

## CHAPTER 13

### *Gun Litigation & the Constitution*

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For all of the discussion about litigation against the firearms industry, and the academic commentary concerning the meaning of the Second Amendment generated in the past decade, the question of whether there is a constitutional dimension to gun litigation has received surprisingly little scholarly attention.<sup>1</sup> Assuming that raising constitutional questions about this litigation is not a frivolous endeavor,<sup>2</sup> I hope that this chapter will help fill a gap in the literature. What sorts of constitutional issues are implicated by civil lawsuits against firearms manufacturers and distributors? The obvious one involves the Second Amendment. To the extent that one believes, as I do, that the amendment guarantees an individual right to private firearms ownership, could the Second Amendment limit gun control by lawsuit as it might limit gun control measures initiated by Congress or state legislatures? The first part of this chapter critically analyzes this question using as a point of departure the argument put forth by Dave Kopel and Richard Gardiner that the First Amendment case *New York Times v. Sullivan*<sup>3</sup> furnishes a precedent for restricting civil lawsuits against gun manufacturers.

The second part of the chapter then raises another constitutional question: Do the lawsuits brought by cities and municipalities violate the dormant Commerce Clause doctrine (DCCD)? The DCCD is the set of self-executing limitations the judiciary has inferred from the Constitution's grant of power over interstate commerce to Congress that prohibit states from discriminating or otherwise burdening commerce among the states.<sup>4</sup> In addition to prohibiting protectionism and discrimination

against out-of-state commerce,<sup>5</sup> the DCCD also prevents states from legislating “extraterritorially”<sup>6</sup> or imposing a burden on interstate commerce that is “clearly excessive” when measured against “putative local benefits.”<sup>7</sup> This part examines whether lawsuits that, for example, seek to alter nationwide advertising and distribution practices or that seek alteration in product design are vulnerable to challenge under the DCCD.

### The Second Amendment and Gun Litigation

In 1964, the United States Supreme Court held that the First Amendment’s guarantee of a free press placed constitutional limits on the enforcement of state libel law. Dave Kopel and Richard Gardiner have argued that the reasoning of *Sullivan* ought to be extended to gun litigation and constitutional limits be placed on suits against gun manufacturers.<sup>8</sup> In this section, I examine that argument critically and ask whether Kopel and Gardiner’s proposed analogy—offered prior to the initiation of the latest round of suits—is stronger in light of cities’ and counties’ involvement.

#### New York Times v. Sullivan *and the Constitutional Limits on Common Law Libel Suits*

In 1960, the *New York Times* ran an ad paid for by prominent civil rights leaders seeking financial support for Dr. Martin Luther King’s efforts to combat segregation in the South.<sup>9</sup> The ad itself contained a few errors of fact in its references to events that had occurred in Alabama, though it did not specifically name any public officials in its text. State officials who claimed that they were libeled by the ad demanded a retraction from the *Times*. When none was forthcoming, they sued. One was awarded five hundred thousand dollars by an Alabama jury, which the state supreme court upheld.

The *Times* appealed the award, and the U.S. Supreme Court held Alabama libel law “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the

First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.”<sup>10</sup> For good measure, the Court also held that the evidence presented at trial was “constitutionally insufficient” to support a jury verdict.

The Court first concluded that the state court’s application of Alabama libel law constituted “state action” for purposes of the Fourteenth Amendment and that the First Amendment applied though the statement was a commercial advertisement. Justice Brennan located at the core of the First Amendment’s guarantee of a free press and of free speech the right to “uninhibited, robust, and wide-open” debate on public issues that may even include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” The *Times* ad was unquestionably “an expression of grievance and protest on one of the major public issues of our time” and “would seem clearly to qualify for the constitutional protection.” The question was whether the portions that were false deprived the ad of that protection.

Brennan concluded that the inaccuracies in the ad could not strip the *Times* of the First Amendment’s protections if “the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” Nor was injury to official reputation sufficient to overcome the constitutional interest in promoting robust debate on public issues. And if neither falsity nor injury to reputation alone was sufficient to remove the First Amendment’s “constitutional shield from criticism of official conduct,” then “the combination of the two elements is no less inadequate.” Analogizing the Alabama civil law of libel to the law of seditious libel criminalized in the 1798 Alien and Sedition Acts, Brennan wrote that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.” That truth was a defense was of no consequence because “would-be critics of official conduct may be deterred from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the expense of having to do so.”

Brennan wrote that “[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

*The Argument for Extending Sullivan to Gun Litigation*

Kopel and Gardiner have argued that *Sullivan* should be extended to tort suits against firearms manufacturers on the theory that such suits could have a chilling effect on the exercise of Second Amendment rights by driving gun manufacturers out of business, thereby depriving citizens of the firearms necessary to exercise their Second Amendment rights.<sup>11</sup> In this subsection, I summarize their argument and discuss the strength of the proposed analogy in the following subsections.

First, Kopel and Gardiner argue that the First and Second Amendments both guarantee individual rights and that, like the First Amendment, the Second Amendment should be applied to the states through the Fourteenth Amendment. They review the legal theories behind the lawsuits filed against gun manufacturers circa 1995, concluding that, while the suits were largely unsuccessful, they nevertheless harmed manufacturers, who either went bankrupt as a result of defending the litigation or who simply left the business, unwilling to bear the costs necessary to defend similar suits.

Kopel and Gardiner then lay out the parallels between the libel suits at issue in *Sullivan* and the tort suits against gun manufacturers. In addition to the kinship they see between the First and Second Amendments as guarantors of important individual rights, they also argue that inferring constitutional limits on tort suits involving those guarantees is essential to their full exercise, given the official immunities available to public officials. According to *Sullivan*, the fact that public officials are entitled to immunity from suit arising out of the discharge of official duties (even if mistakes occur) means that sometimes the only way to call those officials to account is by criticizing them in the press.<sup>12</sup> To permit those same officials to insulate themselves from criticism by threatening libel suits for any erroneous information—no matter how trivial—seemed to the Court to effectively place those officials beyond all criticism.<sup>13</sup> Similarly, since public officials are generally immune from suit for failing to protect citizens from crime, even if the failure was attributable to negligence,<sup>14</sup> Kopel and Gardiner argue that “it would be highly inappropriate for the government, through the courts, to make it economically impossible for persons to own handguns for self-defense. . . . [T]he government’s courts certainly should not let themselves become a vehicle

that deprives people of the tools with which to protect themselves.”<sup>15</sup> They argue that the financial burden on gun manufacturers occasioned by suits or threats of suits “is sufficient to compel a Constitutional remedy for the Second Amendment” analogous to that which the Court provided the First Amendment in *Sullivan*.

Finally, they claim that “the legal assault on the exercise of Second Amendment rights in the 1990s is far more consciously developed and carefully planned than the assault on First Amendment rights in the 1960s.” They noted that law clinics specializing in firearms litigation were established at a number of law schools and that suits were being brought “in jurisdictions such as San Francisco and New York City which are notorious for their antipathy to Second Amendment rights” just as “libel suits were brought in plaintiff-friendly, speech-hostile venues such as Montgomery, Alabama” in *Sullivan*. “If the facts of the 1960s,” they conclude, “were sufficient to necessitate the Supreme Court to take action in [*Sullivan*] to protect the First Amendment, the facts of the 1990s are more than sufficient to mandate judicial action to protect the Second Amendment.” To that end, they propose that “a person injured through the criminal use of a firearm” would be prohibited “from recovering damages against the non-criminal manufacturer and seller, unless he proved that the firearm was transferred by the defendant with knowledge or reckless disregard that the firearm was to be used criminally.”

### *Is the Analogy to Sullivan Valid?*

Only one manufacturer has offered Kopel and Gardiner’s theory as a defense against suits by private litigants or by municipalities.<sup>16</sup> Despite the superficial appeal of the analogy, a number of factors make it unlikely that appeals to *Sullivan* will succeed as a *legal* strategy. However, there is reason to believe that Kopel and Gardiner’s analogy has a definite *political* appeal to legislators considering limiting municipal suits.

First,<sup>17</sup> federal courts generally (if, in my view, mistakenly)<sup>18</sup> do not subscribe to an individual rights reading of the Second Amendment. Moreover, the Second Amendment has never been applied to the states through the Fourteenth Amendment,<sup>19</sup> despite convincing arguments

that it should be.<sup>20</sup> Until the state of the law changes, analogies to *Sullivan* would founder on the objection that the Second Amendment neither guarantees an individual right nor binds the states through the Fourteenth Amendment. But the potency of the analogy to *Sullivan* may not be appreciably enhanced even were courts more accepting of the individual rights interpretation and willing to bind states to that interpretation.

Consider table 1, which compares *Sullivan* to Kopel and Gardiner's formulation of an analogous tort immunity rule to be applied to firearms litigation.

Kopel and Gardiner's analogy to *Sullivan* falls short in several respects. First, the proper analogy for the constitutional limits on libel suits by *private* citizens (as opposed to public officials) is found not in *Sullivan* but rather in later cases that relaxed the *Sullivan* rule for suits brought by nonpublic figures. Second, Kopel and Gardiner's analogy depends upon questionable characterizations of the core meaning of the two amendments and of the threat to that core posed by lawsuits against gun makers. Third, the general failure of the suits against gun manufacturers by crime victims suggests that institutional safeguards absent in *Sullivan* are providing sufficient protections for defendants and that a constitutional rule is unnecessary. Recent suits against manufacturers filed by cities, moreover, do not rehabilitate the analogy to *Sullivan*.

TABLE 1. Comparison of *Sullivan* Rule with Kopel and Gardiner's Formulation

<i>Sullivan</i> Rule	Kopel and Gardiner Article
In libel suits by public official Against news media	In tort suits by private citizens Against gun manufacturers and distributors
Regarding matter of public concern First Amendment requires	For criminal misuse of firearm Second Amendment requires
No liability unless false statements made with knowledge or reckless disregard of falsity	No liability unless manufacturer or distributor intentionally or recklessly made gun available to criminal
Because at core of the First Amendment is the right of citizens to criticize public officials	Because at core of the Second Amendment is the right of citizens to obtain firearms for self-defense against crime committed by other private citizens

*Libel Standards Post-Sullivan*

In the paradigm tort case described in Kopel and Gardiner's article, private plaintiffs bring suit against a manufacturer for harm caused by either the manufacturer's product or the use to which that product was put. Stated in those terms—litigation between private parties—then the facts of *Sullivan*, where a *public official* sued a newspaper for publishing erroneous information about the official's discharge of public duties, no longer look apposite. The proper analogy, it seems, is found in the Court's post-*Sullivan* cases.<sup>21</sup>

In *Gertz v. Robert Welch, Inc.*,<sup>22</sup> the Court rejected an attempt by the John Birch Society to invoke *Sullivan*'s actual malice rule to shield it from damages awarded in a libel suit filed by a lawyer against the society. Gertz was the subject of an article in a Birch periodical accusing him of being part of a communist-inspired conspiracy to harass the police based on a suit Gertz had filed.

Rejecting the society's claim of constitutional immunity from suit, the Court concluded that the justifications for the rule in *Sullivan*—including the need to hold public officials to account and the availability of other avenues of redress to defamed public officials—did not apply in the case of a private individual, and therefore *Sullivan* itself did not control. It then held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” While the Court barred strict liability in libel claims, which had been the rule at common law, it permitted a negligence standard to be applied in these cases, though the Court made clear that *Sullivan*'s actual malice rule had to be applied when plaintiffs sought punitive damages.

A plurality of the Court further loosened constitutional restrictions on libel suits by private parties in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>23</sup> At issue was Dun & Bradstreet's liability for erroneously (and negligently) reporting to its subscribers that Greenmoss Builders had filed for bankruptcy. Dun & Bradstreet appealed a state court verdict against it (\$350,000 in actual and punitive damages), claiming that *Gertz* prohibited the imposition of punitive damages without a demonstration that it had acted with actual malice. A plurality declined to apply *Gertz* because the defamatory statements involved “no issue of public concern.” Justice Powell's opinion stressed that the First Amendment inter-

est in protecting Dun & Bradstreet from the consequences of its negligently prepared credit statement was less important than the state's interest in compensating plaintiffs harmed by defamatory statements and its interest in providing for presumed or punitive damages on evidence that would not satisfy *Sullivan's* actual malice standard.

In light of *Gertz* and *Dun & Bradstreet*, then, Kopel and Gardiner's analogy seems to have been formulated incorrectly. The proper analogy to the sort of suits Kopel and Gardiner describe—suits of private manufacturers and sellers by private victims of violent crime for negligent sales or negligent distribution—is not *Sullivan* but rather *Gertz* or *Dun & Bradstreet*. Even assuming that a private lawsuit can be deemed a matter of public concern, *Gertz* would permit private plaintiffs to collect actual damages from defendants under a negligence standard, without requiring proof of actual malice. If such suits are *not* matters of public concern—and I think a strong argument could be made that they are not—then punitive damages are available as well.

#### *Are There Analogous Constitutional Interests?*

The success of Kopel and Gardiner's proposed analogy, however, does not turn on characterizations of whether firearms litigation is a matter of "public concern" or whether the parties are public or private figures but rather turns on the interests being protected. Are the constitutional interests protected by the First and Second Amendments analogous and their values commensurate?

*Sullivan* was explicit in locating the immunity in the core of the First Amendment's protection of political speech—particularly speech criticizing the actions of elected officials.<sup>24</sup> The Court explained that without a constitutional rule limiting libel suits the *Times* and similarly situated parties would be forced to choose between risking financial ruin and reporting material critical of public officials. The possibility of huge jury verdicts like the one in *Sullivan* would mean that newspapers would be extremely cautious not only in accepting advertisements commenting on public events, like the ad at issue, but also in their own reporting. This would have a "chilling effect" on free speech. *Sullivan* thus provided a constitutional shield against a potential threat to individual liberty by a government seeking to squelch debate about its policies. A critic of the

government is free to voice those criticisms (even if they are erroneous or factually inaccurate) without fear that government officials can retaliate through the tort system.

Kopel and Gardiner argue that the right to armed self-defense is at the core of the Second Amendment. This interest might be seen as analogous to the First Amendment rights protected in *Sullivan*, but the strong form of this argument—which is not clearly made by Kopel and Gardiner—is unlikely to have much appeal to federal judges. One might characterize the purpose of the Second Amendment as guaranteeing a check on governmental power to oppress individual citizens by preventing government from denying those citizens the means to oppose the government with force.<sup>25</sup> More often, however, the argument is made that permitting individuals to arm allows them to resist the unlawful activities of other private citizens, not those of the government. But the defense-against-crime rationale for the Second Amendment does not so clearly implicate the interest protected by *Sullivan*—protection from governmental power—unless one argues that, by depriving citizens of the ability to engage in self-defense, individuals are thus made subordinate to the government.<sup>26</sup> But even at one remove, the argument that citizens need arms to defend themselves against governmental power is unlikely to resonate with judges, though these arguments seem to have more purchase with some legislators.

Further, it remains unclear whether tort suits for negligent manufacture or distribution seriously threaten the ability of citizens either to resist a tyrannical government or to engage in less revolutionary forms of self-defense against crime. Kopel and Gardiner note that some firearms manufacturers have been forced out of business because of litigation, but only a few.<sup>27</sup> Even if the mere prospect of *some* liability is sufficient to cause some manufacturers to shutter their doors, it is difficult to believe that all such manufacturers would follow suit. If every firearms manufacturer in existence were to cease operations tomorrow, the inventory of firearms (estimated to be between 200 and 250 million) presently in existence would not be reduced.<sup>28</sup> Even if the price of remaining guns would rise—possibly endangering widespread availability of relatively inexpensive guns—there is little evidence to suggest that the cost of gun ownership would be prohibitive, whereas unchecked use of libel actions would very quickly have driven papers like the *Times* into bankruptcy.

Moreover, the fact that the present suits are brought under theories of negligence (with regard to marketing and distribution) that require proof of duty, breach of that duty, and harm to plaintiffs proximately caused by the breach of legal duty provides another distinction between past and present gun suits and the strict liability that attached to libel under the Alabama law struck down in *Sullivan*. Unlike newspaper editors, who would be forced, on pain of a large libel judgment, to *guarantee* the truth of everything printed in their publication, by proceeding on a negligence standard, plaintiffs have largely foregone any attempt to place distributors and manufacturers in the position to guarantee that the guns they manufacture and sell never end up in the hands of criminals.

#### *Gun Litigation and the Operation of Institutional Checks*

It is important to emphasize the factual differences between *Sullivan* and the gun suits that Kopel and Gardiner discuss. Evidence exists that courts are functioning and that the legal process has not been entirely commandeered by those wishing to disarm America or even to drive gun manufacturers completely out of business. In fact, despite the plethora of suits, few manufacturers have been bankrupted by damage awards. Further, the primary theory of liability employed now is negligence, not strict liability. As the numerous dismissals suggest, plaintiffs are having trouble surmounting the legal hurdles that exist in proving their negligent distribution and marketing cases.

Legislatures have also shown a willingness to exercise a political check on these lawsuits through the passage of legislation restricting the ability of cities to bring such lawsuits or prohibiting them altogether.<sup>29</sup> A similar bill nearly passed in the U.S. Congress.<sup>30</sup> Thus, I think it beyond cavil that gun manufacturers have more friends in the states than the *New York Times* had in the South at the time *Sullivan* was decided.

#### *Do State and Municipal Lawsuits Strengthen the Sullivan Analogy?*

Kopel and Gardiner wrote prior to the recent wave of municipal lawsuits against gun manufacturers. Since public officials are initiating these

recent suits, is Kopel and Gardiner's analogy more viable now than perhaps it was when they first proposed it? On the one hand, involvement by indisputably public officials gives some weight to the argument that the industry needs a corresponding immunity to counter official immunity shielding municipalities from liability for failing to prevent crime to particular victims. If cities can litigate firearms out of existence, then citizens are left with no means to protect themselves from crime and no avenue of redress should the police negligently fail to protect them.

Yet problems with the analogy still exist. First, it is not clear that the protection-from-crime rationale is persuasive with regard to some of the claims—such as defective design and negligent marketing—that have been brought by municipalities. In fact, those claims are the ones that cities claim will actually aid in crime reduction. Second, the new suits sound in negligence, not strict liability; cities are not asking gun dealers and manufacturers to guarantee that their products will not be used in criminal acts. Third, most of the suits seek only actual damages (though the amounts that might be proven would be substantial, especially if cities can demonstrate how much they pay to prevent gun crime or to deal with its aftermath and can require manufacturers to reimburse them for those costs associated with the alleged wrongdoing). Perhaps most important, the suits by cities are aimed not at gun ownership or armed self-defense, per se, but rather at the secondary effects of allegedly negligent sales of those products. To further borrow from First Amendment doctrine, the cities' suits might be characterized as seeking to ameliorate the harmful secondary effects of gun sales, not striking at the right to keep and bear arms itself.<sup>31</sup> Cities might argue that, as long as they are not trying to suppress *all* gun ownership and as long as the suits still leave open “ample alternative channels” either for self-defense or for law-abiding citizens to obtain a gun for protection, there should be no constitutional bar to them.

*Is Sullivan's Extension to Gun Litigation Desirable?*

Despite its surface appeal, Kopel and Gardiner's *Sullivan* analogy fails on a technical level because of the numerous differences between the cases and the two types of suits. At a more general level, however, it

seems undesirable to seek *Sullivan*'s transplant from its First Amendment context and to ignore the important civil rights context in which it was originally decided. In the forty years since *Sullivan*, courts have wrestled to apply it in a variety of factual circumstances. The Court has intervened on a number of occasions since, to almost no one's satisfaction. If courts have such difficulty striking the balance between the right of tort victims to receive compensation from their injury and the right of states to use tort law to deter wrongful conduct on the one hand and the First Amendment rights of defendants on the other hand, do we want to introduce those difficulties into an area in which the constitutional right in question is so contested? Moreover, with courts dismissing suits and legislatures barring suits in some cases, the need for a constitutional check on this litigation—at least of the sort imposed by *Sullivan*—is not self-evident.

#### *The Political Value of the Sullivan Analogy*

The role legislatures have played in limiting these suits in a number of states raises a final point that is worth making. A growing number of constitutional scholars have urged that opportunity be given by courts to our elected officials to interpret and enforce the Constitution. Some scholars have even suggested that, when given the opportunity, elected officials are more reliable guarantors of liberty than are courts. I submit that legislative protection of the Second Amendment is, in part, what is motivating state legislators to rein in municipalities that filed suit against gun manufacturers and is what motivated members of Congress to support the bill to immunize gun manufacturers from similar suits. If so, then the foregoing analysis is too legalistic. If there is an instinctive appeal to the notion that the right to keep and bear arms is threatened by litigation that could bankrupt firearms manufacturers, and legislators are acting to protect the right by banning or restricting such suits, then my quibbles with the analogy are somewhat beside the point. State legislators' (and perhaps Congress's) actions here are testaments to the power of the analogy,<sup>32</sup> though a court might have substantial problems translating the analogy into workable judicial doctrine and perhaps should not even try.

## Gun Litigation and the Dormant Commerce Clause Doctrine

My conclusion that the Second Amendment is not likely to affect the *judicial* analysis of the latest wave of gun litigation does not mean that *no* plausible constitutional argument could be made to courts regarding the suits. In this section I will outline one of the most promising alternative arguments—that municipal suits violate the so-called dormant Commerce Clause doctrine (DCCD). I will briefly describe the doctrine itself, sketch the strands of the doctrine that speak to the litigation most directly, and then address the obstacles to the successful deployment of such arguments.

### *The Dormant Commerce Clause Doctrine: A Primer*

The U.S. Supreme Court has long held that the delegation of power over interstate commerce by the Constitution to Congress implicitly restricted states' power to regulate that same commerce.<sup>33</sup> After considerable doctrinal evolution, the scope of the DCCD can be briefly stated.

First, states may not discriminate against interstate commerce, through either regulation or taxation, unless the discrimination is for a “legitimate” purpose (i.e., one that is not protectionist) *and* there are no less discriminatory means by which the state could effectuate its purpose.<sup>34</sup> Second, this antidiscrimination principle extends to state statutes that discriminate in their purpose or effects as well as those that discriminate on their face.<sup>35</sup> Third, discriminatory regulations passed at the local level, which may also affect in-state as well as out-of-state commercial actors, are nevertheless subject to strict scrutiny under the DCCD.<sup>36</sup> Fourth, the Court has held that a state may not “project” its legislation into another state or seek to effectively regulate economic activity that takes place beyond its borders. As the Court has put it, a state may not, consistent with the DCCD, regulate “extraterritorially,” though the scope of this principle and its future are uncertain. Sometimes the Court has included in its statement of extraterritoriality principles a rule that extraterritorial state legislation may include that which, if all states passed similar laws, would subject interstate economic actors to inconsistent and possibly conflicting regulatory regimes.<sup>37</sup> Finally, even

statutes that are neutral on their face and in their effects may be struck down if, on balance, the burdens they impose on interstate commerce clearly exceed the local benefits they purport to confer,<sup>38</sup> though this is, as the formulation suggests, a more deferential standard.

#### *How Municipal Litigation May Be Vulnerable to DCCD Challenges*

Assuming that tort litigation, particularly that brought by states and municipalities, constitutes state action that could trigger the DCCD—an assumption that is strongly suggested by the Supreme Court in other contexts<sup>39</sup>—what sorts of arguments might be formulated under the doctrine? Three come to mind: (1) that this litigation has discriminatory effects or is otherwise motivated by an improper purpose; (2) that it seeks to project state regulatory policies into other states and to regulate economic activity that occurs beyond the state’s borders; and (3) that, even in the absence of improper motives or demonstrable discriminatory effects, the benefits of the litigation are clearly exceeded by the possible burdens on interstate commerce. I will look first at how firearms manufacturers have cast their DCCD arguments. Subsequent sections discuss how those claims were treated by courts and whether—despite their being rejected in the overwhelming majority of cases—the DCCD may yet have a role to play in the litigation against the firearms industry.

#### *DCCD Claims Raised by the Industry*

Initially, the industry unsuccessfully sought removal of the suits from state to federal court, invoking the DCCD as one way in which the suits “arose under” federal law, a condition necessary to secure removal.<sup>40</sup> In state courts, manufacturers have also made an extremely broad preemption argument: congressional power to regulate the manufacture and sale of firearms under its “affirmative” Commerce Clause power was, in essence, an exclusive power that, even in the absence of federal legislation, preempted the state suits.<sup>41</sup> By far, however, the most common allegation was that the cities’ suits—insofar as they seek broad injunctive relief mandating changes to gun design, distribution, and marketing practices by manufacturers—would inevitably have impermissible

extraterritorial effects.<sup>42</sup> Gun manufacturers not only cited Supreme Court cases striking down state legislation regulating activity taking place in other states<sup>43</sup> but also cited language from the U.S. Supreme Court's 1996 *BMW v. Gore* decision,<sup>44</sup> which applied DCCD principles to restrict state common law remedies in tort suits, though it is commonly understood primarily as a due process case.

Because the *BMW* case forms the basis for the manufacturers' arguments that the cities' suits violate the DCCD, a brief review of that case and its holding is in order. A civil suit was filed in Alabama state court against BMW by a doctor who discovered that his "new" BMW had suffered minor damage during shipment and had been repainted. BMW had a nationwide policy not to disclose minor repairs if the cost of repair was less than 3 percent of the cost of the car. The jury held BMW liable for nondisclosure and awarded Gore four thousand dollars in compensatory damages plus four million dollars in punitive damages, which was computed based on the total number of cars in the same condition sold nationwide.

The Supreme Court reversed the punitive damage award, concluding primarily that the award violated the Due Process Clause of the Fourteenth Amendment. However, its opinion also mentioned the DCCD, specifically the Court's extraterritoriality cases.<sup>45</sup> Justice Stevens wrote that, "while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation [imposing affirmative disclosure obligations on sellers of new cars], it is clear that no single State could do so, or even impose its own policy choice on neighboring states."<sup>46</sup> States "may not impose economic sanctions on violators of [their] laws with the intent of changing the tortfeasors' lawful conduct in other States."

In a footnote, Stevens said that it was of no importance that the state regulation came in the form of a jury verdict. "State power," he wrote (citing *Sullivan*), "may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." Stevens concluded, "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions."

Relying heavily on *BMW v. Gore*'s apparent application of the DCCD's extraterritoriality principles to state tort claims, manufacturers argue that these lawsuits seek to alter (or inescapably affect) otherwise

legal design, distribution, and marketing decisions and practices in other states and are thus barred by the DCCD.<sup>47</sup>

### *Treatment of DCCD Claims by Courts*

Resort to DCCD arguments has not been a successful strategy for gun manufacturers. Courts have rejected claims that the mere existence of potential federal authority over the manufacturing and marketing of firearms preempts the cities' suits.<sup>48</sup> In addition, federal courts regularly granted plaintiffs' motion to remand cases to state courts following defendants' motion for removal. The courts noted that, while the principles of the DCCD might operate as a *defense* to remedies, if any, granted to the plaintiffs under state law, they were insufficient grounds for removal.<sup>49</sup>

Further, courts—especially state courts, understandably—have expressed considerable skepticism about gun manufacturers' arguments that extraterritoriality principles limit state tort law. Courts argue that, *BMW* notwithstanding, the “applicability of the dormant commerce clause to causes of action under state law is unsettled”<sup>50</sup> and that the “standard for analysis under the Commerce Clause has its focus on positive law—statutes or regulations.”<sup>51</sup> Other courts have held that *BMW* and its DCCD principles would only become relevant to the question of the type and scope of remedies and cannot form the basis for a motion to dismiss on the pleadings.<sup>52</sup> Even when courts assume that *BMW* is applicable to the cities' suits, they often turn the language of that decision back on the defendants by concluding that the alleged conduct *did* “directly affect” residents of the plaintiff cities, that the suits seek only compensatory damages, and that they are not intended solely to deter lawful conduct in other states.<sup>53</sup> Rarely, though, do courts provide extensive analysis or elaborate justification for their conclusions.

Only two courts have cited the DCCD as a reason for dismissing the suits against firearms manufacturers. However, in one of those cases, the court merely recited the defendants' allegations “that the City's lawsuit, in violation of the Commerce Clause, seeks to regulate the lawful conduct of the defendants outside Gary's borders, in their production, distribution, and sales practices” and concluded, with no accompanying analysis, that “the City's proposed claim and relief inevitably have an

unconstitutional and extraterritorial effect.”<sup>54</sup> That decision was later overturned by the Indiana Supreme Court, which first expressed doubts about the characterization of *BMW* as a DCCD case,<sup>55</sup> then concluded that the burdens on interstate commerce were likely outweighed by the city’s interest in controlling illegal conduct, or, if they were, such a finding would “turn on factual issues resolved at this pleading stage in favor of the plaintiffs.”<sup>56</sup> This decision is discussed in more detail later.

The other case, in which a District of Columbia Superior Court judge dismissed the District’s suit, is somewhat different than the other cities’ suits because the District had passed a statute imposing strict liability on gun manufacturers for harm resulting from the discharge of certain firearms in the District.<sup>57</sup> The court concluded that “the Act does and was meant to restrict commercial behavior beyond the borders of the District of Columbia.” The scope of the District’s statute was such that “there is no way of avoiding liability under the Act without going out of business altogether or at least implementing a substantial overhaul of the entire set of relationships with suppliers, distributors, etc.” These effects, the judge concluded, offended the “clear prohibitions against the attempts of local legislatures to regulate commercial activities beyond their borders.”<sup>58</sup>

Other courts merely take for granted the lack of protectionist or discriminatory purpose of the suits and apply the deferential balancing test. They often conclude (again with little analysis) that whatever burdens on interstate commerce arise from the successful prosecution of these suits would be exceeded by the benefits to the local population from a reduction in gun violence.<sup>59</sup>

#### *Are Suits Vulnerable to DCCD Attack?*

Given the novelty of the cities’ suits, which has in turn spurred defendants to offer somewhat novel defenses, it is not surprising that many judges have found themselves at sea in sorting through the claims and defenses offered by each side. None of the cases that address DCCD arguments has done a particularly good job in offering reasoned analysis for accepting or rejecting those arguments. This may, in part, be the fault of defendants who, according to one judge, “rather than seriously litigating these claims . . . are attempting to preserve them for later use.”<sup>60</sup>

It may also reflect the unfamiliarity of state judges with these sorts of constitutional claims—since most DCCD cases are litigated in federal courts—the extreme discomfort with the broader implications of applying the DCCD to state tort law, or both. The important question of how the Constitution affects the fairly recent phenomenon of regulation by litigation is not one that has received much scholarly treatment. This may account for the trouble that judges have had assessing the constitutional arguments offered by the parties. Space prohibits extensive consideration of that important question, but I hope that what follows may provide a framework for further inquiry with respect to the applicability of the DCCD.

First, there is no reason to presume that tort suits should be immune from DCCD scrutiny, particularly when, like these suits, they have an undeniable regulatory purpose and are brought by governmental entities.<sup>61</sup> At the very least, the principles of the DCCD—which prohibit not only discriminatory or protectionist legislation by states but also one state legislating, *de facto*, for other states—should restrict the availability of certain types of remedies, be they excessive punitive damages (as in *BMW*) or far-reaching injunctive relief (as is sought in gun suits). The fact that cities are exercising their police powers to protect the welfare of their citizens provides no automatic immunity from DCCD scrutiny.<sup>62</sup>

But saying that tort suits like those against firearms manufacturers should not be immune from the DCCD says nothing about the level of scrutiny that ought to be employed. As noted earlier, the DCCD subjects state laws either to strict scrutiny or to a more deferential standard of review balancing costs and benefits.<sup>63</sup> Not only are laws or regulations that *discriminate* against interstate commerce subject to the more searching review, but laws that regulate “extraterritorially” are subject to strict scrutiny as well.<sup>64</sup>

While the Court has recently hinted it might limit the scope of extraterritoriality principles,<sup>65</sup> prior cases (including *BMW v. Gore*) suggest that the principles have broad application. In considering whether cities’ suits against gun manufacturers violate the DCCD, I will focus on extraterritoriality, since (1) that is the strongest argument and (2) it is the argument that has been consistently and forcefully advocated by manufacturers resisting these suits. I will initially elaborate on this first point and then explain how extraterritoriality might aid manufacturers in

avoiding some of the more extreme remedies sought, should any of the remaining suits result in a victory for the plaintiffs.

Extraterritoriality is the only species of DCCD argument on which manufacturers have a hope of prevailing. The cities' suits are not motivated by protectionism. There are few (if any) manufacturers in the cities that have filed suit; there does not appear to be an effort to discriminate against out-of-state or out-of-city gun manufacturers. Nor would any local industries likely benefit from suits that might have the effect of banning the import of guns (most of the cities suing, like Chicago, already have strict gun bans in place). While defendants could claim that, whatever the motivation, the suits have a discriminatory effect since only out-of-state commercial actors would feel the pinch, discriminatory effects cases require a well-developed factual record of the sort generally not present in many of the cases in which the DCCD has been raised by defendants.

The industry could make the argument (and has done so in a few cases)<sup>66</sup> that—issues of protectionism or discrimination aside—the burdens on interstate commerce of these suits far exceed the putative local benefits. This kind of balancing test, however, also requires an extensive factual record and leaves tremendous discretion to judges, who are usually inclined to find that the benefits (assuming there is evidence to support their existence) are not “clearly exceeded” by the burdens on interstate commerce, as the deferential balancing test commands.<sup>67</sup>

Extraterritoriality, on the other hand, requires neither proof of intent to discriminate nor proof of discriminatory effects. Nor does it prescribe a deferential balancing test. The Supreme Court recently synthesized its extraterritoriality decisions and extrapolated the following propositions: (1) a state may not apply its laws to activity that takes place outside the state's borders; (2) statutes with such effects are invalid, regardless of whether the extraterritorial reach was intended by the legislature; (3) in assessing extraterritorial effects, courts should consider how state laws interact with similar laws in other states that exist or might exist, with a view toward avoiding inconsistent regulatory regimes; and (4) states may not force out-of-state merchants to seek in-state regulatory approval before undertaking transactions in other states.<sup>68</sup>

Given the injunctive relief sought in most of the lawsuits—including court-mandated changes to marketing, distribution, and design practices

that would affect not only the plaintiff city but also other cities and states in the country—and the apparent focus of extraterritoriality on ensuring that state regulatory power is aimed at those problems that are “local” and that admit of local solution, in contrast to those for which a uniform national solution is appropriate,<sup>69</sup> this branch of the DCCD seems to be the most apposite. The viability of this approach is confirmed when one examines each of *Healy v. The Beer Institute*’s four elements of extraterritoriality in light of the recent round of municipal-led litigation.

Unlike some other extraterritoriality cases,<sup>70</sup> the suits here do not involve attempts to regulate or set in-state prices by reference to prices charged elsewhere for the same goods. However, since most of the cities’ suits demand extensive alterations to marketing and distribution practices claimed to have deleterious effects within the suing cities,<sup>71</sup> and since most of those decisions would be made by out-of-state manufacturers, extraterritoriality principles seem to limit—if not bar—a court in State A to enjoin economic or commercial activity in State B, even if that activity has effects in State A. An apt analogy would be a state court injunction addressed to an out-of-state power plant to cease operations that send pollution across its borders into the state in which the court is located. To the extent that the DCCD prohibits courts from imposing that sort of remedy, the far-reaching injunctive relief sought by many municipal plaintiffs could be similarly barred. Implicit in these restrictions is that remedies for such conduct, if any, should come from Congress, which can address such problems with national regulations binding on the states.

Then consider that the various state courts hearing the remaining suits would prescribe different, possibly conflicting, injunctions. That possibility raises precisely *The Beer Institute*’s other concern: that interstate commercial actors not be subject to a riot of diverse regulations that might restrict them from operating at all. In all likelihood, were manufacturers to stay in business, they would simply choose the most restrictive regulation and comply with it. That state’s regulation would become a de facto national standard, thus projecting its regulatory policy into other states. At the very least, losing manufacturers might be subject to conflicting injunctions, with one requiring, say, personalized technology and another requiring child-protection devices.<sup>72</sup>

Finally, there is that thread of the extraterritoriality concept mentioned earlier barring an interstate commercial actor from being required

to seek regulatory approval in one state for undertaking a transaction occurring in another. Unless one is persuaded that judicial relief granted in a tort suit is simply not covered by the DCCD, the injunctive relief sought in the cases—particularly alterations to distribution and marketing practices—would hold the potential to require just that sort of approval. Presumably manufacturers subject to various injunctions prescribing the incorporation of safety devices into gun design, or the manner in which guns can be distributed or marketed, would have to seek modification of those injunctions should a particular type of safety device prove unworkable or should the market dictate the need to change marketing or distribution practices set in the injunction. This seems well within the scope of *The Beer Institute*'s description of the DCCD's prohibition. Moreover, as a *practical* matter, the mixed success of *federal* courts overseeing school desegregation and prison reform should make plaintiffs think twice about the desirability of delegating the regulation of the firearms industry to a half dozen or more *state* courts.<sup>73</sup>

Nevertheless, state courts remain quite skeptical that these suits, which apply state tort law, implicate the DCCD at all, as a recent decision by the Indiana Supreme Court demonstrates.<sup>74</sup> The City of Gary, Indiana, filed public nuisance, negligent marketing and distribution, and negligent design claims against several gun manufacturers and sought both compensatory and punitive damages and injunctive relief. First, the court rejected reliance on *BMW*, concluding that it was not a DCCD case. The court then rejected the defendants' argument that "the City's relief would require manufacturers to change their distribution methods nationwide, and therefore constitutes extraterritorial regulation which violates the Commerce Clause." The city, the court wrote, did "seek to change how handguns are distributed, but only those handguns that are sold in and around Gary . . . Imposing liability for negligent, reckless, or intentional facilitation of violations of [state law governing sales to felons] that cause harm within the local jurisdiction does no more than state tort law has historically done." All the manufacturers need do, the court explained, was to "comply with existing state and federal laws governing gun distribution." The court repeatedly stressed that "all the requested relief can be accomplished at a local level" and the availability of "more tailored forms of local relief limited to local impact." If the local benefits of Gary's suit imposed burdens on interstate commerce that required balancing, the court concluded, such a claim "would turn

on factual issues resolved at this pleading stage in favor of the plaintiff. . . . [W]hether there are less restrictive means and proof of the degree of harm alleviated remain issues for trial. They do not justify dismissal of the claim on Commerce Clause grounds.”

There are problems with the Indiana court’s analysis—prime among them is that, while the court cites one extraterritoriality decision,<sup>75</sup> it ignores other extraterritoriality decisions, such as *The Beer Institute*, where the Court attempted to synthesize its various cases into a set of principles. Had it done so, it could not have maintained its position that, because some of the relief requested by Gary applied *only* to “local” activities in and around Gary, there was no extraterritoriality problem. The proper inquiry, according to the Supreme Court, is whether there would be extraterritorial effects as a practical matter and what might happen if all jurisdictions followed Gary’s example. One claim made by the city was for deceptive advertising: Gary claimed that guns were marketed as providing protection for occupants when the opposite is true and that such advertising has harmed residents of Gary. Presumably injunctive relief would be sought prohibiting such advertisements. Were the court to award such relief, how could that relief be “limited to local impact”? Would the manufacturers have to ensure that no advertisements, wherever run, would be seen by Gary’s residents? Manufacturers might have to stop making such claims at all, in which case Gary’s regulation would constitute a de facto national standard, or it would have to take extraordinary steps to insulate the residents of Gary from seeing such ads, which could be quite costly. Likewise, forcing changes in distribution practices for guns sold “around Gary,” including out of state, would similarly extend the state court’s regulatory power into other jurisdictions, which seems to be what the Court’s extraterritoriality jurisprudence prohibits.

Noting that states are free to establish their own standards for product liability, absent federal preemption, the Court saw “no qualitative difference between recognition of the negligence and nuisance claims the City asserts as to handguns and restrictions on any other product deemed dangerous”; it also perceived “no difference between local requirements designed to make the product itself more safe [i.e., state products liability law] and requirements that its distribution be conducted consonant with public intent.”

Since the DCCD is a form of federal constitutional preemption, the

court simply begs the question of whether the aspects of the DCCD also apply to state tort claims or remedies state law offers. There may be no difference between products liability law and injunctive relief sought, but the points raised previously merely raise further questions about state tort law and whether constitutional doctrines have anything to say about its regulatory effects on products with national markets. Perhaps the Indiana high court's assumption, shared by many commentators, ought to be examined more closely.

Pursuing extraterritoriality arguments, as the Indiana Supreme Court's decision demonstrates, is by no means a sure win for the gun industry. For one thing, the Court itself may have signaled that it regards its extraterritoriality decisions as confined to state laws requiring goods sold in-state to be no more expensive than goods sold elsewhere.<sup>76</sup> Moreover, extraterritoriality as a constitutional concept has come in for some rather harsh criticism of late. Jack Goldsmith and Alan Sykes, for example, have criticized the Court's "overbroad extraterritoriality dicta,"<sup>77</sup> noting that "[t]here is nothing unusual about non-uniform regulations in our federal system. States are allowed to make their own regulatory judgments about scores of issues." Different standards for liability among state tort systems is one example they give. That "states may promulgate different substantive regulations of the same activity," they posit, "cannot possibly be the touchstone for illegality under the dormant Commerce Clause." Their characterization of the DCCD restricting state tort law as a *reductio ad absurdum* is understandable: limiting the tort law of the fifty states through the DCCD would be nothing short of revolutionary, which explains state courts' eagerness to deny the DCCD's applicability and federal courts' desire to push off consideration until the merits of the suits are resolved. Nevertheless, if the DCCD's extraterritoriality principles are taken at face value and read in conjunction with *BMW*, then the DCCD will have to be addressed sooner or later.

Goldsmith and Sykes advocate substituting the rulelike formulations set forth in cases like *The Beer Institute* with an explicit balancing test that measures the costs of compliance with diverse state regulatory regimes against the benefits to the state regulating the cross-border externalities (like gun distribution) that are harming the citizens of the regulating state. Were courts to abandon *The Beer Institute* approach for something akin to Goldsmith and Sykes's proposal, manufacturers might have a

more difficult time compiling the sort of factual record necessary to demonstrate that “non-uniform state regulations might impose compliance costs that are so severe that they counsel against permitting the states to regulate a particular subject matter” or that they “may become subject to different regulations to such an extent that compliance becomes effectively impossible if they are to engage in interstate commerce.”

Despite Supreme Court hints and academic criticism, though, the extraterritoriality prong of the DCCD remains a viable defense against some of the relief requested, while *BMW v. Gore* could prevent the imposition of ruinous punitive damage awards (whether large compensatory awards are similarly limited is not clear)<sup>78</sup> if the industry can demonstrate an intent to punish for nationwide conduct. The bad news for manufacturers, however, is that the opportunity to deploy these arguments effectively will come only after they have *lost* on a host of legal issues—issues of duty, breach, causation, and public nuisance.