firearms it may

American Gothic, 56 IOWA L. REV. 1219, 1220 (1971) ("Spring guns have a very long history in the common law . . . ."). *See generally* J.D. Perovich, Annotation, *Use of Set Gun, Trap, or Similar Device on Defendant's Own Property*, 47 A.L.R.3d 646, §§ 4-10 (1973 & 2023 Supp.).

36. *See* Hannah Knowles & Emmanuel Felton, *Stand-Your-Ground Policies Expand Across the Country*, WASH. POST, Feb. 27, 2022, at A3 ("Stand-your-ground laws have now spread to most states in the United States, propelled by gun groups such as the National Rifle Association and lawmakers of both parties who say people under attack should not have to worry about a legal 'duty to retreat.'"); *id.* (discussing studies that found resulting increases in homicide rates, adding that some state legislators have proposed also eliminating any need to prove a reasonable fear for safety); *see also* Petula Dvorak, Opinion, *In America, More Guns. And More Fear for All*, WASH. POST, Apr. 25, 2023, at B1; Jack Healy et al., *As Guns and Anger Flow, Tiny Missteps Turn Tragic*, N.Y. TIMES, Apr. 21, 2023, at A1 (discussing a series of recent "wrong address" shootings, calling them "innocent mistakes that became examples of the kind of deadly errors that can occur in a country bristling with guns, anger and paranoia, and where most states have empowered gun owners with new self-defense laws"). *See generally* Jay M. Zitter, Annotation, *Construction and Application of "Make My Day" and "Stand Your Ground" Statutes*, 76 A.L.R.6th 1 (2012 & 2023 Supp.).

37. *See* Cathey v. Bernard, 467 So. 2d 9, 11 (La. Ct. App. 1985) ("The law is clear that a loaded gun is a dangerous instrumentality and that a duty of extraordinary care is placed on those in control of such weapons."); Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) ("Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer."); R.A. Shapiro, Annotation, *Contributory Negligence or Assumption of Risk of One Injured by Firearm or Air Gun Discharged by Another*, 25 A.L.R.3d 518, § 2 (1969) ("Weapons are commonly treated as dangerous instrumentalities, and this should be taken into account in stating the standard of care to be imposed upon one handling such weapons . . . ."); *see also* B. Finberg, Annotation, *Hunter's Civil Liability for Unintentionally Shooting Another Person*, 26 A.L.R.3d 561, § 2[a] (1969) ("Although it would appear to be self[-]evident, some courts have made a specific ruling that a loaded gun constitutes a dangerous instrumentality."); *cf. id.* § 3 n.2 (adding, however, that "[s]everal of the courts have specifically rejected, as erroneous, instructions to the effect that one using a firearm must exercise 'the highest degree of care'").

38. *See, e.g.*, Weaver v. Stewart, 151 A.3d 70, 75 (N.H. 2016); *see also* Douglass v. Hartford Ins., 602 F.2d 934, 936 (10th Cir. 1979) (noting that such claims are "recognized in virtually every state"); RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (AM. L. INST. 1965); *id.* § 308 cmt. b ("[I]t is negligent to place loaded firearms or poisons within reach of young children or feeble-minded adults."). I recently summarized these cases as follows:

> [Negligent entrustment] claims involve an owner transferring control over a dangerous instrumentality to someone whom they know lacks the competence to use it safely. For instance, a parent might face liability for loaning a car to their unemancipated child if they knew that the child did not have the skill to operate the vehicle safely. This recurring fact

extend to any number of ways that an owner might allow access by an irresponsible user,[39] whether intentionally, such as by giving or lending,[40] or unintentionally, such as by inadequate storage.[41] Negligence while hunting represents another common fact pattern that focuses on the unreasonable use of guns.[42] Courts have, however, resisted the occasional efforts by plaintiffs to visit strict liability on the owners or users of firearms.[43]

B. Duties of Manufacturers and Other Sellers

Companies that produce and sell firearms also may face a variety of tort claims, and some of these do not require any showing of negligence. As with all consumer goods, manufacturers and other commercial entities involved in the sale of guns and ammunition encounter products liability litigation when defects cause injury. Although retailers may face negligent entrustment claims for making sales to irresponsible

> pattern hardly exhausts the range of plausible claims: an entrustee may be a grown child, a more distant relative, or entirely unrelated to the entrustor, and other products may qualify as dangerous instrumentalities.

Lars Noah, *"Go Sue Yourself!" Imagining Intrapersonal Liability for Negligently Self-Inflicted Harms*, 70 FLA. L. REV. 649, 672 (2018) (footnotes omitted).

39. *See* Jefferson Fisher, Comment, *So How Do You Hold This Thing Again?: Why the Texas Supreme Court Should Turn the Safety off the Negligent Entrustment of a Firearm Cause of Action*, 46 TEX. TECH. L. REV. 489, 510-12, 515 (2014). For a lengthy catalog of decisions involving the entrustment of a firearm to a minor, both intentionally (other than by sale) and unintentionally (by negligent storage), see L.S. Rogers, Annotation, *Liability of Person Permitting Child to Have Gun, or Leaving Gun Accessible to Child, for Injury Inflicted by the Latter*, 68 A.L.R.2d 782 (1959 & 2023 Supp.). The problem just keeps getting worse. *See* Roni Caryn Rabin, *Study Finds Gun Deaths of Children Are Up*, N.Y. TIMES, Oct. 7, 2023, at A11 ("Some 2,590 children and teenagers under the age of 18 died of firearm injuries in 2021, up from 1,311 in 2011, according to the study, which was published in the journal *Pediatrics*. In other industrialized countries, guns are not even among the top three causes of death for children.").

40. *See, e.g.*, Long v. Turk, 962 P.2d 1093, 1098-100 (Kan. 1998) (involving a powerful handgun that the defendant allegedly gave to his seventeen-year-old son).

41. *See, e.g.*, Wood v. Groh, 7 P.3d 1163, 1168-69 (Kan. 2000); Estate of Strever v. Cline, 924 P.2d 666, 671 (Mont. 1996); *see also* Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1216-45 (2000) (arguing in favor of allowing such claims when linked to an accidental shooting, suicide or even criminal misuse); *cf.* Sims v. Crates, 789 So. 2d 220, 224-25 (Ala. 2000) (affirming summary judgment granted to the defendant because the plaintiff had failed to establish any negligence in the storage of a handgun).

42. *See, e.g.*, Junker v. Ziegler, 498 N.E.2d 1135, 1137-38 (Ill. 1986); Watson v. State Farm Fire & Cas. Ins., 469 So. 2d 967, 972-73 (La. 1985); Holliday v. McKeiver, 401 N.W.2d 278, 280 (Mich. Ct. App. 1986); *see also* Finberg, *supra* note 37 (collecting cases).

43. *See, e.g.*, Jupin v. Kask, 849 N.E.2d 829, 842-43 (Mass. 2006) (explaining that, though handguns qualify as dangerous instrumentalities, their improper storage does not amount to an abnormally dangerous activity subject to strict liability); Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. Ct. App. 1998) (holding that the victim of a drive-by shooting had no strict liability cause of action on the theory that a shotgun that a father gave to his son as a gift was an inherently dangerous instrumentality and that the son's actions on the night of the shooting were abnormally dangerous).

purchasers,[44] still more sweeping theories of negligent marketing or distribution (and public nuisance) brought against the industry have fared less well.[45]

1. Product Defects

If a firearm suffers from some sort of flaw, then sellers face liability even without proof of any negligence on their part. Strict liability for product defects has become well established in this country over the last half-century, and the courts have treated commercial suppliers of guns and ammunition in much the same way as manufacturers and other sellers of all manner of consumer goods.[46] Whether the flaw exists in only a single unit (i.e., a manufacturing defect),[47] in the entire product line (i.e., a design defect),[48] or in the instructions and warnings that accompany it

44. *See, e.g.*, Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1206-08 (Fla. 1997) (involving a rifle sold to a visibly intoxicated customer); First Trust Co. v. Scheels Hardware & Sports Shop, Inc., 429 N.W.2d 5, 8-9 (N.D. 1988) (selling a gun to a fifteen-year-old); *see also* Timperio v. Bronx-Lebanon Hosp. Ctr., 384 F. Supp. 3d 425, 434 (S.D.N.Y. 2019) (dismissing such a claim where the retail seller of an AR-15 rifle had no reason to know that the purchaser would use it to commit a mass shooting); *cf.* Gallara v. Koskovich, 836 A.2d 840, 851-56 (N.J. Super. Ct. 2003) (involving theft from a retailer). *But see In re* Acad., Ltd., 625 S.W.3d 19, 30-32 (Tex. 2021) (declining to recognize negligent entrustment claims in the case of gun sales); *cf.* Valentine v. On Target, Inc., 727 A.2d 947, 950-53 (Md. 1999) (holding that a retailer owed no duty to a person murdered with a gun stolen from it). *See generally* Daniel P. Rosner, Note, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 454-66 (2018).

45. *See* Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1583, 1607 (2014); Lars Noah, *Platitudes About "Product Stewardship" in Torts: Continuing Drug Research and Education*, 15 MICH. TELECOMM. & TECH. L. REV. 359, 387 (2009) (referencing "novel (and largely unsuccessful) theories asserted against gun sellers"); Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 AM. J. PUB. HEALTH 1991, 1995 (2007) (complaining that the PLCAA "eliminates litigation's feedback mechanism without providing an alternative means to ensure the safe design and distribution of firearms"). *See generally* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (Timothy D. Lytton ed., 2005).

46. *See, e.g.*, Gower v. Savage Arms, Inc., 166 F. Supp. 2d 240, 249, 254 (E.D. Pa. 2001).

47. *See, e.g.*, Olin Corp. v. Smith, 990 S.W.2d 789, 797-98 (Tex. Ct. App. 1999) (affirming a $6.5 million judgment for plaintiffs alleging injuries from defective ammunition); *cf.* Tosseth v. Remington Arms Co., 483 F. Supp. 3d 659, 672-73 (D.N.D. 2020) (holding that the plaintiff had failed to prove an alleged manufacturing defect in a pistol).

48. *See, e.g.*, O'Neal v. Remington Arms Co., 817 F.3d 1055, 1060 (8th Cir. 2015) (reversing summary judgment granted to the manufacturer on design defect claims, noting that the defendant previously had admitted that some of its Model 700 rifles "were susceptible to inadvertent discharges when the safety lever was moved from the safe position to the fire position without the trigger being pulled"); Guay v. Sig Sauer, Inc., 610 F. Supp. 3d 423, 434 (D.N.H. 2022) (denying the defendant's motion for summary judgment on design defect claims where a P320 semiautomatic pistol allegedly fired without a trigger pull); *see also* Loitz v. Remington Arms Co., 563 N.E.2d 397, 407-08 (Ill. 1990) (affirming a plaintiff's judgment on a claim of negligent design against a shotgun manufacturer after the barrel exploded, but reversing the punitive damage award); Champe Barton & Tom Jackman, *Popular Handgun Has a Potentially Fatal Flaw, Victims Say*, WASH. POST, Apr. 12, 2023, at A1 (detailing numerous lawsuits alleging injuries from inadvertent firing of the SIG Sauer P320 pistol caused by a faulty

(i.e., an informational defect),[49] liability for any resulting injuries would attach to the entity that introduced the flaw and all of those beneath it in the commercial chain of distribution.[50]

Design defects have always posed the greatest conceptual difficulties. An older test—linked to the field's origins in breach of warranty actions—asked whether the product's performance had disappointed the expectations of an ordinary consumer.[51] This "consumer expectations" test has increasingly given way to a form of risk-utility analysis—closer to a negligence-based balancing inquiry—that asks whether a "reasonable alternative design" existed.[52] When victims of intentional shootings assert products liability claims against manufacturers, however, the defendants invariably respond by pointing out that their weapons performed exactly as designed.[53] Courts also have not embraced efforts to use risk-utility balancing detached from needing to identify a reasonable alternative design; in effect, plaintiffs generally cannot label an entire product category as defective, which sometimes goes under the heading of a "manifestly unreasonable design."[54]

Beyond the traditionally recognized product defect categories, plaintiffs have attempted to assert negligent marketing or distribution claims against commercial entities, but these have generally failed.[55]

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design).

49. *See, e.g.*, Cobb v. Insured Lloyds, 387 So. 2d 13, 19 (La. Ct. App. 1980); *cf.* Deaton v. Robison, 878 N.E.2d 499, 503-04 (Ind. Ct. App. 2007) (holding that an allegedly inadequate warning for a rifle could not have been the cause of an accidental shooting).

50. *See, e.g.*, Curry v. Sile Distribs., 727 F. Supp. 1052, 1054 (N.D. Miss. 1990) (non-negligent distributor of a muzzle loading rifle); Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 124 & n.2 (Okla. 1984) (importers of a shotgun that exploded); *see also* Int'l Armament Corp. v. King, 686 S.W.2d 595, 596, 599 (Tex. 1985) (affirming an award of punitive damages against a culpable importer of a shotgun that misfired).

51. *See, e.g.*, Trespalacios v. Valor Corp. of Fla., 486 So. 2d 649, 650 (Fla. Dist. Ct. App. 1986); *see also* Davis v. McCourt, 226 F.3d 506, 512 (6th Cir. 2000) (holding that the open-and-obvious nature of the risk defeated a design defect claim).

52. *See, e.g.*, Hurst *ex rel.* Hurst v. Glock, Inc., 684 A.2d 970, 973-74 (N.J. Super. Ct. App. Div. 1996) (lack of a magazine disconnect); Endresen v. Scheels Hardware & Sports Shop, Inc., 560 N.W.2d 225, 234-35 (N.D. 1997) (cartridge burst in the chamber of a Beretta 9 mm pistol); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (AM. L. INST. 1998) (explaining that "firearms . . . may be found to be defective [in design] only . . . if reasonable alternative designs could have been adopted").

53. *See, e.g.*, Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1158 (Md. 2002) (rejecting a design defect claim against the manufacturer of a semiautomatic pistol because "it worked exactly as it was designed and intended to work and as any ordinary consumer would have expected it to work"); *id.* at 1153 (pointing out that "a handgun does not malfunction when it shoots a bullet into a person in whose direction it is fired").

54. *See, e.g.*, Wasylow v. Glock, Inc., 975 F. Supp. 370, 380-81 (D. Mass. 1996) (refusing to impose such a form of "absolute liability"); *id.* at 381 n.19 (collecting cases from other jurisdictions that held likewise); Forni v. Ferguson, 648 N.Y.S.2d 73, 73-74 (App. Div. 1996). *See generally* Michael J. Tõke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181 (1996).

55. *See, e.g.*, Merrill v. Navegar, Inc., 28 P.3d 116, 132-33 (Cal. 2001); Hamilton v. Beretta U.S.A.

Alternatively, plaintiffs injured by nondefective firearms have sought to take advantage of the strict liability standard applied to "abnormally dangerous activities," but again largely without success.[56]

2. Public Nuisance

Extending the negligent marketing or distribution theory still further, various parties have sought to charge the firearms industry with committing a public nuisance, which courts typically have defined as causing a substantial interference with a right shared by the community at large.[57] The plaintiffs in these cases argued that supplying guns and ammunition used in the commission of serious crimes had posed a threat to the public's safety. Municipalities and other public entities have pursued this tactic the most aggressively, seeking to recoup the significant outlays necessitated by criminal misuse of firearms,[58] though such litigation has targeted other industries as well.[59] With limited exceptions,

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Corp., 750 N.E.2d 1055, 1061-68 (N.Y. 2001); *see also* Salvador Rizzo, *Survivor of 2022 Sniper Attack Sues Gunmakers*, WASH. POST, Oct. 3, 2023, at B1 (discussing a new lawsuit "against several gun manufacturers, alleging that their marketing practices glorify violence and contribute to an epidemic of mass shootings"). The same pattern appears in claims involving particularly destructive hollow-point ammunition. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 154-57 (2d Cir. 1997); Leslie v. United States, 986 F. Supp. 900, 909-13 (D.N.J. 1997), *aff'd mem.*, 178 F.3d 1279 (3d Cir. 1999); Downs v. R.T.S. Sec., Inc., 670 So. 2d 434, 439 (La. Ct. App. 1996).

56. *See, e.g.*, Copier *ex rel.* Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 836-38 (10th Cir. 1998); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1044-45 (Fla. Dist. Ct. App. 2001).

57. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979). *See generally* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702 (2023).

58. *See, e.g.*, City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1231-41 (Ind. 2003) (reversing the dismissal of a public nuisance claim); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141-44 (Ohio 2002) (4-3 decision) (same); *cf.* Kitsap Cnty. v. Kitsap Rifle & Revolver Club, 337 P.3d 328, 338-44, 351 (Wash. Ct. App. 2014) (holding that the defendant's excessive noise and inability to guard against the escape of bullets rendered a shooting range an enjoinable public nuisance). *See generally* David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000). Private litigants occasionally press such claims. *See, e.g.*, Johnson v. Bryco Arms, 304 F. Supp. 2d 383, 390-93, 398-99 (E.D.N.Y. 2004); *cf.* Young v. Bryco Arms, 821 N.E.2d 1078, 1091 (Ill. 2004) (dismissing public nuisance claims brought by several individuals).

59. For a couple of recent examples that canvas some of the earlier litigation, see People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499 (Ct. App. 2017) (successful claims involving lead paint), and State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (Okla. 2021) (unsuccessful claims involving prescription opioids).

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities . . . . Liability on such theories has been rejected by most courts, and is excluded by this section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.

the courts have rebuffed public nuisance claims in this context.[60] Nonetheless, fearing that such lawsuits might gain traction, Congress largely put an end to them in 2005 when it enacted the PLCAA.[61]

IV. EMBRACING A CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

The Bill of Rights, added to the U.S. Constitution in 1791, included the following language: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[62] In 1868, the Fourteenth Amendment extended certain federal constitutional restraints to state and local actors,[63] and with time the U.S. Supreme Court used this broad language to incorporate many but not all of the original provisions of the Bill of Rights. At the same time, a number of state constitutions enumerated a right to keep and bear arms,[64] but this Section will focus on interpretations of the Second Amendment, and its incorporation against the states, before exploring in the next Section what this all might mean for the operation of state tort law.

In 2008, the U.S. Supreme Court decided *District of Columbia v. Heller*.[65] The five conservative members of the Court struck down the District's longstanding prohibition on the possession of handguns and its requirement for securing other loaded firearms with trigger locks. Writing for the majority, Justice Scalia held that the Second Amendment protected

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RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (AM. L. INST. 2020).

60. *See, e.g.*, City of Phila. v. Beretta U.S.A. Corp., 277 F.3d 415, 420-22 (3d Cir. 2002) (affirming the dismissal of a public nuisance claim); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 131-33 (Conn. 2001) (same); City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1113-48 (Ill. 2004) (same); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 194-204 (App. Div. 2003) (same).

61. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 389-91, 398-404 (2d Cir. 2008); *see also* Jim Dwyer, Opinion, *Keeping Gun Makers Smiling*, N.Y. TIMES, May 29, 2013, at A18 (explaining that the PLCAA "smothered lawsuits by cities around the country"); *cf.* Ileto v. Glock, Inc., 421 F. Supp. 2d 1274, 1298-304 (C.D. Cal. 2006) (dismissing most of the private plaintiffs' claims because of this intervening congressional action), *aff'd*, 565 F.3d 1126, 1138-46 (9th Cir. 2009). *But see* City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813, 833 (Ind. Ct. App. 2019) (reiterating its earlier ruling that the state's public nuisance statute fell within the PLCAA's predicate exception); *cf.* Williams v. Beemiller, Inc., 952 N.Y.S.2d 333, 338-39 (App. Div. 2012) (allowing claims brought by private parties based on violations of federal law), *amended*, 962 N.Y.S.2d 834, 835-36 (App. Div. 2013) (rejecting alternative grounds offered by the defendants for affirming the trial court's decision to dismiss the negligence and public nuisance claims).

62. U.S. CONST. amend. II.

63. *See id.* amend. XIV, § 1.

64. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (cataloging 44 such provisions); *see also infra* note 189 and accompanying text (discussing a handful of tort decisions referencing their respective state's constitutional protection of this right).

65. 554 U.S. 570 (2008).

an individual right to keep and bear arms for self-defense in the home.[66] Two years later, in *McDonald v. City of Chicago*,[67] a slightly more fractured Court held that the Fourteenth Amendment incorporated this same right against the states.[68] This pair of decisions left many questions unanswered and prompted a lively academic debate.[69] Then, in 2022, the Court decided *New York State Rifle & Pistol Association v. Bruen*,[70] which offered us a still more expansive take on this constitutional right.[71]

Several things that the Court said just fifteen years ago deserve mention before trying to make sense of *Bruen*. After a lengthy historical exegesis on the meaning of the Second Amendment, the majority in *Heller* equivocated on precisely what form of heightened scrutiny to apply.[72] In his opinion for the four dissenters, Justice Stevens persuasively critiqued the majority's historical analysis.[73] Meanwhile, in his opinion for the four dissenters, Justice Breyer carefully undertook the sort of means-ends analysis entirely glossed over by the majority when it invalidated the

66. *See id.* at 635. The four liberal members of the Court joined in a pair of dissenting opinions. *See id.* at 636 (Stevens, J., dissenting); *id.* at 681 (Breyer, J., dissenting).

67. 561 U.S. 742 (2010).

68. *See id.* at 791 (plurality opinion). The author of the majority opinion in *Heller* filed a concurrence for the sole purpose of more fully answering the approach offered by one of the dissenting Justices. *See id.* at 791 (Scalia, J., concurring). One member of the *Heller* majority wrote separately to offer his idiosyncratic approach to incorporation. *See id.* at 805 (Thomas, J., concurring in part and concurring in judgment) (preferring to use the Fourteenth Amendment's Privileges or Immunities Clause rather than its Due Process Clause). The same four members of the Court dissented, though they did not all join in the pair of opinions. *See id.* at 858 (Stevens, J., dissenting) (for himself alone); *id.* at 912 (Breyer, J., dissenting) (joined by Ginsburg & Sotomayor, JJ.).

69. *See, e.g.*, JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187 (2015); Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229 (2020); Symposium, *The Geography of a Constitutional Right: Gun Rights Outside the Home*, 83 LAW & CONTEMP. PROBS., no. 3, 2020; Symposium, *Guns and Freedom*, 39 QUINNIPIAC L. REV. 357 (2021); Symposium, *Second Amendment*, 116 NW. U. L. REV. 1 (2021); Symposium, *The Second Amendment at the Supreme Court: "700 Years of History" and the Modern Effects of Guns in Public*, 55 U.C. DAVIS L. REV. 2495 (2022).

70. 142 S. Ct. 2111 (2022).

71. The likely avalanche of academic commentary on this one has only just begun. *See, e.g.*, Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623 (2023); Danny Y. Li, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821 (2023); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023).

72. *See* District of Columbia v. Heller, 554 U.S. 570, 628-29 & n.27 (2008) (applying some form of heightened scrutiny); *id.* at 634-35 (responding to the dissent's criticism of its failure to elaborate on the standard of review but rejecting an interest balancing approach).

73. *See id.* at 640 (Stevens, J., dissenting) (finding it "abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes"); *id.* at 679 ("Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia.").

District's handgun prohibition.[74]

The *Heller* majority conceded that the Second Amendment hardly granted individuals an absolute right to possess firearms.[75] More interestingly, it summarily carved out some forms of gun control as permissible:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[76]

The majority also limited Second Amendment protection to commonly used weapons.[77] It plainly did not thereby mean only firearms used by the

74. *See id.* at 714 (Breyer, J., dissenting) ("The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative."); *id.* (finding no undue burden in part because "[t]he law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition"); *id.* at 719-20 (criticizing the majority's failure to put as much effort into trying to apply its newfound right to the facts before it); *id.* at 722 ("One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.").

75. *See id.* at 626 (majority opinion) ("[T]he right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."); *cf. id.* at 635 ("The Second Amendment . . . surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). Can the reference in the last-quoted passage (in the parenthetical) to "responsible" be understood to mean non-negligent? *Cf. id.* at 644 (Stevens, J., dissenting) (wondering about this turn of phrase).

76. *Id.* at 626-27 (majority opinion); *see also id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."); *id.* at 632 ("Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents."); *id.* at 635 ("[F]or those regulations of the right that we describe as permissible . . . [,] there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."); *cf. id.* at 688 (Breyer, J., dissenting) ("[T]he majority implicitly, and appropriately, rejects [strict scrutiny] by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear."); *id.* at 721 ("Why these? Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues."); Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1386 (2009) ("These exceptions will ultimately have to be justified under some standard of scrutiny . . . possibly under an undue-burden or an intermediate-scrutiny test.").

77. *See Heller*, 554 U.S. at 627 (majority opinion) ("We also recognize another important limitation on the right to keep and carry arms. . . . [T]he sorts of weapons protected were those 'in common use at the time.'"); *id.* (conceding that this would allow a ban on "M-16 rifles and the like" even though less sophisticated "small arms" in common use may have little value against modern military threats); *id.* at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."). The dissenters expressed puzzlement over this "circular reasoning." *Id.* at 721 (Breyer, J., dissenting); *see also id.* at 720-21 ("Nor is it at all clear to me how the majority decides *which* loaded 'arms' a homeowner may keep. . . . In essence, the majority

Founders,[78] but it did suggest that this "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[79] The District's prohibition on the possession of all handguns, however, went too far.[80]

McDonald offered rather less guidance about the contours of the right to keep and bear arms, focusing instead on the question of the Second Amendment's application to states and their subdivisions.[81] The plurality reiterated *Heller*'s recognition of "longstanding regulatory measures" that permissibly limited gun possession,[82] prompting the dissenters to again point out the failure to explain why these but not others passed muster.[83] Nonetheless, it usefully served as a reminder that fundamental rights do not entitle citizens to access any and all means for pursuing a constitutionally protected purpose.[84]

A dozen years later, the U.S. Supreme Court took things to a whole new level in *Bruen*.[85] The two plaintiffs in that case had challenged New York's century-old licensing system for firearms after officials denied their applications for unrestricted permits to carry loaded handguns in public.[86] Writing for the majority, Justice Thomas explained that the previously recognized individual right to "keep" arms in the home for

determines what regulations are permissible by looking to see what existing regulations permit.").

78. *See id.* at 582 (majority opinion) ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

79. *Id.* at 627.

80. *See id.* at 628 ("The [District's] handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose [i.e., self-defense]."); *id.* at 629 ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *id.* at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.").

81. *See* McDonald v. City of Chi., 561 U.S. 742, 778 (2010) (plurality opinion) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

82. *See id.* at 786.

83. *See id.* at 925 (Breyer, J., dissenting) (complaining that this "haphazardly created a few simple rules").

84. *See* Michael R. Ulrich, *A Public Health Law Path for Second Amendment Jurisprudence*, 71 HASTINGS L.J. 1053, 1079-84 (2020); *cf.* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 663-64 (2003) (making the same point in connection with procreative rights). The Court then went a dozen years without offering further clarification about the scope of the Second Amendment right, apart from a brief opinion explaining that stun guns also enjoyed protection. *See* Caetano v. Massachusetts, 577 U.S. 411, 412 (2016) (per curiam); *see also id.* at 412, 420 (Alito, J., concurring in judgment) ("While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.").

85. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

86. *See id.* at 2122-25. Each of the plaintiffs received restricted public carry licenses for hunting and target practice, and one of them was also allowed to carry a handgun to and from his job working with the state courts, but in other respects they could not demonstrate any special need.

purposes of self-defense meant that the word "bear" in the text of the Second Amendment plainly connoted an affiliated right to carry firearms and not solely while at home.[87] Instead of engaging in heightened (or even strict) scrutiny, his opinion asked whether there was any history or tradition of such regulation,[88] claiming that courts do not subject other restrictions on enumerated rights to some form of interest balancing because the Founders had already done so when deciding to include them in the Constitution.[89] According to the majority, courts must search for historical analogues that burdened the right in comparable ways and for similar reasons as the modern regulation, and here it found nothing sufficiently like New York's "may issue" law to sustain it.[90] The majority contrasted longstanding prohibitions on carrying in "sensitive places" such as government buildings, but it rejected any suggestion that the whole of Manhattan would so qualify.[91] It also distinguished nineteenth

87. *See id.* at 2134-35; *see also id.* at 2135 ("Many Americans hazard greater danger outside the home than in it."). In initially summarizing its prior holdings, however, the Court twice referred to the rights of "*ordinary*, law-abiding citizens." *Id.* at 2122 (emphasis added); *see also id.* at 2134 (same). As quoted later in the opinion, *Heller* had addressed "'law-abiding, *responsible* citizens.'" *Id.* at 2131, 2138 n.9 (emphasis added); *cf. id.* at 2156 (referring in the end to "law-abiding, responsible citizens" as well). Although the Court had not invariably paired the word "responsible" with "law-abiding" in its earlier decisions, one searches in vain for use of the term "ordinary" in that connection. Whatever the Court may have meant by this seemingly loose language in previously describing the class of right holders, it has decided to directly confront that very question later this Term. *See* United States v. Rahimi, 61 F.4th 443, 451-53, 460-61 (5th Cir. 2023) (invalidating a federal law prohibiting the possession of firearms by persons subject to a domestic violence restraining order), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023) (No. 22-915); *see also* Adam Liptak & Glenn Thrush, *Court Will Consider Domestic Violence in Major Guns Case*, N.Y. TIMES, July 1, 2023, at A13 ("The court's decision to hear a Second Amendment case in its next term was seen by lawyers on both sides of the issue as an attempt to define the parameters of the *Bruen* ruling, and to perhaps provide a clearer set of standards.").

88. *See Bruen*, 142 S. Ct. at 2126 ("[W]hen the Second Amendment's plain text covers an individual's conduct, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); *id.* at 2129-30 (same); *see also id.* at 2131-38 (elaborating on various features of this new methodology).

89. *See id.* at 2129-31; *see also id.* at 2127 ("*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context."). In the conclusion of his opinion, Justice Thomas emphasized that the exercise of no other right requires first persuading a government official that you have some special need to do so, *see id.* at 2156, but that would seemingly imperil "shall issue" laws as well because they also require securing (even if only pro forma) permission before exercising a right. *Cf. id.* at 2138 n.9 (claiming not to question the constitutionality of such laws).

90. *See id.* at 2138-56. The majority gave particular attention to English common law during the pertinent time periods. *See id.* at 2136. Although this encompassed crimes subject to public prosecution, it also would, of course, have relevance to tort litigation. *See infra* note 143.

91. *See Bruen*, 142 S. Ct. at 2133-34. The state legislature quickly responded to *Bruen* by barring public carry in several sensitive locations: subways, buses, parks, hospitals, stadiums, day care settings, and Times Square. *See* Jonah E. Bromwich & Nicholas Fandos, *New York Acts to Curb Fallout from Two Rulings*, N.Y. TIMES, July 2, 2022, at A1 ("The law also requires permit applicants to undergo 16 hours of training on the handling of guns and two hours of firing range training, as well as an in-person interview and a written exam."); Adam Liptak, *New York Law Limiting Guns in Public Is Left in Place, for Now, by Court Order*, N.Y. TIMES, Jan. 12, 2023, at A17 (reporting that the Supreme Court denied a request for an emergency stay pending appeal of a challenge to this revised law).

century state surety laws from this discretionary licensing scheme.[92]

The Court had split 6-3, and each of the three concurring opinions began by expressing full agreement with Justice Thomas. The separate solo opinions by Justices Alito and Barrett hardly detracted from the majority's analysis, with the former offering a more pointed rebuttal to the dissent while the latter simply flagged a few methodological nuances left unresolved in applying the new historical test.[93] Justice Alito framed the Court's holding as fairly narrow, simply extending (rather than altering) *Heller* and *McDonald* to reach beyond the home.[94] He also doubted that restrictive licensing successfully guarded against gun violence, especially insofar as it had no connection to the harms that typically occur within the home (e.g., suicide).[95] On the contrary, he imagined that allowing more public carry would repel or deter the bad guys, citing evidence related to defensive use as well as anecdotes supplied by various amici.[96] At the end of his opinion, Justice Alito harkened back to a time when persons lived on isolated farms or in frontier towns—and would have been unable to call on law enforcement for assistance—to underscore the "furor" that would have met any government attempt to disarm the populace, concluding that essentially the same need for self-protection exists nowadays.[97]

Justice Kavanaugh's concurrence, joined by Chief Justice Roberts, might amount to a more significant caveat to the majority opinion, as it represented the views of two of the six members making up the majority. First, this concurrence more clearly endorsed the "shall issue" laws used in most states because they provide for less official discretion.[98] Second, it reiterated the Court's previously expressed reassurances about certain other allowable forms of gun control without (as the dissenters pointed

92. *See Bruen*, 142 S. Ct. at 2148-50.

93. *See id.* at 2162 (Barrett, J., concurring). In particular, she emphasized that the majority had not settled on the appropriate cut-off date for applying the historical test, though they seemed to prefer using 1791 for assessing challenges to state and local (as opposed to solely federal) restrictions, *see id.* at 2137-38 (majority opinion), even though the Bill of Rights would only have become applicable to the latter after ratification of the Fourteenth Amendment in 1868—and, of course, it would take the Court many decades to declare particular rights as incorporated thereby (not until 2010 for the Second Amendment), which arguably might call for grandfathering any restrictions predating those decisions.

94. *See id.* at 2156, 2157 (Alito, J., concurring); *see also id.* at 2160-61 ("[T]he real thrust of today's dissent is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit.").

95. *See id.* at 2157-58.

96. *See id.* at 2158-59. He claimed that there were 2.5 million instances annually of defensive use and referenced a report of lower injury rates when crime victims were armed, *see id.* at 2159, though these had not differentiated between use in the home and elsewhere.

97. *See id.* at 2161. In point of fact, New York's statute hardly would have prevented persons living on isolated farms from maintaining an arsenal for self-defense.

98. *See id.* at 2161-62 (Kavanaugh, J., concurring). He cautioned, however, that even such licensing laws can become too restrictive (e.g., exorbitant fees or excessive delays).

out) explaining their consistency with the historical test deployed by Justice Thomas.[99]

Apart from documenting the growing and varied (and stark) problem of gun violence in this country,[100] Justice Breyer's dissent compared the experience of densely populated states that retained "may issue" licensing systems with the far greater (though generally less populated) states that more recently switched to "shall issue," with rates of gun violence increasing in the latter.[101] Moreover, he emphasized that such contested questions are primarily for legislatures to resolve—and then for the courts to check by using some form of heightened scrutiny—rather than entirely constrained by historical practice, baked in for all time by the Founders.[102] Justice Breyer explained the practical difficulties with a purely historical test: judges lack the necessary expertise (or time and assistance in the case of lower courts), source materials suffer from ambiguities, and the

99. *See id.* at 2162; *see also id.* at 2189 (Breyer, J., dissenting). Thus, Kavanaugh's opinion came perilously close to a concurrence in judgment, which would turn the majority opinion into a plurality, but one could construe it more generously: Rather than an endorsement of a type of restriction that lacked any true historical pedigree, the commercial sales caveat represented a reminder that the text of the Second Amendment had not in fact spoken to that collateral question; as an activity adjacent to the exercise of the core right, the test arguably would have to ask whether restrictions on the former might unduly burden the latter, which would allow the government somewhat greater flexibility. The other illustrations of allowable restrictions (e.g., felons and the mentally ill, unusual and dangerous weapons) are not, however, quite so readily reconciled (and the reassurance itself was introduced originally as evidence that this newfound right was not unlimited), which casts real doubt on whether a majority of the current Court is on board with the seemingly all-or-nothing historical test deployed by the majority, Justice Alito's effort to downplay the shift notwithstanding.

100. *See id.* at 2163, 2164-67 (Breyer, J., dissenting).

101. *See id.* at 2172-74.

102. *See id.* at 2167, 2174-77, 2190-91. In particular, the shift in locus from a right of self-defense in the home (private sphere) to everywhere else (public sphere) arguably magnifies the public health stakes in this debate—keeping firearms in the home hardly limited the opportunities for gun violence, of course, especially because suicides, domestic violence and accidents account for the majority of deaths. Moreover, the right to defend the home assumed that wrongdoers would have no compunction about brandishing weapons away from their own homes; insofar as those wrongdoers posed comparable if not greater threats in public spaces, the self-defense rationale seems equally apt (even if empirically dubious) away from home, but making it harder for the government to control carrying in public would complicate efforts to interdict those who premeditate and, more importantly, would risk escalating petty squabbles (e.g., road-rage incidents, *see id.* at 2166) into violent confrontations more reminiscent of the Wild West. Indeed, is that not a glaring problem with importing a historical approach, taken from lawless frontier (or at least low density) conditions (when citizens might be called upon to help repel a threat), to more civilized (or at least urbanized) circumstances (and professionals replacing amateurs when it comes to communal protection)? Justice Breyer contrasted New York City's population of 33,000 in 1790 with 8.5 million today. *See id.* at 2168, 2180. If nothing else, when public carry becomes unexceptional, more among the still sizeable ranks of holdouts might feel compelled to arm themselves in order to guard against the growing threat posed by other members of the normally law-abiding public, and the next thing you know it has become a good old-fashioned arms race, except now on the streets of American cities rather than between Cold War adversaries anxious to signal their commitment to mutually assured destruction. Separately, note that the dangers associated with having guns in the home will increase when public carry becomes the norm as more homes will have guns and/or their increased mobility will make storage in the home even less secure than it is at present.

historical test invites cherry picking, as was painfully evident in *Heller* itself.[103] Such a test also leaves all sorts of questions (e.g., how many, how similar) unresolved when used as the exclusive method for judging the constitutionality of restrictions that respond to peculiarly modern problems (e.g., 3D printers, smart gun technology) or places (e.g., subways, theaters).[104] Lastly, the dissenters thought that the majority had discounted plenty of analogous historical regulation of public carry, concealed or otherwise.[105]

V. DOES THE PROSPECT OF LIABILITY IMPACT SECOND AMENDMENT RIGHTS?

Might constitutional protection of an individual right to keep and bear arms work to limit the recourse available to victims of gun violence? Joseph Blocher and Darrell Miller posed this question seven years ago, focusing on liability claims asserted against individual possessors and concluding that the Second Amendment would not imperil "gun neutral" tort doctrines.[106] Several years before the *Heller* and *McDonald* decisions, Jerry Phillips asked much the same question, though focusing on the potential liability of sellers and by reference to state constitutions.[107] These and other commentators uncovered little reason to think that the Second Amendment would impact tort law.[108]

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103. *See id.* at 2177-80.

104. *See id.* at 2179-81, 2190.

105. *See id.* at 2181-90.

106. *See* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 304-11, 320-23, 330 (2016); *see also* Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1227-28, 1230-31 (2009) (posing these same questions in the immediate wake of *Heller*, and expressing greater uncertainty about the correct answer); *id.* at 1244 ("[I]f the Second Amendment precludes statutory mandates that limit the availability of firearms in the home for immediate self-defense, there is no obvious reason why the Amendment should not also be taken into account if negligence law seriously burdens firearm accessibility through the threat of civil liability.").

107. *See* Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337, 1344, 1347 (2000); *id.* at 1339 ("Curiously, the Second Amendment to the U.S. Constitution and similar state constitutional provisions have not usually been raised as defenses in these cases."); *see also* City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1238 (Ind. 2003) ("The defendants [in this public nuisance litigation] raise no Second Amendment issue.").

108. Recently, a pair of commentators concluded, after engaging in hardly any constitutional analysis, that "it would not violate the Second Amendment to allow victims of gun violence to bring civil actions against the manufacturers and distributors who negligently design and sell these inherently dangerous products." Dru Stevenson & Jenna R. Shorter, *Revisiting Gun Control and Tort Liability*, 54 IND. L. REV. 365, 419 (2021); *see also id.* at 383 ("As long as individuals are still able to acquire, keep, and bear arms, liability for some gun manufacturers is not clearly a constitutional issue . . . ."). They did, however, usefully discuss the extent to which courts have recently interpreted the PLCAA's exceptions more broadly to allow claims to proceed against sellers. *See id.* at 393-95, 402-18.

In 2017, however, Cody Jacobs rather confidently concluded otherwise, taking the position that *Heller* and *McDonald* required limiting common law claims against both users and sellers.[109] His provocative article prompted me to explore how else products liability doctrine might have to get refashioned in order to insulate the sellers of other constitutionally protected items, particularly contraceptives.[110] Although I found potential merit to such extensions, the complete and utter absence of any such arguments by litigants or commentators gave me reason for pause.[111] Now I turn my attention to guns but more broadly than just products liability claims and also in light of the latest guidance from the U.S. Supreme Court.

Preliminarily, efforts to single out for unfavorable treatment users or sellers of firearms, whether by statute or judicial decision, should make the constitutional analysis a good deal more straightforward.[112] What

109. *See* Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 982-94 (2017). For a similar conclusion, though predating *Heller* by a quarter of a century, see Stephen P. Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 HAMLINE L. REV. 351, 366 (1983) ("Making handgun manufacture, distribution or ownership economically impossible through strict tort liability or overly broad negligence standards would create an atmosphere where [S]econd [A]mendment freedoms could not survive."); *id.* at 364-68, 379 (elaborating).

110. *See* Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 223 (2019) ("If the Bill of Rights does constrain products liability claims, then courts should . . . offer greater—not just comparable, and certainly not reduced—protection to the sellers of contraceptives and the like."); *id.* at 224 ("[C]ertain consumer goods closely connected to the exercise of fundamental rights—including but not limited to contraceptives—might deserve additional protection from the operation of well-established principles of strict products liability."); *see also id.* at 223 ("At the very least, courts need to limit the prospect of punitive damages, just as the U.S. Supreme Court has insisted that they do in the context of speech torts." (footnote omitted)).

111. *See id.* at 216 ("The lengthy history of tort litigation against sellers of [contraceptive] products reveals, however, absolutely no suggestion that the Fourteenth Amendment might place some outer boundary on these lawsuits.").

> If [the Second Amendment] position has merit, then it would seem that other types of products should enjoy special protections from the threat of tort liability as well. Perhaps the fact that no one has ever before suggested as much provokes justified skepticism about the argument of those preoccupied with guns; otherwise, courts will have to retool their products liability doctrine to carve out any number of other constitutionally valued consumer goods.

Id. at 214-15; *see also id.* at 224 n.184 ("Unless something about the freedom of speech explains why it should interact with tort law differently than other constitutional rights, this may just represent another illustration of 'path dependence' in the law."); *cf. id.* at 224 ("If, however, that comes across as too radical an idea, then . . . developments in the law of defamation can offer little assistance to those commentators who promote the notion that the Second Amendment should infiltrate the law of torts."); *id.* at 194 (same).

112. *See* Blocher & Miller, *supra* note 106, at 346 ("[P]ermitting punitive damages only for reckless use of a firearm, but not for reckless use of a vehicle, could justify the application of constitutional scrutiny."); *see also* Noah, *supra* note 110, at 214 ("[D]octrinal modifications cannot single out certain defendants for unfavorable treatment simply because they choose to exercise their federal constitutional rights in ways not to the liking of, for instance, liberal judges in New Jersey any more so than conservative legislators in Louisiana."). Indeed, my earlier article had devoted most of its time to just that sort of a situation, especially in connection with prescription drugs advertised directly to consumers; depriving pharmaceutical manufacturers of a critical defense against failure-to-warn claims as punishment for engaging in protected commercial speech struck me as unmistakably unconstitutional. *See id.* at 209-10;

exactly does it mean, however, to "single out" (at least in a constitutional sense) a person or activity for unfavorable treatment; or, to put it another way, where do courts draw the line between direct and incidental burdens on the exercise of fundamental rights?[113] Decisions under the First Amendment may offer some guidance,[114] and scholars who specialize in the Second Amendment have looked there for other purposes,[115] but normally they have the Speech Clause in mind. Instead, let me suggest that the Free Exercise Clause may offer a more useful parallel.

Indeed, in much the same way that conservative jurists have complained about according "second class" status to the Second Amendment,[116] religious liberty had until quite recently languished as a

id. at 224 ("[D]ecisions recognizing an exception to the learned intermediary doctrine whenever manufacturers of prescription drugs or medical devices advertise directly to consumers . . . represent a fairly blatant violation of federal constitutional protections for commercial speech."); *id.* at 206 ("[T]he fact that it emanated from the state's high court rather than its legislature should make no difference in the analysis."); *see also id.* at 223 ("[C]ontraceptives actually may do less well than therapeutic products lacking any constitutional pedigree."); *id.* at 221 (offering diethylstilbestrol (DES) as another "illustration of sellers of a drug deserving some added constitutional protection getting singled out for unfavorable treatment under state tort law").

113. *See* Note, *Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713, 1727-28 & n.81 (2002).

114. *See, e.g.*, Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 578-93 (1983) (holding that a state law imposing a special tax on ink and paper used by large newspapers, and the *Star Tribune* in particular, violated the First Amendment as incorporated by the Fourteenth, deploying some version of the phrase "single out" ten times); *id.* at 582 ("Minnesota has singled out the press for special treatment."); *id.* at 583 n.5 (distinguishing broadly applicable economic regulations even when they included "isolated exceptions" of other enterprises); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 164-73 (2015) (invalidating a municipal ordinance that limited the posting of outdoor signs because its varied exceptions demonstrated a lack of "content neutrality"); *supra* note 17 and accompanying text (discussing this issue in connection with speech torts); *cf.* Leathers v. Medlock, 499 U.S. 439, 453 (1991) ("[T]he State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment."). *See generally* Dan T. Coenen, *Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis*, 103 IOWA L. REV. 435 (2018). "Singling out" also may feature in other due process (or equal protection) analysis involving claims of fundamental rights of access to products made subject to disfavored treatment by state actors. *See, e.g.*, Lars Noah, *State Regulatory Responses to the Prescription Opioid Crisis: Too Much to Bear?*, 124 DICK. L. REV. 633, 644 n.42, 659 (2020).

115. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012); Joseph E. Sitzmann, Comment, *High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment*, 86 U. CHI. L. REV. 1981 (2019); *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022) ("Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms."). This underscores, of course, the importance of considering the constitutionalization of the speech torts in thinking about a comparable approach to gun torts.

116. *See, e.g.*, Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But . . . the Second Amendment is a disfavored right in this Court."); *see also* Robert Barnes, *Court Declines to Take a Handful of Gun Rights Cases*, BOS. GLOBE, June 16, 2020, at A4 ("The court's most conservative members at various times have expressed frustration that their colleagues have routinely turned down requests to evaluate laws that impose tough restrictions for permits to carry guns

purportedly disfavored right.[117] In 1990, the U.S. Supreme Court relinquished strict scrutiny of neutral and generally applicable laws, which meant that the First Amendment would not entitle persons of faith to demand exemptions from the operation of broad edicts.[118] Only those laws that blatantly discriminated against religious practices faced invalidation,[119] though Congress did thereafter resurrect strict scrutiny of federal laws by statute.[120]

This constrained approach to the First Amendment's Free Exercise Clause has now changed, though so far it has gotten fleshed out primarily in the Court's benighted "shadow docket" used to resolve applications for emergency stays.[121] For example, pandemic-related capacity restrictions could not exempt essential businesses without also freeing houses of worship,[122] and some members of the high court believe that any

outside the home and ban certain types of weapons."). *See generally* Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613 (2022).

117. *See* Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES, Apr. 6, 2021, at A14 (quoting Justice Alito's oft-repeated lament to this effect even as the evidence recently has swung in the other direction); *cf.* Daniel Henninger, Opinion, *Oberlin's $44 Million Mistake*, WALL ST. J., June 27, 2019, at A13 (applauding a defamation verdict against Oberlin College for smearing a local business, adding that "Barack Obama didn't pay a price for his remark about people who cling to guns or religion, but it proved too much to swallow when Hillary Clinton recast his condescension as the 'basket of deplorables'"). Striking shifts in the judiciary made both rights ascendant. *See* Adam Liptak, *Trump's Judges: Religious Ties and N.R.A. Memberships*, N.Y. TIMES, July 18, 2023, at A16 (discussing new research that "explored what was distinctive about Mr. Trump's appointees to the lower courts").

118. *See* Emp. Div. v. Smith, 494 U.S. 872, 878-80 (1990). *See generally* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (roundly criticizing this shift in approach).

119. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 463-66 (2017); *id.* at 458 (explaining that "denying a generally available benefit *solely* on account of religious identity imposes a penalty on the free exercise of religion" (emphasis added)); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534-47 (1993); *id.* at 538 ("[R]eligious practice is being singled out for discriminatory treatment."). The Equal Protection Clause confronts such questions as well, of course, though from a somewhat different angle.

120. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719-31, 736 (2014) (holding that the Religious Freedom Restoration Act ("RFRA") entitled the owners of closely held corporations with purported religious objections to opt out of federally mandated health insurance coverage of contraceptives for their employees).

121. *See* Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 90-91, 103-06 (2022); Kristen E. Parnigoni, Note, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2767-70 (2022); *see also* Charlie Savage, *Court's "Shadow Docket" Draws Scrutiny, and Fire, from All Sides*, N.Y. TIMES, Sept. 3, 2021, at A1 ("With increasing frequency, the court is taking up weighty matters in a rushed way, considering emergency petitions that often yield late-night decisions issued with minimal or no written opinions."). *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023); Symposium, *Dark Necessities? The Supreme Court's Shadow Docket*, 23 NEV. L.J. 669 (2023).

122. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66-69 (2020) (per curiam); *see also* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious

vaccination mandates allowing medical exemptions must also, for that reason, allow religious exemptions.[123] The moment that a law frees anyone from an obligation to comply—no matter how narrow or easily justified—the failure to do likewise for any religious objectors implies that the authors of the law have failed to sufficiently value religion.[124] In short, the Court appears to have redefined what it means for a law to have "general application," with the slightest underexclusivity offering an opening for true believers to complain.[125]

A comparable approach to the Second Amendment could imperil any number of previously discussed tort doctrines. Although arranged by reference to the liability of possessors and then sellers, each of the two Parts that follow consider the three different ways in which tort doctrine might prompt Second Amendment objections: (1) rules that plainly single out firearms for relatively unfavorable treatment; (2) rules that fail to extend recognized exceptions to cover cases involving firearms, thereby depriving the latter of equally favorable treatment; and (3) rules that operate in an entirely evenhanded fashion but still apply what seems like an excessively burdensome standard of liability on constitutionally protected activities.

Obviously, these hardly represent distinct or uncontested lines, with

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exercise."); *id.* ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . . Comparability is concerned with the risks various activities pose, not the reasons why people gather.").

123. *See* Dr. A v. Hochul, 142 S. Ct. 552, 556-59 (2021) (Gorsuch, J., dissenting); Does 1-3 v. Mills, 142 S. Ct. 17, 19-22 (2021) (Gorsuch, J., dissenting); *see also* Austin v. U.S. Navy SEALs 1–26, 142 S. Ct. 1301, 1304-07 (2022) (Alito, J., dissenting) (finding merit in both RFRA and First Amendment objections to the military's Covid-19 vaccine mandate).

124. *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021) (explaining that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *see also* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2414 (2021) (explaining that, under the "most favored nation" test advocated by a pair of scholars, "a single secular exemption can be enough to defeat general applicability and trigger the compelling interest test"); *id.* at 2398 ("An unfamiliar equality rule has become prominent in constitutional discourse. Promoted by scholars and judges in the context of the free exercise of religion, it has implications for other provisions that guarantee evenhandedness toward conduct."); Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1193 (2023) ("Because most laws contain secular exemptions and religious beliefs are so diverse, many laws are newly vulnerable to free exercise challenges in light of the Supreme Court's recent cases.").

125. In tort law, this might upend how courts have typically approached the affirmative defense of mitigation. Traditionally, personal injury victims could decline without penalty recommended treatments on medical but not also on religious grounds. *See* Noah, *supra* note 110, at 192 n.13 ("[T]he Free Exercise Clause has not helped tort victims escape the operation of the avoidable consequences rule."); *see also* Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 448-50 (2009) (summarizing the doctrine); *cf. id.* at 450-80 (advocating the routine application of this defense to noneconomic harms); *id.* at 458-59 (discussing the objections of Scientologists to any form of psychiatric care).

such cases better viewed as lying along a continuum, but we must not lose sight of the fact that even the less problematic type of cases might raise concerns and prompt courts to rethink all manner of generally applicable tort doctrines when applied to firearms, including the self-defense privilege, simple negligence claims against owners and users, strict liability claims against the sellers of defective products, and the availability of punitive damages in any of these contexts.[126] Indeed, the least problematic (third) type of cases represents where the common law of defamation resided before the U.S. Supreme Court decided to fundamentally remake it using the First and Fourteenth Amendments.[127]

Bruen arguably rendered this manner of framing the problem moot, but it retained some hints that more recognizable forms of constitutional scrutiny would continue to operate at the margins.[128] The majority's preferred historical test gets separate mention in the Parts that follow, especially insofar as it had relied heavily on ancient common law antecedents in the course of striking down restrictions on carrying arms in public that the state had imposed legislatively.[129] An inability to trace

126. Courts have awarded punitive damages for claims associated with the use of a firearm. *See* Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 A.L.R.5th 195, § 8 (1993 & 2023 Supp.) (assault and battery); *id.* § 22 (claims against sellers of guns); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459-60 (1993) (recognizing that punitive damages could substantially exceed compensatory damages if someone irresponsibly fired a gun into crowd but caused only minor property damage).

127. *See supra* notes 15-17 and accompanying text. Insofar as fears of prejudice by those tasked with resolving speech torts explained the need for a more demanding standard, a similar concern could arise in this setting. *See* William D. Araiza, *Disgust and Guns: Conduct, Identity, and Second Amendment Animus*, 116 NW. U. L. REV. 1365, 1369 (2022) ("Alleged distaste for the Second Amendment extends beyond courts to include citizens . . . ."); *id.* at 1381 (drawing a parallel to views about certain religious practitioners); *id.* at 1392-93 (concluding that such prejudices, even if weaker than in other contexts, may well exist); Nathan D. Harp, *Extralegal Influences on Juror Decision Making in Suits Against Firearm Manufacturers*, 54 CREIGHTON L. REV. 297, 319-21 (2021) (summarizing the likely (and cross-cutting) biases of jurors in such tort cases). *See generally* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001).

128. *See supra* note 99 (discussing the caveat from *Heller* endorsed by two of the six members constituting the *Bruen* majority); *see also supra* note 75 (focusing on *Heller*'s use of the phrase "law-abiding, responsible citizens" when defining the right); *cf. supra* note 87 (pointing out that the *Bruen* majority seemed to replace "responsible" with "ordinary"). The standard of care in negligence purports to reflect a normative (rather than simply a descriptive) inquiry about what reasonable people should do under the circumstances, making it aspirational rather than merely a question about average levels of behavior. *See* Geistfeld, *supra* note 24, at 1103-05 & n.34; *see also id.* at 1103-11 (pointing out that jury determinations about what constitutes reasonable care—as well as how much to award in noneconomic damages and the duty analysis undertaken by judges—suffer from unpredictability and therefore may pose due process problems). *See generally* Gregory Jay Hall, *Demystifying the Enigma: The Reasonable Person Standard in Tort*, 90 UMKC L. REV. 801 (2022) (critiquing various efforts to make sense of the standard of care in negligence).

129. Although ventured in the course of rejecting the dissent's interest balancing test to judge the permissibility of particular restrictions, the majority in *Heller* used language that also seemingly would disable courts from resorting to the common law as a means of imposing restrictions. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands

modern liability rules applicable to firearms far enough back in time seemingly would render them vulnerable to constitutional objections and might require modifications along the lines of what has happened in the domain of speech torts.

A. Constitutionality of Tort Claims Targeting Possessors

This question arose in connection with litigation brought by several victims of the violent protests that had erupted in the summer of 2017 at a white supremacist ("Unite the Right") rally in Charlottesville, Virginia. In the course of largely rejecting various motions to dismiss, and after devoting much of its attention to the plaintiffs' conspiracy claims under a federal statute (and defenses premised on the First Amendment),[130] the federal district court held that the Second Amendment provided the defendants with no shield against state tort liability for allegedly using their weapons to threaten the plaintiffs, offering by way of explanation little more than the following: "[It] no more insulates Defendants from civil liability for the use of their weapons in an assault than it insulates a criminal defendant from liability because he committed his crime with a weapon."[131] Insofar as *Heller* had distinguished between the defensive (protected) and offensive (unprotected) use of firearms,[132] such cursory treatment of the argument makes perfect sense.

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of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

130. *See* Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018).

131. *Id.* at 804; *see also id.* at 805 ("Likewise, Defendants point to no authority preventing the Court from considering Defendants' decisions to bring substantial amounts of weapons to the rally as evidence of a plan to engage in violence . . . , choosing instead to invoke *Heller* and *McDonald* as talismans. Defendants' Second Amendment arguments fall flat."). The lead plaintiff, Elizabeth Sines, was a second year law student at the University of Virginia at the time of the protests. *See id.* at 775 (explaining that she had alleged severe emotional distress from witnessing the events). Note that, though it should not detract from the analysis offered by the court, the weapons allegedly used in committing the particular batteries seemingly would not have qualified as "arms" in any event: shields, lit torches, pepper spray, and a car. *Cf. id.* at 796 ("The fact that a counter-protestor was killed by a vehicle, instead of by the 'semi-automatic machine guns' Defendants brought, provides a distinction that makes no difference to this analysis.").

132. *See Heller*, 554 U.S. at 612 (quoting an 1829 decision from the Supreme Court of the Territory of Michigan: "'[T]he grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.'"); *id.* at 602 (quoting dicta from an 1825 decision of the high court of Massachusetts, explaining that the state constitutional right to bear arms "does not protect him who uses them for annoyance or destruction"); *see also* Halbrook, *supra* note 109, at 368 ("Certainly no argument can be made that misuse of firearms is constitutionally protected . . . ."). Even if such a clear dichotomy existed, however, some commentators have argued that the Second Amendment went beyond a right to defend oneself to include offensive uses in certain circumstances. *See, e.g.*, Skylar Petitt, Note, *Tyranny Prevention: A "Core" Purpose of the Second Amendment*, 44 S. ILL. U. L.J. 455, 515-16 (2020).

Among the intentional torts, however, the "spring gun" rule sounds as if it singles out for unfavorable treatment those who set up shotguns to protect their property. Nonetheless, that seems to represent a historical quirk,[133] merely reflecting the fact that such weapons offered the sole practical form of automated self-defense—surely if we could use robots for the same purpose nowadays, the doctrinal restriction would operate in the same way. Even if the more straightforward rules governing the privilege of self-defense do not differentiate between armed and unarmed responses to threats, demanding proof of necessity and proportionality plainly seeks to discourage resort to firearms and other potentially lethal means of defending oneself and at least raises questions about whether these factors comport with the Second Amendment.[134]

Among the negligence claims premised on the usage, storage or entrustment of an inherently dangerous instrumentality, firearms regularly appear among a relatively small class of items.[135] What happens, however, if other items thought to pose equal or greater hazards do not get included in this subset—does that mean the courts have discriminated against gun owners? For instance, the death toll from tobacco products remains almost an order of magnitude larger than firearms,[136] yet courts do not characterize cigarettes and the like as dangerous instrumentalities, perhaps because aside from starting occasional fires these products pose risks of chronic illness (primarily to users) rather than acute injuries (primarily to third parties). In that case, how about the failure to include alcoholic beverages, which cause more than twice as many deaths as firearms and a fair number of those involve bystanders rather than

133. *See supra* note 35 and accompanying text. *Compare* RESTATEMENT (SECOND) OF TORTS § 85 (AM. L. INST. 1965) (referring broadly to a "mechanical device" and mentioning a spring gun in only a single illustration), *with* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 31 cmt. d, reporters' note (AM. L. INST., Tent. Draft No. 6, Apr. 26, 2021) ("With regard to devices capable of causing death or serious injury, spring guns are the most commonly discussed.").

134. *See* Brownstein, *supra* note 106, at 1231-43; *id.* at 1243-44 ("It is hard to explain after *Heller* how the right to keep and bear firearms for self-defense purposes can be rigorously protected as a matter of constitutional law while the right to use a firearm to protect one's person, family, and home remains subject to the discretionary determination of common law courts and juries as to the reasonableness of a defendant's conduct."); *id.* at 1239 ("A reasonableness standard is intrinsically ad hoc and unpredictable in its application. Its use to evaluate the legality of an individual's conduct creates a daunting chilling effect that can easily discourage the exercise of a right.").

135. *See, e.g.*, Jacobs v. Tyson, 407 S.E.2d 62, 64 (Ga. Ct. App. 1991) (distinguishing firearms from, for instance, knives). Explosives routinely appear alongside firearms in this category. *See, e.g.*, Bridges v. Dahl, 108 F.2d 228, 229 (6th Cir. 1939); Luttrell v. Carolina Min. Co., 18 S.E.2d 412, 417 (N.C. 1942).

136. *See* Lars Noah, *Time to Bite the Bullet? How an Emboldened FDA Could Take Aim at the Firearms Industry*, 53 CONN. L. REV. 787, 826 (2022) ("Tobacco products cause roughly ten times as many deaths as do firearms, and evidently all uses of the former contribute marginally to health risks while the latter have both safe and unsafe patterns of use.").

users,[137] among the category of dangerous instrumentalities?[138]

Consider one altogether minor example. Youngsters routinely face a more forgiving age-adjusted standard of care except when they engage in an adult activity such as driving a car.[139] Only a handful of courts have confronted this question in connection with hunting and other uses of firearms, with nearly all of them rejecting the argument that these amounted to adult activities.[140] In 1994, however, an intermediate appellate court in Minnesota held otherwise.[141] Assuming that youngsters enjoy at least some Second Amendment rights,[142] they may have constitutional grounds for assailing such disfavored treatment in tort doctrine: entirely apart from the contrary position adopted in other jurisdictions, Minnesota does not at present hold teenagers to an adult standard of care for any number of other activities that might pose comparable or greater dangers to themselves or others.

The historical test utilized in *Bruen* would sweep more broadly. Indeed,

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137. *See* Aaron M. White et al., *Alcohol-Related Deaths During the Covid-19 Pandemic*, 327 JAMA 1704 (2022) (finding 99,000 deaths in the United States linked to the consumption of alcoholic beverages during 2020, a 25.5% increase over the previous year).

138. *Cf.* Noah, *supra* note 38, at 677 (discussing the availability of "dram shop" claims against commercial suppliers of alcoholic beverages). After all, what do we call the small federal agency that enjoys jurisdiction over guns? *See* Noah, *supra* note 136, at 792 n.17, 797-98 (discussing the Bureau of Alcohol Tobacco Firearms & Explosives (ATF)). Also, driving under the influence (DUI) accounts for only some of the carnage on our roads; vehicles represent another product category responsible for more aggregate deaths than firearms, though at least some tort doctrines do treat these as dangerous instrumentalities.

139. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 10 (AM. L. INST. 2010) ("A child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience . . . [unless] the child is engaging in a dangerous activity that is characteristically undertaken by adults."). The issue may arise in situations where an underage victim of someone else's tortious behavior brings a lawsuit that then prompts the assertion of a defense of contributory or comparative negligence.

140. *See* Wade R. Habeeb, Annotation, *Weapons: Application of Adult Standard of Care to Infant Handling Firearms*, 47 A.L.R.3d 620 (1973 & 2023 Supp.).

141. *See* Huebner *ex rel.* Lane v. Koelfgren, 519 N.W.2d 488, 489-90 (Minn. Ct. App. 1994) (affirming judgment against a defendant who was 14½ years old when he negligently handled a BB gun and injured the plaintiff, extending a precedent that previously had applied only to minors when operating motorized vehicles); *id.* at 490 ("[T]he adult standard of care applies to teenagers handling guns. Hence, we create a fourth exception [to go with automobiles, airplanes, and powerboats] to Minnesota's general rule applying the child's standard of care to minors."). Thus, instead of simply holding that a reasonable jury could apply the broadly framed exception for adult activities on the facts of this case, the court announced a brand-new rule categorically designed to cover youngsters handling firearms.

142. *See* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1324-32 (11th Cir.) (affirming a decision that rejected Second Amendment objections to Florida's minimum purchase age of 21 for all firearms even assuming that younger individuals enjoyed the right to keep arms), *vacated for en banc rehearing*, 72 F.4th 1346 (11th Cir. 2023) (mem.); Jones v. Bonta, 34 F.4th 704, 717-27 (9th Cir.) (reversing the denial of a preliminary injunction against a California law banning the sale of semiautomatic rifles to eighteen- to twenty-year-olds), *vacated on rehearing*, 47 F.4th 1124 (9th Cir. 2022); Zachary S. Halpern, Note, *Young Guns: The Constitutionality of Raising the Minimum Purchase Age for Firearms to Twenty-One*, 63 B.C. L. REV. 1421, 1436-50, 1459 (2022) (discussing earlier litigation that confronted this threshold question).

the common law antecedents discussed by the majority represented claims that today we would call intentional torts,[143] which comes as no surprise because most forms of pre-modern civil liability had that cast.[144] Even the antebellum surety laws discussed by the Court appeared to demand ensuring only that potentially irresponsible users would pay for intentionally inflicted injuries,[145] while newly emerging insurance mandates aim more broadly by obligating all gun owners to carry liability coverage.[146] Insofar as some commentators have questioned the

143. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2143 (2022) (finding in the colonial era only a "common-law offense of bearing arms to terrorize the people"); *id.* at 2145 ("As during the colonial and founding periods, the common-law offenses of 'affray' or going armed 'to the terror of the people' [*in terrorem populi*] continued to impose some limits on firearm carry in the antebellum period."); *id.* at 2146 ("Other state courts likewise recognized that the common law did not punish the carrying of deadly weapons *per se* . . . . Therefore, those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so."); *id.* at 2150 ("Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others."). Although ventured in reference to a licensing regime for concealed carry of handguns, these points would suggest that only our modern claim of intentional infliction of emotional distress (with a weapon) would have a sufficiently analogous historical precedent.

144. *See* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1723 (1981); *id.* (referencing *Weaver v. Ward*, 80 Eng. Rep. 284 (1616), which allowed a writ of trespass claim based upon the accidental discharge of a firearm). Indeed, the ancient English precursor to tort claims, the writ of trespass, covered forcible boundary crossings, which required little more than a showing of injury caused *vi et armis* (by force and arms). *See id.*; *id.* at 1723 n.38 ("Was it the purpose of the trespass writ, then, to give the crime victim a civil remedy?"); *see also* Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 298 (2021) ("[W]hen trespass was brought for causing bodily injury, it was denominated trespass *vi et armis*—'by force and arms'—even if weapons had nothing to do with it."). *See generally* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW ch. 13 (2d ed. 1981) (discussing the rise of modern tort law).

145. *See Bruen*, 142 S. Ct. at 2150 ("[A]lthough surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying."); *id.* at 2148 ("In the mid-19th century, many jurisdictions began adopting surety statutes that required certain individuals to post bond before carrying weapons in public."); *id.* at 2187 (Breyer, J., dissenting) (elaborating on these laws). As a lower court previously explained the operation of such laws, upon a finding that a particular person might use a firearm recklessly, such an individual "had to post money that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if *he* needed self-defense." Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017) (quoted with approval in *Bruen*, 142 S. Ct. at 2148). Pretrial release upon posting bail might offer a more accurate parallel to these surety requirements. *Cf.* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328-1928*, 55 U.C. DAVIS L. REV. 2545, 2577-79, 2586 (2022) (discussing the creation of this mechanism for securing a "peace bond"); *id.* at 2594-95 (explaining that increased urbanization caused it to fall out of favor after the Civil War). From this perspective, a violation that led to forfeiture of the bond would amount to a fine rather than restitution for injuries to a victim.

146. *See* Sam Liccardo, Opinion, *My City Has a New Strategy to Reduce Gun Deaths*, N.Y. TIMES, Dec. 27, 2022, at A15 (elaborating on a novel insurance mandate about to take effect in San Jose, CA after a federal judge declined to enjoin it); *see also* Tracey Tully, *New Jersey May Require Insurance for Gun Owners*, N.Y. TIMES, Oct. 14, 2022, at A20 (discussing a state bill that would require persons seeking public carry permits to have liability insurance); *cf.* Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at Al (discussing proposals in several large states as well as earlier efforts that failed to pass). Aside from an obvious parallel to motor vehicles, such local laws also occasionally exist for owners of dangerous dog breeds. *See, e.g.*, State v. Peters, 534

constitutionality of such insurance mandates,[147] they presumably would raise comparable objections to the use of tort law to shift losses from gun users to the victims of their intentional or negligent conduct.

Although left unresolved in *Bruen*,[148] let us assume the use of 1868 rather than 1791 as the critical date when evaluating state (as opposed to federal) laws. Negligence began to emerge as the default standard of tort liability roughly in the middle of the nineteenth century,[149] but the refinements that arguably subjected owners and users of firearms to more demanding duties of care first started to arrive on the scene many decades later.[150] Indeed, based on a side-by-side comparison of the different editions of the *Restatement of Torts*—the first started appearing in 1934,

So. 2d 760, 762 (Fla. Dist. Ct. App. 1988) (explaining that an ordinance required pit bull "owners to carry insurance, post a surety bond, or furnish other evidence of financial responsibility in the amount of $300,000 to cover any bodily injury, death or property damage that may be caused by the dog"); *id.* at 762-68 (accepting the trial judge's finding that no insurance company would offer such coverage, but joining a number of other courts that had rejected constitutional objections to local laws restricting pit bulls).

147. *See* George A. Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209, 1236-39 (2014) (summarizing these objections); *see also id.* at 1240 ("Liability for firearm torts already exists in the absence of insurance."); *id.* at 1264 (concluding that it would be better to give owners of firearms the option of securing liability insurance than mandate coverage). *But see* Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 128-29 (1987) (arguing that the threat of personal tort liability as well as mandatory insurance coverage laws would comport with the Constitution).

148. *See supra* note 93 (conceding, however, that the majority appeared to favor the use of 1791).

149. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 684, 715-16 (1989); John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 699-706 (2001); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005) ("[T]he law of torts was totally insignificant before 1800 . . . [and] had very little to say about personal injuries caused by careless behavior. A good many basic doctrines of tort law first appeared before 1850; but it was in the late nineteenth century that this area of law (and life) experienced its greatest spurt of growth."). Indeed, the common law did not provide for recovery in case of fatal injuries, which prompted legislative fixes that swept the country in the mid-nineteenth century. *See* Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 445-46 (2020) (discussing Lord Campbell's Act of 1846 in the England and its rapid subsequent spread in the United States); Bowen E. Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 114-16 (1924).

150. Consider the history of one type of claim as recently summarized by the Connecticut Supreme Court:

> Although the idea that it may be wrong to entrust a weapon or other dangerous item to one likely to misuse it is as old as civilization [citing Plato], the common-law tort of negligent entrustment traces its origins to *Dixon v. Bell*, 105 Eng. Rep. 1023 (K.B. 1816). . . . American courts began applying the doctrine of negligent entrustment in the 1920s, following the advent of the mass produced automobile . . . .

Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 279-80 (Conn. 2019) (footnote omitted). Then again, taking a less granular approach might allow us to both elide objections about singling out and identify still older antecedents. *Cf.* Kenneth W. Simons, *Justifying and Categorizing Tort Doctrines: What Is the Optimal Level of Generality?*, 14 J. TORT L. 551, 565-73 (2021) (favoring greater specificity); *id.* at 572 ("Traditional doctrines sometimes reflect historical accident and arbitrary path-dependence rather than justifiable principles and policies. But overly exuberant simplification is no more defensible than excessive complexity.").

the *Second* in 1965, and the nearly finished *Third* had its initial volume published in 1998—some of these special rules post-date ratification of the Fourteenth Amendment by a full century, and even those reflected in the original *Restatement of Torts* that arrived on the scene almost seventy years after the Fourteenth Amendment would not necessarily manage to trace their lineage to predate 1868.[151]

B. Constitutionality of Tort Claims Targeting Sellers

Occasionally, legislatures have modified the common law in ways that plainly target firearms, as the District of Columbia did when it imposed strict liability against sellers of assault weapons even in the absence of proof of any defect,[152] which effectively imposed a form of absolute liability, but the courts later decided that the PLCAA preempted the availability of such tort claims.[153] Putting the Supremacy Clause aside, how would such a private right of action have fared against a Second Amendment challenge?[154]

More recently, the State of New York crafted a private right of action against sellers in limited circumstances involving the criminal misuse of firearms,[155] which attempted to fit within the "predicate" exception left

151. *See* Patrick J. Kelley, *The First* Restatement of Torts*: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93 (2007) (tracing the source of innovative provisions adopted in the original *Torts Restatement*). For efforts to document the dynamic changes witnessed by American tort law since the late nineteenth century, see Robert F. Blomquist, *"New Torts": A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23 (1990), and Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75 (2015). For a summary of the dramatic evolution in one theory tried against the firearms industry, see Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 947-48, 951-54 (tracing public nuisance all the way back to the twelfth century, but pointing out that it did not appear in the original *Restatement of Torts*).

152. *See* D.C. CODE § 7-2551.02 (2022); *see also* District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 651-59 (D.C. 2005) (allowing a group of plaintiffs to pursue such claims under this statute).

153. *See* Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174, 180-86 (D.D.C. 2009); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 170-72 (D.C. 2008); *see also id.* at 172-82 (rejecting separation of powers, due process, and takings objections to this result). For an argument that the PLCAA only displaced common law claims and not also private rights of action (created by state or local legislatures), see Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 FLA. L. REV. 833 (2023).

154. Separately, the lack of any meaningful opportunity to seek pre-enforcement judicial review of such laws may threaten to chill the exercise of protected rights made subject to such private rights of action. *See* Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 761 (2006) (hypothesizing that "legislatures could inhibit the sale of guns by imposing huge damage awards against gun manufacturers, distributors, and retailers for any harm caused by a gun"); *cf.* Don Thompson, *Newsom Signs Unique Gun Control Law; Bill Was Patterned After Abortion Measure in Texas*, BOS. GLOBE, July 23, 2022, at A7 (reporting that California empowered anyone to seek a $10,000 bounty plus attorneys' fees from distributors of unlawful assault weapons and affiliated items).

155. *See* N.Y. GEN. BUS. LAW § 898 (2022).

by Congress.[156] A federal court dismissed the industry's challenge.[157] Perhaps this statute's fairly demanding standard of culpability (i.e., recklessness)—coupled with the PLCAA's requirement that a defendant "knowingly" violated such a predicate statute—would avoid raising constitutional hackles given its resemblance to the actual malice standard now required for defamation claims brought by public figures. Nonetheless, if irresponsible distribution into criminal channels merits legislative attention and the prospect of sizeable damage awards, why did New York only do so for firearms (and not also for comparable problems with, for example, prescription opioids)? In short, state statutes designed to thread the needle of the predicate exception arguably magnify the constitutional objection by singling out this industry for unfavorable treatment. A handful of states have since followed New York's lead: California and New Jersey in 2022,[158] followed by Illinois and Washington in 2023.[159]

Aside from such legislative initiatives, commentators have endorsed greater use of private litigation to accomplish a modicum of gun control in the absence of serious efforts at direct regulation,[160] with one recently going so far as to urge the filing of lawsuits naming the National Rifle Association ("NRA") as a defendant.[161] On those rare occasions when a

156. *See* 15 U.S.C. § 7903(5)(A)(iii) (declining to preempt "an action in which a manufacturer or seller . . . knowingly 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"); *see also supra* note 61 (citing cases construing this exception).

157. *See* Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 56-61 (N.D.N.Y. 2022) (rejecting the industry's claim that the PLCAA preempted this statute); *id.* at 61-69 (rejecting Dormant Commerce Clause and vagueness objections); *see also* Ashley Southall & Jonah E. Bromwich, *New York Files Lawsuits Against Gun Companies*, N.Y. TIMES, June 30, 2022, at A15 (reporting on the first efforts to make use of this law).

158. *See* CAL. CIV. CODE § 3273.55 (2023); N.J. STAT. ANN. §§ 2C:58-33-35 (2023); *see also* Tobi Raji, *Are Gun Companies Liable for Killings? The Supreme Court Could Decide*, WASH. POST, Feb. 22, 2023, at A4 (reporting that Delaware had done so as well, adding that the industry's trade association challenged each of these laws and that the issue might eventually make its way to the high court). The industry successfully challenged the New Jersey law as preempted by the PLCAA. *See* Nat'l Shooting Sports Found. v. Platkin, 2023 WL 1380388, at *4-7, *10 (D.N.J. Jan. 31, 2023) (granting a preliminary injunction), *vacated and remanded*, 80 F.4th 215 (3d Cir. 2023) (lack of standing); *see also id.* at *7 (expressing "concerns as to whether [this statute] can survive on Constitutional grounds").

159. *See* 2023 Ill. Legis. Serv. P.A. 103-559 (West) (to be codified at 815 ILL. COMP. STAT. 505/2BBBB); 2023 Wash. Sess. Laws ch. 163 (to be codified at WASH. REV. CODE § 7.48.0001).

160. *See, e.g.*, Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 176-210 (2002) (advocating recognition of strict liability for manifestly unreasonable design as well as negligent marketing claims); *cf.* Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 5, 21-45, 53-54, 79-81 (2000) (favoring a more limited class of negligent marketing claims).

161. *See* Frank J. Vandall, *Suing the NRA for Damages*, 69 EMORY L.J. 1077, 1111, 1129 (2020); *see also* Mike McIntire, *Lawmakers' Files Reveal Secret History of N.R.A.*, N.Y. TIMES, July 30, 2023, at A1 ("Over decades, politics, money and ideology altered gun culture, reframed the Second Amendment

court adopted a novel theory of expansive gun industry liability, however, the state's legislature acted quickly to shoot down the idea.[162] The more interesting question therefore relates to the application of general tort doctrines in the firearms context and whether defendants can shield themselves by invoking the Second Amendment.

For the most part, products liability law has avoided subjecting sellers of firearms to distinctive treatment.[163] Notwithstanding the entreaties of scholars, courts generally have declined to visit particularly draconian standards on this industry. On rare occasions (and long before the *Heller* and *McDonald* decisions), judges entertained novel theories of liability; perhaps nowadays the opportunity to lodge Second Amendment objections directly in the course of such litigation will obviate the need to later seek special legislative relief.[164] On the whole, however, the law of products liability has hardly singled out gun sellers for disfavored treatment.[165]

Nonetheless, a few industries have gotten something of a free pass, which means that the failure to treat sellers of firearms and ammunition equally might well come across as discriminatory. In particular, certain "unavoidably unsafe" products have escaped the full brunt of strict liability from the outset.[166] Although the precise contours of this exception have attracted much debate, at a minimum it removed the threat of strict liability for design defects from the makers of vaccines and other socially valuable items.[167] Over time, the scope of this protection has expanded and come to encompass most if not all prescription

to embrace ever broader gun rights and opened the door to relentless marketing driven by fear rather than sport."). Oddly enough, one wrongful death lawsuit pursued against the NRA involved a gun stolen from its national headquarters. *See* Romero v. Nat'l Rifle Ass'n of Am., Inc., 749 F.2d 77, 80-81 (D.C. Cir. 1984) (affirming a JNOV granted to the defendant).

162. *See, e.g.*, Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1159-62 (Md. 1985), *superseded by statute*, MD. CODE ANN. PUB. SAFETY § 5-402(b) (West 2022), *as recognized in* Halliday v. Sturm, Ruger & Co., 792 A.2d 1145, 1156 (Md. 2002); *see also* KS&E Sports v. Runnels, 72 N.E.3d 892, 899-901 (Ind. 2017) (construing a state's immunity statute).

163. *See* Richard E. Kaye, Annotation, *Products Liability: Firearms, Ammunition, and Chemical Weapons*, 96 A.L.R.5th 239, 239 (2002) ("Products liability claims alleging that a defective firearm . . . was responsible for death, personal injury, or property damage have been treated by the courts in the same manner as claims involving other products.").

164. *See supra* note 162. The PLCAA did not bar lawsuits for harms "resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except . . . where the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v); *cf.* Travieso v. Glock Inc., 526 F. Supp. 3d 533, 542-48 (D. Ariz. 2021) (construing this exception narrowly); Adames v. Sheahan, 909 N.E.2d 742, 762-65 (Ill. 2009) (same).

165. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmts. d & e (AM. L. INST. 1998) (explaining that firearms would not qualify as "manifestly unreasonable designs").

166. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

167. *See* Lars Noah, *This Is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839, 842-43 (2009).

pharmaceuticals (including opioid analgesics) as well as implanted medical devices.[168] Much as defenders of the faith have felt slighted during the pandemic when state officials denominated certain secular businesses as "essential" while leaving out houses of worship,[169] some will argue that firearms also qualify as socially valuable products that deserve comparable insulation from the prospect of strict liability for certain alleged defects.[170]

Even more pointedly, the Connecticut Unfair Trade Practices Act ("CUTPA"), which the plaintiffs in the Sandy Hook shooting litigation successfully used in order to get past PLCAA immunity,[171] includes some

168. *See id.* at 842-88, 905-16; *see also id.* at 915 (explaining that "the *Products Liability Restatement* expressly excludes human tissue products from coverage"); *infra* note 194 (adding that it did so for books as well). One could call the immunity for unavoidably unsafe products the flipside of a "manifestly unreasonable design" claim. *See supra* note 54 and accompanying text.

169. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) ("[I]t turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too."); *id.* ("The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces. . . . [O]ther Governors have issued similar edicts . . . privileg[ing] restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples."). Religious venues, however, posed far higher risks of viral transmission. *See id.* at 79 (Sotomayor, J., dissenting) ("[B]ike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time."); *see also* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting); *supra* note 122.

170. *Cf.* LARS NOAH, LAW AND THE PUBLIC'S HEALTH: CASES, CONTROVERSIES & COVID-19, at 199 (2023) ("How about people who view firearms as PPE [personal protective equipment] (i.e., as a means for repelling threats or for promoting social distancing)?"). Although firearms plainly have some utility, *cf.* Fuller v. Berger, 120 F. 274, 275-76 (7th Cir. 1903) (discussing the patent granted for the Colt revolver as evidence of utility notwithstanding its affiliated risks), devotees of guns have exaggerated their benefits while downplaying the threat that these products pose to the public health, *see* Larry Buchanan & Lauren Leatherby, *Who Stops a "Bad Guy" with a Gun?*, N.Y. TIMES, June 23, 2022, at A12; Roni Caryn Rabin, *Researching the Reasons Behind Gun Purchases*, N.Y. TIMES, June 27, 2023, at D3 ("Many studies have found that easy access to firearms does not make the home safer."). Bullet-proof vests offer a more apt parallel to masks and related types of PPE. *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f, illus. 10 (AM. L. INST. 1998) (offering as an illustration *Linegar v. Armour of America, Inc.*, 909 F.2d 1150 (8th Cir. 1990)).

171. *See* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 325 (Conn. 2019); *see also* Rick Rojas et al., *Families Settle Gunmaker Suit for $73 Million*, N.Y. TIMES, Feb. 16, 2022, at A1 (reporting that insurers for the bankrupt manufacturer Remington settled with the families of nine of the victims of the mass shooting at Sandy Hook Elementary School); Michael Steinberger, *The Liability Argument*, N.Y. TIMES MAG., Oct. 1, 2023, at 30 (profiling the plaintiffs' attorney behind *Soto v. Bushmaster*); *cf.* Jennifer Calfas, *Gun Maker Sued over Highland Park Attack*, WALL ST. J., Sept. 29, 2022, at A3 (discussing a recent effort to make similar use of such a statute in Illinois). Similarly, a federal court held that claims under Nevada's Deceptive Trade Practices Act against the manufacturer of a bump stock used by a mass shooter in Las Vegas successfully evaded the PLCAA. *See* Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1138-40 (D. Nev. 2019); *cf.* Parsons v. Colts Mfg. Co., 499 P.3d 602, 607-11 (Nev. 2021) (holding that a state statute immunized the sellers of the AR-15 rifles used in this mass shooting); Richard A. Oppel, Jr., *Hotel Agrees to Settlement over Massacre in Las Vegas*, N.Y. TIMES, Oct. 4, 2019, at A12 (reporting that MGM Resorts settled the various claims filed against it for $800 million).

limited exceptions.[172] Although the state legislature plainly had not singled out gun manufacturers with this law, it failed to grant equally favorable treatment to the sellers of firearms as enjoyed, for example, by doctors and lawyers accused of professional negligence.[173] A Second Amendment test that turned in part on asking whether a law discriminated against possessors or sellers of firearms—and borrowed from the emerging approach used in the free exercise cases[174]—could undercut the application of various statutes and common law doctrines defining the scope of civil liability in this setting.

Unlike claims asserted against owners and other users of firearms, tort claims against sellers arguably threaten to cause a more attenuated burden on the Second Amendment rights of the former. In other contexts, however, the U.S. Supreme Court has recognized that a right of possession would mean little if the government could freely restrict sales.[175] Moreover, the Court has allowed suppliers of products or services to assert the rights of customers not party to litigation.[176] Even so, if the user of a gun gets injured and sues the sellers, presumably they will resist the vicarious invocation of their rights by these defendants.[177] If, however, brought by an injured bystander rather than a purchaser or

172. *See* CONN. GEN. STAT. § 42-110c (2023); *see also* Connelly v. Hous. Auth. City of New Haven, 567 A.2d 1212, 1215-17 (Conn. 1990) (municipal housing authority). Conversely, imagine that a state legislature decided to withdraw its previously granted special immunity for firearm manufacturers. *See, e.g.*, 2022 Del. Laws Ch. 332, § 2 (repealing 11 DEL. CODE § 1448A(d)); Ileto v. Glock Inc., 349 F.3d 1191, 1202 n.12 (9th Cir. 2003) (noting the repeal of such a statute in California). Would that discriminate in a constitutional sense? *Cf.* F.F. v. State, 143 N.Y.S.3d 734, 741-42 (App. Div. 2021) (rejecting such a free exercise objection after the legislature repealed a provision allowing for religious exemptions to childhood vaccination requirements).

173. *See* Tatum v. Oberg, 650 F. Supp. 2d 185, 193-94 (D. Conn. 2009) (explaining that, although it addresses commercial aspects of the profession of law, the statute does not govern claims of legal malpractice); Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 972 (Conn. 1997) ("We conclude that professional negligence—that is, malpractice—does not fall under CUTPA. Although physicians and other health care providers are subject to CUTPA, only the entrepreneurial or commercial aspects of the profession are covered . . . ."). As it happens, doctors and lawyers face far too little in the way of direct or indirect regulation of their sales practices. *See* Lars Noah, *Doctors on the Take: Aligning Tort Law to Address Drug Company Payments to Prescribers*, 66 BUFF. L. REV. 855, 879-86, 902-06 (2018); Lars Noah, *Giving Personal Injury Attorneys Who Run Misleading Drug Ads a Dose of Their Own Medicine*, 2019 U. ILL. L. REV. 701, 711-28; *id.* at 713 n.59 (noting suggestions for the greater use of state unfair trade practice statutes).

174. *See supra* notes 121-25 and accompanying text.

175. *Cf.* Noah, *supra* note 110, at 216 ("The constitutional decisions focused on an individual's right of contraceptive access and use rather than a seller's right of production and distribution, but the Court has recognized that these represent two sides of the same coin." (footnote omitted)).

176. *See id.* at 217 n.150 (referencing third-party standing doctrine used in the abortion context); *see also* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 743 (5th Cir. 2008) ("Supreme Court cases hold that businesses can assert the rights of their customers and that restricting the ability to purchase an item is tantamount to restricting that item's use.").

177. *See* Noah, *supra* note 110, at 216-17. In 1999, the Wyoming legislature invited that state's attorney general to interpose precisely such constitutional arguments in private tort litigation. *See* WYO. STAT. ANN. § 9-14-101 (2023).

other user, then a products liability claim against a seller would not pose such a difficulty.[178]

Even when brought by a disappointed consumer, a products liability defendant may have legitimate grounds for interposing a constitutional right possessed by their other customers. As I previously suggested:

> In contrast to the typical alignment in speech tort cases, the plaintiffs in these lawsuits do not mind declining to invoke their constitutional rights to unimpeded access, and it may seem strange to argue against recognizing a right to recover for flawed products that cause physical injuries. Nonetheless, exposure to tort liability—including the prospect of claims that have little or no merit—may send signals to manufacturers about the wisdom of continuing to serve a market associated with frequent claims, and the strict liability aspects of product defect litigation may invite lawsuits based on little more than consumer disappointment, regret, or surprise after experiencing a poor outcome. If the First Amendment requires tolerating some defamatory falsehoods in order to avoid chilling valuable speech, then other fundamental rights might mean having to tolerate the sale of certain arguably defective products lest suppliers become spooked about distributing even nondefective versions that individuals have a right to use.[179]

Plausible, perhaps, but far from conclusive, which may explain the evident failure by the defendants in products liability cases to even bother bringing up constitutional rights that the injured plaintiffs have no desire to assert.[180]

Again, *Bruen*'s historical test would seem to pose a serious obstacle. The earliest hints of products liability appeared in the mid-nineteenth century, as recounted in a famous 1916 New York decision eliminating the privity doctrine that previously had stood in the way of negligence claims by consumers against distant product manufacturers.[181] Similarly,

178. *See, e.g.*, Rhodes v. R.G. Indus., Inc., 325 S.E.2d 465, 466-67 (Ga. Ct. App. 1984) (affirming summary judgment for the members in the chain of distribution on a products liability claim asserted on behalf of the victim of an accidental shooting in part because of federal and state constitutional rights to bear arms). *But see* Smith *ex rel.* Smith v. Bryco Arms, 33 P.3d 638, 650 (N.M. Ct. App. 2001) (reversing summary judgment granted to the defendants); *see also id.* at 643 ("The trial court was perhaps concerned that applying our tort law to handguns could have the effect of infringing on the [state] constitutional right to bear arms."); *id.* at 643-45 (explaining why such a fear was misplaced).

179. Noah, *supra* note 110, at 221-22 (footnotes omitted). My earlier article had offered these observations, however, in connection with medical products rather than firearms.

180. Indeed, a study of over 1,000 decisions addressing Second Amendment objections in the first seven plus years after *Heller* failed to reference any tort cases whatsoever. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1478-80 (2018) (differentiating between civil and criminal litigation, though the former appeared to exclusively cover public rather than private law, and discussing constitutional objections pressed by either criminal defendants or civil plaintiffs with no mention of defendants in civil case).

181. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051-52 (N.Y. 1916) (tracing the privity

the movement to a standard of strict liability, though hinted at in some early twentieth century cases, did not begin to take hold until the 1960s.[182] Nonetheless, the Supreme Court's caveat about allowing "conditions and qualifications on the commercial sale of arms," carried forward from *Heller* by a concurring opinion pivotal to securing a majority in *Bruen*,[183] may still offer a bit of wiggle room,[184] and some historians have uncovered evidence of control over arms manufacturing that dates to the Founding era.[185]

C. Influencing (Not Dictating) Common Law Decisions

Even if the Second Amendment does not constrain tort doctrine, it

exception for "imminently dangerous" items to *Thomas v. Winchester*, 6 N.Y. 397 (1852)); *see also* Favo v. Remington Arms Co., 73 N.Y.S. 788, 789 (App. Div. 1901) ("A manufacturer and dealer in dangerous articles intended for use, such as a gun, is liable to the purchaser, at least, for damages resulting from his negligence in using defective materials, or from want of proper care and skill in manufacturing."). In *MacPherson*, the court discussed a still older decision from England that had endorsed the privity rule, *see* 111 N.E. at 1054, but it deserves mention that one of the opinions in that case referenced a decision imposing liability on the manufacturer of a gun that burst when fired, though there the distant plaintiff had prevailed only by alleging fraud, *see* Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Exch. 1842) (Alderson, B., concurring) (discussing the Court of the Exchequer's 1837 decision in *Langridge v. Levy*).

182. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963); *see also* Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring) (providing the classic statement of the various rationales for imposing strict products liability); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965); Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 556 (2014).

183. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring); *see also id.* at 2189 (Breyer, J., dissenting) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding."). Thus, even if Justice Thomas intentionally neglected to do so in his lead opinion, that means five members of the *Bruen* Court explicitly endorsed this caveat.

184. Although the broader caveat appeared to have restrictions imposed by positive law in mind, products liability doctrines (which many states have codified) might qualify as putting some conditions on commercial sale. Nonetheless, a right to possess firearms implies that suppliers would enjoy some correlative right to sell these products without undue constraints. *See* Teixeira v. Cnty. of Alameda, 873 F.3d 670, 677-90 (9th Cir. 2017) (en banc); *id.* at 682 ("Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense, but the right of gun users to acquire firearms legally is not coextensive with the right of a particular proprietor to sell them."); Corey A. Ciocchetti, *The Business of Guns: The Second Amendment and Firearms Commerce*, 46 PEPP. L. REV. 1, 5, 30, 36-41 (2018). Separately, though the rules of negligence applied to private possessors hardly seem to align with any of these preserved categories, the *Heller* majority had dropped a hint on that score as well. *See* District of Columbia v. Heller, 554 U.S. 570, 632 (2008) ("Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.").

185. *See* Benjamin L. Cavataro, *Regulating Guns as Products*, 92 GEO. WASH. L. REV. (manuscript at Pt. V.A.2.b) (forthcoming 2024) (discussing the supervision of manufacturing quality in seventeenth century England and in early nineteenth century America); Lindsay Schakenbach Regele, *A Different Constitutionality for Gun Regulation*, 46 HASTINGS CONST. L.Q. 523 (2019) (documenting the federal government's early role in the emergence of this industry). I have no basis for assessing the import of this fairly limited historical record, *cf.* Shawn Hubler, *A Sudden Need for Experts on Weapons of 1791*, N.Y. TIMES, Mar. 19, 2023, at A21, but I seriously doubt that it would matter to the *Bruen* majority.

nonetheless might affect judgments about the appropriate scope of liability in cases involving firearms. Indeed, at least one commentator claims to have uncovered evidence that this has already happened.[186] Although I have searched in vain for what he evidently found in the course of reading between the lines of these various judicial opinions, his claim strikes me as plausible—even if the asserted right to keep and bear arms does not provide a basis for altogether immunizing otherwise tortious conduct, it may well play a more modest (and perhaps covert) role as a policy factor embedded in duty analysis.[187]

For an illustration, consider a negligence claim brought against the owners of a handgun that had been stolen by their troubled adult son and used in the killing of a law enforcement officer. The trial judge dismissed the estate's lawsuit, and the intermediate appellate court in Indiana affirmed.[188] In the course of holding that the owners of the gun owed no obligation to the victim, the court referenced the right to keep and bear arms under the state constitution as evidence of a public policy opposed to the recognition of such a duty of care,[189] but the state supreme court reversed, finding no merit to this argument.[190] More interestingly, it appears that an amicus brief filed by the NRA had invoked the constitutional right as a freestanding ground for refusing to entertain the

186. *See* Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1, 4-10, 45-47 (2016) (asserting that owners and sellers of handguns already largely enjoy immunity from tort liability, with common law and statutory rules influenced by the federal constitutional right to keep and bear arms, and criticizing this state of affairs); *id.* at 3 (arguing that "the United States has enshrined a de facto Second Amendment right to be negligent regarding many aspects of making, distributing, and possessing firearms"); *id.* at 29 (noting "the unstated infiltration of the Second Amendment in this area").

187. *Cf.* Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 257-59, 265 (2018) (finding this phenomenon in other settings); *id.* at 254 ("[S]tate law is embracing such a robust, anti-regulatory view of the right to keep and bear arms that the Judicial Second Amendment, at least as currently construed, seems likely to have less and less to say about the shape of America's gun laws."). For a court referencing a state constitutional right to bear arms in the course of rejecting a claim that the selling of handguns represented an ultrahazardous activity subject to strict liability, see Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (applying Illinois law).

188. *See* Estate of Heck *ex rel.* Heck v. Stoffer, 752 N.E.2d 192 (Ind. Ct. App. 2001), *rev'd*, 786 N.E.2d 265 (Ind. 2003).

189. *See id.* at 200-01; *see also id.* at 201 n.10 ("The federal corollary to the state right to bear arms is found within the Second Amendment . . . ."). The dissent dismissed the idea with a brief footnote. *See id.* at 208 n.17 (Sullivan, J., dissenting). For a couple of older examples, see McKellar v. Mason, 159 So. 2d 700, 702 (La. Ct. App. 1964) (noting, in the course of excusing the mistaken use of excessive force by a homeowner, that the federal and state constitutional right "to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured"), and Lopez v. Chewiwie, 186 P.2d 512, 513 (N.M. 1947) (referencing the right to bear arms recognized in the state's constitution as evidence of a public policy that justified declining to hold the owner of a high-powered rifle liable for negligent storage when his thirteen-year-old son took it and fatally shot another person, quoting with approval from a dissenting opinion in a 1925 decision from the Supreme Court of Kansas that waxed poetic about the place of guns in American history, which after rehearing in that case effectively became the opinion for a majority of that court).

190. *See Heck*, 786 N.E.2d at 270.

claim, but Indiana's high court found this angle equally unavailing: "[N]othing precludes a person from suing for slip-and-fall injuries that occur on a church's premises. . . . [N]ewspaper distributors are not shielded from negligence suits for injuries caused by their delivery drivers."[191] This analysis, however, confuses the status of the defendant (as a church, newspaper distributor, or gun owner) with the allegedly injurious instrumentality that enjoys constitutional protection (i.e., religious doctrine, published information, or firearms).[192]

The First Amendment has unmistakably had a similarly indirect impact beyond speech torts. Sellers of books that contain potentially hazardous misinformation often enjoy special protection from the prospect of tort liability thanks in part to concerns derived from constitutional safeguards for free speech.[193] In particular, several courts have explained that books do not qualify as products because the prospect of visiting strict liability on sellers would run afoul of the U.S. Supreme Court's standards for

191. *Id.* at 270-71; *see also id.* at 271 ("[T]his right does not entitle [gun] owners to impose on their fellow citizens all the external human and economic costs associated with their ownership."). Similarly, in the course of concluding that owners of firearms owe an actionable duty of care to prevent access by intoxicated adults, the Utah Supreme Court began its opinion by recognizing that "[t]he right to bear arms is enshrined in both the United States and Utah Constitutions." Herland v. Izatt, 345 P.3d 661, 663 (Utah 2015). The court did not circle back to that thought until many pages later in its concluding paragraph with only the following further elaboration:

> [T]his right is not unrestricted. . . . Given the minor burden imposed and the great risk where such weapons are supplied to these groups, we affirm that gun owners have a duty to exercise reasonable care in supplying their guns to others—such as children and incompetent or impaired individuals—whom they know, or should know, are likely to use the gun in a manner that creates a foreseeable risk of injury to themselves or third parties.

Id. at 674-75.

192. The First Amendment's protection "of the press" evidently had nothing to do with shielding those in the media; instead, it covered the printing press and the right to use it for publishing (i.e., written communication), while the protection "of speech" covered only oral communication. *See, e.g.*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 464, 538-40 (2012).

193. *See, e.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991) (rejecting negligence claims against a book publisher after referencing "the gentle tug of the First Amendment and the values embodied therein"); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) ("Even if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay."); *see also* Richard C. Ausness, *"The Disorderly Conduct of Words": Civil Liability for Injuries Caused by the Dissemination of False or Inaccurate Information*, 65 S.C. L. REV. 131, 157-89 (2013) (providing an exhaustive description of the available case law); *id.* at 187-88 (summarizing judicial references to constitutional concerns); *id.* at 210 ("Time and time again, courts have expressed concern that holding book publishers and others liable would create a chilling effect . . . ."); Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1197 (1998) ("[C]ourts have treated books unlike other mass-produced commercial products, often citing policies derived from the First Amendment's protections against governmental interference with free speech for their special treatment."); *id.* at 1218 ("In rejecting tort claims against authors and publishers, courts routinely invoke the First Amendment or its underlying values as expressing a public policy against chilling speech."); *cf. id.* at 1219 ("To the extent that courts simply invoke a policy argument informed by constitutional values, they provide scant support for their fears of chilling authors and publishers.").

recovery in cases of defamation.[194] Although this view would leave open the possibility of negligent misrepresentation or similar claims predicated upon some showing of fault, in practice even these theories offer little prospect of recovery for injured readers.[195]

Interestingly, however, certain publications related to the use of firearms and other dangerous weapons have fared less well on this score—namely, books and magazines that solicit or facilitate criminal activity.[196] Putting aside the fact that these contemplated the offensive (and unlawful) rather than defensive use of arms, one wonders whether invocation of the Second Amendment would have worked any better for the defendants in these sorts of cases, especially now that *Bruen*

194. *See, e.g.*, *Winter*, 938 F.2d at 1035 ("We place a high priority on the unfettered exchange of ideas. . . . The threat of liability without fault . . . could seriously inhibit those who wish to share thoughts and theories."); Cardozo v. True, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. d (AM. L. INST. 1998) ("Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases."); *cf. id.* (suggesting that "the better view is that false information in such documents [i.e., maps and navigational charts] constitutes a misrepresentation that the user may properly rely upon").

195. *See, e.g.*, Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315, 325-28 (S.D.N.Y. 2006) (dismissing negligent misrepresentation and other claims against the source of diet books, products, and a website that recommended consumption primarily of high-fat and high-protein foods, concluding that the information qualified as fully protected noncommercial speech), *aff'd*, 279 F. App'x 40, 41-42 (2d Cir. 2008); Smith v. Linn, 563 A.2d 123, 124-27 (Pa. Super. Ct. 1989) (rejecting both negligent misrepresentation and strict products liability claims brought on behalf of the reader of a diet book who died of complications from following it), *aff'd*, 587 A.2d 309 (Pa. 1991); *see also* Ausness, *supra* note 193, at 185 ("For the most part, courts have also rejected negligence and negligent misrepresentation claims . . . ."); *id.* at 210-11 (same); Noah, *supra* note 193, at 1209-10 & n.43; *id.* at 1196 ("[A]part from libel claims, [books] are rarely the subject of tort litigation."); *id.* at 1210 ("[C]ourts often conclude that publishers have no duty of care running to readers unless they were involved in the process of authorship. This distinguishes negligence from strict products liability, which generally applies to all persons in the chain of distribution." (footnote omitted)); *id.* at 1216 ("[S]ome courts have expressed concerns about imposing potentially ruinous liability and excessive fact-checking or verification obligations on editors and publishers."); *cf.* Lars Noah, *Medicine's Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community*, 44 ARIZ. L. REV. 373, 464-65 (2002) (discussing the potential liability of third parties that supply inaccurate information about therapeutic products).

196. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 247-55, 265 (4th Cir. 1997) (reversing summary judgment for the publisher of the *Hit Man* manual, rejecting the defendant's argument that the First Amendment barred civil liability for a wrongful death claim premised on aiding and abetting an intentional tort); *id.* at 248 n.4 (noting that separate negligence and strict liability claims were not before the court); Wilson v. Paladin Enters., Inc., 186 F. Supp. 2d 1140, 1144 (D. Or. 2001) (granting summary judgment to these defendants on negligence and strict liability but not assault and battery claims in a similar case); *see also* Braun v. Soldier of Fortune Mag., Inc., 968 F.2d 1110 (11th Cir. 1992) (affirming a jury verdict against the publisher of a magazine that ran a personal ad implicitly offering to commit murder for hire); *id.* at 1118-20 (holding that a modified negligence standard, which would not require that a magazine publisher investigate advertisements, satisfied First Amendment concerns); Eimann v. Soldier of Fortune Mag., Inc., 880 F.2d 830, 838 (5th Cir. 1989) (reversing a jury verdict against the publisher of a magazine that ran an ambiguous personal advertisement that lead to the hiring of a hit man); Norwood v. Soldier of Fortune Mag., Inc., 651 F. Supp. 1397, 1401-03 (W.D. Ark. 1987) (denying the magazine publisher's motion for summary judgment in a similar case). *See generally* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002).

seemingly has rejected all use of the modern tiers of scrutiny so commonly deployed in resolving First Amendment and many other constitutional challenges.[197]

VI. CONCLUSION

Constitutional arguments have hardly played any perceptible role in tort litigation involving firearms, but that could soon begin to change. Even before the decision in *Bruen*, a handful of commentators drew attention to this possibility. As litigants find more success in circumventing the immunity crafted by Congress almost two decades ago, and as lower courts begin to work through the dramatic changes in constitutional scrutiny ushered in by *Bruen* almost two years ago,[198] the time has come to take this prospect more seriously.

Although a parallel approach for medical products liability previously had tempted me, I find it alarming that courts might use the U.S. Constitution to further free users and sellers of firearms from the prospect of tort liability.[199] Consider it a warning of where we might soon be headed, which is to say far beyond where Congress took us with the PLCAA.[200] Perhaps any judges inclined to buy these sorts of arguments will pause for fear of starting down a slippery slope encompassing contraceptives and other constitutionally protected consumer goods that mortify many of those on the right. Otherwise, the all-too limited measure of accountability effectuated through the threat of civil liability against possessors and sellers of firearms will become even more muted in the future.

197. *See supra* notes 88-89.

198. *See* Ruth Marcus, Opinion, *A Judge Calls the Supreme Court's Bluff on Guns*, WASH. POST, July 9, 2023, at A25 (discussing a striking new opinion issued by U.S. District Judge Carlton Reeves of Mississippi that roundly criticized *Bruen*'s methodology but nonetheless felt constrained to hold unconstitutional—as applied to a person convicted of a violent crime—the longstanding federal prohibition on firearms possession by felons).

199. Alas, it appears that I have once again given aid and comfort to the proverbial enemy. *Cf.* Lars Noah, *Listening to Mifepristone*, 80 N.Y.U. ANN. SURV. AM. L. 33, 61 (2023).

200. Now that a strong reading of the Second Amendment has become well entrenched, the time may have finally come to revisit the Court's use of the First Amendment to refashion the common law of defamation and other speech torts, but such an about-face seems unlikely at this late date. *See supra* note 21 and accompanying text. Moreover, the newer decisions involving both federal preemption and punitive damages (discussed at the end of Section II above) make an about-face only on the speech torts far from enough to withdraw constitutional scrutiny of tort litigation.